

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

SPRINTCOM, INC., WIRELESSCO, L.P., NPCR,	)	
INC. D/B/A NEXTEL PARTNERS, AND	)	
NEXTEL WEST CORP.	)	
	)	
Petition for Arbitration, Pursuant to Section 252(b)	)	Docket No. 12-0550
of the Telecommunications Act of 1996, to	)	
Establish an Interconnection Agreement With	)	
	)	
Illinois Bell Telephone Company d/b/a AT&T	)	
Illinois	)	

**AT&T ILLINOIS' INITIAL POST-HEARING BRIEF**

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**AT&T ILLINOIS' INITIAL POST-HEARING BRIEF**

Illinois Bell Telephone Company (“AT&T Illinois”), by its counsel, respectfully submits its initial post-hearing brief.<sup>1</sup>

**I. TRANSITION FROM EXISTING CMRS NETWORK INTERCONNECTION ARRANGEMENT TO SECTION 251(c)(2) INTERCONNECTION ARRANGEMENT**

**ISSUE 49(a):** Should the ICA include AT&T’s language to address the interim period between the Effective Date and the implementation of the section 251(c)(2) interconnection arrangements set forth in Attachment 2?

**ISSUE 49(b):** What rates, terms and conditions should apply to convert from the existing interconnection arrangement to the 251(c)(2) interconnection arrangement?

**(GT&C, section 2.99; Attachment 2, sections 1.2-1.2.1.2.3, 3.5.4, 3.8.2, 3.8.3; Pricing, section 1.2.1)**

**AT&T Illinois Position:**

Issue 49(a): The transition provisions AT&T Illinois proposes for Attachment 2, sections 1.2 through 1.2.1.2.3 and 3.5.4, are necessary because of differences between the parties’ existing CMRS model network interconnection arrangement and the section 251(c)(2)

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<sup>1</sup> For the convenience of the Administrative Law Judges (“ALJs”) and the Commission, a “Joint Decision Points List – Open Issues” setting forth the parties’ competing contract language proposals for each issue is provided as an Appendix to this brief. The Appendix is identical to the “Joint Decision Points List – Open Issues” that Sprint sent by email to the ALJs and Staff on February 22, 2013, with the exception of a footnote that AT&T Illinois has added to the entry for Issue 70.

model Interconnection arrangement that Sprint has requested for the new ICA. Under its existing interconnection arrangement, Sprint uses the same transport facilities, obtained from AT&T Illinois' access tariff, to carry all of its traffic, including both Interconnection traffic (*i.e.*, traffic exchanged between Sprint's and AT&T Illinois' end users) and non-Interconnection traffic (*e.g.*, 911 traffic, traffic between Sprint and IXC's, and backhaul traffic). However, the Interconnection Facilities that Sprint seeks to obtain at TELRIC-based prices pursuant to section 251(c)(2) may be used only for Interconnection traffic. Thus, before it is entitled to obtain TELRIC-based pricing, Sprint must obtain Interconnection Facilities under the terms of the ICA that are separate from the transport facilities used for backhaul and other non-Interconnection purposes. AT&T Illinois' proposed transition language is necessary to maintain the status quo during the period between the ICA's Effective Date and the time when the conversion to a section 251(c)(2) Interconnection arrangement is complete. The absence of transition language would leave a void in the ICA that would likely lead to disputes.

Issue 49(b): Sprint's proposed language for Attachment 2, sections 3.8.2.3 and 3.8.3, would require AT&T Illinois to bear all the costs associated with converting from the existing CMRS model to a section 251(c)(2) model network arrangement. Sprint's proposals must be rejected because it is Sprint that seeks to change the parties' existing arrangement in order to avail itself of TELRIC-based pricing for Interconnection Facilities. Accordingly, as provided for in AT&T Illinois' proposed sections 1.2.1.2.1 and 3.5.4, Sprint should issue the required Access Service Requests ("ASRs") and bear the cost of processing those orders, as well as pay for any termination liability associated with the disconnection of existing access facilities prior to the expiration of Sprint's term commitments for the purchase of such facilities (if any).

These issues involve AT&T Illinois' proposed language for Attachment 2, section 1.2, entitled "Transition," and subsections 1.2.1 through 1.2.1.2.3, as well as section 3.5.4. That language establishes a process, and associated rates, terms and conditions, for transitioning from the parties' current network interconnection arrangement to an Interconnection arrangement that conforms with section 251(c)(2) of the federal Telecommunications Act of 1996 (the "1996 Act" or "Act"), 47 U.S.C. § 251(c)(2). The Commission should adopt these provisions. Issue 49(b) also involves Sprint's proposed language for Attachment 2, sections 3.8.2.3 and 3.8.3, which would unfairly require AT&T Illinois to bear all of the costs associated with Sprint's request for a section 251(c)(2) network Interconnection arrangement. The Commission should reject Sprint's proposals.

To understand the need for the transition language proposed by AT&T Illinois, and as background for related issues discussed below, it is important to understand the differences between (i) the standard network interconnection arrangement that AT&T Illinois and other incumbent local exchange carriers (“ILECs”) have entered into with competitive local exchange carriers (“CLECs”) pursuant to the requirements of section 251(c)(2) since the 1996 Act was enacted (the “section 251(c)(2) model”); and (ii) the standard network arrangement that AT&T Illinois and ILECs have typically entered into with commercial mobile radio service (“CMRS”) providers and that is reflected in the currently effective interconnection agreements between Sprint and AT&T ILECs, including AT&T Illinois (the “CMRS model”).

### **Introduction and Background**

In accordance with the requirements of section 251(c)(2)(B) of the 1996 Act, a section 251(c)(2) model interconnection arrangement includes one or more points of interconnection (“POIs”) on the ILEC’s (*e.g.*, AT&T Illinois’) network.<sup>2</sup> Section 251(c)(2) requires the establishment of POIs only on the ILEC’s network; it does not contemplate, much less require, the establishment of a POI on the requesting carrier’s network. POIs serve as demarcation points between the parties’ networks for the purpose of section 251(c)(2) Interconnection, which has been defined by the Federal Communications Commission (“FCC”) in its Rule 51.5 as the “linking of two networks for the mutual exchange of traffic.” 47 C.F.R. § 51.5. As discussed below in Sections III (Issue 15) and IV (Issues 46 and 47), each party to this arrangement is financially responsible for the facilities on its side of the POI(s). Pursuant to the Supreme Court’s decision in *Talk America, Inc., v. Michigan Bell Tel. Co.*, 131 S.Ct. 2254

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<sup>2</sup> Section 251(c)(2)(B) provides that interconnection is to be “at any technically feasible point within the [incumbent] carrier’s network.” The rule promulgated by the FCC to implement this provision requires interconnection “at any technically feasible point within the incumbent LEC’s network.” 47 C.F.R. § 51.305(a)(2).

(June 9, 2011), existing transport facilities (referred to in *Talk America* as “entrance facilities”) that connect the networks of the requesting carrier and the ILEC, and that are used solely for Interconnection, as defined in FCC Rule 51.5, must be made available to the requesting carrier at a TELRIC-based price. Direct Testimony of Patricia H. Pellerin (“Pellerin Direct”) at 5.<sup>3</sup> Requesting carriers, however, have no right to use TELRIC-priced entrance facilities for purposes, such as “backhauling,” that do not constitute the “mutual exchange of traffic” between the requesting carrier and the ILEC.<sup>4</sup> 131 S.Ct. at 2264.

Unlike the section 251(c)(2) model described above, the CMRS model interconnection arrangement, such as the one under which Sprint and AT&T Illinois currently operate, was not (nor could it have been) developed to conform with the requirements of section 251(c)(2). Rather, that arrangement was developed before the 1996 Act, and it evolved on a negotiated business-to-business basis. Direct Testimony of Carl C. Albright, Jr. (“Albright Direct”) at 32. In contrast to the section 251(c)(2) model, in which each interconnection features a POI on the ILEC’s network, the CMRS model is a “dual POI” arrangement, *i.e.*, there are two POIs, one on each party’s network, with facilities running between the POIs. Pellerin at 6; AT&T Cross Ex. 2 (Current Sprint/AT&T Illinois ICA), § 2.3. Sprint purchases facilities connecting the two networks from AT&T Illinois’ access tariff, at prices that are not (and that are not required to be) TELRIC-based.<sup>5</sup> *Id.* The same facilities can be, and are, used by Sprint for both the mutual

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<sup>3</sup> We use “TRILIC-based” and “cost-based” interchangeably in this brief. Section 252(d)(1) of the 1996 Act requires that rates for interconnection of facilities and equipment be “based on the cost” (47 U.S.C. § 252(d)(1)), and the FCC has established TRILIC (Total Element Long Term Incremental Cost) as the methodology to be used when the 1996 Act mandates cost-based rates.

<sup>4</sup> Backhaul traffic is traffic that does not involve an AT&T Illinois customer, such as traffic that is carried between two points on Sprint’s network.

<sup>5</sup> Sprint may self-provision and/or obtain facilities from other carriers to connect with AT&T Illinois. However, Sprint elected to lease facilities from AT&T Illinois.

exchange of traffic between end users of Sprint and AT&T Illinois (Interconnection traffic) and for other, non-Interconnection, traffic, including backhaul traffic, transit traffic and 911 traffic. The parties share the cost of the facilities that connect their switches and apportion the costs based on a shared facility factor (“SFF”). AT&T Illinois bills Sprint the tariffed access price for this facility, discounted by the SFF. The SFF in the parties’ current ICA is 24%.<sup>6</sup> That percentage reflects that of all the interconnection traffic that flows over the shared facility, 24% is originated by AT&T Illinois; accordingly, AT&T Illinois bears 24% of the cost of the facility. Pellerin Direct at 6-7.

AT&T Illinois was willing to maintain the current CMRS model interconnection arrangement with Sprint, just as AT&T Illinois is doing with other CMRS providers and just as AT&T Illinois’ affiliated ILECs are doing with Sprint in at least ten other states. Pellerin Direct at 9; Rebuttal Testimony of Patricia H. Pellerin (Corrected) (“Pellerin Rebuttal”) at 6. Sprint, however, in order to take advantage of TELRIC-priced Interconnection Facilities, requested section 251(c)(2) Interconnection, as it is entitled to do, and AT&T Illinois has agreed to provide section 251(c)(2) Interconnection, as it must. At the same time, though, Sprint seeks to maintain certain aspects of its existing CMRS model interconnection arrangement that are inconsistent with section 251(c)(2) in two major respects. Pellerin Direct at 10.

First, Sprint proposes to maintain a cost-sharing arrangement under which AT&T Illinois would bear 50% of the cost of the Interconnection Facilities Sprint uses to connect its network with the POI. This would require AT&T Illinois to provide Sprint with existing Interconnection Facilities at a price equal to only one-half the TELRIC-based rate. Sprint’s proposal is contrary

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<sup>6</sup> AT&T Illinois proposes language in section 1.2.1 of the Pricing Schedule to refer to the SFF as an example of a carrier-specific factor that would not apply to a carrier adopting Sprint’s ICA pursuant to section 252(i) of the 1996 Act. To the extent the ICA includes an SFF for Sprint, the ICA must make clear that an adopting carrier would be subject to its own SFF.

to *Talk America* and to the well-recognized principle that, under section 251(c)(2), each carrier is financially responsible for the transport facilities on its side of the POI. See Sections III (Issue 15) and IV (Issues 46 and 47), below; Pellerin Direct 10-11.

Second, Sprint proposes that it be allowed to use TELRIC-priced Interconnection Facilities not only to route Interconnection traffic (*i.e.*, traffic exchanged between the parties' end users), but also to route traffic that is not exchanged with AT&T Illinois end users (*e.g.*, backhaul traffic, 911 traffic and traffic sent by Sprint to, or received by Sprint from, interexchange carriers ("IXCs")). Sprint's proposal is contrary to the rule that ILECs are required to make TELRIC-priced entrance facilities available solely for Interconnection as defined by the FCC for purposes of section 251(c)(2), *i.e.*, "the linking of two networks for the mutual exchange of traffic." 47 C.F.R §51.5. See Section II (Issues 19, 20, 24), below; Pellerin Direct at 11.

The Commission should reject Sprint's attempt to cherry-pick the aspects of each type of interconnection arrangement that are advantageous only to Sprint and to cobble together something entirely new and at odds with controlling law. Sprint is not entitled to do that, and while AT&T Illinois was previously willing to agree to interconnection that did not comply with section 251(c)(2) as part of a voluntary arrangement that suited both parties' needs,<sup>7</sup> AT&T Illinois cannot be required to accept an arrangement in which Sprint gets the benefit of those aspects of section 251(c)(2) that work to Sprint's advantage, while spurning those aspects of section 251(c)(2) that provide the balance to make the arrangement acceptable to both parties. Pellerin Direct at 10.

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<sup>7</sup> Section 252(a) of the 1996 Act allows parties to negotiate ICA provisions "without regard to" the requirements of section 251. 47 U.S.C. § 252(a).

### **Issue 49(a)**

The transition provisions AT&T Illinois proposes for Attachment 2, sections 1.2 through 1.2.1.2.3 and 3.5.4 are necessitated by the differences between the parties' existing CMRS model interconnection arrangement and a section 251(c)(2) model Interconnection arrangement, as discussed above. When the ICA resulting from this arbitration goes into effect, the parties will still be interconnected pursuant to the existing arrangement. It is not possible to "flash cut" from the existing arrangement to the new arrangement at the moment the ICA becomes effective. Pellerin Direct at 11. Furthermore, Sprint is not entitled to TELRIC-based pricing for Interconnection Facilities unless and until the parties' interconnection arrangement is compliant with section 251(c)(2). Accordingly, AT&T Illinois' proposed transition language is required to maintain the status quo during the period between the ICA's Effective Date and the time when the conversion to a section 251(c)(2) Interconnection arrangement is complete. This includes maintaining the existing cost sharing arrangement with an SFF of 24%, with each party retaining the right to periodically request review of that factor pursuant to a traffic study. The absence of transition language would leave a void in the ICA that would most likely lead to disputes. Pellerin Direct at 12.<sup>8</sup>

The primary reason that it is not possible to "flash cut" to a section 251(c)(2) model arrangement immediately upon the Effective Date of the new ICA is that Sprint, under its existing CMRS model network arrangement, uses the same transport facilities, obtained from AT&T Illinois' access tariff, to carry all of its traffic between its location(s) and AT&T Illinois' locations, including traffic that is not exchanged with customers of AT&T Illinois, *i.e.*, non-

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<sup>8</sup> The term "Shared Facility Factor," as used in AT&T Illinois' proposed transition language, is in AT&T Illinois' proposed GT&C section 2.99. As Ms. Pellerin explained, a reference to this Shared Facility Factor must be included in Pricing Schedule, section 1.2.1. Pellerin Rebuttal at 8.

Interconnection traffic. Consequently, as part of the transition from the existing CMRS interconnection model to a section 251(c)(2) interconnection model, Sprint will have to obtain Interconnection Facilities that are dedicated to Interconnection traffic, and that are separate from the transport facilities used for backhaul and other forms of traffic that are not eligible for transport over TELRIC-priced Interconnection Facilities.

As AT&T Illinois witness Carl Albright discussed, this will require extensive work by AT&T Illinois' Network Planning and Engineering ("NP&E") organization to ensure that the transition does not impact customer service. For example, NP&E will have to determine the availability of the transport facilities and the equipment needed to activate fiber, perform multiplexing, and terminate the Interconnection Facilities. Other tasks, such as providing additional power, floor space and HVAC needed for any new equipment, may also be required. Because the section 251(c)(2) model Interconnection arrangement would change the POI architecture, NP&E would also need to identify interoffice transport facilities that AT&T Illinois would need to provide transport for interconnection trunk groups to the various offices on its side of the POI. The same activities described above with respect to Interconnection Facilities would also need to be performed for these interoffice transport facilities. Albright Direct at 37.

Staff witness Dr. Liu supports AT&T Illinois' proposed transition language for Issue 49(a), stating that "it is necessary to establish interim provisions to govern the transition period" and that AT&T Illinois' proposed language "appears to be the natural option and thus should be adopted." Direct Testimony of Dr. Qin Liu ("Liu Direct") at 92.

Sprint's direct testimony failed to address the proposed transition language that is the subject of Issue 49(a). Rather, Sprint witness Farrar waited until his rebuttal testimony to criticize, and propose changes to, that language for the first time. Supplemental Verified Written

Statement of Randy G. Farrar (“Farrar Rebuttal”) at 62-63; Tr. 283 (Farrar). There is no reason that Sprint could not have offered this criticism and proposed language changes in its direct testimony. By failing to do so, Sprint deprived AT&T Illinois of the opportunity to rebut Mr. Farrar. Accordingly, the Commission should disregard Mr. Farrar’s rebuttal testimony on this issue, and his proposed revisions to AT&T Illinois’ transition provisions. Furthermore, Mr. Farrar was unable to point to any specific language in AT&T Illinois’ transition proposal that supports his assertion that that proposal would “require that *all* transitioning be completed before Sprint received *any* benefits attributable to TELRIC pricing.” Farrar Rebuttal at 62; Tr. 284 (Farrar) (emphasis added). In fact, AT&T Illinois’ proposed language includes no such requirement. Rather, Sprint will qualify for TELRIC-pricing on each Interconnection Facility after it is has been ordered and established in accordance with the requirements of the ICA.<sup>9</sup>

**Issue 49(b)**

Sprint’s proposed language for Attachment 2, sections 3.8.2.3 and 3.8.3, would require AT&T Illinois to bear all the costs associated with Sprint’s request for a section 251(c)(2) Interconnection model, including the costs of transitioning from the current CMRS model to the section 251(c)(2) model. Specifically, Sprint’s proposed section 3.8.2.3 provides that AT&T Illinois shall perform any and all necessary transition work at no cost to Sprint. This would include any network costs associated with shifting Sprint’s services from one facility to another so that only eligible services use TELRIC-priced Interconnection Facilities. In addition, section 3.8.3 would prohibit AT&T Illinois from charging Sprint any “rearrangement, disconnection,

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<sup>9</sup> Sprint also complains that AT&T Illinois’ language would allow AT&T Illinois, as well as Sprint, to initiate a transition to the section 251(c)(2) model. Farrar Rebuttal at 62. The Commission should reject Sprint’s attempt to maintain for itself the unilateral right to trigger such a transition. If Sprint decides not to commence (or complete) the transition to the section 251(c)(2) model on its own, AT&T Illinois should not be required to maintain a hybrid interconnection arrangement indefinitely, where some facilities are interconnected pursuant to section 251(c)(2) while others remain under the CMRS model. Tr. 421-425 (Pellerin)

termination or other non-recurring fees that may be associated with” the conversion to the new Interconnection arrangement.

Sprint’s proposals must be rejected. Again, Sprint seeks to change the parties’ existing CMRS model arrangement in order to avail itself of TELRIC-based pricing for Interconnection Facilities – pricing that is only available from a section 251(c)(2) model Interconnection arrangement. Accordingly, as provided in AT&T Illinois’ proposed sections 1.2.1.2.1 and 3.5.4, Sprint should issue the required ASRs and should bear the cost of processing those orders, including the cost of any required network connections and/or disconnections.<sup>10</sup> In addition, there may be termination liability associated with the disconnection of existing access facilities – facilities for which Sprint received a lower price by committing to a term plan. Such term plans typically have early termination fees, and Sprint should not be exempt from those fees simply because it has chosen to convert to a different arrangement with AT&T Illinois. Pellerin Direct at 13-14; Liu Direct at 80-87.

Furthermore, Sprint’s proposed section 3.8.2.3 would improperly permit Sprint to receive TELRIC-based pricing on facilities used for non-Interconnection purposes, including backhaul, without actually converting those facilities. See Section IV (Issue 44), below. Sprint’s language incorrectly implies that AT&T Illinois need only perform simple record-keeping changes for the parties to effectuate the transition to the section 251(c)(2) model Interconnection arrangement – in other words, that AT&T Illinois need only change Sprint’s billing, and that Sprint has to do nothing more than cooperate in identifying the facilities to be re-priced. Sprint’s language further states that AT&T Illinois cannot require Sprint to rearrange its network in any way as a

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<sup>10</sup> Sprint uses the term “rearrangement” in section 3.8.3. However, there is no single activity that constitutes “rearrangement.” Rather, there are connections, disconnections, and ordering activities that may collectively result in a different network arrangement. Pellerin Direct at 14, n. 11.

condition of receiving TELRIC-based pricing on facilities. Additionally, Sprint's language provides that AT&T Illinois must change Sprint's rates to TELRIC-based rates within 90 days of the Effective Date of the ICA, and that those rate changes would be retroactive to that Effective Date. Thus, Sprint's language would give it TELRIC-based pricing not only on facilities used for traffic that is Interconnection traffic, but also on facilities used for backhaul and other non-Interconnection traffic, in violation of *Talk America*. In this respect, Sprint's proposed section 3.8.2.3 is directly contrary to its agreement to language in Attachment 2, section 3.5.3, that makes clear that Sprint is not entitled to TELRIC-based pricing on facilities that are used for backhauling. Pellerin Direct at 15-16.

Further, Sprint takes the position that it should not be obligated to issue ASRs and pay for the conversion of its facilities from access to TELRIC-based rates. Verified Written Statement of Randy G. Farrar (Corrected) ("Farrar Direct") at 48. Sprint's position must be rejected, because Sprint is responsible for the services it orders from AT&T Illinois' federal and state access tariffs and is subject to the associated tariffed rates, terms, and conditions. As the access tariff customer, it is Sprint that controls when a service is disconnected (except in limited circumstances, *e.g.*, non-payment). Furthermore, absent a disconnect order, AT&T Illinois' system will continue to bill Sprint pursuant to the access tariff from which the facilities were ordered and provisioned. These tariff charges are appropriate until Sprint orders a change, and the ordering vehicle to change (or disconnect) a tariffed service is the ASR. Pellerin Rebuttal at 10.

Sprint incorrectly asserts that, under AT&T Illinois' proposal, Sprint would be required to physically "disconnect existing circuits" and then "reorder the same circuits" and "pay new non-recurring charges as if Sprint was ordering and provisioning new facilities." Farrar Direct at

49. In reality, if Sprint intends to use the same physical facilities for Interconnection that it is currently using for Interconnection, there will be no need to physically disconnect and reconnect those facilities. An ASR is still required, however, to convert a facility from access tariff pricing to ICA pricing. In addition, since Sprint currently uses the same facilities for both Interconnection and non-Interconnection purposes, Sprint would have to order separate access facilities for its non-Interconnection traffic (or lease from another carrier or self-provision), and the associated tariffed charges would apply. Pellerin Rebuttal at 10.

Furthermore, since the only Interconnection Facilities that Sprint may obtain at TELRIC-based rates are those that are “existing,” *i.e.*, already present in the AT&T Illinois’ network and available for use as an Interconnection Facility with no special construction, AT&T Illinois would not be assessing a non-recurring provisioning charge, as Mr. Farrar implied. Rather, AT&T Illinois would only assess the electronic service order processing charge of \$11.44 per order, a charge agreed to by the parties and included in the ICA’s Pricing Sheets. Pellerin Rebuttal at 11-12.

For all the reasons discussed, the Commission should approve AT&T Illinois’ proposed GT&C section 2.99 and Attachment 2, sections 1.2 through 1.2.1.2.3 and 3.5.4, and should reject Sprint’s proposed Attachment 2, section 3.8.2.3 and 3.8.3.

## **II. USES OF INTERCONNECTION FACILITIES AND RELATED DEFINITIONS**

**ISSUE 13(a):           Should the definition of Interconnection be based on both Part 51 and Part 20 of the FCC’s rules?**

**(GT&C, section 2.59)**

**ISSUE 13(b):           Should there be a distinction between “Interconnection,” as defined in 47 C.F.R. section 51.5, and “interconnection”?**

**(GT&C, section 2.59; Attachment 2, section 1.1)**

**AT&T Illinois Position:** The definition of “Interconnection” should refer solely to the definition of “Interconnection” in FCC Rule 51.5 because that is the definition the FCC adopted to implement sections 251 and 252 of the 1996 Act. Sprint’s proposal to also refer to the broader definition of “Interconnection or Interconnected” in FCC Rule 20.3 should be rejected because that definition goes beyond the requirements of section 251(c)(2).

These issues relate to the definition of “Interconnection” in GT&C section 2.59. With respect to Issue 13(a), AT&T Illinois proposes to define “Interconnection” to mean the same as the definition of Interconnection that the FCC adopted in its Rule 51.5 implementing sections 251 and 252 of the 1996 Act. Sprint, on the other hand, proposes to define Interconnection by cross-referencing the FCC’s definition of “Interconnection or Interconnected” in 47 C.F.R. § 20.3, in addition to 47 C.F.R. § 51.5.

The parties have negotiated and are arbitrating this ICA pursuant to sections 251 and 252 of the 1996 Act. Pursuant to section 252(c) of the 1996 Act, the Commission, in resolving issues in this arbitration, must “ensure that such resolution and conditions meet the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section 251.*” 47 U.S.C. § 252(c) (emphasis added). The FCC promulgated Part 51 of the its Rules for the purpose of implementing sections 251 and 252 of the 1996 Act. 47 C.F.R. § 51.1. Accordingly, pursuant to section 252(c), the appropriate definition of “Interconnection” for purposes of this ICA is the definition that appears in section 51.5 of Part 51, *i.e.*, the “linking of two networks for the mutual exchange of traffic.” 47 C.F.R. § 51.5. Pellerin Direct at 17-18.

Part 20 of the FCC’s rules, in contrast, was not promulgated for the purpose of implementing sections 251 and 252. Rather, the purpose of the rules in Part 20 is to “set forth the requirements and conditions applicable to commercial mobile radio service providers.” 47 C.F.R. § 20.1. For that purpose, the FCC adopted a much broader definition of

“Interconnection” than the definition in Rule 51.5.<sup>11</sup> Sprint’s proposal to incorporate the broader definition of “Interconnection or Interconnected” in 47 C.F.R. § 20.3 goes beyond the requirements of section 251(c)(2). Staff witness Liu agreed with AT&T Illinois that Sprint’s inclusion of a reference to Part 20 of the FCC’s rules is inappropriate, and she therefore endorsed AT&T Illinois’ proposed definition of “Interconnection.” Liu Direct at p. 8.

Sprint asserts that 47 C.F.R. § 20.11(c) states that LECs and CMRS providers are also subject to the FCC’s Part 51 rules, and then jumps to the conclusion that all of the Part 20 rules must apply to a section 251/252 ICA. Verified Written Statement of James Burt (“Burt Direct”) at 36. Sprint’s conclusion does not follow. While one of the requirements of Part 20 may be that carriers comply with Part 51, there is nothing in Part 51 that incorporates all the requirements and definitions of Part 20. Accordingly, the fact that in certain circumstances carriers are subject to both Parts 20 and 51 of the FCC’s rules does not logically mean that the Part 20 rules apply to a section 251/252 ICA. Pellerin Rebuttal at 19-20.

Issue 13(b) relates to AT&T Illinois’ proposal to include in GT&C section 2.59 a sentence that explains that “when the word ‘interconnection’ (as opposed to ‘Interconnection’) is used in this Agreement it shall mean the connection of the Parties’ networks for the exchange of Authorized Traffic.” The purpose of this language is to accommodate terms and conditions in the ICA that address both section 251(c)(2) Interconnection, as defined in 47 C.F.R § 51.5, and other interconnection arrangements that do not fall within that definition (*e.g.*, indirect interconnection) by making clear that capital “I” Interconnection specifically means as defined by Part 51.5, while lower case “i” interconnection refers to connections for the exchange of all

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<sup>11</sup> The definition in 47 C.F.R. § 20.3 reads: “*Interconnection or Interconnected.* Direct or indirect connection through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit the transmission or reception of messages or signals to or from points in the public switched network.”

Authorized Services traffic. The distinction is relevant because only those existing facilities used for Interconnection as defined in section 251(c)(2) and 47 C.F.R. § 51.5 (*i.e.*, “Interconnection Facilities”) are subject to TELRIC-based pricing. Facilities connecting the parties’ networks that are used for sending non-Interconnection traffic, such as 911 traffic, or Equal Access traffic, which do not constitute the mutual exchange of traffic between end users of Sprint and AT&T Illinois, are not eligible for TELRIC-based pricing. See discussion of Issues 19, 20(a) and 20(b), below. AT&T Illinois’ proposed additional language for GT&C section 2.59 will remove the potential for disputes, regarding any ambiguity between “Interconnection” and interconnection,” as those words are used in the ICA. Pellerin Direct at 19.

**ISSUE 19:                   Should the definition of “Interconnection Facilities” reference the FCC’s definition of “Interconnection” in 47 C.F.R. § 51.5? (GT&C, section 2.60; Attachment 2, section 3.3)**

**AT&T Illinois Position:** The definition of “Interconnection Facilities” should include AT&T Illinois’ proposed language making clear that such facilities are to be used exclusively for Interconnection as the FCC defined that term in the context of section 251(c)(2) of the 1996 Act (*i.e.*, 47 C.F.R. § 51.5). AT&T Illinois’ position is supported by the Supreme Court’s decision in *Talk America*, as well as other authority, including this Commission’s order in Docket 05-0442 and the Seventh Circuit’s decision affirming that order. Sprint has not identified any reason for its objection to AT&T Illinois’ proposed language, aside from its dispute with AT&T Illinois over the proper interpretation of FCC Rule 51.5. Regardless of how the Commission resolves that dispute, which is the subject of Issues 20 and 24, not 19, there is no reason not to adopt AT&T Illinois’ proposed definition of “Interconnection Facilities.”

This issue involves a dispute regarding the definition of “Interconnection Facilities” in GT&C section 2.60. The parties agree that term should be defined as “transmission facilities that connect Sprint’s network with AT&T Illinois’ network for the mutual exchange of traffic” and that “connect Sprint’s network from Sprint’s Switch or associated point of presence within the LATA [Local Access Transport Area] to the POI for the transmission and routing of telephone exchange service and/or exchange access service.” The disagreement concerns the last sentence

of the definition, which states: “For avoidance of doubt, but subject to Attachment 02, section 5.6, the facilities referred to in this definition mean the entrance facilities used **exclusively** for Interconnection **as defined at 47 C.F.R. section 51.5.**” AT&T Illinois proposes the bold underlined language to make clear that Interconnection Facilities should be used exclusively for Interconnection as the FCC has defined that term in the context of section 251(c)(2) of the 1996 Act (*i.e.*, 47 C.F.R. § 51.5). Sprint objects to the bold underlined language, although Sprint has not identified any sound basis for that objection.

AT&T Illinois’ language is supported by the Supreme Court’s decision in *Talk America*, which ruled that ILECs’ obligation under the 1996 Act, to provide requesting carriers with access to TELRIC-priced entrance facilities (referred to by the parties for purposes of this ICA as “Interconnection Facilities”) is limited to those facilities used only (or “exclusively”) for section 251(c)(2) Interconnection, as defined in FCC Rule 51.5 (*i.e.*, to “link the incumbent providers’ network with the competitor’s network for the mutual exchange of traffic”) and not for backhaul or other non-interconnection purposes. The decision expressly states that “entrance facilities leased under § 251(c)(2) can be used *only* for interconnection.” 131 S.Ct. at 2264 (emphasis added).

AT&T Illinois’ language is also consistent with this Commission’s *TRO/TRRO Arbitration Decision* in Docket No. 05-0442, where it addressed CLECs’ rights to use TELRIC-priced entrance facilities as follows:

The Commission sees the principal question here as whether entrance facilities, no longer available as a leased UNE, can be simply reclassified as interconnection facilities if used *solely* for the purpose of interconnecting ILEC/CLEC networks for the mutual exchange of traffic. . . . [T]he Commission agrees with CLECs and Staff that entrance facilities should be available to CLECs if used for the *sole* purpose of interconnection.

Arbitration Decision, Docket No. 05-0442, *Access One, Inc., et al., Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order* (ICC Nov. 2, 2005) (“*TRO/TRRO Arbitration Decision*”), at 43-44 (emphasis added). In affirming the *TRO/TRRO Arbitration Decision*, the U.S. Court of Appeals for the Seventh Circuit stated, “Under [that] order, CLECs use entrance facilities *exclusively* for interconnection . . . .” *Illinois Bell Telephone Company v. Box*, 526 F.3d 1069, 1071 (7th Cir. 2008) (emphasis added). *See also, Sw. Bell Telephone, L.P. v. Missouri Pub. Serv. Comm’n*, 530 F. 3d 676, 684 (8th Cir. 2008) (affirming decision of the Missouri Public Service Commission (“MPSC”), in which “the MPSC found, and the district court agreed, the entrance facilities requested by CLECs would be used *solely* for interconnection purposes within the meaning of § 251(c)(2)” (emphasis added)).

Sprint has identified no valid reason for rejecting AT&T Illinois’ proposed definition of “Interconnection Facilities.” In addressing Issue 19, Sprint witness Felton explained that Sprint does not really object to including in the definition a reference to the definition of “Interconnection” in FCC Rule 51.5. Supplemental Verified Statement of Mark G. Felton (“Felton Rebuttal”) at 8-9; Tr. 86 (Felton). Mr. Felton also testified that Sprint has no objection to AT&T Illinois’ proposed definition “to the extent that it would limit the use of Interconnection Facilities to interconnection as defined in Rule 51.5 as Sprint interprets Rule 51.5.” Tr. at 88. Mr. Felton further agreed that “TELRIC-priced Interconnection Facilities may not be used for the purpose of carrying backhaul traffic.” Tr. 90. In short, Mr. Felton essentially agreed with the proposition expressed in the disputed language proposed by AT&T Illinois for GT&C section

2.80, *i.e.*, that Interconnection Facilities are to be used “**exclusively** for Interconnection **as defined at 47 C.F.R. Section 51.5.**”

As Mr. Felton’s testimony made clear, the real dispute concerning use of Interconnection Facilities does not involve the language (including the reference to FCC Rule 51.5 or the word “exclusively”) proposed by AT&T Illinois for the definition of “Interconnection Facilities” in GT&C section 2.80. Rather, the real dispute involves the interpretation of the term “mutual exchange of traffic” as it is used in FCC Rule 51.5. Tr. 87-88 (Felton). As a practical matter, that dispute relates specifically to the questions of whether (i) 911 traffic sent by Sprint to a Public Safety Answering Point (“PSAP”), and (ii) traffic that Sprint sends to, and receives from, IXCs constitute the “mutual exchange of traffic” between Sprint and AT&T Illinois within the meaning of FCC Rule 51.5, thereby entitling Sprint to send and receive such traffic over Interconnection Facilities. Tr. 88-89 (Felton). Those questions are not the subject of Issue 19; they are the subjects of Issues 20(b) and 24. Regardless of how the Commission rules on those issues, there is no basis for rejecting AT&T Illinois’ proposed definition of “Interconnection Facilities.”

**ISSUE 20(a):**            **Should the ICA state that the Interconnection Facilities available to Sprint at TELRIC prices be limited to those facilities used “solely” for section 251(c)(2) interconnection?**

**(Attachment 2, section 3.5.2)**

**ISSUE 20(b):**            **Should the ICA provide that Interconnection Facilities purchased at TELRIC rates may not be used for 911 and Equal Access trunks?**

**(Attachment 2, sections 3.4, 3.5.3)**

**AT&T Illinois Position:** With respect to Issue 20(a), the Commission should approve AT&T Illinois’ proposal to include language stating that Interconnection Facilities may be used “solely” for Interconnection for the same reasons that the Commission should adopt AT&T Illinois’ proposed definition of “Interconnection Facilities” in Issue 19. With respect to Issue 20(b), Sprint should not be allowed to use Interconnection Facilities

to carry 911 traffic or traffic exchanged with IXCs over “Equal Access” trunks, because neither type of traffic represents the mutual exchange of traffic between customers of Sprint and AT&T Illinois. Therefore, neither type of traffic constitutes “Interconnection” traffic, subject to the requirements of section 251(c)(2) of the 1996 Act and FCC Rule 51.5. Furthermore, this Commission has previously determined that 911 traffic does not constitute “telephone exchange service” traffic.

Issue 20(a) involves Attachment 2, section 3.5.2, which addresses AT&T Illinois’ obligation to provide Sprint with access to existing Interconnection Facilities at TELRIC-based rates. While the parties agree that AT&T Illinois shall provide Sprint with such facilities when used for the purpose of Interconnection within the meaning of 47 U.S.C. § 251(c)(2) and FCC Rule 51.5, Sprint objects to AT&T Illinois’ proposed language stating that Interconnection Facilities may be used “solely” for that purpose. Sprint, however, has no more basis for its objection to this language than it does for its objection to AT&T Illinois’ proposed definition of “Interconnection Facilities.” As demonstrated by the discussion of Issue 19, above, AT&T Illinois’ use of the word “solely” in Attach. 2, section 3.5.2, like its use of the word “exclusively” in the definition of “Interconnection Facilities,” is supported by the Supreme Court’s holding that “entrance facilities leased under § 251(c)(2) can be used *only* for interconnection” and this Commission’s ruling (affirmed by the Seventh Circuit) that “entrance facilities should be available to CLECs if used for the *sole* purpose of interconnection.” 131 S.Ct. at 2264 (emphasis added); *TRO/TRRO Arbitration Decision* at 43-44 (emphasis added). Furthermore, Sprint has agreed to language for section 3.5.3 that precludes it from using an Interconnection Facility for “any other purpose,” *i.e.*, any purpose other than the purpose described in section 3.5.2, which is Interconnection “within the meaning of section 251(c)(2).” Pellerin Direct at 15, 24. Thus, there can be no valid objection to the use of the word “solely” in section 3.5.2.

Issue 20(b) involves a dispute over Attachment 2, section 3.5.3, which identifies specific purposes for which TELRIC-priced Interconnection Facilities may not be used. The dispute arises out of Sprint's insistence that it be allowed to use Interconnection Facilities to carry 911 and Equal Access Trunk Groups. Sprint's position must be rejected, because it is inconsistent with the definition and purpose of Interconnection Facilities, which is to "link" Sprint's and AT&T Illinois' networks for the "mutual exchange of traffic." 911 trunks are used by Sprint to carry its own customers' 911 calls to the PSAP. Such trunks carry no traffic to or from AT&T Illinois' end users and have nothing to do with any service provided by AT&T Illinois. Pellerin Direct at 25. Similarly, Equal Access Trunks are not used for the mutual exchange of traffic between customers of Sprint and customers of AT&T Illinois. Rather, as indicated by the agreed language of GT&C section 2.47, Equal Access Trunks are used to exchange traffic between Sprint's customers and the customers of IXC's, by providing for the delivery of traffic "through an AT&T access tandem to or from an IXC, using Feature D protocols."<sup>12</sup> Pellerin Direct at 26. Thus, as Staff witness Dr. Liu correctly concluded, "neither type of traffic [911 and Equal Access] is interconnection traffic within the meaning of section 251(c)(2) and thus eligible to ride on cost-based interconnection facilities provided under section 251(c)(2)." Liu Direct at 46.

AT&T Illinois' position with respect to 911 and Equal Access Trunks is also supported by this Commission's 2004 arbitration decision involving MCI and SBC Illinois (n/k/a AT&T Illinois). There, the Commission concluded that MCI was solely responsible for the facilities that carry 911 and Meet Point Trunks:<sup>13</sup>

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<sup>12</sup> Feature Group D is the equal access protocol used for connecting IXC's with local carriers, providing for carrier identification and enabling access usage recordings. Pellerin Direct at 26, n. 18.

<sup>13</sup> "Meet Point Trunks" in the MCI ICA are the same as "Equal Access Trunks" in Sprint's ICA. In both cases, the trunks connect MCI/Sprint with IXC's via AT&T Illinois' access tandem. Pellerin Direct at 27, n. 19.

MCI is responsible for providing the facilities that MCI uses to provide telecommunications services to its end users.... None of these facilities [including 911, OS/DA, and Meet Point] are used to connect calls between an MCI end user and an SBC end user. Rather, MCI uses them to provide services to its own customers. SBC's proposed language for Section 2.5 makes MCI responsible for the transport facilities necessary to do so. It is therefore adopted.

Arbitration Decision, Docket 04-0469, *MCI Metro Access Transmission Communications, Inc., et al. Petition for Arbitration of Interconnection Rates, Terms and Conditions, and Related Arrangements with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996* (ICC Nov. 30, 2004) (“*MCI Arbitration Decision*”), at 84. The Commission declined to include Mass Calling trunks with 911, OS/DA, and Meet Point trunks as MCI's sole responsibility, because the Commission found that Mass Calling trunks, unlike 911, OS/DA, and Meet Point Trunks, *did* connect MCI's end users and AT&T Illinois' end users.<sup>14</sup> In this way, the Commission made clear that the facilities that carry 911 and Equal Access trunks, which do not connect Sprint's end users with AT&T Illinois' end users, are Sprint's sole responsibility. Pellerin Direct at 27.

In support of its position that it should be allowed to carry 911 and Equal Access Trunk groups over Interconnection Facilities, Sprint argues that any traffic coming to or from Sprint that touches AT&T Illinois' network somewhere along the way represents the “mutual exchange of traffic” within the meaning of FCC Rule 51.5, *even where no AT&T Illinois end user is involved in any way*. Felton Rebuttal at 9-10. Sprint's argument is contradicted by the U.S. Supreme Court's statement in *Talk America* that the purpose of the section 251(c)(2)

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<sup>14</sup> “We decline to adopt SBC's inclusion of so-called mass calling facilities in Section 2.5. In the case of radio contests and similar mass calling events, the increase in call volume is not caused exclusively by MCI's end user customers. In fact, *it is likely that many callers are SBC subscribers. This fact separates the mass calling trunks from the facilities mentioned above. In this case, the facilities are used to connect calls between an MCI end user and an SBC end user.* It seems reasonable to adopt MCI's position that the parties have joint obligations in such circumstances. We therefore reject SBC's proposed language for mass calling trunks.” (Emphasis added).

interconnection requirement is to “ensure[] that customers on a competitor’s network can call customers on the incumbent’s network, and vice versa.” 131 S. Ct. 2254, 2258. Sprint’s argument is also contradicted by the FCC’s own interpretation of Rule 51.5, as expressed in the *amicus* brief it filed with the Supreme Court in *Talk America*:

Section 251(c)(2) requires incumbent LECs to “provide \* \* \* interconnection” between their networks and the networks of competitive LECs (CLECs). 47 U.S.C. 251(c)(2). Interconnection is “the physical linking of two networks for the mutual exchange of traffic.” *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499, 15,590 ¶ 176 (1996) (subsequent history omitted) (*Local Competition Order*); see 47 C.F.R. 51.5. *Such linking enables customers of a competitive LEC to call the incumbent’s customers, and vice versa.* The absence of such interconnection would disadvantage the competitive LEC, whose customers would be unable to call (or receive calls from) the incumbent’s much larger customer base. AT&T III. Cross Ex. 1 at 2-3 (emphasis added).

Entrance facilities have two distinct principal uses. *First, a competitor can use an entrance facility to interconnect its equipment with the incumbent’s equipment, so that calls can move back and forth between customers on the two networks.* *Id.* at 5 (emphasis added).

Section 251(c)(2) requires incumbent carriers to provide interconnection to their competitors at cost-based rates, *making it possible for the customers of a competitive carrier to call (and receive calls from) an incumbent’s larger customer base.* *Id.* at 12 (emphasis added).

Sprint’s argument is also contradicted by the FCC’s description of the term “backhauling.” While Sprint acknowledges that backhaul traffic is not “Interconnection” traffic (Tr. 90) (Felton), it incorrectly assumes that backhaul traffic is limited to traffic that “remains internal to Sprint.” Verified Written Statement of Mark G. Felton (“Felton Direct”) at 8-9. In its *Talk America amicus* brief, the FCC expressly rejected this view, making clear that “backhauling is not limited to calls that originate and terminate with a competitive LEC’s [or, as in this case, a wireless carrier’s] customers. Instead, it occurs whenever a competitive LEC [or wireless carrier] uses an entrance facility for a purpose other than interconnection.” AT&T III. Cross Ex.

1 at 6, n.4. As an example, the FCC stated that “backhauling occurs when a competitive LEC leases an incumbent’s entrance facility to transport a call originated by one of its [the CLEC’s] customers to a customer served by a wireless provider with which the competitive LEC has interconnected.” *Id.* This example, which describes transiting, directly contradicts Sprint’s view that any use of facilities by Sprint to send traffic to AT&T Illinois’ network constitutes “Interconnection” with AT&T Illinois, even when that traffic is destined for delivery to the end users of a third party.<sup>15</sup> To the contrary, this example is fully consistent with the FCC’s view that section 251(c) (2) interconnection involves the mutual exchange of traffic between customers of the two carriers that are directly interconnected, such as Sprint and AT&T Illinois.

In support of its position, Sprint relies on language in the *CAF Order*<sup>16</sup> that states that, as long as an existing carrier is using a section 251(c)(2) interconnection arrangement to exchange some telephone exchange service and/or exchange access service, section 251(c)(2) “does not preclude the carrier from using that same functionality to exchange other traffic with the incumbent LEC, as well.” *CAF Order* at ¶ 972; Felton Rebuttal at 12-13. Sprint claims that this statement indicates a “clear intent” on the part of the FCC to allow CLECs and CMRS providers to use Interconnection Facilities to carry 911 and Equal Access trunk groups. *Id.* Sprint reads far too much into that paragraph, which was intended to resolve a “potential ambiguity in existing law” regarding carriers’ ability to use existing 251(c)(2) interconnection arrangement to exchange VoIP-to-PSTN traffic, given the fact that the FCC has never classified interconnected VoIP services as “telecommunications services.” *CAF Order* at ¶¶ 954, 972. The

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<sup>15</sup> In the case of both transit traffic and IXC traffic, AT&T Illinois is serving as an intermediate carrier facilitating the indirect interconnection of two other carriers. Thus, the FCC’s example of transit traffic between two local carriers as being ineligible for Interconnection Facilities applies equally to IXC traffic.

<sup>16</sup> Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, WC Docket No. 10-90 et al., FCC 11-161 at para. 1404 (rel. Nov. 18, 2011) (“*CAF Order*”).

phrase “exchange other traffic with the [ILEC],” as used in the paragraph 972, must be read as a reference to the FCC’s Rule 51.5 definition of Interconnection as the “linking of two networks for the mutual exchange of traffic.” 47 C.F.R § 51.5. Since VoIP-to-PSTN traffic includes traffic exchanged between the VoIP providers’ and ILECs’ end users, there is no basis to conclude that the FCC intended to broaden its interpretation of the phrase “mutual exchange of traffic,” as expressed in its *amicus* brief in *Talk America*, to include traffic, such 911 and Equal Access traffic, that is not exchanged with an ILEC’s end users. Nor should the *CAF Order* be read as contradicting the Supreme Court’s statement in *Talk America* that “entrance facilities leased under § 251(c)(2) can be used *only* for interconnection,” as defined in FCC Rule 51.5. 131 S.Ct. at 2264 (emphasis added).

Citing as its only authority a North Carolina case involving the 911 service offered to PSAPs by Intrado, Sprint also argues that 911 traffic is properly classified “as a form of telephone exchange service subject to AT&T’s 251(c)(2) interconnection obligations.” Felton Rebuttal at 14. However, Sprint ignores the far more relevant order of this Commission in Docket 08-0545, in which it ruled, based on a detailed legal analysis, that Intrado’s 911 service does *not* constitute “telephone exchange service” and, therefore, that “AT&T Illinois has no duty to interconnect with Intrado under subsection 251(c)(2), of the Federal Act.” Arbitration Decision, Docket 08-0545, *Intrado, Inc. Petition for Arbitration pursuant to Section 252(b) of the Communications Act of 1934 as Amended to Establish an Interconnection Agreement with Illinois Bell Telephone Company* (ICC March 17, 2009) (“*ICC Intrado Decision*”), at 21. In any event, as discussed above, even if 911 service were properly classified as a “telephone exchange service” (and, per the *ICC Intrado Decision*, it is not), the fact remains that 911 traffic sent by

Sprint to a PSAP does not constitute the “mutual exchange of traffic” between Sprint and AT&T Illinois and, therefore, does not constitute “Interconnection” as defined in FCC Rule 51.5.

Finally, Sprint’s position that it should be allowed to place 911 trunks on Interconnection Facilities also is directly contrary to other ICA provisions to which Sprint has agreed. For example, Sprint has agreed, in Attachment 2, section 3.4, that it shall be “solely responsible, including financially, for the facilities that carry 911 trunks.” Pellerin Direct at 25. This agreement reflects the fact that 911 facilities are not connected through a POI (which is the physical and financial demarcation point between the parties’ networks for the mutual exchange of traffic) the way Interconnection Facilities are. Rather, 911 facilities are connected all the way from Sprint’s network to the selective router that serves the PSAP, and Sprint is 100% financially responsible for providing those facilities. *Id.*; Attach. 05, section 4.2.1. Thus, by definition, 911 trunks cannot ride “Interconnection Facilities” because, under the agreed portion of the definition of “Interconnection Facilities,” such facilities connect Sprint’s network “to the POI.” GT&C section 2.80, Issue 19. Furthermore, in the Pricing Attachment, Sprint agreed that for 911/E911, “[f]acility rates can be found in the State Special Access Tariff.” Pellerin Direct at 26; Schedules PHP-2, p.1, PHP-6, p.1. In short, Sprint has agreed that it is solely responsible for the cost of 911 facilities, and that to the extent it leases those facilities from AT&T Illinois it does so pursuant to the special access tariff. Accordingly, Sprint is precluded from using TELRIC-priced Interconnection Facilities for 911 trunks.

For all the reasons discussed, the Commission should approve AT&T Illinois’ proposed language for Attach. 2, sections 3.4, 3.5.2, and 3.5.3. Staff concurs. Liu Direct at 53.

**ISSUE 21:                   Should the ICA permit AT&T to obtain an independent audit of Sprint’s use of Interconnection Facilities?**

**(Attachment 2, sections 3.5.5, 3.5.5.1 through 3.5.5.4)**

**AT&T Illinois Position:** The Commission should approve AT&T Illinois’ proposed language permitting it to request an independent audit of Sprint’s use of Interconnection Facilities in order to ensure that such facilities are being used solely for the purpose of section 251(c)(2) Interconnection, as defined in FCC Rule 51.5. Sprint has offered no valid objections to these provisions, which Staff supports.

AT&T Illinois has proposed language for Attachment 2, sections 3.5.5 through 3.5.5.4, that would permit it to request an independent audit of Sprint’s use of TELRIC-priced Interconnection Facilities. AT&T Illinois should be allowed to request such an audit to ensure that those facilities are being used solely for section 251(c)(2) Interconnection and not for any other purpose, including the purposes listed in section 3.5.3 (Issue 20(b)). To avoid an undue burden on Sprint, AT&T Illinois’ proposal allows for such an audit no more frequently than once a year. Pellerin Direct at 29. Audit provisions such as those proposed by AT&T Illinois are not unusual. For example, the ICA that AT&T Illinois currently has with Sprint’s CLEC affiliate, Sprint Communications, LLP, allows AT&T Illinois to request an independent audit of Sprint’s use of certain unbundled network elements (“UNEs”) to ensure compliance with the eligibility criteria applicable to such UNEs. *Id.* at 29-30, Schedule PHP-1.

Sprint proposes language for Attachment 2, section 3.5.5.7, as an alternative. Sprint’s proposed language, however, is inadequate, because it provides only that AT&T Illinois may notify Sprint of non-compliance and invoke the ICA’s dispute resolution provisions. Pellerin Direct at 28. Contrary to Sprint’s apparent assumption, AT&T Illinois may not always be able to tell from its own records that Sprint is not in compliance with the ICA’s provisions for the use of Interconnection Facilities. If AT&T Illinois has reason to believe that Sprint (or an adopting

carrier) is not in compliance, but does not have the records to confirm that belief, it may be necessary, and is entirely reasonable, for AT&T Illinois to request an independent audit. *Id.*

Mr. Felton, Sprint's witness for Issue 21 and the related Issue 22 (discussed below), did not provide any comments on the specific language of AT&T Illinois' proposed audit provisions. Rather, Mr. Felton objected generally to the inclusion of any audit provisions, arguing that such provisions "are all based upon, and only necessary to enforce" AT&T Illinois' position (supported by Staff) that Sprint has a right to use TELRIC-priced Interconnection Facilities only for the mutual exchange of traffic between end users of Sprint and AT&T Illinois. Felton Rebuttal at 22. Assuming, therefore, that the Commission adopts the AT&T Illinois/Staff position on the appropriate use limitations for Interconnection Facilities in its resolution of Issue 20(b), the Commission also should resolve Issue 21 in favor of AT&T Illinois, because it is entirely reasonable to include audit provisions to enforce those limitations.

There is also no basis for Sprint's assertion that the proposed audit provisions would "chill" Sprint's right to obtain Interconnection Facilities. Felton Direct at 12. The only thing the audit provisions would "chill" is any inclination on the part of Sprint (or an adopting carrier) to violate the ICA's provisions regarding the valid use of Interconnection Facilities. *Id.* As Staff witness Dr. Zolnierek, who supports AT&T Illinois' position on Issue 21, stated, "[i]f Sprint is able to take advantage of the fact that AT&T Illinois is required to provide facilities for limited purposes at forward looking total element long run increment cost ('TELRIC') costs, then AT&T Illinois should be entitled to take reasonable steps to ensure that such facilities are being used only for the limited purpose for which AT&T Illinois must provide them." Direct Testimony of Dr. James Zolnierek ("Zolnierek Direct") at 43.

**ISSUE 22: If audit provisions are included in the ICA and an audit demonstrates Sprint is not compliant, how should Sprint's non-compliance be addressed?**

**(Attachment 2, sections 3.5.5.5 - 3.5.5.8)**

**AT&T Illinois Position:** AT&T Illinois' proposed remedies for non-compliance with the ICA's limitations on the use of Interconnection Facilities are reasonable, as is AT&T Illinois' proposal for assigning the costs of an audit. AT&T Illinois' proposals are not punitive, as suggested by Staff witness Dr. Zolnierek. Rather, they are reasonably designed to ensure that Sprint does not benefit from, and that AT&T Illinois is made whole for, any non-compliance.

If an independent auditor finds that Sprint is out of compliance with the ICA's provisions governing the use of Interconnection Facilities, Sprint should be required to (1) remedy the non-compliance (section 3.5.5.5.1); (2) make AT&T Illinois whole through a billing adjustment (section 3.5.5.5.2) or by placing disputed amounts in escrow (section 3.5.5.8); and (3) reimburse AT&T Illinois for the full cost of the audit if 10% or more of Sprint's facilities are out of compliance (section 3.5.5.5.3). If Sprint does not issue the orders necessary to remedy the non-compliance, AT&T Illinois should be allowed to initiate the required orders (section 3.5.5.6). Sprint should not be permitted to sustain non-compliance by failing to take the necessary remedial action. Nor should Sprint be allowed to benefit financially from its non-compliance. Pellerin Direct at 25. AT&T Illinois' proposed language for section 3.5.5.7 allows Sprint to notify AT&T Illinois that it disagrees with the auditor's report regarding Sprint's use of Interconnection Facilities. The parties would then engage in two weeks of negotiation to resolve the dispute. If the discussions failed, Sprint could file a complaint with the Commission. *Id.* at 25.

Other than expressing his general objection to audits, which is addressed above in connection with Issue 21, Sprint witness Felton did not discuss, much less identify, any problems with the specific audit language proposed by AT&T Illinois in sections 3.5.5.5 through 3.5.5.8.

Staff witness Dr. Zolnierek recommended the adoption of AT&T Illinois' proposed sections 3.5.5.5, 3.5.5.5.2, 3.5.5.7, and 3.5.5.8. Dr. Zolnierek, however, took issue with the remedy provisions of sections 3.5.5.5.1 and 3.5.5.6 and the audit cost recovery provision of section 3.5.5.5.3. Dr. Zolnierek's objections are addressed below.

**Remedies for non-compliance (sections 3.5.5.5.1 and 3.5.5.6)**

Section 3.5.5.5.1 gives Sprint 45 days after receipt of the auditor's report to correct violations by converting or disconnecting non-compliant facilities. Section 3.5.5.6 states that if Sprint does not issue the orders to bring the facilities into compliance (or disconnect them), AT&T Illinois may issue the conversion orders. Pellerin Rebuttal at 26-27. Dr. Zolnierek asserted that these provisions are "overly punitive" because they would force Sprint to convert or disconnect facilities for a single misrouted call. Zolnierek Direct at 46. As Ms. Pellerin explained, however, this is not a realistic concern. Pellerin Rebuttal at 27. Because calls are routed in accordance with a carrier's switch translations, which are established based on the Local Exchange Routing Guide ("LERG"), individual calls are not routed independent of the trunk group that carries other calls to the same destination. Thus, if Sprint misroutes one call destined to a particular NPA-NXX code, it will misroute all calls to that code. *Id.*

Dr. Zolnierek was also concerned that if Sprint is found to be in non-compliance on a particular Interconnection Facility, Sprint would forfeit its right to order any Interconnection Facilities for the life of the ICA. Zolnierek Direct at 46. Again, there is no basis for this concern. Nothing in AT&T Illinois' language would preclude Sprint from ordering existing Interconnection Facilities; Sprint could convert the non-compliant facility to an access service

and order a separate Interconnection Facility to be used exclusively for Interconnection. Pellerin Rebuttal at 27.<sup>17</sup>

Dr. Zolnierек also suggested that the proposal to charge Sprint at the month-to-month access rates plus late payment charges constitutes a “penalty” for non-compliance. Zolnierек Direct at 46-47. AT&T Illinois disagrees. Charging Sprint the appropriate month-to-month access charges for facilities that were ordered and billed as Interconnection Facilities at TELRIC-based prices, but that were not used exclusively for Interconnection, is not a “penalty;” it is simply requiring that Sprint pay what it should have been charged in the first place based on Sprint’s use of the facilities. Pellerin Rebuttal at 28.<sup>18</sup>

Dr. Zolnierек also further asserted that AT&T Illinois’ proposed section 3.5.5.5.2 (which he supports) provides a sufficient “penalty” for Sprint’s non-compliance, indicating that he interpreted section 3.5.5.5.2 as allowing AT&T Illinois to bill for non-compliant facilities at access rates going forward. That section, however, only provides for a retroactive true-up to access rates and does not provide for a future change in billing (absent conversion orders). Thus, unless Sprint were to submit an order for the conversion of the non-compliant Interconnection Facility to access, as would be required by section 3.5.5.5.1 (or unless AT&T Illinois were allowed to initiate such a conversion on its (own assuming that Sprint failed to do so itself), as

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<sup>17</sup> It is true that, if there is no existing Interconnection Facility available for lease, Sprint cannot order it, but that is the case independent of the compliance violation uncovered by an audit. It is not punitive to require that Sprint use an access facility (or lease a facility from another carrier or self-provision) when it uses the facility for non-Interconnection services, even if there is no existing Interconnection Facility available for lease. In other words, Sprint is not entitled to use Interconnection Facilities for non-Interconnection purposes simply because there are limited AT&T Illinois facilities available. Pellerin Rebuttal at 27-28.

<sup>18</sup> Some AT&T Illinois access tariff services are available pursuant to term plans (rather than month-to-month), which have lower monthly rates for longer term commitments. For example, a 36-month rate is lower than the corresponding month-to-month rate (which has no term commitment), and a 60-month rate is lower than the 36-month rate. Sprint is entitled to the lower term plan rates only when it commits (in advance) to maintain the service for its selected term plan. It would be inappropriate to assume, after the fact, that Sprint would have ordered any particular term plan had it not violated the ICA by using the Interconnection Facilities for non-Interconnection services. Pellerin Rebuttal at 28.

provided for by section 3.5.5.6), AT&T Illinois could be forced to provide TELRIC-priced Interconnection Facilities that have been proven to be used for non-Interconnection purposes with no requirement that Sprint cease its non-compliance. Pellerin Rebuttal at 29. While AT&T Illinois could perform a one-time billing adjustment (in accordance with section 3.5.5.5.2), AT&T Illinois cannot simply change Sprint's billing going forward without the related ASRs. Accordingly, AT&T Illinois' proposed section 3.5.4 obligates Sprint to issue the necessary ASRs to transition its existing tariffed special access facilities to Interconnection Facilities obtained pursuant to the ICA before Sprint can enjoy TELRIC-priced Interconnection Facilities (Issue 49(a)). *Id.* The same is true in reverse; Sprint would need to issue ASRs to convert Interconnection Facilities to tariffed access facilities before AT&T Illinois could assess the appropriate access charges. If Sprint refuses to issue the orders, AT&T Illinois should be permitted by section 3.5.5.6 to issue them on Sprint's behalf. *Id.*

As an alternative to AT&T Illinois' proposed sections 3.5.5.5.1 and 3.5.5.6, Dr. Zolnierек suggested that the Commission order language permitting the parties to negotiate an amendment with additional penalty language in the event Sprint's "non-compliance is found by audits to be repeated or systematic." Zolnierек Direct at 47. It is not clear, however, what Dr. Zolnierек means by "repeated or systematic" non-compliance. As previously discussed, AT&T Illinois would not be permitted to initiate an audit more often than once per year. Thus, Sprint could be out of compliance with the ICA's Interconnection Facility use limitations for two years or more before AT&T Illinois could even request an amendment, and negotiating (and potentially arbitrating) an amendment could take several more months. Pellerin Rebuttal at 31. Thus, Dr. Zolnierек's suggested approach would leave AT&T Illinois with an inadequate remedy.

**Recovery of audit costs (section 3.5.5.5.3)**

AT&T Illinois' proposed section 3.5.5.5.3 provides that if the number of circuits found by an independent auditor to be non-compliant is equal to or greater than 10% of the number of circuits being audited, then Sprint must reimburse AT&T Illinois for 100% of the cost of the audit. If the number of non-complaint circuits is less than 10%, then Sprint would be required to reimburse AT&T Illinois an amount of the auditor's costs that is in direct proportion to the number of circuits found to be non-compliant. Dr. Zolnierek asserted that this proposed section is "overly punitive" because it "could force Sprint to incur all audit costs for all audits," even where the non-compliance is "de minimis (for example, in an audit of 10 facilities where only one of the facilities a single call was inappropriately routed over the facility on only one occasion)." Zolnierek Direct at 47-48. Dr. Zolnierek also asserted that AT&T Illinois' proposed language would "incent AT&T Illinois to conduct overly frequent and unnecessary audits." *Id.* at 48.

Dr. Zolnierek's objection to section 3.5.5.5.3 is unwarranted for a number of reasons. First, the hypothetical situation on which Dr. Zolnierek bases his objection is one that will not occur. As explained above, if Sprint misroutes one call destined to a particular NPA-NXX code, it will misroute all calls to that code. Accordingly, it is virtually impossible for an audit to identify only a single misrouted call on a single occasion. Pellerin Rebuttal at 32.

Second, there is no basis for Dr. Zolnierek's assertion that AT&T Illinois' proposal would "incent" it "to conduct overly frequent and unnecessary audits." Under its proposed section 3.5.5.1, AT&T Illinois would be permitted to request an audit only once every 12 months. Moreover, it is not in AT&T Illinois' interest to request independent audits just for the sake of imposing audit costs on Sprint. This is particularly true because AT&T Illinois will bear

90% or more of the auditor's costs if Sprint is more than 90% compliant. Pellerin Rebuttal at 32-33.

Third, AT&T Illinois should not be obligated to pay for an audit to prove that Sprint has not complied, just so that AT&T Illinois may charge the access rates to which it is entitled. The difference between tariffed special access rates and TELRIC-priced Interconnection Facilities may be sufficient to incent Sprint (or an adopting carrier) to use Interconnection Facilities in a non-compliant manner. AT&T Illinois has little leverage to ensure Sprint's compliance other than the audit provisions. A requirement that Sprint bear the auditor's costs if an audit shows 10% or more of the audited circuits to be out of compliance should serve as an incentive for Sprint to comply. If that incentive proves effective, Sprint will never have to pay any audit cost. Pellerin Rebuttal at 33.

As an alternative to AT&T Illinois' proposal, Dr. Zolnierек recommended that the auditor's costs be shared between Sprint and AT&T Illinois based on the ratio of non-compliant facilities to the total number of facilities audited. Zolnierек Direct at 48. Dr. Zolnierек's recommended approach could lead to unfair results and may not provide a sufficient incentive for Sprint (or an adopting carrier) to comply with the ICA's use limitations, particularly if there is a large number of facilities. Pellerin Rebuttal at 33-34. As an example, assume that AT&T Illinois requests an audit of 40 DS1 Interconnection Facilities, that the auditor's cost is \$28,000, and that the auditor finds that ten of the 40 DS1s are used for non-Interconnection traffic. Pellerin Rebuttal at 34-35. Under Dr. Zolnierек's proposal, Sprint (or an adopting carrier) would incur only one-quarter, or \$7,000, of the auditor's costs, with AT&T Illinois bearing the other \$21,000 – even though the audit revealed the carrier to be in substantial non-compliance with the ICA. *Id.* at 34-35. It is not reasonable for AT&T Illinois to have to bear three-quarters of the

audit cost when the other party is out of compliance on *ten DSIs*, simply because AT&T Illinois did not have sufficient data to either narrow the scope of the audit to fewer DSIs or to avoid the audit entirely. *Id.* By comparison, AT&T Illinois’ proposal to share the auditor’s costs only when the carrier is more than 90% compliant is reasonable and fair because it appropriately places the burden on the carrier to comply rather than play “catch me if you can” with AT&T Illinois’ Interconnection Facilities. *Id.*

For the reasons discussed, the Commission should adopt all of AT&T Illinois’ proposed language for Issue 22.

**ISSUE 24(b): Under what circumstances may Sprint use Combined Trunk Groups?**

**(Attachment 2, sections 4.2.3, 4.2.4, 4.2.4.1)**

**AT&T Illinois Position:** TELRIC-priced Interconnection Facilities can be used *only* for Interconnection. Sprint is not entitled to TELRIC-priced transport when it uses those facilities to carry IXC traffic. Such traffic is switched access traffic between Sprint and the IXC. It is not Interconnection under § 251(c)(2) because it is not going to, or coming from, an AT&T Illinois end user and therefore there is no “mutual exchange of traffic” within the meaning of FCC Rule 51.5.

The dispute in Issue 24(b)<sup>19</sup> is whether Sprint can mix Interconnection traffic with all other types of traffic (principally IXC switched access) on its Interconnection Facilities, while still paying TELRIC-based rates for those facilities. AT&T Illinois and Staff separately arrived at the conclusion that Sprint may not lawfully do this. To be clear, this issue does not involve the question of whether Sprint can combine its traffic on a single transport facility. It can. Rather, it involves the question of how a single transport facility will be priced if Sprint mixes traffic in the way it proposes.

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<sup>19</sup> There is no longer an Issue 24(a), which settled.

At a high level, Attachment 2, section 4.2 lists and describes the different trunking options available to Sprint for handling traffic between its switches and the AT&T Illinois switches.<sup>20</sup> The disputed language in sections 4.2.3, 4.2.4, and 4.2.4.1 concerns “Type 2A Combined Trunk Groups” and “Type 2A Equal Access Trunk Groups.” This language is part of the larger dispute over the circumstances under which Sprint is entitled to TELRIC-based pricing for Interconnection Facilities – which is addressed in detail in Issue 20. In Issue 20, AT&T Illinois proposes language that prevents Sprint from using TELRIC-priced transport facilities to carry traffic that Sprint exchanges with IXC (“IXC switched access”) or 911 traffic. Likewise, here in Issue 24(b), AT&T Illinois proposes language that rules out TELRIC-based pricing for the “underlying facilities” that connect the parties’ networks when Sprint mixes Interconnection traffic with IXC switched access traffic.

As AT&T Illinois explained in the discussion of Issue 20, Sprint may use TELRIC-priced Interconnection Facilities only for Interconnection, and not to carry switched access traffic. To summarize, the Supreme Court’s decision in *Talk America* states that “entrance facilities leased under § 251(c)(2) can be used *only* for interconnection.” 131 S.Ct. at 2264 (emphasis added). “Interconnection,” as the Supreme Court’s decision notes, is defined in FCC Rule 51.5 as the “linking of two networks for the mutual exchange of traffic.” 131 S.Ct. at 2262. There is no mutual exchange of traffic within the meaning of FCC Rule 51.5 if the traffic is not going to, or coming from, an AT&T Illinois end user. This is confirmed by the Supreme Court’s statement in *Talk America* that the purpose of the section 251(c)(2) interconnection requirement is to “ensure[] that customers on a competitor’s network can call customers on the incumbent’s network, and vice versa.” 131 S. Ct. 2254, 2258. It is further confirmed by the FCC’s *amicus*

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<sup>20</sup> “Trunking” is a defined, agreed, term in GT&C section 2.123 that means “the switch port interface(s) used and the communications path created to connect two switches.”

brief in *Talk America*, which explains that the Interconnection required by section 251(c)(2) and Rule 51.5 is “the physical linking of two networks for the mutual exchange of traffic” which “enables customers of a competitive LEC to call the incumbent’s customers, and vice versa.” AT&T Ill. Cross Ex. 1 at 2-3.

Thus, AT&T Illinois’ language for section 4.2.3 accurately reflects federal law when it says, “Type 2A Combined Trunk Groups may only be used when Sprint obtains the underlying facilities pursuant to AT&T Illinois’ access tariff or from another carrier or self provisions those facilities.” Sprint’s proposal for both 4.2.3 and 4.2.4 runs afoul of the law because it includes no language that limits TELRIC-based pricing to facilities that carry only Interconnection traffic. On the contrary, Sprint’s language would create only one, very limited situation in which Sprint would have to order *separate* Type 2A combined or equal access trunks, *i.e.*, when Sprint sends traffic to an IXC through the AT&T Illinois access tandem *and* when AT&T Illinois cannot record such traffic. Since AT&T Illinois *can* record such traffic, this situation will never occur.<sup>21</sup> Thus, Sprint’s language would always allow it to use Interconnection Facilities for switched access traffic and should therefore be rejected.

Sprint contends that switched access traffic it sends to, or receives from, an IXC via an AT&T Illinois access tandem is Interconnection traffic that can be carried on TELRIC-priced transport facilities because it is “exchange access” under section 251(c)(2)(A) of the Act. Felton Direct at 14. But AT&T Illinois and Sprint are not providing “exchange access” services to each other in this situation, because AT&T Illinois is not sending Sprint InterMTA traffic from AT&T Illinois’ end users. The traffic in question is from IXCs – not from AT&T Illinois’ end users. Indeed, Sprint concedes that AT&T Illinois is not providing “exchange access” to Sprint. Felton

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<sup>21</sup> It is not clear why Sprint insists on retaining language that would never apply.

Direct at 14. In short, there is no “mutual exchange of traffic” within the meaning of FCC Rule 51.5 in this situation, and the traffic in question does not qualify as 251(c)(2) traffic eligible for TELRIC-priced transport facilities. Staff agrees with this analysis. Liu Direct at 57-64.

In light of this, Sprint makes the only argument left open to it, *i.e.*, that Sprint and AT&T Illinois are jointly providing exchange access to an IXC. Felton Direct at 14. As Staff observes, this argument fails for two reasons. Liu Direct at 56-57. First, even if it were true that AT&T Illinois and Sprint were somehow jointly providing exchange access to an IXC (and they are not), it would not bring this traffic within the scope of section 251(c)(2). As we have conclusively established, section 251(c)(2) applies only to “Interconnection,” *i.e.*, the “linking of two networks for the mutual exchange of traffic” between end users of AT&T Illinois and Sprint. *Talk America*, 131 S. Ct. at 2254, 2258; 47 C.F.R. § 51.5. AT&T Illinois has no end users in this situation. Pellerin Rebuttal at 38-39.

Moreover, AT&T Illinois and Sprint are not jointly providing exchange access to an IXC. It is Sprint that is providing the exchange access to the IXC, because it is Sprint’s exchange customer the IXC is “accessing.” AT&T Illinois simply provides tandem switching and transport to the IXC, which then allows Sprint provide the exchange access service to the IXCs, *i.e.*, allows the IXC customer to connect with the Sprint customer. Zolnierrek at 61-62. At no point is an AT&T Illinois exchange customer involved, so AT&T Illinois is not providing access (“joint” or otherwise) to its exchange customers in any sense of the word. Pellerin Rebuttal at 38. The fact that AT&T Illinois provides a functionality that enables Sprint to provide exchange access to IXCs does not change the linking of three networks into the linking of two networks for the mutual exchange of traffic.

In fact, Sprint has been exchanging traffic with IXCs through AT&T Illinois access tandems for years, and that traffic has never been placed over Interconnection Facilities. It has always been treated as switched access traffic and it has always been routed over switched access facilities. Not coincidentally, this is also true for all CLEC traffic to and from IXCs via AT&T Illinois' tandem. There is no reason that Sprint should be treated differently than all other competing carriers. Pellerin Direct at 59; Pellerin Rebuttal at 39-40.

Sprint points out that AT&T Illinois charges an IXC for the tandem switching and transport it provides in this situation. Felton Rebuttal at 27. But this does not mean that AT&T Illinois and Sprint are jointly providing exchange access in this situation. If charging is somehow the touchstone of whether carriers are jointly providing exchange access, then this cuts strongly against Sprint. Sprint does not have a tariff for switched access charges because it is not allowed to have such tariffs. *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Gen. Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480, ¶ 179 (1994). And there is nothing in the record that indicates that Sprint is charging IXCs via contract rather than tariff. Moreover, the entire concept of jointly charging an IXC breaks down when wireless providers are involved, as the FCC explained in *Petitions of Sprint PCS and AT&T Corp For Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling 17 FCC Rcd. 13192, 13195-96 (2002). There, Sprint unsuccessfully sued pre-merger AT&T to collect access charges. The FCC pointed out that CMRS providers have never operated under the same calling party's network pays compensation regime as wireline LECs. "LECs are compensated for terminating calls by the carrier of the customer that originates the call, not by the customer receiving the call. In contrast, since the advent of commercial wireless service, and continuing today, CMRS

carriers have charged their end users both to make and to receive calls.” *Id.* at 13198. This difference in compensation mechanisms does not support Sprint’s theory of “jointly provided exchange access.”

Finally, there are other problems with Sprint’s proposed language that counsel against its adoption. Sprint’s proposed language is internally inconsistent with other provisions of the ICA, because it would allow Sprint to mix together on a single trunk group “IXC Exchange Access” traffic and “Authorized Services” traffic. “Authorized Services” traffic is broadly defined to include any traffic that can lawfully be carried by Sprint, including E911 traffic. But in Attachment 2, section 4.2.6, the Parties agree that 911 traffic will be carried over Type 2C Trunks, which are different than Type 2A Combined Trunks. Pellerin Direct at 34.

Furthermore, Sprint’s proposed language in section 4.2.3 would obligate it to establish an Equal Access Trunk Group only when it routes traffic to (and not from) an IXC via AT&T Illinois’ tandem switch. This language is inappropriate because it only deals with traffic in one direction. Equal Access Trunks are required when Sprint either *originates traffic to* an IXC via AT&T Illinois’ tandem switch or *receives traffic from* an IXC via AT&T Illinois’ tandem. InterMTA Traffic that AT&T Illinois receives from an IXC and routes to Sprint for completion to a Sprint end user is just as much an access service as the InterMTA Traffic that Sprint originates. Pellerin Direct at 35.

For all of these reasons, and for those additional reasons set forth in the testimonies of Ms. Pellerin and Dr. Liu, the Commission should adopt the language recommended by AT&T Illinois and Staff for sections 4.2.3, 4.2.4, and 4.2.4.1 of Attachment 2.

**ISSUE 30(a):**            **Should InterMTA Traffic be routed and billed in accordance with Feature Group D?**

**(Attachment 2, sections 4.8.9, 4.10, 4.10.2, 4.10.3, 4.10.4, 4.10.5)**

**ISSUE 30(b):**            **Should the ICA state that the parties will abide by the Ordering and Billing Forum’s guidelines regarding JIP?**

**(Attachment 2, section 4.10.6)**

**AT&T Illinois Position:** (1). Sprint InterMTA traffic is switched access traffic that should be routed over equal access facilities. (2). Traffic between Sprint and IXCs is switched access traffic that should be routed over equal access facilities. (3). IXC traffic that Sprint hands off to AT&T Illinois is switched access traffic that should be routed over equal access facilities. (4). Land-to-mobile traffic that appears to be IntraMTA at the start of the call, but which turns out to be InterMTA because the Sprint wireless customer roamed outside the MTA, may be routed over Interconnection facilities. With respect to JIP, Sprint should follow industry standards and provide calling records so that the parties can accurately classify calls as IntraMTA or InterMTA.

**Issue 30(a)**

Issue 30(a) raises the question of whether four different types of traffic exchanged between the parties should be routed over Interconnection Facilities or equal access (*i.e.*, switched access) facilities. Each traffic type is discussed below.

**1.     Sprint InterMTA Traffic Terminating to AT&T Illinois – section 4.10.4**

AT&T Illinois Position – Route over Access Facilities  
Sprint Position – Route over Interconnection Facilities  
Staff Position – Route over Access Facilities

This is Sprint-originated traffic that originates and terminates in different Major Trading Areas (“MTAs”). This traffic is properly treated as switched access traffic, *i.e.*, it is subject to switched access charges and must be carried over switched access (*i.e.*, equal access) facilities. Accordingly, AT&T Illinois’ proposed language in section 4.10.4 correctly requires Sprint to route this traffic over switched access trunks and transport facilities.

An MTA is the geographic area within which a CMRS call is considered “local” for purposes of reciprocal compensation. Calls that originate and terminate within the same MTA

were previously subject to reciprocal compensation (and are now subject to a bill and keep arrangement). Calls that originate and terminate in different MTAs were (and still are) subject to switched access charges, as the FCC explained in its *Local Competition Order*.<sup>22</sup> This is the way InterMTA traffic has been exchanged between AT&T Illinois and Sprint (and all other wireless carriers) for years. Pellerin Direct at 59, 61. Nothing has happened to change this long-standing practice.

Sprint argues that its InterMTA traffic should not be treated as switched access traffic because it is not “toll” traffic, and therefore is not “exchange access” traffic under section 153(16) of the Act. Felton Direct at 32-37. This issue is thoroughly addressed in Issues 39 and 40 (see Section VI.B below), so AT&T Illinois will not repeat those arguments here. Suffice to say that Sprint’s creative theory has not been adopted by the FCC and has been rejected by at least two courts. *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 454 F.3d 91, 98 (2d Cir. 2006); *Line Systems, Inc. v. Sprint Nextel Corporation*, 2012 WL 3024015, at \*\*3, 4, Civil Action No. 11–6527 (E.D. Pa. July 24, 2012).

Nor has the *CAF* Order changed the fact that InterMTA traffic is properly considered to be switched access traffic. As Staff witness Dr. Rearden points out, “The FCC made it quite clear in its *CAF* Order that InterMTA traffic was to be viewed as access traffic for purposes of intercarrier compensation. In particular, the FCC’s reform timeline does not make sense if it

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<sup>22</sup> First Report and Order, FCC 96-325, In the Matter of Implementation of the Local Competition *Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd. 15499 (rel. Aug. 8, 1996) (“*Local Competition Order*”) (subsequent history omitted), ¶1036. (“Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.”)

simply wanted all CMRS traffic, including InterMTA traffic, immediately reset to bill and keep.” Direct Testimony of David Rearden (“Rearden Direct”) at 26. See also Pellerin Direct at 68-71.

Staff witness Dr. Zolnierек agrees with AT&T Illinois that InterMTA traffic should be routed like any other switched access traffic, *i.e.*, it should be placed on switched access transport facilities purchased at tariffed rates and should not go over Interconnection Facilities. Accordingly, he recommends that the Commission adopt AT&T Illinois’ language for section 4.10.4. Zolnierек at 63.

**2. AT&T Illinois Incidental InterMTA Traffic Terminating to Sprint – section 4.10.5**

AT&T Illinois Position – Route over Interconnection Facilities  
Sprint Position –Route over Interconnection Facilities  
Staff Position – Route over Interconnection Facilities

The traffic subject to dispute in section 4.10.5 is AT&T Illinois-originated calls that appear to be IntraMTA based on the calling and called parties’ telephone numbers, but that in fact are InterMTA because the called party has roamed out of the MTA associated with his/her telephone number. In this situation, AT&T Illinois does not know that the Sprint end user is located outside of the MTA and that the call is actually an InterMTA call. Accordingly, AT&T Illinois will route the call over the Interconnection Facilities as though it were a normal IntraMTA call. Pellerin Direct at 60.

AT&T Illinois and Sprint have been routing incidental land-to-mobile InterMTA traffic in this way for years, and there is no reason to change this practice now. There is only a small amount of InterMTA traffic that is handled this way. The vast majority of InterMTA traffic from AT&T Illinois to Sprint is routed over access facilities to a customer’s selected IXC. Pellerin Direct at 60.

Sprint does not oppose this routing of traffic, in concept. On the contrary, Sprint's position is that AT&T Illinois and Sprint should exchange "all traffic, including Exchange Access traffic, over Interconnection Facilities." Pet. for Arbitration, Exh. 3 (DPL), Sprint Position Stmt for Issue 30. Nonetheless, Sprint does not affirmatively agree to include the language in the ICA.

Staff agrees that this incidental InterMTA traffic should continue to be routed over the Interconnection Facilities. According to Dr. Zolnierек, "AT&T Illinois should be allowed to route InterMTA traffic destined for CMRS end users over Interconnection Trunks when that traffic appears to be IntraMTA provided appropriate Originating InterMTA factors are applied to the Interconnection Trunks for billing purposes." Zolnierек at 53-54.<sup>23</sup>

Dr. Zolnierек recommended slightly different wording for section 4.10.5, and AT&T Illinois agreed to revise its proposed language to reflect Dr. Zolnierек's recommendation:

Originating Landline to CMRS InterMTA Traffic is routed over the Interconnection Trunks only when such traffic appears to AT&T Illinois (based on the calling and called parties' telephone numbers) to be IntraMTA traffic.

Pellerin Rebuttal at 96. This revised language should be adopted by the Commission.

### **3. Traffic Going from an IXC to Sprint to AT&T Illinois – section 4.8.9**

AT&T Illinois Position – Route over Access Facilities  
Sprint Position – Route over Interconnection Facilities  
Staff Position – Route over Access Facilities

Section 4.8.9 concerns traffic that Sprint receives from an IXC and hands off to AT&T Illinois for termination to an AT&T Illinois end user. Pellerin Direct at 60-61. Calls between IXCs and AT&T Illinois' end users are not the "mutual exchange of traffic" between Sprint and

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<sup>23</sup> As Ms. Pellerin explains, the originating InterMTA factors referred to by Dr. Zolnierек are applied by AT&T Illinois for billing purposes, so this condition is satisfied. Pellerin Rebuttal at 73, 89-90.

AT&T Illinois. For all the reasons explained in the discussion of Issues 20 and 24, above, this is not Interconnection traffic subject to section 251(c)(2). Therefore, it is appropriate for section 4.8.9 to state that any calls Sprint receives from an IXC that are destined for an AT&T Illinois end office switch should not be routed to local Interconnection Facilities obtained at TELRIC-based pricing. Rather, these calls should be routed to tariffed switched access service facilities.

Staff supports AT&T Illinois' language. Zolnierек Direct at 50-53, 63. According to Staff, this language is appropriate because "the FCC has long restricted the ability of carriers to obtain 251(c)(2) interconnection for interexchange purposes" and because nothing in the *CAF Order* changed that restriction. Zolnierек at 52-53. Moreover, Staff correctly points out that the *CAF Order* devoted several paragraphs to the Halo wireless dispute, in which Halo received predominantly wireline traffic from carriers and handed it off to other carriers for termination as wireless IntraMTA traffic (at reciprocal compensation rates) rather than as switched access traffic (at higher switched access rates). In this rate-arbitrage scheme, Halo was an intermediate carrier. It received wireline, interexchange traffic that was unquestionably subject to switched access charges. Halo argued that it "re-originated" the traffic as wireless traffic within the MTA, so that it was IntraMTA traffic and no longer subject to switched access rates. The FCC rejected this theory. *CAF Order* at ¶¶ 1003-1008. As Staff points out, AT&T Illinois' language would preclude any such scheme because it would prevent Sprint from routing traffic it receives from an IXC through the Interconnection facilities. Zolnierек Direct at 50-52.

Sprint acknowledges there have been cases in which wireless carriers have gamed the compensation system by making wireline traffic appear to be wireless traffic, but argues that it does not engage in such tactics. Felton Rebuttal at 31. AT&T Illinois is not suggesting that Sprint would engage in the type of access avoidance scheme in which Halo Wireless engaged.

But interconnection agreements can be adopted by other carriers under section 252(i) of the 1996 Act (47 U.S.C. § 252(i)), so it is appropriate to make sure that no carrier can use this agreement for access avoidance. In any event, if Sprint is not going to engage in that conduct, it should have no objection to placing section 4.8.9 in the ICA. Zolnierrek at 60-61.

Sprint also argues that the language is unnecessary because it already agreed, in section 3.1.2 of Attachment 2, that it would not deliver wireline traffic under this ICA unless and until the parties negotiate additional provisions for such traffic. Felton Rebuttal at 29. The problem with this argument is that section 3.1.2 is only a provisional resolution and does not prevent Sprint (or another carrier opting into the ICA) from requesting an amendment to allow it to terminate wireline traffic. If the parties cannot agree on such an amendment, Sprint can take the issue to the Commission for dispute resolution. So, Sprint overstates the case when it says that the ICA prevents it from terminating wireline traffic to AT&T Illinois.

The other problem with Sprint's argument is that, in the Halo case, Halo argued that once it "re-originated" the wireline traffic it received, that traffic became wireless traffic and was no longer wireline traffic. A carrier that opts-into this ICA could likewise argue that the traffic it receives from other carriers is "re-originated" as wireless traffic and thereby becomes its own traffic – not the traffic of another carrier and therefore not subject to the prohibition in section 3.1.2. against passing wireline traffic to AT&T Illinois.

In short, section 4.8.9 provides reasonable protection against access avoidance schemes. The Commission should accept the recommendation of AT&T Illinois and Staff and direct that this language be included in the ICA.

4. **Traffic Between an IXC and Sprint that Goes Through AT&T Illinois – section 4.10.3**

AT&T Illinois Position – Route over Access Facilities  
Sprint Position – Route over Interconnection Facilities  
Staff Position – Route over Access Facilities

Like Issue 24(b), this issue concerns traffic between an IXC and Sprint that is routed through an AT&T Illinois access tandem. As in Issue 24(b), AT&T Illinois' language makes clear that any such traffic must be transported over equal access (*i.e.*, switched access) transport facilities. Sprint's language would allow it to "elect" whether or not to route this traffic over equal access trunks. For all the reasons explained in Issues 20 and 24, above, this is not section 251(c)(2) (*i.e.*, "Interconnection") traffic because there is no mutual exchange of traffic between AT&T Illinois and Sprint. The Commission should therefore reject Sprint's language for section 4.10.3.

Staff agrees that Sprint should not be allowed to route IXC traffic over Interconnection Facilities (Liu Direct at 57-64 (addressing Issue 24(b))), and therefore generally supports AT&T Illinois' position. With respect to the specific wording of section 4.10.3, Dr. Zolnierек suggests three changes. He recommends that: 1) Sprint's use of the term "switched access service" be rejected; 2) both proposals on "routing" be rejected and replaced with the words "routed to or routed from"; and 3) both proposals on trunk group language be adopted. Zolnierек at 57-59. AT&T Illinois agree with Dr. Zolnierек on his first two recommendations, but not his third.

On the third recommendation, the Sprint trunk group language reads, in part: "This arrangement requires a *separate* Trunk Group employing a Type 2 interface, when AT&T ILLINOIS is *not* able to record Sprint-originated traffic to an IXC." (Emphasis added). In some states, AT&T is "not able to record Sprint-originated traffic to an IXC," making this language essential in those states. However, that is not the case in Illinois. Here, AT&T Illinois is able to

record Sprint-originated traffic to an IXC. Pellerin Rebuttal at 98. This language is therefore meaningless in Illinois and should not be included in the ICA. Accordingly, AT&T Illinois recommends that the Commission adopt the following language for section 4.10.3:

All traffic between Sprint and the AT&T ILLINOIS Access Tandem or combined local/Access Tandem routed to or routed from an Interexchange Carrier (“IXC”) connected with such AT&T ILLINOIS Access Tandem or combined local/Access Tandem, shall be transported over an Equal Access Trunk Group. This Equal Access Trunk Group will be established for the transmission and routing of all traffic between Sprint’s End Users and IXCs, via an AT&T ILLINOIS Access Tandem, or combined local/Access Tandem. Where a separate Equal Access Trunk Group is used, Sprint is solely financially responsible for the facilities, termination, muxing, Trunk ports and any other equipment used to provide such Equal Access Trunk Groups.

Nonetheless, if the Commission decides to include the Sprint trunk group language, AT&T Illinois is willing to accept it. In that event, section 4.10.3 would be as follows:

All traffic between Sprint and the AT&T ILLINOIS Access Tandem or combined local/Access Tandem routed to or routed from an Interexchange Carrier (“IXC”) connected with such AT&T ILLINOIS Access Tandem or combined local/Access Tandem, shall be transported over an Equal Access Trunk Group. This arrangement requires a separate Trunk Group employing a Type 2 interface, when AT&T ILLINOIS is not able to record Sprint-originated traffic to an IXC. Sprint also will provide to AT&T ILLINOIS, using industry standard data record formats, recordings of all calls (both Completed Calls and attempts) to IXCs from Sprint’s network, using Trunks employing a Type 2A interface. This Equal Access Trunk Group will be established for the transmission and routing of all traffic between Sprint’s End Users and IXCs, via an AT&T ILLINOIS Access Tandem, or combined local/Access Tandem. Where a separate Equal Access Trunk Group is used, Sprint is solely financially responsible for the facilities, termination, muxing, Trunk ports and any other equipment used to provide such Equal Access Trunk Groups.

### **Issue 30(b)**

AT&T Illinois proposes language that would require both parties to abide by the ultimate resolution of Issue 2308 (“Recording and Signaling Changes Required to Support Billing”) pending before the Ordering and Billing Forum (“OBF”). The OBF is an industry group that

provides a forum for customers and providers in the telecommunications industry to identify and resolve national issues that affect ordering, billing, provisioning and exchange of information about services. Both AT&T and Sprint participate in the OBF, and each company has a representative on the Board of Directors of ATIS, the entity that oversees the OBF.<sup>24</sup>

OBF Issue 2308 addresses the rules associated with the population of the Jurisdictional Information Parameter (“JIP”) in call data records. Pellerin Rebuttal at 104. JIP is a field in the call data record that can be used as a tool for classifying mobile-to-land traffic as either IntraMTA or InterMTA. Pellerin Direct at 76. While JIP data, standing alone, does not identify whether a call is IntraMTA or InterMTA, it is a valuable tool, when used in conjunction with cell site data that identifies the location of the originating caller (which Sprint does provide) to validate the amount of mobile-to-land InterMTA traffic that Sprint sends to AT&T Illinois. Pellerin Rebuttal at 105. Simply stated, this data would assist AT&T Illinois to more accurately jurisdictionalize Sprint’s traffic and, therefore, to more accurately bill Sprint for switched access services.

Sprint opposes AT&T Illinois’ language, not because it would be difficult or expensive to provide the data, but because it would assist AT&T Illinois in distinguishing between IntraMTA and InterMTA traffic – something that Sprint argues is irrelevant because, in Sprint’s view, all traffic is treated the same for purposes of the intercarrier compensation that must be paid and the transport facilities that may be used. Felton Direct at 21-22. As AT&T Illinois and Staff have explained, however, Sprint is fundamentally mistaken in this view. The parties must continue to distinguish between IntraMTA and InterMTA traffic, both for purposes of the intercarrier

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<sup>24</sup> <http://www.atis.org/about/board.asp>

compensation to be paid and the transport facilities to be used. Since populating JIP in call data records would assist in making this distinction, it should be required.

Dr. Zolnierек conceded that JIP could be a “valuable tool,” but did not recommend AT&T Illinois’ language because he does not know whether it is feasible for Sprint to populate JIP data in the call records, does not know what costs Sprint might incur, and does not believe that OBF Issue 2308 has been finally resolved. Zolnierек at 59-60.

These questions should not prevent the Commission from adopting AT&T Illinois’ language. Section 4.10.6 is written so that it applies to the final resolution of OBF Issue 2308, not to any interim resolution. Accordingly, Sprint would only have to follow that issue resolution if and when it becomes final. As for feasibility and cost, Sprint never raised any question about its ability to comply with the final resolution of OBF Issue 2308. Indeed, as an established wireless provider with a modern, cutting-edge network, it would be unusual for Sprint to claim that it was unable to comply with an industry standard developed by an industry body of which it is a member.

In sum, section 4.10.6 is commercially reasonable because it requires both parties to abide by an industry billing standard, and the Commission should order that it be included in the ICA.

### III. POINTS OF INTERCONNECTION

**ISSUE 15:                   Should the POI serve as both the physical and financial demarcation point between the parties’ networks?**

**(GT&C, section 2.88)**

**AT&T Illinois Position:** It is well-established that each carrier is physically *and financially* responsible for the transport facilities on its side of the point of interconnection (“POI”). Thus, as AT&T Illinois and Staff propose, the word “financially” should be included in the definition of POI. As for the remaining disputed language in section 2.88, AT&T Illinois’ language should be adopted because it provides the most succinct and accurate description of the interconnection that occurs at a POI.

In Issue 15, the parties disagree about the definition of the term “point of interconnection” (“POI”). The proposed definition in section 2.88 of the General Terms and Conditions is a short one, but there are two language disputes for the Commission to resolve.

The first dispute concerns financial responsibility for transport facilities to and from a POI. There is no dispute that a POI is a point on AT&T Illinois’ network that serves as the physical demarcation between the parties’ networks. Likewise, there is no dispute that each party is responsible to provide the physical transport facilities on its side of a POI. The dispute is whether each party is also *financially* responsible for those facilities. AT&T Illinois asserts they are; Sprint says they are not.

This question is well-settled in Illinois; the Commission has decided it in AT&T Illinois’ favor at least four times. Arbitration Order, Docket 05-0402, *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* (Nov. 8, 2005) (“*Sprint Communications Arbitration Decision*”) at 18-19 (“Sprint [Communications] has not provided a compelling or persuasive reason for the Commission to depart from the accepted practice of requiring each interconnecting party to be physically and financially responsible for facilities on its side of the POI.”); *MCI Arbitration Decision*, Docket No. 04-0469, at 79, 84 (“Each party is responsible for the facilities on its side of the POI(s).”); Arbitration Decision, Docket No. 01-0786, *Global Naps, Inc. Petition for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Company d/b/a Ameritech*, (May 14, 2002), at 8 (“Ameritech and Global should be responsible both financially and physically on its side of the single POI”); Order on Rehearing, Docket No. 02-0253, *Global Naps Illinois, Inc., Petition for Arbitration*

*Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North, Inc. f/k/a GTE North Incorporated and Verizon South, Inc., f/k/a GTE South Incorporated*, (Nov. 2, 2002), at 11 (“Each party here should assume financial responsibility for transport on its side of any POI established for the exchange of telecommunications traffic.”). *See Pellerin Direct* at 39-40.

These cases overwhelmingly establish that an interconnecting carrier in Illinois is financially responsible for the transport facilities on its side of the POI. This has been the Commission’s policy for over a decade and there is no reason to change it now.

AT&T Illinois’ position is supported by Staff. *Liu Direct* at 10-20. Dr. Liu explained that the Commission has consistently ruled that an interconnecting carrier is physically *and financially* responsible for the facilities on its side of the POI under section 251(c)(2) and that there is no reason to depart from that precedent in this case. (In fact, she mentions a fifth Commission case deciding the issue this same way, *Arbitration Decision, Docket No. 03-0329, AT&T Communications of Illinois, Inc., TCG Illinois and TCG Chicago, Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (SBC Illinois) pursuant to Section 252(b) of the Telecommunications Act of 1996*, (August 26, 2003), at 22). Because of the overwhelming precedent in Illinois, Dr. Liu recommends language that states “each Party is physically and financially responsible for facilities on its side of the POI.” *Liu Direct* at 20. That is consistent with AT&T Illinois’ position on this issue and the Commission should adopt AT&T Illinois’ position on this portion of Issue 15.

The second dispute in Issue 15 concerns the first part of GT&C section 2.88, where the parties propose different language to describe the interconnecting of networks that occurs at a

POI. The parties agree on the beginning of the language, which says that a POI “means a point on the AT&T Illinois’ network (End Office or Tandem building) where . . . .” The disagreement arises in the next clause. AT&T Illinois proposes to continue the sentence by succinctly saying “where the Parties’ networks meet.” Sprint offers the more cumbersome “where the Interconnection Facilities connect with the AT&T Illinois network.”

There is no hidden policy issue lurking here. Tr. at 113 (Felton). Thus, the choice turns on which party’s wording best describes the interconnection that occurs at a POI. AT&T Illinois’ language is clearer and more concise than Sprint’s. Sprint’s language is unnecessarily repetitive because it uses the words “the AT&T Illinois network” – which already appear in the first clause of the sentence. Likewise, the Sprint language uses a defined term (“Interconnection Facilities”) where it is not needed, forcing the reader to cross-reference the definition of that term in GT&C section 2.60 – which is also a disputed term in this proceeding – adding even more complexity to what the parties mean by “POI.”

Staff offers its own version of the first portion of section 2.88:

Point of Interconnection (“POI”) is a point on the AT&T Illinois network where Sprint physically links its network with the AT&T Illinois network for the mutual exchange of traffic.

Liu Direct at 20. While this proposal cures the problems in Sprint’s language, it omits the useful parenthetical “(End Office or Tandem)” that the parties agreed upon and which accurately describes the points on the AT&T Illinois network where the POIs will be located. As a general proposition, the Commission should not alter language on which the parties have agreed.

Overall, AT&T Illinois’ language on the first portion of GT&C section 2.88 is preferable to the proposals of Sprint or Staff and should be adopted.

**ISSUE 16: Must Sprint obtain AT&T's consent to Sprint's removal of a previously established POI?**

**(Attachment 2, section 2.2.1.4)**

**AT&T Illinois Position:** It is well-established in Illinois that a carrier may not unilaterally decommission a POI. Thus, as AT&T Illinois and Staff propose, Sprint's language allowing it unbridled discretion to decommission POIs should be rejected.

Sprint proposes to insert language in Attachment 2, section 2.2.1.4 that would allow it to unilaterally decommission a POI without consulting AT&T Illinois or the Commission. ("Sprint may remove any previously established POIs for Sprint network optimization . . ."). AT&T Illinois and Staff oppose this language because Commission precedent requires Sprint to either reach agreement with its interconnection partner (AT&T Illinois) or obtain Commission approval based upon sufficient justification. Albright Direct at 25; Liu Direct at 21-22.

In its November 30, 2004, *MCI Arbitration Decision*, Docket No. 04-0469, at 88-89, the Commission ruled that MCI could not unilaterally eliminate established POIs. While the Commission acknowledged the general rule that an interconnecting carrier can establish a single POI per LATA, it went on to say that that does not mean a carrier can eliminate established POIs. "The Commission concurs with SBC and Staff, however, that, where MCI already established multiple POIs in a LATA, it shall not decommission them in its sole discretion. [Discussion of fiber meet POI example omitted]. The Commission does not prohibit MCI from dismantling established interconnection arrangements in all circumstances. Instead, a LEC shall not be allowed to dismantle any established interconnection arrangement unless it either reaches an agreement with its interconnection partner, or receives Commission approval based upon sufficient justification."

Thus, since 2004 it has been the rule in Illinois that a carrier with multiple POIs in a LATA cannot unilaterally decommission a POI. If a carrier wants to eliminate a POI, it must

negotiate with the other carrier. If the carriers do not agree, then the carrier that wishes to decommission a POI can bring the issue to the Commission.

This rule makes perfect sense for several reasons. As Mr. Albright testified, carriers incur costs to establish POIs. Albright Direct at 19. That time and money could be wasted if one carrier could decide, at any time, to eliminate a POI. Moreover, POIs are established only when carriers recognize that they provide an efficient way to interconnect. Albright Direct at 19. Sprint's existing ICA requires it to establish POIs at multiple locations as traffic grows. As Dr. Liu explained, a voluntary arrangement takes into account the economic interests of both parties and is therefore likely to be efficient. Liu Direct at 25. To be sure, a carrier's needs may change over time, but that in no way undercuts the Commission's judgment that a POI should be decommissioned only pursuant to the parties' agreement or a Commission order. Finally, the Commission's rule makes sense because a multi-POI architecture provides public benefits. Multiple POIs provide the diversity, security and reliability that a single POI does not. In a multiple POI arrangement, for example, a catastrophic failure at a single POI location caused by a fire or natural disaster will not isolate a carrier's network from the public switched telephone network. Albright Direct at 20-21.

There is no question but that Sprint has "established multiple POIs" within the meaning of this rule. As Mr. Albright testified, Sprint voluntarily established a multiple POI interconnection architecture in Illinois, with a POI at every tandem in the Chicago LATA – and more. Albright Direct at 19-20. Sprint witness Mark Felton concurred, stating that Sprint has more than 70 POIs in Illinois. Felton Direct at 41. Thus, the ruling in the *MCI Arbitration Decision* applies in this case and Sprint's contrary language should be rejected.

Sprint's arguments to avoid the effect of this Commission precedent are without merit. First, Sprint asserts that section 251(c)(2)(B) of the 1996 Act gives it an unfettered right to decommission POIs. Felton Rebuttal 38-39. Section 251(c)(2) establishes the interconnection obligation, and, according to Sprint, since it does not limit Sprint's ability to decommission POIs, such decommissioning must be allowed. Sprint's analysis overlooks section 251(c)(2)(D), which states that interconnection must take place on terms and conditions "that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement." The Commission, therefore, has leeway to approve interconnection terms and conditions for the decommissioning of POIs, as long as those terms and conditions are "just, reasonable, and nondiscriminatory." The Commission has already done this in the *MCI Arbitration Decision*.

Sprint also argues that federal law – specifically, FCC orders that allow a carrier to establish a single POI per LATA – allow it to decommission as many POIs as necessary to get down to a single POI in a LATA. Felton Rebuttal at 40. The FCC orders Mr. Felton cites say nothing of the kind. The FCC allows a new entrant to establish a single POI in a LATA – but the FCC has never decided whether a carrier with multiple POIs can unilaterally decommission all but one of those POIs. Those are two distinct issues and they cannot be conflated. On the one hand, it is clear that a carrier establishing its initial interconnection arrangement in a LATA can establish a single POI. This Commission has so held. But once a carrier has voluntarily established multiple POIs, the elimination of those POIs directly impacts the interests of the connecting carrier and the Commission.

In the MCI arbitration, MCI argued, just as Sprint does here, that the “single POI” rule allows unilateral elimination of established POIs. *MCI Arbitration Decision* at 84-85. The Commission rejected the argument when MCI made it, and it should do the same here.

Sprint argues next that the *MCI Arbitration Decision* applies only to fiber meet arrangements. Felton Direct at 26-27. Sprint is wrong. There is nothing in the Commission’s order that limits its ruling in that way. The key sentence in the order reads: “The Commission concurs with SBC and Staff, however, that, where MCI already established multiple POIs in a LATA, it shall not decommission them in its sole discretion.” *MCI Arbitration Decision* at 88. To be sure, the rest of the paragraph discusses fiber meet POIs, but the discussion refers to fiber meet POIs as an “example” of how carriers can incur time and expense to establish a POI. The Commission nowhere suggested that its ruling was limited to the example it happened to use. On the contrary, the Commission’s ruling by its terms applies to “any established interconnection arrangement.” *Id.* It is no surprise that the Commission’s Staff disagrees with Sprint’s misinterpretation of the *MCI Arbitration Decision*. Liu Direct at page 22.

For all of these reasons, the Commission should reject Sprint’s language and accept the language proposed by AT&T Illinois and Staff for Issue 16.

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| <b>ISSUE 17(a)</b> | <b>Should Sprint be required to establish additional Points of Interconnection (POIs) when its traffic to an AT&amp;T Tandem Serving Area exceeds 24 DS1s?</b>  |
| <b>ISSUE 17(b)</b> | <b>Should Sprint be required to establish an additional Points of Interconnection (POI) at an AT&amp;T end office not served by an AT&amp;T tandem when its traffic to that end office exceeds 24 DS1s?</b> |
| <b>ISSUE 17(c)</b> | <b>Should Sprint establish these additional connections within 90 days?</b><br><br><b>(Attachment 2, sections 2.2.1.3; 2.2.1.3.1; 2.2.1.3.2 and 2.2.1.3.3)</b>  |

**AT&T Illinois Position:** The Commission correctly held in the *Level 3 Arbitration Order* that it has authority to require additional POIs when traffic between carriers grows. The OC-12 threshold established in that case, however, is far too high when viewed in light of the actual network data provided in this case, which shows that few, if any, interconnections reach that traffic volume. In order to have a rule that actually means something, the Commission should lower the traffic threshold to one (1) DS3.

For established carriers, an interconnection architecture with more than one POI is highly desirable for several reasons. First, it enhances network reliability. As Mr. Albright explained, a single POI arrangement concentrates traffic at a single location, increasing the chance that a catastrophic failure at that location, such as a fire or flood, can completely isolate that carrier's network from the public switched telephone network ("PSTN"). An outage in one carrier's network could create a "backlash" into other carriers' networks, blocking calls and leading to more blocked calls as customers attempt to redial. National concerns about network reliability have never been higher, and having more than one POI undeniably enhances network reliability. Albright Direct at 27.

Second, having more than one POI balances facilities investment between carriers. This consideration has increased in importance in light of the *CAF Order*'s institution of a bill and keep regime for non-access wireless traffic. A single POI approach, coupled with "bill and keep" for non-access wireless traffic, would impose a significant transport burden on ILECs, who can no longer look to compensation as a means of cost recovery. Albright Direct at 27-28. In fact, the FCC acknowledged in the *CAF Order* that states retain their authority under section 252(d) to set rates for interconnection under a "bill and keep" framework, because states will determine through the arbitration process the points on a network at which a carrier must deliver terminating traffic to another carrier. *Id.* at ¶ 776.<sup>25</sup> Thus, the FCC recognizes that state

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<sup>25</sup> "Moreover, states will retain important responsibilities in the implementation of a bill-and-keep framework. An inherent part of any rate setting process is not only the establishment of the rate level and rate structure, but the definition of the service or functionality to which the rate will apply. Under a bill-and-keep framework, the

commissions have authority in arbitration proceedings to require additional POIs for the exchange of traffic that is subject to a “bill and keep” regime. With the demise of reciprocal compensation for wireless traffic, the time is ripe for the Commission to recognize that a multiple POI interconnection arrangement for established carriers is appropriate.

In fact, much to its credit, the Commission has already recognized that – at some traffic level – it is reasonable for interconnected carriers to establish an additional POI. Arbitration Decision, Docket No. 00-0332, *Petition for Arbitration Pursuant to Section 252 (b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois*, (ICC Aug. 30, 2000) (“*Level 3 Arbitration Order*”), at 31. There, the Commission ruled that it is “reasonable” to require a carrier to establish an additional POI when traffic volume between two carriers reaches an OC-12 level. *Id.* The Commission made this ruling in full awareness of the FCC’s pronouncements that “a CLEC need have only one POI per LATA.” *Id.* Thus, the Commission has recognized that established carriers are appropriately required to establish additional POIs as traffic volume increases.

The Public Utility Commission of Texas (“PUCT”) has likewise imposed an “additional POI” requirement – but at a much lower traffic level. In Order Approving Interconnection Agreement, Docket No. 21791, *Petition of Southwestern Bell Telephone Company for Arbitration with MCI Worldcom, Inc. Pursuant to Section 252(b)(1) of the Federal Telecommunications Act of 1996*, (Pub. Util. Comm’n Texas Sept. 20, 2000) (“*MCIW Order*”), the PUCT held (at p. 4) that the FCC’s *Local Competition Order* recognizes that states may go

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determination of points on a network at which a carrier must deliver terminating traffic to avail itself of bill-and-keep (sometimes known as the ‘edge’) serves this function, and will be addressed by states through the arbitration process where parties cannot agree on a negotiated outcome.”

beyond national rules and “impose additional pro-competitive interconnection requirements, as long as such requirements are otherwise consistent with the 1996 Act and the FCC’s regulations.” It went on to find that it is reasonable to require additional POIs to avoid network or tandem exhaust and required MCIW and SWBT to negotiate additional POIs when MCIW’s traffic usage exceeds a traffic level equal to twenty-four DS1s. *Id.* at 6-7.

AT&T Illinois’ proposal is consistent with the principle the Commission established in the *Level 3 Arbitration Order*, and with the result in the Texas *MCIW Order*. It requires Sprint (and any carriers opting into Sprint’s ICA) to establish additional POIs as the volume of traffic exchanged between them grows. While AT&T Illinois initially proposed a threshold of 24 DS1s, it revised that proposal to a higher level of traffic, *i.e.*, one DS3 (equal to 28 DS1s).<sup>26</sup>

Sprint previously accepted the principle behind AT&T Illinois’ proposal, because it agreed to a provision in its current ICA that requires Sprint to establish a POI to each switch at a traffic volume of only one DS1.<sup>27</sup> The language AT&T Illinois proposes here is significantly more favorable to Sprint than the language in the existing ICA.

Staff agrees that the *Level 3 Arbitration Order* precedent applies here and that the parties should be required to establish an additional POI once traffic between them reaches some pre-determined level. Liu Direct at 29-30. Staff does not agree, however, on AT&T Illinois’ DS3 traffic volume threshold. In Staff’s view, the traffic threshold should be an OC-12. *Id.* at 33.

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<sup>26</sup> A DS1 provides 24 voice grade channels, so it can handle 24 simultaneous conversations. There are 28 DS1 channels in a DS3, so a DS3 can provide 672 (24 x 28) voice grade channels. There are three DS3s in an OC-3, so an OC-3 can provide 2,016 (672 x 3) voice grade channels. There are four OC-3s in an OC-12, so an OC-12 can provide 8,064 (2,016 x 4) voice grade channels. Rebuttal Testimony of Carl C. Albright, Jr. (“Albright Rebuttal”) at 22.

<sup>27</sup> Section 2.3.2 of the current ICA between Sprint Spectrum and AT&T Illinois dated June 7, 2001 (AT&T Cross Ex. 2) requires Sprint to establish a POI at “each **SBC-13STATE** Tandem switch or End Office Switch where trunking is required under this Agreement.” Section 2.1.11 of the ICA requires the parties to establish direct trunking to an end office when traffic between them at that end office “meets the CCS equivalent of one DS1 (*i.e.* 500 busy hour centum call seconds), for three consecutive Months.”

That standard is far too high. Under Staff's proposed threshold, a carrier would not have to establish an additional POI until traffic to a single tandem reached the level of 336 DS-1s, or 8064 trunks, for three consecutive months. Since there are 13 tandem serving areas in the Chicago LATA, a carrier could have slightly under an OC-12's worth of traffic at each of the 13 AT&T Illinois tandems – a huge volume of traffic by any measure – but still not be required to establish an additional POI. Albright Rebuttal at 21.

Mr. Albright further demonstrated that an OC-12 standard is effectively no standard at all, because only one competing carrier in Illinois has traffic levels that high. Specifically, of the 773 interconnections that carriers have established with AT&T Illinois, there are only *two* with traffic volumes that exceed one OC-12 at a tandem serving area. Albright Rebuttal at 21.<sup>28</sup> Thus, under the Commission's current traffic threshold for establishing an additional POI, only 0.26% of POIs would be affected. Stated differently, 99.74% of all interconnections would be unaffected by the Commission's existing additional POI threshold. That is far too little impact for a principle as important as this one. In order for principle that an additional POI should be established when traffic attains a sufficient level to have any meaning, the threshold must be lower.

Mr. Albright's traffic data was presented to address Dr. Liu's observation that "AT&T has not presented sufficient evidence to warrant a departure from that Commission finding or warrant the decrease of traffic threshold from OC-12 (or 336 DS1s) to 24 DS1s for additional POIs." Liu Direct at 33. The data also address the outdated assumption in the *Level 3 Arbitration Order* that the Commission used to establish the OC-12 standard in the first place. The *Level 3 Arbitration Order* (at 30) bases the OC-12 standard on the assertion that "95% of

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<sup>28</sup> Staff witness Dr. Liu agreed on cross examination that these data show that an OC-12 standard is so high that in practice it is effectively the same as having no threshold at all for a majority of CLECs. Tr. at 1046.

[Level 3's] traffic is ISP. The rapid continuous growth of the internet suggests that it is only a matter of time before Level 3 will have to install additional POIs in the Chicago LATA." Since that order was issued in 2000, ISP traffic on the PSTN has dropped as customers migrated to broadband services (e.g., DSL, U-verse and Cable) that do not travel over the PSTN. Thus, the "continuous growth of the internet" did not generate traffic volumes that caused Level 3 (or other carriers, for that matter) to "have to install additional POIs in the Chicago LATA" under the OC-12 standard. *See* Albright Rebuttal at 21.

In place of the outmoded OC-12 standard, AT&T Illinois proposes a DS-3 threshold. A single DS-3 carries a large amount of traffic. A DS-3 can carry up to 5,600,000 minutes of use ("MOU") per month (28 DS-1s x 200,000 MOU). So, a carrier can carry as many as 5½ million MOUs per month to a tandem serving area without triggering a DS3 threshold. Under AT&T Illinois' proposal, it is only when traffic to a single tandem serving area exceeds 5,600,000 MOU per month for three consecutive months that the carrier would be required to establish an additional POI. This ensures that an additional POI is established only where there is a continued, sustained exchange of large amounts of traffic between carriers. Albright Rebuttal at 22-23.

According to Mr. Albright's data, only 21.3% of the current interconnections would meet the DS-3 traffic threshold AT&T Illinois proposes. Albright Rebuttal at 21. Mr. Albright's data also show that even an OC-3 traffic threshold standard would have some impact because it would affect 6.1% of AT&T Illinois' interconnections. While AT&T Illinois is not advocating an OC-3 standard, it is a far better standard than the OC-12 standard recommended by Staff.

Sprint's main argument in opposition to AT&T Illinois' proposal is the same one it asserts on Issue 16, namely, that federal law permits it to have a single POI per LATA, so it

cannot be required under any circumstances to establish an additional POI. But the Commission has already rejected that argument by ruling that established carriers can be required to add POIs. *Level 3 Arbitration Order* at 31. Second, Sprint is mistaken about federal law. In the *CAF Order*, the FCC made clear that states have authority to determine the points on a network at which a carrier must deliver terminating traffic to another carrier. *CAF Order* at ¶ 776. In the words of the FCC, “Under a bill-and-keep framework, the determination of points on a network at which a carrier must deliver terminating traffic to avail itself of bill-and-keep (sometimes known as the ‘edge’) serves this function, and will be addressed by states through the arbitration process where parties cannot agree on a negotiated outcome.” In these words, the FCC acknowledges state authority to require in an arbitration proceeding additional POIs for traffic subject to a bill and keep regime. Finally, section 251(c)(2)(D) gives the Commission authority to establish “just and reasonable” terms and conditions for interconnection.

One final point. Although AT&T Illinois disagrees with Staff on the OC-12 traffic threshold, Staff otherwise recommends the adoption of all the rest of AT&T Illinois’ language for sections 2.2.1.3; 2.2.1.3.1; 2.2.1.3.2; and 2.2.1.3.3. Liu Direct at 33-34. Obviously, AT&T Illinois agrees with this portion of Staff’s recommendation.

For all of the reasons set forth above and in the testimony of AT&T Illinois witness Mr. Albright, AT&T Illinois requests the Commission to adopt the language it proposes for the four sections of the ICA addressed in Issues 17(a) – 17(c).

#### IV. INTERCONNECTION FACILITY PRICING

**ISSUE 44:** Should the ICA provide that Sprint is automatically entitled, as of the Effective Date of the ICA, to TELRIC-based pricing on facilities ordered from AT&T's access tariff?

(Attachment 2, sections 3.8, 3.8.1)

**AT&T Illinois Position:** AT&T Illinois should not be required to begin applying TELRIC-based rates to all facilities that Sprint is currently using to exchange traffic with AT&T Illinois immediately upon the effective date of the ICA. Most, if not all, of the facilities Sprint leases from AT&T Illinois are not used exclusively for Interconnection. Accordingly, to qualify for TELRIC-based pricing, Sprint will first need to order, pursuant to the new ICA, Interconnection Facilities that are separate from the transport facilities used for backhaul and other forms of traffic that are not eligible for being sent over TELRIC-priced Interconnection Facilities.

The language in dispute is Sprint's proposed Attachment 2, sections 3.8 and 3.8.1. That language would require AT&T Illinois to begin applying TELRIC-based rates immediately upon the Effective Date of the ICA to all of the facilities that Sprint is currently using to exchange traffic with AT&T Illinois.

Sprint's proposal must be rejected. As explained in Section I (Issue 49), above, the facilities currently linking the parties' networks were not ordered and provisioned pursuant to section 251(c)(2) of the 1996 Act, and they are therefore not subject to either section 251(c)(2) or to the section 252(d)(1) pricing provisions applicable to section 251(c)(2) Interconnection. Instead, they are subject to the rates, terms, and conditions of the AT&T Illinois' special access tariffs from which they were ordered and provisioned. Pellerin Rebuttal at 42. As Ms. Pellerin and Dr. Liu testified, Sprint is entitled to TELRIC-based pricing only on facilities that are (1) used exclusively for Interconnection as the FCC defined that term in 47 C.F.R. § 51.5; and (2) ordered pursuant to the ICA. Pellerin Direct at 37; Liu Direct at 37, 70. The facilities Sprint currently leases from AT&T Illinois are not being used exclusively for Interconnection. Rather, those facilities are being used for other purposes, such as backhaul, and, therefore, they do not

qualify for TELRIC-based pricing as of the Effective Date of the ICA. See Section II (Issues 19, 20(a), 20(b)), above. Pellerin Direct at 37-38; Pellerin Rebuttal at 42-43. Accordingly, to qualify for TELRIC-based pricing, Sprint will first need to order, pursuant to the new ICA, Interconnection Facilities that are separate from the transport facilities used for backhaul and other forms of traffic that are not eligible for being sent over TELRIC-priced Interconnection Facilities. *Id.*; Liu Direct at 66.

Staff witness Liu agrees that Sprint’s proposed language for Issue 44 should be rejected. Liu Direct at 70.<sup>29</sup>

**ISSUE 45(a):                   Should the Interconnection Facilities prices be applied on a “DS1/DS1 equivalents basis”?**

**(Attachment 2, section 3.8.2)**

**AT&T Illinois Position:** The term “DS1/DS1 equivalents basis” is confusing and is unnecessary since the rates applicable to DS1 and DS3 Interconnection Facilities are included in the Pricing Schedule. In addition, the Commission should reject Sprint’s request that it be allowed to use the same DS3 facility to carry both backhaul traffic and Interconnection traffic, with the price of that facility pro-rated between TELRIC-based prices and tariff special access pricing. Sprint’s position is contrary to the principle that TELRIC-priced Interconnection Facilities must be used exclusively for Interconnection and may not be used for non-Interconnection purposes like backhauling. Furthermore, Sprint’s proposed method of pro-rating charges would result in below-cost pricing for Interconnection Facilities.

This issue involves Sprint’s proposed Attachment 2, section 3.8.2, which provides that TELRIC-based rates for Interconnection Facilities will be applied on a “DS1/DS1 equivalents basis,” a vague and confusing term for which no definition or explanation is included in Sprint’s proposed contract language. In an attempt to fill that void, Mr. Farrar testified that the term “DS1/DS1 equivalents basis” “simply means that the TELRIC rates for DS1 (or DS3)

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<sup>29</sup> In attempting to defend Sprint’s position on this issue, Mr. Farrar argued that Sprint should be able to use “high capacity facilities on a subdivided basis for both Interconnection and backhauling” subject to “pro rata pricing for that portion that is used for Interconnection.” Farrar Direct at 24. This argument must be rejected for the reasons discussed in connection with Issue 45(a), below.

Interconnection facilities will be equal to the TELRIC DS1(or DS3) rates for Entrance Facilities and Interoffice Transport rates on the Pricing Sheets as already determined by the Commission.” Farrar Rebuttal at 33-34. If, in fact, the term “DS1/DS1 equivalents basis” is intended to mean what Mr. Farrar says it means, there is absolutely no reason to include that confusing term in the ICA, since the DS1 and DS3 rates included on the Pricing Sheets speak for themselves.

Mr. Farrar’s testimony, however, reveals that Sprint intends to interpret and apply the term “DS1/DS1 equivalents basis” (if adopted) in a manner very different than his simple explanation of that term indicates. Specifically, Sprint would interpret its proposed language as obligating AT&T Illinois to allow Sprint to use the same DS3 facility to carry both backhaul traffic and Interconnection traffic, with the price of that facility to be determined by allocating the total price of the DS3 facility between TELRIC-based prices and tariffed special access prices based on the percentage of DS1 channels riding over the DS3 facility that are dedicated to Interconnection and backhauling, respectively. Farrar Direct at 42; Farrar Rebuttal at 36. Sprint’s position in this regard incorrectly assumes that Sprint should be allowed to use the same DS3 Interconnection Facility for both Interconnection and for backhauling. As discussed more fully in connection with Issues 19 and 20, above, Sprint’s assumption is directly contrary to the principle, expressly recognized by the U.S. Supreme Court, other courts, and this Commission, that TELRIC-priced Interconnection Facilities are to be used exclusively for Interconnection as defined in FCC Rule 51.5 and, therefore, may not be used for non-Interconnection purposes like backhauling. Even Sprint witness Felton acknowledged that “Interconnection Facilities may not be used for the purpose of carrying [backhaul] traffic.” Felton Rebuttal at 4. In fact, the Seventh Circuit has made it clear that ILECs have the right to “*block* any attempted use of [a TELRIC-priced] entrance facility for backhauling.” *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1071 (7th

Cir. 2008) (emphasis added). Thus, if Sprint wishes to use the same facility for the transport of both Interconnection traffic and non-Interconnection traffic (which includes backhauling), then it is not entitled to TELRIC-based pricing for any portion of that facility. Pellerin Rebuttal at 47.

Furthermore, as Dr. Liu pointed out, the manner in which Sprint proposes to apply the “DS1/DS1 equivalents” approach, as described by Mr. Farrar, would result in the pro-rated price of a DS1 channel used for Interconnection and riding over a DS3 transport facility to be set equal to 1/28 of the DS3 TELRIC price, which is less than the Commission-approved TELRIC-based rate for a DS1 transport facility set forth in the agreed Pricing Sheets. Thus, Sprint’s “equivalent pricing” approach would effectively force AT&T Illinois to provide facilities used for Interconnection at a price that is below TELRIC. Liu Direct at 72.

For all the reasons discussed, Sprint’s proposed language for section 3.8.2 should be rejected.

**ISSUE 45(b):                   Should the ICA reference specific Commission orders for Interconnection Facilities pricing?**

**(Attachment 2, section 3.8.2.1)**

**AT&T Illinois Position:** There is no need to reference the specific proceeding in which some (but not all) of the TELRIC-based prices applicable to Interconnection Facilities were approved. The applicable rates are not in dispute and are included in the ICA’s Pricing Sheets.

Sprint has never explained, much less justified, the need for including in the ICA a reference to specific Commission orders for Interconnection Facilities pricing, as it proposes to do in Attachment 2, section 3.8.2.1. Such a reference is completely unnecessary. Rates for Interconnection Facilities are included in the Pricing Sheets attached to the ICA and are not in dispute; they will apply regardless of the proceeding in which they happen to have been approved. Pellerin Direct at 38. Furthermore, while it is correct that the TELRIC-based monthly recurring rates for DS1 and DS3 Interconnection Facilities in the Pricing Sheets happen to have

been approved in the proceeding referenced by Sprint (Docket Nos. 96-0569 and 96-0486 (consolidated)), at least one other TELRIC-based price listed in the Pricing Sheet (the \$11.44 non-recurring service order charge applicable to electronic orders for DS1 and DS3 Interconnection Facilities) was approved in Docket No. 02-0864. Moreover, if the Commission orders any of the previously approved TELRIC-based rates to be modified in some future proceeding, either party could seek to amend the ICA to include the updated rates in the Pricing Sheet pursuant to the ICA's Intervening Law provision (GT&C section 21), in which case the reference to a specific docket in Attachment 2, section 3.8.2.1 would be incorrect or incomplete. *Id.* at 48. Accordingly, Sprint's proposed section 3.8.2.1 should be rejected.

**ISSUE 45(c):                   Should Sprint be entitled to different rates for Interconnection Facilities than those set forth in the Price Sheet without amending the ICA?**

**(Attachment 2, section 3.8.2.2)**

**AT&T Illinois Position:** The Commission should reject Sprint's proposal to require that any change in TELRIC-based prices that the Commission may order in a future proceeding be immediately available to Sprint, without an ICA amendment. Sprint's proposal is unfairly one-sided. It is also unnecessary, as either party may request an ICA amendment, to incorporate a change in rates pursuant to the ICA's Intervening Law provisions.

Sprint's proposed section 3.8.2.2 would require that any change in TELRIC-based prices ordered by the Commission in a future proceeding "be immediately available to Sprint without an amendment to the Agreement and or Pricing Sheets." Sprint's proposed language is unfairly one-sided, as it could be interpreted to provide Sprint with the immediate benefit of any ordered rate reductions without providing AT&T Illinois with a similar benefit in the event of any ordered rate increases. Pellerin Rebuttal at 48-49. Furthermore, neither Sprint nor AT&T Illinois should be automatically entitled to different rates without amending the ICA. If the Commission were to establish different TELRIC-based prices for Interconnection Facilities in a

generic cost proceeding, either party could request an ICA amendment to include those rates in the ICA, pursuant to the Intervening Law provisions of GT&C, section 21. Pellerin Direct at 49. Accordingly, Sprint's proposed section 3.8.2.2 should be rejected.

**ISSUE 46:                   Should the parties share the cost of TELRIC-priced facilities on Sprint's side of the POI?**

**(Attachment 2, sections 3.9, 3.9.1, 3.9.2)**

**ISSUE 47:                   Should Attachment 2 contain billing terms specific to Interconnection Facilities?**

**(Attachment 2, sections 3.9.3, 3.9.3.1; Pricing, sections 1.3.2, 1.3.3, 1.4.2)**

**AT&T Illinois Position:** Sprint's proposal that the parties "share" the cost of Interconnection Facilities on a 50/50 basis is directly contrary to the well-established principle that each party to a section 251(c)(2) Interconnection arrangement is financially responsible for the facilities on its side of the POI. It is undisputed that the Interconnection Facilities at issue in this case are located entirely on Sprint's side of the POI. Sprint should be financially responsible for the full cost of those facilities. Based on this principle, the Commission has previously rejected cost-sharing proposals like Sprint's. Sprint's cost-sharing proposal is also inconsistent with its insistence on exercising its right to obtain existing Interconnection Facilities at TELRIC-based prices, since the result of its cost-sharing proposal would be to pay a rate equal to only *one-half* the TELRIC-based price. The FCC rules Sprint relies on in support of its position do not apply to the determination of compensation for Interconnection Facilities.

Issue 46 involves Sprint's proposed language for Attachment 2, sections 3.9 through 3.9.2. That language provides that all of the costs, both recurring and non-recurring, of Interconnection Facilities carrying two-way trunks shall be "equally shared" by the parties. Issue 47 concerns Sprint's proposed language for Attachment 2, sections 3.9.3 and 3.9.3.1 and Pricing Schedule, sections 1.3.2, 1.3.3, and 1.4.2, which set forth billing terms specific to Sprint's cost "sharing" proposal in sections 3.9 through 3.9.2. The Commission should reject the contract language proposed by Sprint for both Issues 46 and 47. Staff agrees. Liu Direct at 9-20.

Interconnection Facilities are transmission facilities that connect Sprint's network to AT&T Illinois' network at the POI for the mutual exchange of traffic. See GT&C section 2.60.

By definition, therefore, Interconnection Facilities are located entirely on Sprint's side of the POI, as Sprint witness Farrar acknowledged. Pellerin Direct at 41; Tr. 224 (Farrar). As this Commission has consistently recognized, each party to a section 251(c)(2) Interconnection arrangement is financially responsible for the facilities on its side of the POI. See Section III (Issue 15), above. Consistent with this principle, the Commission has previously rejected proposals such as Sprint's to require ILECs to "share" in the cost of transport facilities located on the other party's side of the POI. See, e.g., *MCI Arbitration Decision* at 104; *Sprint Communications Arbitration Decision* at 13-19. The Interconnection Facilities that Sprint may lease from AT&T Illinois are on Sprint's side of the POI, and they are therefore 100% Sprint's responsibility. This is true whether the parties' traffic is routed over one-way or two-way trunks. Pellerin Direct at 41-42.

Sprint's proposal is also inconsistent with its insistence on exercising its right under section 251(c)(2) of the 1996 Act to obtain existing Interconnection Facilities at below-market TELRIC-based prices – prices that the U. S. Supreme Court has described as near confiscatory. *Verizon Comms. v. FCC*, 535 U.S. 467, 489 (2002). Pellerin Direct at 31-32, 42. There is no basis for requiring AT&T Illinois to further "share" in the costs of those facilities by allowing Sprint to pay *less* than the TELRIC-based price for such facilities, yet that is exactly what Sprint proposes here: The effect of Sprint's sharing proposal would be to allow AT&T Illinois to charge only one-half of the TELRIC-based price.<sup>30</sup>

Sprint's position relies in part on FCC Rule 51.507, which governs the manner in which rates for the recovery of the costs of certain network elements should be structured. Specifically,

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<sup>30</sup> As Dr. Liu testified, even if the Commission were to conclude that some cost sharing is appropriate (and it should not), Sprint has failed to provide any support for its position that AT&T Illinois should be required to bear as much as one-half of the cost of the Interconnection Facilities provided at TELRIC-based rates for Sprint's benefit. Liu Direct at 19.

Sprint contends that the Interconnection Facilities at issue here are subject to subpart (c) of Rule 51.507, which provides that “[t]he costs of shared facilities shall be recovered in a manner that efficiently apportions costs among users.” Farrar Rebuttal at 42. However, subpart (c) is inapplicable to Interconnection Facilities. Subpart (c) applies only to “shared facilities,” which the FCC has described as facilities used by “multiple parties,” such as local and tandem switching and transmission facilities between an ILEC’s tandem and its end offices. *Local Competition Order*, ¶¶ 741, 755. Pellerin Rebuttal at 53. The Interconnection Facilities at issue here are not “shared facilities”; they are “dedicated facilities,” described by the FCC as facilities “that are used by a single party – either an end user or an interconnecting network.” *Local Competition Order*, ¶ 741 (emphasis added). Sprint agrees that Interconnection Facilities are “a form of dedicated transport, transport dedicated to a particular carrier to interconnect with the ILEC’s switch.” Tr. 233-34 (Farrar).

The Rule 51.507 “cost structure standard” applicable to “dedicated facilities” is not in subpart (c); it is in subpart (b), which states that the “costs of dedicated facilities shall be recovered through flat-rated charges.” Pellerin Rebuttal at 53. The parties’ agreed prices for Interconnection Facilities, which were approved by the Commission and are shown in the Pricing Sheets attached to the ICA, are flat rated charges and, therefore, fully comply with Rule 51.507. Pellerin Rebuttal at 54. In short, Rule 51.507 provides no support whatsoever for Sprint’s position that it should be allowed to pay only one-half of the approved TELRIC prices for Interconnection Facilities.

Sprint also argues that Sprint’s sharing proposal is supported by FCC Rules 51.703(b) and 51.709(b). Farrar Rebuttal at 38, 47. The Commission, however, has already rejected that argument. In Docket No. 05-0402, an arbitration involving Sprint’s CLEC affiliate (“Sprint

Communications”) and a group of rural ILECs (“RLECs”), the Commission Staff opposed Sprint Communications’ proposal, virtually identical to the one made by Sprint in this case, that the RLECs be required to share in the cost of transport facilities connecting Sprint Communications’ network to the RLECs’ networks. In doing so, Staff pointed out that Rules 51.703(b) and 51.709(b), on which Sprint Communications relied, appear in Subpart H (entitled “Reciprocal Compensation for Transport and Termination of Telecommunications Traffic”) of 47 C.F.R. Part 51. Accordingly, Staff noted that Rules 51.703(b) and 51.709(b) govern reciprocal compensation and “should not apply to rules for cost recovery of interconnection facilities.” *Sprint Communications Arbitration Decision* at 18. Staff further argued that “[t]he proper method for Sprint to recover costs incurred to transport and terminate RLEC originated local traffic (on Sprint’s side of the POI) is reciprocal compensation, not some type of cost-sharing. This is the method required by the 1996 Act, FCC rules and regulations, and Commission regulations and decisions.” *Id.* The Commission agreed with Staff and rejected Sprint’s sharing proposal. *Id.* at 19.

The Commission’s decision in Docket 05-0402 is on point, and its analysis is supported by the plain language of the FCC’s Rules and the Supreme Court’s decision in *Talk America*. As Mr. Farrar acknowledged, Rules 51.703 and 51.709 are included in Part 51, Subpart H of the FCC’s rules, which governs reciprocal compensation for the transport and termination of Non-access Telecommunications Traffic between LECs and other carriers. Tr. 235-36. For example, Rule 51.709(b), on which Sprint primarily relies, establishes a cost “principle” applicable to the establishment of “initial rates for the transport and termination of Non-Access

Telecommunications Traffic.” 47 C.F.R. § 51.709(a), (b).<sup>31</sup> As Mr. Farrar also acknowledged, the rules in Subpart H were promulgated to implement section 251(b)(5) of the 1996 Act, which imposes on all LECs the “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5). Tr. 236. By comparison, the statute requiring ILECs to provide for Interconnection, and the statute that the FCC and the Supreme Court have interpreted as requiring ILECs to provide competing carriers with access to TELRIC-based Interconnection Facilities, is section 251(c)(2), *not* section 251(b)(5). In fact, FCC Rule 51.5, which defines Interconnection for purposes of section 251(c)(2), expressly excludes from that definition the “transport and termination of traffic.” Tr. 236-37 (Farrar).

Thus, Rules 51.703(b) and 51.709(b) do not apply to an ILEC’s recovery of the cost of Interconnection Facilities. This conclusion is supported by *Talk America*, where the Supreme Court made clear that compensation for the “transport and termination of traffic” is “subject to different regulatory treatment” and “governed” by different “statutory provisions and regulations” than the regulatory treatment, statutory provisions and regulations applicable to compensation for Interconnection. 131 S. Ct. 2254, 2263. Consistent with this analysis, the Supreme Court noted that a CLEC “typically pays one fee for interconnection – ‘just for having the link’ – and then an additional fee for the transport and termination of telephone calls.” *Id.* It is the “additional fee for the transport and termination of telephone calls,” not the “one fee for interconnection,” that is subject to the FCC’s Subpart H rules, including Rules 51.703 and 51.709. In accordance with the Supreme Court’s decision, the “one fee” that Sprint should be

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<sup>31</sup> Rule 51.709 does not apply to the transport and termination of Non-access Telecommunications Traffic between ILECs and CMRS carriers, such as AT&T Illinois and Sprint, because such traffic is subject to “bill and keep.” 47 C.F.R. § 51.705(a).

required to pay for Interconnection Facilities (*i.e.*, for “just having the link”) is equal to the TELRIC-based price of those facilities, not a fraction of that price, as proposed by Sprint. The “additional fee for transport and termination of telephone calls” that Sprint was formerly required to pay through a rate for reciprocal compensation has been replaced by the FCC with a bill and keep arrangement. 47 C.F.R. 51.705(a).

Sprint has not tried to distinguish its “sharing” proposal in this case from the one the Commission rejected in Docket 05-0402. There is no distinction. Instead, Sprint argues that the order in Docket 05-0402 has been “superseded” by the order of the Chief of the FCC’s Enforcement Bureau in *MAP Mobile Communications, Inc. v. Illinois Bell Telephone Company, et al.*, File No. EB-05-MD-013, *Memorandum and Order*, DA 09-1065 (rel. 5/13/09). Farrar Rebuttal at 42-43. According to Sprint, that order ruled that “AT&T Illinois could not bill a CMRS carrier for interconnection facilities used to deliver Illinois Bell-originated traffic on the CMRS carrier’s side of the point of interconnection with AT&T’s network.” *Id.* at 43. The order did no such thing.

In the case on which Sprint mistakenly relies, a paging company, MAP Mobile, alleged that AT&T Illinois and affiliated ILECs violated certain statutes and rules (including section 251(b)(5)) with respect to the ILECs’ charges for “the transport and termination of Defendant-originated traffic.” *MAP Mobile Order* at ¶¶ 1, 2. Thus, the issue in *MAP Mobile* was whether the ILECs could charge MAP Mobile, a paging carrier, for the cost of transport of one-way paging traffic from the ILECs’ end users to MAP Mobile. As discussed above, and as the Supreme Court held in *Talk America*, the regulatory treatment of compensation for the transport and termination of traffic pursuant to section 251(b)(5) is different than the regulatory treatment of compensation for Interconnection Facilities provided pursuant to section 251(c)(2). There is

no indication in the *MAP Mobile Order* that MAP Mobile's complaint contained any allegations of a violation of the ILECs' interconnection obligations under section 251(c)(2). This alone makes the *MAP Mobile Order* inapposite for two reasons, namely, that the order dealt with the transport of one-way paging traffic, which is not at issue here, and that the order did not deal with an ILEC's section 251(c)(2) interconnection obligations.

Furthermore, Sprint incorrectly assumes that the interconnection facilities used to deliver ILEC-originated traffic to MAP Mobile were located on MAP Mobile's side of the POI, which Sprint believed was located on the AT&T Illinois' network. Tr. 258 (Farrar). In fact, the opposite is true: the POI was located on MAP Mobile's network, and the interconnection facilities at issue were all located on AT&T Illinois' (and the other ILECs') side of the POI. *MAP Mobile Order* at ¶¶ 27, n. 75; Tr. 258-59 (Farrar). This fact was key to the Enforcement Bureau's ruling, which was "limited to the facts of this case":

As applied to these facts, the Act and implementing Commission rules and orders prohibit [the ILECs] from charging MAP for the interconnection facilities and service they provide to MAP, *to the extent such facilities and service were used to deliver intraMTA traffic originated on their networks to MAP's point of interconnection.*

*MAP Mobile Order* at ¶31 (emphasis added). In other words, *MAP Mobile* held that the ILECs could not impose charges calculated to recover costs of transporting their customers' originating traffic on facilities that were located on the ILECs' side of the POI. This ruling is fully consistent with the principle, consistently applied by the Commission, that each party to a section 251(c)(2) Interconnection arrangement is financially responsible for the facilities on its side of the POI.<sup>32</sup> And, therefore, the *MAP Mobile Order* is also consistent with AT&T Illinois'

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<sup>32</sup> Although section 251(c)(2)(B) requires that the POI be established on the ILEC's network, carriers are free to negotiate different arrangements, which is the case with the AT&T ILECs and MAP Mobile, where the POI was established at MAP Mobile's location. The voluntary location of the POI at MAP Mobile's location does not negate the established principle that each carrier is responsible for the facility costs on its respective side of the POI (wherever that POI may be).

position that Sprint should be financially responsible for 100% of the cost of Interconnection Facilities, which are located on Sprint's side of the POI.

For all the reasons discussed, the Commission should reject Sprint's sharing proposal and its proposed language for Issues 46 and 47.

## V. IP-TO-IP INTERCONNECTION

**ISSUE 1(a):** Should the ICA provide for IP-to-IP interconnection or should it provide that all traffic that Sprint delivers to AT&T under the ICA must be delivered in TDM format?

(GT&C section 3.11.2.2)

**ISSUE 11:** Should terms and conditions regarding IP interconnection be included in the Agreement?

(Attachment 2, section 2.1.6.2)

**ISSUE 18:** Should the ICA address POIs for IP-to-IP interconnection and, if so, is Sprint's proposed language just and reasonable?

(Attachment 2, sections 2.2.1 and 2.2.2)

**AT&T Illinois Position:** The Commission should resolve these issues by adopting the approach recommended by Staff and reflected in contract language that AT&T Illinois proposed and Staff endorses. That resolution allows Sprint to request IP-to-IP interconnection during the term of the parties' contract, and appropriately defers until such a request is made all arguments concerning whether AT&T Illinois must provide IP-to-IP interconnection to Sprint and, if so, on what terms and conditions. In particular, the recommended language appropriately defers for later a decision on whether the Telecommunications Act requires IP-to-IP interconnection, which the FCC is currently considering. Even if the Act does require IP-to-IP interconnection when it is technically feasible, it would not be technically feasible with AT&T Illinois' current network, because there is no point on that network at which such an interconnection could be established. The resolution proposed by Staff and AT&T Illinois, however, also defers that determination for later, as well as the question whether, as Sprint contends and AT&T Illinois denies, the Commission could lawfully require AT&T Illinois to provide interconnection to Sprint at a point that is on the network of AT&T Illinois' affiliate, AT&T Corp.

The IP-to-IP interconnection issues present a legal question that neither this Commission, the FCC, nor any federal court has decided, namely, whether the interconnection requirement in section 251(c)(2) of 1996 Act applies to IP-to-IP interconnection. As we explain at the end of

our discussion of these issues, the answer to that question is no. We defer the legal question to the end because there is no reason for the Commission to decide it in this case, and there is good reason not to decide it.

Sprint is not asking for IP-to-IP interconnection as of the Effective Date of the new ICA. Rather, Sprint is asking for language that would allow it to negotiate terms for IP-to-IP interconnection during the term of the ICA, and to have the Commission resolve any disagreements that arise out of the negotiation. Staff has proposed an approach that gives Sprint something close to what it is asking for while prudently saving for later a decision on the legal issue, and AT&T Illinois has proposed language that implements Staff's proposal and that Staff has endorsed. The FCC is considering the question whether section 251(c)(2) requires IP-to-IP interconnection (*see* Albright Direct at 14; Zolnierек Direct at 15), and the Commission would be ill-advised to get out in front of the FCC on that question, especially in a case where there is no need for it to do so. The correct resolution of the IP-to-IP interconnection issues, therefore, is for the Commission to approve the language AT&T Illinois proposed to implement Staff's suggested approach.

**1. Background; framing of the issue**

When carriers exchange voice traffic in Time Division Multiplexing ("TDM") format, they send the traffic over dedicated circuits. Zolnierек Direct at 6. In Internet Protocol ("IP") format, in contrast, the voice signals are divided into packets and each packet is sent over the fastest available route in a packet switched network. *Id.* If a carrier delivers a voice message in IP format to a carrier that uses only TDM format, the signal must be converted from IP format to TDM format. *Id.*

All traffic that AT&T Illinois exchanges with Sprint (and with every other carrier with which AT&T Illinois exchanges traffic) is exchanged in TDM format. Albright Direct at 4. Sprint proposes that the ICA include provisions for IP-to-IP interconnection, *i.e.*, provisions that would allow each party to deliver traffic in IP format to the other party, with no conversion to TDM format. Specifically, Sprint initially proposed the following language in connection with the three IP-to-IP interconnection Issues:

**ISSUE 1(a):**            **Should the ICA provide for IP-to-IP interconnection or should it provide that all traffic that Sprint delivers to AT&T under the ICA must be delivered in TDM format?**

**GT&C section 3.11.2.2:**

*Notwithstanding the foregoing, when the Parties utilize IP Interconnection, this Agreement may be used to exchange traffic in IP format.*

**ISSUE 11:**            **Should terms and conditions regarding IP interconnection be included in the Agreement?**

**Attachment 2 section 2.1.6.2:**

*Sprint and AT&T Illinois will interconnect directly using IP interconnection facilities to exchange Authorized Services traffic where the parties exchange IP data traffic. When Sprint designates IP Interconnection in accordance with this Agreement, the Parties will engage in operational discussions to establish IP Interconnection in an expeditious manner.*

**ISSUE 18:**            **Should the ICA address POIs for IP-to-IP interconnection and, if so, is Sprint's proposed language just and reasonable?**

**Attachment 2 sections 2.2.1 and 2.2.2:**

*Except where the Parties utilize IP Interconnection the location of the POI(s) will be as follows:*

*When Sprint designates IP Interconnection and the Parties utilize IP Interconnection, Sprint and ATT ILLINOIS will exchange Authorized Services traffic at the existing internet exchange points ("IXP" or "IP POI"), where they are currently interconnected (e.g., Los Angeles, San Jose, Seattle, Chicago, Dallas, D.C. Metro, Miami, New York City, and or Atlanta) or*

*such additional IP POIs as may be mutually agreed. Where the Parties utilize IP Interconnection, each Party is responsible for the cost of establishing IP connection from its network to the IP POI, including any TDM-IP media gateway conversions, ports on its network edge router, port charges on the carrier hotel Ethernet switch and any carrier hotel fees for its collocated equipment or any IP transit costs associated with reaching the IP POI.*

AT&T Illinois opposes all of Sprint's proposed language. The only language AT&T Illinois proposed initially (*i.e.*, until it filed reply testimony that included language to implement Dr. Zolnierек's recommended resolution of the IP-to-IP issues), was in connection with Issue 1(a). There, AT&T Illinois proposed the following language for GT&C section 3.11.2.2: "All traffic that Sprint delivers to AT&T Illinois pursuant to this Agreement will be delivered in TDM format."

**2. If IP-to-IP interconnection were required, any such interconnection that Sprint established with AT&T Illinois would have to be at a point on AT&T Illinois' network.**

Sprint's proposal assumes that section 251(c)(2) of the 1996 Act requires IP-to-IP interconnection. As noted above, that is not the case – certainly, neither the FCC nor any federal court has ruled that it is – but the Commission need not and should not decide the question in this proceeding. But if section 251(c)(2) did require IP-to-IP interconnection, as Sprint contends, the point of interconnection would have to be on AT&T Illinois' network.

Section 251(c)(2)(B) of the 1996 Act provides that interconnection is to be "at any technically feasible point within the [incumbent] carrier's network." Accordingly, the FCC, in its initial set of rules implementing the 1996 Act, noted that section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point "on that network" (*Local Competition Order*, ¶ 209), and promulgated 47 C.F.R. § 51.305(a)(2), which requires interconnection "at any technically feasible point *within* the

incumbent LEC's network, including, at a minimum," six enumerated locations within that network. (Emphasis added.)

Indisputably, then, any IP-to-IP interconnection that Sprint might establish with AT&T Illinois would have to be at a point within AT&T Illinois' network.

**3. There is currently no point within AT&T Illinois' network at which it would be technically feasible for Sprint to establish IP-to-IP interconnection.**

Sprint will argue that IP-to-IP interconnection affords great benefits and that AT&T Illinois plans to transition to an all-IP network. AT&T Illinois will not debate those points, because it makes no difference how wonderful IP networks of the future may be, or how much more efficient IP-to-IP interconnection of the future might turn out to be than the TDM-to-TDM interconnection of today. For even if section 251(c)(2) of the 1996 Act required AT&T Illinois to provide IP-to-IP interconnection once it is technically feasible, there is, as of today, no point on AT&T Illinois' network at which Sprint could establish IP-to-IP interconnection. To be sure, there may be such a point in the future, and that is one reason that Staff's approach, as implemented by AT&T Illinois' revised proposed language, should be adopted. But there can be no IP-to-IP interconnection with AT&T Illinois now.

As AT&T Illinois witness Carl Albright explained, AT&T Illinois "does not have IP-capable equipment with which Sprint could interconnect even if section 251(c)(2) did require incumbent carriers with IP networks to provide interconnection with those networks." Albright Direct at 5. That is because "AT&T Illinois' network is a TDM network. AT&T Illinois' network simply does not include IP-capable equipment with which Sprint could interconnect any IP-capable equipment that it might own or operate." *Id.* at 7.

AT&T Illinois does have wholesale customers that carry traffic in IP format, but AT&T Illinois does not have IP-to-IP interconnection with any of those customers; rather, those carriers

convert their IP traffic to TDM before they deliver the traffic to AT&T Illinois. *Id.* at 7, 11. That is exactly what AT&T Illinois is proposing here.

Similarly, AT&T Illinois has retail U-verse customers who originate and receive calls in IP format, but the VoIP calls that those customers make and receive are not carried on an AT&T Illinois IP network, because there is no such network. Rather, they are carried over the IP network owned by AT&T Illinois' affiliate, AT&T Corp., which performs the IP-to-TDM conversion. *Id.* at 8.

Mr. Albright described in detail the equipment and facilities that are used to provide IP service to U-verse customers, and explained why it would not be possible for Sprint to establish IP-to-IP interconnection at any of those pieces of equipment or facilities that are on AT&T Illinois' network. *Id.* at 8-10. In particular, it would not be possible for Sprint to establish IP-to-IP interconnection at the Residential Gateway or the IP DSLAM (*id.* at 9), or at the Video Hub Office (Albright Rebuttal at 8).

Neither Sprint nor Staff has disputed Mr. Albright's testimony on this point. Staff acknowledges that it "does not know whether there are or are not any technically feasible point(s) on AT&T Illinois' network at which Sprint could establish IP-to-IP interconnection of the type necessary and appropriate to exchange traffic pursuant to the Interconnection Agreement at issue in this proceeding." Response of Staff witness Zolnierек to AT&T Illinois Data Request 2.d (Schedule CCA-7). For its part, Sprint proposed, in connection with Issue 18, a number of points for IP-to-IP interconnection, but it is undisputed that AT&T Illinois cannot be required to provide interconnection at any of those points, because they are not on AT&T Illinois' network; most of them are not even in Illinois. *See* Albright Direct at 17. Thus, as Dr. Zolnierек pointed out, "Sprint's proposal does not seem to be designed around interconnection requirements

contained in Section 251(c)(2) of the Federal Telecommunications Act and, in particular, the requirement of subpart (B) of Section 251(c)(2) . . . that AT&T Illinois is required to provide interconnection at any technically feasible point *within its network*.” Zolnierek Direct at 13 (emphasis added).

In short, AT&T Illinois witness Albright testified “without reservation that there is no point on AT&T Illinois’ network at which Sprint could establish IP-to-IP interconnection” (Albright Rebuttal at 7), and neither Sprint nor Staff has offered any evidence to the contrary.

Sprint, however, contends that it should be permitted to establish IP-to-IP interconnection at the AT&T Corp. switch that AT&T Illinois uses in the provision of service to its U-verse customers. That contention is contrary to law. The AT&T Corp. switch belongs to AT&T Corp., not to AT&T Illinois, and it is not part of AT&T Illinois’ network. AT&T Illinois cannot lawfully be required to provide interconnection at a switch that it does not own and that is not part of its network; indeed, AT&T Illinois could not provide interconnection at the AT&T Corp. switch even if it were erroneously ordered to do so, because it is not AT&T Illinois’ switch.

AT&T Illinois expects Sprint’s brief to carry on at length about how AT&T Corp.’s switch is used to provide IP-based service to AT&T Illinois retail customers (which is true), and about how the Commission should therefore treat AT&T Corp.’s switch as if it were part of AT&T Illinois’ network by declaring that that switch is a technically feasible point of IP-to-IP interconnection between Sprint and AT&T Illinois. There is a simple answer to Sprint’s argument: It is contrary to law. The law is clear that *if* Sprint were permitted to establish IP-to-IP interconnection with AT&T Illinois, the point(s) of interconnection must be on AT&T Illinois’ network, and there is no basis in law for pretending that a switch that belongs to AT&T Corp. is on AT&T Illinois’ network. And it would be, to say the least, imprudent for the

Commission to invent a new legal principle at Sprint's request in a case where there is no need to address the point, since it is a given that the Commission will not need to come to grips with the particulars of a possible IP-to-IP interconnection until some unknown point in the future, if ever.<sup>33</sup>

In support of Sprint's request that the Commission treat the AT&T Corp. switch as part of AT&T Illinois' network, Sprint quotes paragraph 1388 of the FCC's *CAF Order* (Supplemental Verified Written Statement of James Burt ("Burt Rebuttal") at 12):

[T]he record reveals that today, some incumbent LECs are offering IP service through affiliates. Some commenters contend that incumbent LECs are doing so simply in an effort to evade the application of incumbent LEC specific legal requirements on those facilities and services, and we would be concerned if that were the case.

That language does not support Sprint's position; it undermines it. In the first place, the FCC indicated it would be concerned *if* ILECs were offering IP service through affiliates "simply in an effort to evade the application of incumbent LEC specific legal requirements." Here, there is no competent evidence that the use of the AT&T Corp. switch in the provision of U-verse service to AT&T Illinois customers is an effort to avoid such requirements. Indeed, the only evidence in the case concerning the reason for the U-verse arrangement shows that the decision to use an affiliate company to provide Internet service was based on financial, not competitive, considerations:

The AT&T U-verse evolved from what was called Project Lightspeed originally. Project Lightspeed was kind of the genesis of what ultimately became U-verse. I joined that group in 2005 providing methods and procedure support. . . . At the time of the advent of Lightspeed and the project the U-verse [sic] we were looking at what synergies could we use to

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<sup>33</sup> Recall that even under Sprint's proposed language ("When Sprint designates IP Interconnection in accordance with this Agreement, the Parties will engage in operational discussions to establish IP Interconnection in an expeditious manner"), the details of any IP-to-IP interconnection are deferred.

bring U-verse over here and to add our internet over to here to the end user customers as well as to add in a video service.

We already had an internet affiliate. So there was no reason for AT&T Illinois or any of the incumbent LECs to build a mirror image of an affiliate that already provided us with internet services. So it was a financial decision to utilize our affiliate internet service provider to provide the internet services across – in conjunction with the video services for U-verse. So this was a purely financial decision since the network already existed.

Tr. at 538-539 (Albright). *See also id.* at 560 (Albright) (“It was determined that the synergies already existed for us to have internet and internet type services provided through an affiliate rather than build out another network. Why build another one when you already have it?”).<sup>34</sup>

The lack of any evidence of intent to evade the requirements of section 251 should put this matter to rest. But even if there was some competent evidence to demonstrate an attempt at such evasion – and again, the evidence is to the contrary – that would not warrant the extraordinary relief Sprint proposes. Importantly, the FCC did no more than indicate that it would be “concerned” if there were such a showing. It did not indicate what, if any steps, it would take in those circumstances. The FCC certainly did not say that any such expression of “concern” would automatically convert the affiliates’ networks into part of the ILECs’ networks, nor did it say anything that remotely suggests it would be lawful for a state commission to make such a determination.

In short, even if the law entitled Sprint to IP-to-IP interconnection with an ILEC with IP equipment with which Sprint could interconnect, AT&T Illinois has no such equipment, so there can be no such interconnection “at [a] technically feasible point within the incumbent LEC’s network,” as 47 C.F.R. § 51.305(a)(2) requires.

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<sup>34</sup> Sprint witness Burt opines about AT&T’s motives, but those speculations are not evidence.

**4. AT&T Illinois does not provide IP-to-IP interconnection to AT&T Corp.**

Sprint argues that it must be permitted to establish IP-to-IP interconnection with AT&T Illinois because AT&T Corp. has IP-to-IP interconnection with AT&T Illinois. Sprint is wrong.

To be sure, a showing that AT&T Corp. had IP-to-IP interconnection with AT&T Illinois would indicate (contrary to what the uncontroverted evidence in this case proves) that there is a technically feasible point on the AT&T Illinois network at which interconnection could be established. *See* Albright Rebuttal at 9. But the fact is that AT&T Corp. does *not* have a section 251(c)(2) interconnection with AT&T Illinois.

AT&T Corp. does have a *connection* to AT&T Illinois, but not all connections are “interconnections” within the meaning of the statute. “Interconnection” under section 251(c)(2) is the “linking of two networks for the mutual exchange of traffic.” 47 C.F.R. § 51.5 There is no such interconnection between AT&T Corp. and AT&T Illinois at the IP level for the origination or termination of U-verse traffic. Rather, the U-verse network provides backhaul from the AT&T Illinois end user across the AT&T Illinois network to the AT&T Corp. switch for call processing and routing. This is much like the backhaul Sprint uses from its cell sites across facilities leased from the AT&T network and delivered back to the Sprint switch for call processing and routing. Albright Rebuttal at 10.

The backhaul of the IP stream to/from the end user over the U-verse network to the AT&T Corp. IP switch does not terminate, connect to, or in any way interconnect with an AT&T Illinois switch prior to handoff to the AT&T Corp. switch. *See id.* at 10-12 (explaining in detail that this is a backhaul arrangement, not interconnection). Thus, any interconnection between AT&T Illinois and AT&T Corp. is only at the TDM level, and occurs after the AT&T Corp. IP switch has processed the VoIP originated call and determined the need to route that call to the

PSTN, at which time AT&T Corp. performs the necessary protocol conversion from IP-to-TDM for delivery to AT&T Illinois via the TDM interconnection. *Id.*

Backhaul is not interconnection. The FCC made this clear in an *amicus* brief it filed with the Supreme Court in *Talk America v. Michigan Bell Tel. Co.* 131 S.Ct. 2254 (2011). AT&T Ill. Cross Ex 1. In *Talk America*, the Supreme Court discussed the FCC's requirement that incumbent LECs lease their entrance facilities to competitive carriers for the purpose of interconnection under section 251(c)(2). In its brief, the FCC emphasized that it did not require ILECs to provide entrance facilities for the purpose of backhauling traffic, because backhauling is "for a purpose other than interconnection with an incumbent." *Id.* at 6 n.4. The Supreme Court agreed that backhaul "differs from interconnection" because it does not involve the exchange of traffic between competitive and incumbent networks." 131 S.Ct. at 2259, n.2.

**5. The Commission should resolve Issues 1(a), 11 and 18 by adopting the language that AT&T Illinois proposed to implement Staff's recommendation.**

To this point, we have established that the FCC is considering whether section 251(c)(2) encompasses IP-to-IP interconnection; that the Commission should not decide that question in this proceeding because Sprint does not seek immediate IP-to-IP interconnection, but only the right to request IP-to-IP interconnection during the term of the agreement; and that AT&T Illinois cannot in any event be required to provide IP-to-IP interconnection with its existing network because there is no point on that network at which such an interconnection can be established.

The parties faced a similar situation with respect to another disagreement when they were negotiating the ICA. Specifically, AT&T Illinois maintained that Sprint, as a CMRS provider, could deliver only CMRS-originated traffic to AT&T Illinois under the ICA. Sprint maintained that it should be allowed to deliver landline-originated traffic as well, but did not seek to do so as

of the Effective Date of the ICA; instead, Sprint wished to preserve its right to raise the matter later, during the term of the ICA. The parties resolved that issue by agreeing on contract language that defers the resolution of the disagreement for another day. As Dr. Zolnierek describes it, the agreed language that resolved that issue “allows for future resolution of [the] issue and the preservation of each parties’ rights to contest each others proposals.” Zolnierek Direct at 14. Dr. Zolnierek suggested that the agreed language that resolved the landline traffic disagreement be used as a model for resolving the similarly positioned IP-to-IP interconnection issue. *Id.* at 14-15.

In its rebuttal testimony (Albright Rebuttal at 4-5), AT&T Illinois accepted Dr. Zolnierek’s recommendation, and proposed the following language, which closely tracks the model Dr. Zolnierek cited, to implement it:

3.11.2.2 All traffic that Sprint delivers to AT&T Illinois pursuant to this Agreement will be delivered in TDM format.

3.11.2.2.1 This Agreement does not provide for IP-to-IP interconnection. (See section 3.11.2.2.). AT&T Illinois maintains (and Sprint acknowledges that AT&T Illinois maintains) that the interconnection duties imposed by the 1996 Act do not encompass IP-to-IP interconnection and that the Commission is without authority to establish terms for IP-to-IP interconnection. Sprint maintains (and AT&T Illinois acknowledges that Sprint maintains) that the interconnection duties imposed by the 1996 Act encompass IP-to-IP interconnection and that the Commission has authority to establish terms for IP-to-IP interconnection. The Parties have included the following section 3.11.2.2.2 in this Agreement based upon, and conditioned on Commission recognition of, their agreement that inclusion of section 3.11.2.2.2 in the Agreement neither waives nor in any way derogates from either Party’s position as set forth in this section 3.11.2.2.1.

3.11.2.2.2 After the Effective Date, Sprint may propose to AT&T Illinois that the Parties amend the Agreement to provide for IP-to-IP interconnection (and/or to permit Sprint to deliver traffic to AT&T Illinois in IP format rather than in TDM format). If, after Sprint makes such a proposal, the parties do not agree on an amendment, or that there shall be no amendment, Sprint may seek resolution of the matter by invoking Dispute Resolution pursuant to Section 12 of the General Terms and Conditions, and the Commission shall be the forum for any Formal Dispute Resolution.

AT&T Illinois may contend in any Formal Dispute Resolution proceeding that the interconnection duties imposed by the 1996 Act, including but not limited to section 251(c)(2) thereof, do not govern IP-to-IP interconnection and that the Commission is without authority to establish terms and conditions for IP-to-IP interconnection for inclusion in a section 251/252 interconnection agreement. Sprint, does not agree with that contention and does not waive its right to oppose that contention, but acknowledges that AT&T Illinois has not waived its right to assert such a contention, either by agreeing to this Section 3.11.2.2.2 or by any other action or inaction.

Sprint also proposed language that purported to implement Dr. Zolnierek's recommendation. Burt Rebuttal at 35-36. Sprint's proposal, however, is inferior to AT&T Illinois' and is not faithful to Dr. Zolnierek's recommendation. Dr. Zolnierek testified at hearing that he prefers AT&T Illinois' proposal over Sprint's (Tr. at 916), and that Sprint's proposal is problematic because it assumes "that [IP-to-IP] interconnection is technically feasible and that the network of the affiliate would be considered the network of AT&T Illinois," which Dr. Zolnierek believes "is premature" (*id.* at 915). Thus, Dr. Zolnierek said, "there are some provisions in there [Sprint's proposal] that I wouldn't personally recommend the Commission adopt." *Id.* at 897. In contrast, Dr. Zolnierek said he is "generally okay with AT&T's proposal." *Id.*

Dr. Zolnierek is clearly correct that Sprint's proposal assumes that IP-to-IP interconnection is technically feasible *and* that the AT&T Corp. network would be considered the network of AT&T Illinois; Sprint's language comes right out and says those things. *See* Burt Rebuttal at 36. Dr. Zolnierek is also correct that it would be premature for the Commission to decide that IP-to-IP interconnection is technically feasible, or that the AT&T Corp. switch should (or legally can) be considered part of AT&T Illinois' network. But there is another, more subtle, flaw in Sprint's language: Sprint's proposal also assumes, though it does not say so in so many words, that IP-to-IP interconnection is required by section 251(c)(2). Sprint's proposal provides in pertinent part,

3.11.2.2.1 After the Effective Date, Sprint may develop and propose to the other [sic], language prescribing any additional rates, terms, and conditions as may be necessary for the implementation of voice IP-to-IP Interconnection under this Agreement, including such provisions as may be necessary to transition from voice TDM-to-TDM Interconnection (an “IP Interconnection Proposal”). If, after Sprint makes such a proposal, the Parties do not agree on an amendment, the proposing Party may seek resolution of the matter by petitioning the Commission pursuant to Sections 251/252 of the Act to include its proposed language in the Agreement, and the Commission shall be the forum for resolution of such petition.

Burt Rebuttal at 36.

If that language were included in the ICA, AT&T Illinois could dispute the particulars of Sprint’s “IP Interconnection Proposal” – *i.e.*, the “additional rates, terms, and conditions . . . necessary for the implementation of voice IP-to-IP Interconnection” that Sprint proposed, but – and this is surely Sprint’s intent – would *not* be able to dispute Sprint’s right to IP-to-IP interconnection; Sprint’s language assumes that Sprint has that right, *i.e.*, it assumes that section 251(c)(2) requires AT&T Illinois to provide IP-to-IP interconnection. As we have discussed, the Commission need not, and should not, decide that question in this proceeding.

Sprint’s language for implementing Dr. Zolnierek’s proposed resolution is badly flawed, both in the ways Dr. Zolnierek mentioned at hearing and in the additional way just noted. AT&T Illinois language, on the other hand, is faithful to Dr. Zolnierek’s proposal, prudently does not require the Commission to decide questions that it has no need to decide, as Sprint’s proposal does, and should be adopted.

**6. Section 251(c)(2) of the 1996 Act does not require IP-to-IP interconnection.**

As we have explained, the Commission should steer clear of the question whether the interconnection requirement in section 251(c)(2) of the 1996 Act comprises IP-to-IP interconnection, because (a) there is no need to answer that question in order to resolve Issues

1(a), 11 and 18, and (b) the Commission would be ill-advised to decide the question before the FCC does, in part because any conclusion the Commission might reach would be appealed.<sup>35</sup>

That said, section 251(c)(2) does not require IP-to-IP interconnection. Congress added section 251 to Title II of the Communications Act in order to promote competition in various markets for Title II “telecommunications services.” To that end, section 251(a)-(c) gives “telecommunications carriers” various rights with respect to other “telecommunications carriers” in general and “local exchange carriers” and “incumbent local exchange carriers” in particular. By their terms, those provisions are inapplicable *either* when the party seeking to interconnect *or* when the party from whom interconnection is sought is not itself a “telecommunications carrier.”

For all relevant purposes, the term “telecommunications carrier” is synonymous with “common carrier”<sup>36</sup> and is defined as “any provider of telecommunications services.” 47 U.S.C. § 153(51). The Act further specifies that any “telecommunications carrier shall be treated as a common carrier under this [Act] *only to the extent that it is engaged in providing telecommunications services.*” *Id.* (emphasis added). As the FCC has long observed, moreover, the statutory categories “telecommunications service[s]” and “information service[s]” are mutually exclusive.<sup>37</sup> Thus, the Commission may not invoke any provision of section 251 to require X to interconnect with Y if Y is providing an information service, let alone when *both X and Y* are offering such services, as in most or all cases of IP-to-IP interconnection.

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<sup>35</sup> At hearing, Staff indicated that the positions it takes are not based on appeal risks. Tr. at 921. As a general matter, that is commendable. However, it would be unwise, and contrary to the public interest, for the Commission to decide an issue *that it need not decide* when there is nothing to be gained by deciding the issue and when it is certain that if the Commission does decide the issue, its decision will be appealed.

<sup>36</sup> See, e.g., *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999).

<sup>37</sup> 47 U.S.C. § 153(51); see Report to Congress, 13 FCC Rcd at 11522-23 ¶ 43; see also Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4823-24 ¶ 41 (2002), *aff'd*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

Section 251(c)(2) requires *incumbent LECs* “to provide, for the facilities and equipment of any *requesting telecommunications carrier*, interconnection with the local exchange carrier’s network” “for the transmission and routing of telephone exchange service and exchange access.” 47 U.S.C. § 251(c)(2), (c)(2)(A) (emphasis added). That provision is inapplicable to IP-to-IP interconnection for at least three reasons. The first two relate to the status of the requesting party, while the third relates to the status of the party against whom section 251(c)(2) would be invoked.

First, VoIP providers – as well as providers of other IP-based information services – are not “telecommunications carriers.” They therefore may not invoke interconnection rights under section 251(c)(2). Second, section 251(c)(2) is unavailable to VoIP providers because, even if they were “telecommunications carriers,” they would not be invoking this provision in order to provide the local services identified in section 251(c)(2)(A): “telephone exchange service and exchange access.” As the FCC found in its *Vonage Order*, VoIP is an indivisibly interstate, *interexchange*-type service.<sup>38</sup> And as the FCC concluded in 1996, “[a] telecommunications carrier seeking interconnection only for interexchange services is not within th[e] scope of the statutory language” and is therefore not entitled to seek interconnection under section 251(c)(2).<sup>39</sup> That is the correct – and indeed the only permissible – reading of the statutory text, which requires that the “*request*[.]” to interconnect be *for the purpose* of “the transmission and routing of telephone exchange service and exchange access.” In other words, the requesting

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<sup>38</sup> See Memorandum Opinion and Order, *Vonage Holdings Corporation Petition for a Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, 22415-16, 22423-24 ¶¶ 20, 31 (2004) (“*Vonage Order*”), *aff’d*, *Minn. PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007).

<sup>39</sup> See *Local Competition Order*, ¶ 191.

carrier must be “offering” those services and not merely receiving them in order to satisfy the statutory criteria for interconnection.

Third, the *other* IP network, against which interconnection rights would be invoked, would not qualify as an “ILEC” subject to section 251(c)(2) – or, for that matter, to *any* of the ILEC-specific obligations under section 251(c). Instead, it would be an IP-based *broadband information services provider* to which section 251(c) is simply inapplicable.

The term “incumbent local exchange carrier” means a “local exchange carrier” that either (1) falls within a defined list of companies operating in 1996 or (2) is a successor or assign of those companies. 47 U.S.C. § 251(h)(1). The term does not include any corporate entity – including one affiliated with a legacy ILEC – that offers broadband Internet and managed IP services, which did not exist in the consumer market in 1996, by means of new fiber-based, packet-switched networks, which also did not exist in that market in 1996. Under no plausible interpretation could such an affiliate qualify as an ILEC’s “successor” or “assign.”

In addition, once an *existing* “ILEC” (or the affiliate of such an ILEC) stops offering “LEC” services within a given area, it will no longer be an “ILEC” subject to section 251(c)(2). The statutory definition of “ILEC” requires “that the entity *be* a ‘local exchange carrier’” and “remain[] a ‘local exchange carrier’” during the period in which any ILEC-specific regulation is applied. *CAF Order* at ¶ 1386 & n.2524 (emphasis added). Put differently, the entity must, in the FCC’s words, be a “live LEC” in order to qualify as an ILEC. *WorldCom, Inc. v. FCC*, 246 F.3d 690, 694 (D.C. Cir. 2001). But a “local exchange carrier” is defined as “any person that is engaged in the provision of telephone exchange service or exchange access.” 47 U.S.C. § 153(32). For the reasons just discussed, VoIP falls outside those categories. And providers that offer information services (including VoIP) but not these legacy services are not LECs and

therefore do not fall within the subset of LECs designated as “ILECs.” Finally, that hurdle cannot be avoided by invoking section 251(h)(2), entitled “treatment of comparable carriers as incumbents,” because that provision, too, authorizes such treatment only for “a local exchange carrier (or class or category thereof).” *Id.* § 251(h)(2) (capitalization altered).

### **Conclusion on Issues 1(a), 11 and 18**

For the foregoing reasons, the Commission should resolve the IP-to-IP interconnection Issues by directing the parties to include their ICA GT&C sections 3.11.2.2, 3.11.2.2.1 and 3.11.2.2.2 as proposed by AT&T Illinois and set forth above.<sup>40</sup>

## **VI. TRAFFIC COMPENSATION ISSUES**

### **A. IntraMTA & Miscellaneous**

**ISSUE 5:                   Should the Agreement contain a definition of section 251(b)(5) Traffic? If so, what is the appropriate definition?**

**(GT&C, section 2.94)**

**AT&T Illinois Position:** The term “Section 251(b)(5) Traffic” should not be defined in the ICA, because doing so is unnecessary and could lead to confusion. The only places where that term appears are in other definitions proposed by Sprint, and those definitions should be rejected in favor of definitions proposed by AT&T Illinois that do not include the term “Section 251(b)(5) Traffic.”

It is not necessary to include a definition of the term “Section 251(b)(5) Traffic” in the ICA, as Sprint proposes. The only places in the ICA in which Sprint proposes to use the term “Section 251(b)(5) Traffic” are in its proposed definitions of “IntraMTA Traffic” (Issue 6), “Non-Toll InterMTA Traffic,” and “Toll InterMTA Traffic” (Issue 7). However, including the

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<sup>40</sup> There are two modifications that AT&T Illinois would make to its language if the Commission wishes. At the beginning of section 3.11.2.2, the words “Subject to subsections 3.11.2.2.1 and 3.11.2.2.2” could be added; the addition is not necessary, because the context makes clear that the obligation to deliver traffic in TDM format is subject to what follows, but AT&T Illinois would not object to the modification. Also, AT&T Illinois would not object to changing section 3.11.2.2 to read, “All traffic that the Parties deliver to each other pursuant to this Agreement will be delivered in TDM format.” AT&T Illinois will deliver all traffic to Sprint in TDM format unless and until the parties establish IP-to-IP interconnection in any event, but has no objection to making that explicit.

term “Section 251(b)(5) Traffic” in those definitions is unnecessary and could lead to confusion. Pellerin Direct at 51; Pellerin Rebuttal at 59. Dr. Zolnierек recommends that the Commission reject Sprint’s proposed definition of “Section 251(b)(5) Traffic,” because the ICA “will be clearer and more easily interpreted” if the origination and termination provisions of that definition are included directly in the definitions of “IntraMTA Traffic” and “InterMTA Traffic” (as they are in AT&T Illinois’ proposed definitions of those terms), rather than through a cross reference to another definition, as proposed by Sprint. Zolnierек Direct at 24-25.

Furthermore, as discussed immediately below (Issue 6) and in Section VI.B (Issue 7), the Commission should reject Sprint’s proposed definitions of “Non-Toll InterMTA Traffic,” “Toll InterMTA Traffic,” and “IntraMTA Traffic” and adopt, instead, Staff’s proposed definition of “IntraMTA Traffic” (which AT&T Illinois has adopted) and AT&T Illinois’ proposed definition of “InterMTA Traffic” (which Staff supports). Because these definitions do not incorporate the term “Section 251(b)(5) Traffic” (and because there is no need to do so), there is also no need to define that term in the ICA.

**ISSUE 6:                   What is the appropriate definition of “IntraMTA Traffic”?**  
**(GT&C, sections 2.65, 2.94.1)**

**AT&T Illinois Position:** The Commission should adopt Staff’s proposed definition of “IntraMTA Traffic,” which is reasonable and appropriately refers to traffic exchanged between the parties’ end users.

As defined by the FCC, “MTA” stands for “Major Trading Area,” a geographic area established by the FCC for purposes of CMRS licensing.<sup>41</sup> The FCC’s 1996 *Local Competition Order* established the MTA as the geographic scope of “local” traffic for CMRS traffic under section 251(b)(5) of the 1996 Act. Under the FCC’s rules, MTAs are used to define CMRS calls

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<sup>41</sup> There are 51 MTAs in the United States and its island territories (46 in the continental U.S.).

that were subject to reciprocal compensation (now, under the *CAF Order*, subject to bill and keep), as opposed to access charges, in the same way that local exchange areas are used with respect to wireline calls. Pellerin Direct at 52.

The parties agree that “IntraMTA Traffic” refers to traffic that “at the beginning of the call, originates and terminates within the same MTA.” AT&T Illinois’ proposed definition, however, makes clear that “IntraMTA Traffic” refers specifically to traffic exchanged between Sprint’s end users and AT&T Illinois’ end users. Sprint’s proposed definition, on the other hand, is unduly vague, in that it refers simply to traffic exchanged between Sprint and AT&T Illinois without any reference to “end users.” Pellerin Direct at 52-53.<sup>42</sup>

Staff witness Dr. Zolnierек proposed alternative language that, while differing somewhat from AT&T Illinois’ original proposal, also includes a reference to “end users”:

“IntraMTA Traffic” means traffic that, at the beginning of the call, originates and terminates within the same MTA, and is originated by one Party on its network from its End User and delivered to the other Party for termination on its network to its End User.

Zolnierек Direct at 34. Staff’s proposed definition of “IntraMTA Traffic,” like AT&T Illinois’, is preferable to Sprint’s, because it is consistent with the manner in which the term is used in the context of the ICA, *i.e.*, for the routing and billing of traffic exchanged between the parties’ end users. Pellerin Direct at 53. Staff’s proposed definition is reasonable and should be approved.

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<sup>42</sup> Sprint has objected to AT&T Illinois’ proposed language, based on speculation about the position that AT&T Illinois might take if the bill and keep provisions of the *CAF Order* are overturned. Farrar Direct at 57. That concern is unwarranted and is no basis for adopting Sprint’s proposed language. If a court were to overturn the *CAF Order*, with respect to bill and keep for IntraMTA Traffic, that would constitute a change in law for which either party could request an appropriate amendment, pursuant to the ICA’s Intervening Law provisions (GT&C section 21). Pellerin Rebuttal at 60.

**ISSUE 36(a):** What are the appropriate classifications for traffic subject to intercarrier compensation?

**ISSUE 36(b):** Should the ICA identify traffic that is not subject to bill and keep? If so, what traffic should be excluded?

(Attachment 2, AT&T sections 6.1, 6.1.1, 6.2.3, 6.2.3.1, 6.2.3.1.1 through 6.2.3.1.8; Sprint section 6.2, 6.2.1)

**ISSUE 37:** Should IntraMTA Traffic be subject to bill and keep without exception?

(Attachment 2, AT&T sections 6.2, 6.2.2; Sprint section 6.2.2.1)

**AT&T Illinois Position:** The Commission should adopt the three classifications of traffic proposed by AT&T Illinois (*i.e.*, InterMTA Traffic, IntraMTA Traffic, and IXC Traffic), as these are the only categories of traffic to which the ICA’s intercarrier compensation provisions are relevant. Sprint’s proposed classifications (which include improper references to “toll” and “non-toll” InterMTA traffic, as well as references to Transit Service Traffic and VoIP-PSTN Traffic) should be rejected because they are not consistent with either the ICA or the regulations regarding compensation for various traffic types. The Commission also should adopt AT&T Illinois’ proposed language that lists the types of traffic that are not subject to bill and keep under the ICA.

**Issue 36(a)**

AT&T Illinois proposes three traffic classifications in its section 6.1.1 of Attachment 2 – IntraMTA Traffic, InterMTA Traffic, and IXC traffic. These classifications accurately capture the three discrete traffic types, as they relate to the intercarrier compensation provisions of Attachment 2, section 6. Staff witness Dr. Rearden supports proposed traffic classification. Rearden Direct at 22.

As Ms. Pellerin explained, “IntraMTA” and “InterMTA” are the correct designations of the only two types of traffic exchanged between AT&T Illinois and Sprint. Such traffic involves either calls made between end users of the two parties that are located within the same MTA (“IntraMTA”), or it involves calls made between end users located in two different MTAs (“InterMTA”). IntraMTA traffic is subject to bill and keep, which is defined by the FCC as an arrangement in which “carriers exchanging telecommunications traffic do not charge each other

for specific transport and/or terminating functions or services.” 47 C.F.R. § 51.713. Thus, in a bill and keep arrangement, the parties do not charge each other reciprocal compensation for the recovery of the costs of transporting and terminating the other carrier’s traffic. Rather, each party recovers such costs from its own end users. In the *CAF Order* (§ 978), the FCC adopted bill and keep as the “default mechanism for non-access traffic exchanged between LECs and CMRS carriers” and defined “non-access traffic” to mean “IntraMTA” traffic. 47 C.F.R. §§ 51.701(b)(2), 51.713. InterMTA Traffic, on other hand, remains subject to access compensation. Pellerin Direct at 63-64.

The third classification of traffic (“IXC traffic”) represents Sprint traffic to and from IXCs that is routed through AT&T Illinois’ tandem, but that neither originates nor terminates with an AT&T Illinois end user. IXC Traffic is not subject to bill and keep (section 6.2.3.1.5) and instead is subject to the meet point billing provisions of section 7 of the ICA. Pellerin Direct at 64; Pellerin Rebuttal at 101.

Sprint proposes five classifications of traffic in its section 6.2.1 – IntraMTA Traffic, Non-Toll InterMTA Traffic, Toll InterMTA Traffic, Transit Service Traffic, and VoIP-PSTN Traffic. Sprint does not provide any support for its traffic classifications. With the exception of “IntraMTA Traffic,” Sprint’s traffic classifications are not consistent with either the ICA, or the regulations regarding compensation for various traffic types. For example, Sprint makes an improper distinction between Toll and Non-Toll InterMTA traffic. For the reasons fully discussed in Section VI.B (Issues 7, 39, 40 and 41) below, no such distinction should exist for purposes of this ICA. In addition, transit traffic should not be listed, because it is not subject to intercarrier compensation between the parties, and is instead addressed in Att. 2, section 5. Pellerin Direct at 65. VoIP-PSTN traffic is treated in the same manner as telecommunications

traffic, so there is no need to separately classify it as a traffic type for compensation. *Id.* Staff witness Rearden agreed that the Commission should reject Sprint’s proposed classification of traffic types. Rearden Direct at 21.

**Issue 36(b)**

The ICA should clearly identify traffic that is not subject to bill and keep, to eliminate ambiguity and minimize disputes. Accordingly, AT&T Illinois proposes to include, in Attachment 2, sections 6.2.3 through 6.2.3.1.6, a list of traffic types that are not subject to bill and keep, including non-CMRS traffic, Toll-free calls, Third Party Traffic, InterMTA Traffic, IXC Traffic, and any other types of traffic that are exempt from bill and keep, pursuant to the FCC.

“Non-CMRS Traffic” is properly included on this list because bill and keep should apply only to the transport and termination of IntraMTA Traffic between an AT&T Illinois end user and a Sprint end user. Further, with the exception of the traffic of third party wholesale customers of Sprint that use Sprint NPA-NXXs and any other CMRS providers’ roaming traffic, both of which are treated as Sprint end user traffic, there should not be any traffic exchanged pursuant to the ICA that does not either originate from or terminate to a Sprint end user. To the extent there is any such traffic, however, it would not be classified based on MTA boundaries and would therefore not be eligible for IntraMTA bill and keep compensation. Pellerin Direct at 65-66.

“Toll free calls” are properly included on the list because they are access calls that remain subject to the existing access charge regime and are therefore exempt from bill and keep. Pellerin Direct at 66. “Third Party Traffic” is properly included because, by agreed definition, it is “traffic carried by AT&T ILLINOIS acting as an intermediary that is originated and

terminated by and between Sprint and a Third Party Telecommunications Carrier.” As such, this traffic is not subject to reciprocal compensation with respect to AT&T Illinois and Sprint. It is therefore appropriate to also exclude it from the bill and keep provisions of the ICA. *Id.*

“InterMTA Traffic” is properly included on the list because the FCC adopted bill and keep only for IntraMTA traffic. Contrary to Sprint’s claim, the FCC did not establish bill and keep as the compensation mechanism for so-called Non-Toll InterMTA Traffic. (See discussion of Issues 7, 39, 40 and 41, below). Similarly, the FCC did not adopt bill and keep for IXC traffic, which continues to be subject to the FCC’s access charge regime. Accordingly, it is appropriate to expressly exclude “IXC traffic” from the traffic subject to bill and keep. Pellerin Direct at 66.

Contrary to the assertion of Staff witness Rearden, AT&T Illinois’ proposed list of exclusions from bill and keep will add clarity, not “confusion,” to the ICA. Pellerin Rebuttal at 102. Accordingly, the Commission should approve AT&T Illinois’ language for Attachment 2, sections 6.2.3 through 6.2.3.1.

### **Issue 37**

The parties agree that IntraMTA traffic is subject to bill and keep. Sprint, however, objects to including in section 6.2.2 a reference to the specific exceptions to bill and keep contained in AT&T Illinois’ proposed section 6.2.3 (Issue 36(b)). For the reasons discussed above, Sprint’s objection should be rejected.

Sprint’s proposed language for section 6.2.2.1 states that IntraMTA traffic exchanged both directly *and indirectly* will be subject to bill and keep. However, while nothing in the ICA precludes Sprint from routing traffic to AT&T Illinois via another carrier (*i.e.*, indirectly), such indirect interconnection will not be made pursuant to the ICA at issue in this case, which covers

only the parties' direct interconnection arrangement. Thus, while AT&T Illinois would not charge Sprint reciprocal compensation on any IntraMTA calls sent by Sprint to AT&T Illinois on an indirect basis, such traffic is not subject to the bill and keep provisions of *this ICA*. Pellerin Direct at 67. Accordingly, Sprint's proposed language for section 6.2.2.1 should be rejected.

Sprint has suggested that AT&T Illinois' language for section 6.2.2 might be construed as precluding indirect interconnection. Felton Direct at 58. That was not AT&T Illinois' intent. To eliminate that concern, AT&T Illinois removed the language that Sprint had interpreted as *requiring* Sprint to route its IntraMTA Traffic directly to AT&T Illinois. Pellerin Direct at 67. In addition, AT&T Illinois modified its proposed language for Attachment 2, section 6.2.3.1 (which is the subject of Issue 36(b)) to eliminate a reference to IntraMTA Traffic being sent over Interconnection Trunks. As a result of that change, AT&T Illinois' proposed language for section 6.2.3.1 now reads as follows:

Exclusions. Bill-and-keep shall apply solely to the transport and termination of IntraMTA Traffic and shall not apply to the following, including but not limited to:

Thus, Sprint is free to route its IntraMTA Traffic to AT&T Illinois via direct and/or indirect interconnection. Pellerin Rebuttal at 103.

## **B. InterMTA**

**ISSUE 7: What are the appropriate definitions related to "InterMTA Traffic"?**

**(GT&C, sections 2.64, 2.94.2, 2.94.3, 2.113)**

**AT&T Illinois' Position:** AT&T Illinois' definitions of "InterMTA Traffic" and "Terminating InterMTA Traffic" are accurate, and they also are consistent with the FCC's intercarrier compensation rules, and with the definition of "InterMTA Traffic," in the parties' existing ICA. Sprint's proposal to include separate definitions for "Toll" and "Non-Toll" InterMTA Traffic should be rejected, because the FCC's intercarrier compensation rules make no distinction between "toll" and "non-toll" traffic.

AT&T Illinois' proposed GT&C section 2.64, defines "InterMTA Traffic" as "traffic to or from Sprint's network which, at the beginning of the call, originates in one MTA and terminates in another MTA." This definition is accurate and consistent with the definition of "InterMTA Traffic" contained in the parties' currently effective ICA. Pellerin Direct at 53. It should be approved.

Sprint, by comparison, proposes two separate definitions, one for "Toll InterMTA Traffic," and one for "Non-Toll InterMTA Traffic." Sprint proposes these two separate definitions in furtherance of its position that the only InterMTA traffic that is subject to switched access charges is "Toll InterMTA" traffic, and that "Non-Toll InterMTA Traffic" should be subject to bill and keep. Sprint's position is without merit and should be rejected for the reasons fully discussed in connection with Issues 39(a)-(d), 40(a)-(b) and 41, below. As explained in that discussion, for purposes of the application of its intercarrier compensation rules, the FCC makes no distinction between "Toll" and "Non-Toll" InterMTA traffic; all InterMTA traffic is subject to switched access charges, both terminating (in the case of mobile-to-land traffic) and originating (in the case of land-to-mobile traffic). Pellerin Direct at 54. Accordingly, Sprint's proposed definitions must be rejected.

This issue also involves AT&T Illinois' proposed GT&C section 2.114, which defines "Terminating InterMTA Traffic," as InterMTA traffic that originates on Sprint's network and terminates on AT&T Illinois' network, in another MTA. This definition is necessary to reflect the different treatment that the FCC accorded terminating and originating access in its *CAF Order*. Specifically, for terminating access traffic, the FCC adopted a rule that requires reductions in terminating access charges over a six-year transition period, with the result that, at the end of that period, terminating access traffic will be subject to bill and keep. The FCC

reserved consideration of originating access for another day. Pellerin Direct at 54. The distinction between originating and terminating access compensation is also reflected in AT&T Illinois' proposed language for Attachment 2, sections 6.4.1 and 6.4.2, which govern mobile-to-land (terminating) InterMTA Traffic, and land-to-mobile (originating) InterMTA Traffic, respectively. *Id.* at 54-55. See Issues 39 and 41, discussed below.

**ISSUE 8:                   What is the appropriate definition of “Switched Access Service”?**

**(GT&C, section 2.103)**

**AT&T Illinois Position:** The definition of the term “Switched Access Service” should include AT&T Illinois' proposed language, which simply refers to “access” to AT&T Illinois' network pursuant to the switched access tariff, and reject Sprint's language improperly limiting the application of the term to AT&T Illinois' provision of exchange access to IXCs other than Sprint. AT&T Illinois' proposed definition is consistent with the parties' current ICA, it is compliant with the *CAF Order*, which continues to apply tariffed access charges to InterMTA traffic, and it is supported by Staff.

AT&T Illinois proposes to define the term “Switched Access Service” in GT&C section 2.103, as “an offering of **access** to AT&T Illinois' network, for the purpose of the origination or the termination of traffic, from or to end users, in a given area, pursuant to a Switched Access Services tariff.” Sprint's proposed definition is the same, with one crucial exception: Sprint proposes to replace the phrase “offering of **access**” with the phrase “offering ***to an IXC of Exchange Access by AT&T Illinois.***” Thus, Sprint would define “Switched Access Service” as being limited to a service provided to an “IXC,” as “IXC” is defined in the ICA. Pellerin Direct at 55. Neither Sprint nor AT&T Illinois is an IXC within the meaning of the agreed definition of that term in the proposed ICA. Pellerin Direct at 55-56. Thus, if Sprint's proposed definition of “Switched Access Service” is adopted, it might be construed to mean that InterMTA traffic exchanged between Sprint and AT&T Illinois is not “Switched Access Service,” and is not subject to AT&T Illinois' switched access tariffs.

Sprint's proposal is contrary to the definition of "Switched Access Services" that is included in the parties' currently effective ICA, and must be rejected. For purposes of the state and federal tariffs, pursuant to which AT&T Illinois provides switched access services, *any carrier* that provides services between exchanges or, in the case of CMRS providers, between MTAs, is considered to be an "interexchange carrier." Pellerin Direct at 55-57. Accordingly, AT&T Illinois' switched access tariffs apply to any carrier, including Sprint, that uses its network to access AT&T Illinois' network for the purpose of originating or terminating an interexchange call, *i.e.*, one that begins and ends in different exchanges (or MTAs for CMRS providers). The switched access tariffs are not limited to "IXCs," as defined in the parties' ICA (which definition of "IXC" excludes Sprint), nor, contrary to Sprint witness Felton's assertion (Felton Direct at 61), do those tariffs require that the carrier have a Carrier Identification Code ("CIC"). *Id.*; Pellerin Rebuttal at 91-92. Thus, when AT&T Illinois and Sprint exchange traffic that originates and terminates in different MTAs, that InterMTA traffic is Switched Access Service traffic subject to AT&T Illinois' switched access tariffs. *Id.*

Sprint's restrictive definition of "Switched Access Service" goes hand-in-hand with its positions that InterMTA traffic: (i) should be routed over Interconnection Facilities, rather than over tariffed switched access (*i.e.*, equal access) facilities (Issue 30(a)); and (ii) should not be subject to tariffed switched access charges (Issues 7, 39, 40 and 41). For the reasons fully explained in the discussion of Issue 30(a) (see Section II above) and the discussion of Issues 7, 39, 40(a-b) and 41 below, Sprint's positions should be rejected. Consistent with the Commission's rejection of Sprint's position on those issues, and as also recommended by Dr. Zolnierek, the Commission should approve AT&T Illinois' proposed definition of "Switched Access Service." Zolnierek Direct at 42.

- ISSUE 39(a):** Should the ICA include compensation terms for Sprint’s term “Non-Toll InterMTA Traffic”?  
(Attachment 2, Sprint section 6.2.2.2)
- ISSUE 39(b):** What is the appropriate compensation for mobile-to-land InterMTA Traffic?  
(Attachment 2, AT&T section 6.4, 6.4.1, 6.4.1.1)
- ISSUE 39(c):** Should the ICA include terms for AT&T to estimate the percentage of mobile-to-land InterMTA Traffic, if any, improperly routed over trunks obtained pursuant to the ICA and bill Sprint for terminating access in accordance with that percentage?  
(Attachment 2, AT&T section 6.4.1.2, 6.4.1.4)
- ISSUE 39(d):** Should the ICA obligate Sprint to provide JIP in the call records for its originating IntraMTA and InterMTA Traffic or permit AT&T to use alternate methods to determine jurisdiction?  
(Attachment 2, section 6.4.1.3)
- ISSUE 40(a):** Should the ICA include compensation terms for Sprint’s term “Toll InterMTA Traffic”?
- ISSUE 40(b):** What is the appropriate compensation for mobile-to-land InterMTA Traffic?  
(Attachment 2, Sprint section 6.2.2.3)

**AT&T Illinois Position:** All of these issues relate to the same dispute, namely, whether mobile-to-land InterMTA traffic should be subject to terminating switched access charges. AT&T Illinois’ proposed language maintains the status quo, pursuant to which InterMTA traffic is subject to tariffed switched access charges, with only the terminating access rate itself changing, in accordance with the FCC’s *CAF Order*. AT&T Illinois’ proposal, which is supported by Staff, is consistent with the terms of the parties’ currently effective ICA, universally accepted industry practice, and the rules and orders of the FCC. Sprint, on the other hand, argues that all InterMTA Traffic that it delivers to AT&T Illinois should be exempt from switched access charges (i.e., be should subject to bill and keep), based on a purported distinction between “toll” and “non-toll” InterMTA traffic. Sprint’s position is inconsistent with the FCC’s orders and rules governing intercarrier compensation, including the *CAF Order*, which make no distinction between “toll” and “non-toll” InterMTA traffic, and Sprint’s arguments have been expressly rejected by the courts.

Issues 39(a)-(d) and 40 (a)-(b) all relate to the same dispute, i.e., whether terminating switched access charges should apply to mobile-to-land InterMTA traffic.

AT&T Illinois' proposed language maintains the status quo, pursuant to which InterMTA traffic is subject to tariffed switched access charges, with only the terminating access rate itself changing, in accordance with the FCC's *CAF Order*. Under that language, Sprint will be required (just as it is today) to route its mobile-to-land InterMTA Traffic over switched access facilities, purchased from AT&T Illinois' federal and state access service tariffs (section 6.4.1.1). If Sprint routes InterMTA traffic to AT&T Illinois over non-access facilities, AT&T Illinois will continue to be entitled to assess terminating access charges (section 6.4.1.2).<sup>43</sup> The parties will continue to conduct traffic studies to estimate the percentage of InterMTA calls sent by Sprint to AT&T Illinois over non-access facilities, and AT&T Illinois will bill accordingly (section 6.4.1.4). Pellerin Direct at 73-75. Sprint also will be required to provide the Jurisdictional Informational Parameter ("JIP") (explained in Section II (Issue 30(b), above), for use in verifying the percentage for InterMTA calls (section 6.4.1.3). Pellerin Direct at 77. Staff supports all of these provisions. Rearden Direct at 26.

Sprint, on the other hand, proposes that all InterMTA traffic exchanged between the parties be made subject to bill and keep immediately upon the Effective Date of the ICA. This means that AT&T Illinois would no longer be able to charge originating access charges (Issue 41, below) or terminating access charges on InterMTA traffic, as it does under the current ICA. In support of its position, Sprint claims that the FCC effectively treats InterMTA traffic no differently than IntraMTA traffic. Sprint asserts that only "toll" InterMTA Traffic is subject to

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<sup>43</sup> AT&T Illinois' proposed language, in section 6.4.1.2, indicates that it will bill Sprint terminating access charges from the access tariff (rather than the pricing sheet of the ICA). This is appropriate, because AT&T Illinois is reducing its terminating access charges annually, pursuant to the *CAF Order*, and simply referencing the tariff avoids the need for multiple ICA amendments to modify the rate.

access charges, but claims it has very little, if any, such traffic, since its customers purchase service predominantly under “nationwide flat-rated plans.” Felton Direct at 38-62. Sprint, therefore, proposes that all InterMTA traffic should be subject to bill and keep.

Sprint’s position is without merit and must be rejected. Under established industry practice, CMRS providers pay terminating access charges to LECs on mobile-to-land InterMTA calls. When a CMRS provider transports traffic across MTA boundaries, it is acting as an interexchange carrier for its end users. The CMRS provider’s end user is making the call, and the CMRS provider is receiving all the end user revenue for the call. The LEC’s customer did not make the call, and the LEC receives no revenue for the call from the CMRS provider’s end users. The CMRS provider is thus obtaining “access” from the LEC to complete its (the CMRS provider’s) call; therefore, the LEC is entitled to receive compensation from the CMRS provider to reimburse the LEC for its costs in completing the call. Pellerin Direct at 70.

This established industry practice is supported by the *Local Competition Order*, where the FCC ruled, pursuant to section 251(g) of the 1996 Act (47 U.S.C. § 251(g)), that “LECs must continue to offer tariffed interstate service as they did prior to the enactment of the 1996 Act,” and found that the “reciprocal compensation provisions of Section 251(b)(5) for transport and termination of traffic do not apply to the transport and termination of interstate or intrastate interexchange traffic.” *Local Competition Order* at ¶ 1034. In this context, the FCC indicated that InterMTA traffic is treated as interexchange traffic, subject to switched access charges, and that only IntraMTA traffic would be subject to reciprocal compensation, under Section 251(b)(5):

[I]n light of this Commission’s exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under section 251(b)(5). Different types of

wireless carriers have different FCC-authorized licensed territories, the largest of which is the “Major Trading Area” (MTA). Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. *Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.*

*Id.* at ¶ 1036 (emphasis added). The FCC made no distinction between “toll” and “non-toll” traffic. Rather, in discussing the compensation arrangements specifically applicable to CMRS traffic, the FCC made it clear that “the geographic locations of the calling and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate and intrastate access charges.” *Id.* at ¶ 1044.

Subsequent FCC orders confirm that the FCC’s rules require CMRS providers to pay access charges on InterMTA traffic. For example, in *Developing A Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9614 ¶¶ 6, 7 (2001), the FCC stated:

Existing intercarrier compensation rules may be categorized as follows: *access charge rules*, which govern the payments that interexchange carrier (“IXCs”) and CMRS carriers make to LECs to originate and terminate long distance calls; and *reciprocal compensation rules*, which govern the compensation between telecommunications carriers for the transport and termination of local traffic . . . . CMRS carriers also pay access charges to LECs for CMRS-to-LEC traffic that is not considered local [*i.e.*, IntraMTA] and hence not covered by reciprocal compensation rules. (Emphasis in original).

Again, the FCC made no distinction between “toll” and “non-toll” traffic.

Consistent with the FCC’s orders, the parties’ currently effective ICA expressly provides that “all terminating InterMTA Traffic is subject to the rates, terms and condition set forth in

[AT&T Illinois'] Federal and/or State Access Service tariffs and payable to [AT&T Illinois].” Pellerin Direct at 71-72. The parties’ currently effective ICA also requires Sprint to pay AT&T Illinois tariffed switched access charges on originating land-to-mobile calls (Issue 41, below). Pellerin Rebuttal at 85-86. For purposes of these provisions, the current ICA makes no distinction between “toll” and “non-toll” InterMTA Traffic. *Id.* at 63.

The current arrangement between Sprint and AT&T Illinois is hardly unique. In fact, all CMRS providers (including AT&T Mobility) are assessed tariffed access charges on InterMTA traffic by AT&T Illinois, its affiliated ILECs and, for that matter, most, if not all, other LECs, without regard to the manner in which the CMRS providers choose to bill their own end users for such calls. Moreover, Sprint is not unique in offering “nationwide, flat-rate calling plans” (Felton Direct at 38); that is the standard plan for most, if not all, CMRS providers. InterMTA calls made by customers pursuant to such plans, however, have never been excluded from the applicability of switched access charges on the ground that they constitute “non-toll” calls. Pellerin Rebuttal at 63.

There has been no change in circumstances since Sprint entered into its existing ICA with AT&T Illinois that would require (or support) a change in the current arrangement. That ICA became effective on November 5, 2003. The flat-rated nationwide plan that Mr. Felton pointed to as the basis for changing the current arrangement was introduced five years earlier, in 1998. Pellerin Rebuttal at 64.

Mr. Felton argued that Sprint’s proposed distinction between “toll” and “non-toll” traffic is supported by the 1996 Act’s definitions of “exchange access” and “Telephone Toll Service.” Felton Direct at 36. That argument, however, has been flatly rejected by at least two courts. In *Line Systems, Inc. v. Sprint Nextel Corporation*, Sprint challenged a local exchange carrier’s

right to assess switched access charges on so-called “non-toll” InterMTA traffic, making the same arguments that it is making in this case. In a decision dated July 24, 2012, the court rejected Sprint’s arguments and concluded that section 251(g) (*i.e.*, access compensation) applies to InterMTA traffic based solely on the fact that a call crosses MTA boundaries (*i.e.*, is InterMTA) and that the manner in which the CMRS provider chooses to bill its own end users is not relevant. In support of its conclusion, the district court relied, in part, on a Second Circuit Court of Appeals decision<sup>44</sup> that reached the same conclusion in a case involving a CLEC. In discussing the Second Circuit’s decision and applying it to the facts of the case before it, the district court states as follows:

The [Second Circuit] Court summarized the carrier’s argument as follows:

[The carrier] centers its argument on the “separate charge” language in the statutory definition of “telephone toll services” (which in turn defines exchange access, which in turn determines whether access charges apply). [The carrier] reasons that, since the regulations prescribe that a charge separate from the applicable service contracts is necessary to make a call a “toll” call and since [the carrier] imposes no separate toll charges, its traffic is not subject to access fees ....

*Global NAPs, Inc. v. Verizon New Eng., Inc.*, 454 F.3d 91, 98 (2d Cir.2006). The Court rejected this argument, reasoning that it “attributes far too much significance to the term ‘separate charge.’” *Id.* It explained that

[i]t seems likely that the “separate charge” language in the statute was written to underscore that “tolls” applied exclusively to long-distance service and were charged separately. But what really mattered in determining whether an access charge was appropriate was whether a call traversed local exchanges, not how a carrier chose to bill its customers.

Here, Sprint argues that its decision not to charge its customers separate fees means that Line Systems does not provide Sprint “exchange access.” I do not find this argument persuasive for the same reasons the *Global NAPs* Court rejected a similar argument. Sprint’s billing methods are, in the

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<sup>44</sup> *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 454 F.3d 91, 98 (2d Cir.2006).

words of that Court, “beside the point.” *Id.* The type of phone call, not Sprint’s approach to charging its customers, controls.

*Line Systems, Inc. v. Sprint Nextel Corporation*, 2012 WL 3024015, at \*\*3, 4, Civil Action No. 11–6527 (July 24, 2012). Pellerin Rebuttal at 65, Schedules PHP-4, PHP-5.

Contrary to Mr. Felton’s contention (Felton Direct at 41-42), the FCC’s *CAF Order* does not support Sprint’s position. In comments filed in the proceeding that resulted in the issuance of the *CAF Order*, Sprint requested that the FCC explicitly declare that LECs are prohibited from imposing access charges on wireless traffic. Tr. 106-07 (Felton). In support of that request, Sprint made the same arguments it is making here. Tr. 108 (Felton). As Mr. Felton acknowledged, the FCC did not grant Sprint’s request. *Id.*

In fact, the FCC effectively *rejected* Sprint’s request. Specifically, the FCC made clear that the requirement for an immediate implementation of bill and keep applies only to “non-access telecommunications traffic,” defined in 47 C.F.R. §51.701(b)(2) as “telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in §24.2029a) of this chapter,” *i.e.*, IntraMTA traffic. The FCC did not abandon section 251(g) access compensation for InterMTA traffic during the transition to bill and keep, for terminating traffic. Instead, the FCC preserved existing access arrangements, while stepping down the rates over six years. As the FCC stated:

Although we have adopted a glide path to a bill-and-keep methodology for access charges generally and for reciprocal compensation between two wireline carriers, we find that a different approach is warranted for non-access traffic between LECs and CMRS providers for several reasons.

*CAF Order*, ¶ 995. As this statement makes clear, it is only with respect to non-access (*i.e.*, IntraMTA) traffic that the FCC singled out the traffic between LECs and CMRS providers for special treatment, *i.e.*, the immediate implementation of bill and keep. Access (*i.e.*, InterMTA)

traffic between LECs and CMRS providers is subject to the same “glide path to a bill and keep methodology for access charges generally” to which IXC-to-LEC access traffic is subject.

Pellerin Direct at 72-73; Pellerin Rebuttal at 66. Staff agrees that Sprint’s proposal is inconsistent with the *CAF Order*. Zolnierrek Direct at 38-39.

The *CAF Order* also contradicts Sprint’s argument that, when wireless carriers offer nationwide calling plans, calls made anywhere in the country should be deemed to be “local” and, therefore, subject to bill and keep. Felton Direct at 42. Specifically, the FCC expressly rejected a proposal to “expand the scope of the IntraMTA rule,” thereby reaffirming that the MTA, not the geographic area of a particular CMRS provider’s retail calling plans, remains the relevant geographical area for purposes of determining whether CMRS traffic is subject to bill and keep (IntraMTA) or access charges (InterMTA):

Further, in response to the *USF/ICC Transformation NPRM*, T-Mobile proposed that we expand the scope of the IntraMTA rule to reflect the fact that CMRS licenses are now issued for REAGs, geographic areas that are larger than MTAs . . . We decline to adopt T-Mobile’s proposal. Given the long experience of the industry dealing with the current rule, the very broad scope of the changes to the intercarrier compensation rules being made in this Order that will, after the transition period, make the rule irrelevant, and the limited support in the record for the suggested change even from CMRS commenters, we do not believe it is either necessary or appropriate to expand the scope of this rule as proposed by T-Mobile.

*CAF Order* at ¶ 1008. Pellerin Rebuttal at 67-68.

Mr. Felton argued that the *CAF Order* brought all telecommunications traffic under section 251(b)(5) of the 1996 Act. Felton Direct at 4, 34. While this is true, it does nothing to support Sprint’s position that so-called “toll” InterMTA traffic should be subject to bill and keep. In the *CAF Order*, the FCC amended Subpart H and added Subpart J to its Part 51 Rules. Subpart H addresses “Reciprocal Compensation for Transport and Termination of Telecommunications Traffic,” while Subpart J addresses “Transitional Access Service Pricing.”

Pellerin Rebuttal at 69. Because, as Mr. Felton correctly asserted, the “universe” of terminating telecommunications traffic (a universe that necessarily includes *all* InterMTA traffic) is subject to section 251(b)(5), InterMTA traffic is necessarily subject to either Subpart H (non-access) or Subpart J (access). InterMTA traffic is clearly not subject to Subpart H because that subpart applies only to “non-access” traffic, and “non-access” traffic is defined as IntraMTA traffic. Thus, InterMTA traffic necessarily constitutes “access” traffic subject to Subpart J, and is, therefore, subject to switched access charges. Pellerin Rebuttal at 68-71. Sprint’s attempt to create a third category of traffic (“Non-Toll InterMTA”), for which the FCC promulgated no rules, is unsupported.

Finally, Mr. Felton argued that Sprint’s position is supported by the *CAF Order*’s discussion of “toll” VoIP-PSTN traffic. Felton Direct at 41. Specifically, Mr. Felton quoted from the portion of *CAF Order*’s footnote 1902 that defines “telephone toll service,” and concludes that the FCC intended to treat all of Sprint’s traffic as non-toll. However, Mr. Felton ignored the FCC’s clarifying footnote 1904, which states:

In addition to ISP-bound traffic, section 251(b)(5) traffic historically included all local traffic. In the case of traffic both originated and terminated by a LEC, the local area is defined by the state. *Local Competition First Report and Order*, 11 FCC Rcd at 16013-14, para. 1035. In the case of traffic to or from a CMRS network, section 251(b)(5) applies to traffic that originates and terminates in the same Major Trading Area (MTA). *Id.*, at 16014, para. 1036.

This language makes clear that the FCC has traditionally identified “local” (as opposed to “non-local” or “toll”) CMRS traffic, as *only* traffic that is IntraMTA traffic. This is consistent with Rule 51.701(b)(2), which treats only IntraMTA traffic as “non-access” traffic. In other words, the *CAF Order* did not change the characterization of CMRS traffic that is not subject to access charges. The “local” area for CMRS traffic continues to be the MTA, and any traffic that crosses

the MTA boundary is non-local (*i.e.*, interexchange), and it is subject to access charges. Pellerin Rebuttal at 71-72.<sup>45</sup>

Staff witness Zolnierек agreed that Sprint’s proposal to exempt “non-toll” InterMTA traffic from switched access charges is inconsistent with the intent of the *CAF Order*. Dr. Zolnierек astutely observed that, if Sprint’s approach were adopted, “carriers of all types (*e.g.*, wireline and wireless)” could be expected to “quickly adopt the entire nation as their local calling area (or simply assert their current plans effectively result in the same) in order to avoid switched access charges and that all carriers would almost immediately cease to pay switched access charges.” Zolnierек Direct at 37. As Dr. Zolnierек correctly concluded, such a result would be directly contrary to the intent of the *CAF Order*, which was to “put in place a plan that phases out access charges over several years,” rather than adopting a “flash cut” to bill and keep, because such a flash cut ““would entail significant market disruption to the detriment of consumers and carriers alike.”” *Id.* at 37, quoting *CAF Order*, ¶¶ 809, 810.

For all the reasons discussed, the Commission should adopt AT&T Illinois’ proposed language for sections 6.4.1.1, 6.4.1.2, and 6.4.1.4, which maintain the status quo regarding compensation for terminating InterMTA traffic. Such traffic is subject to tariffed switched access charges, with only the terminating access rate itself changing, in accordance with the FCC’s *CAF Order*. Sprint’s proposed language for Issues 39 and 40 conflicts with the FCC’s rules and orders, including the *CAF Order*, and should be rejected.

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<sup>45</sup> Furthermore, Mr. Felton ignored the fact that, like CMRS providers, VoIP providers typically offer nationwide calling plans for a flat monthly fee, with no separate usage-based “toll” charges. Pellerin Rebuttal at 72. Despite this fact – a fact of which the FCC was presumably aware – the *CAF Order* subjects “toll” VoIP-to-PSTN traffic to switched access charges. *CAF Order* at ¶ 944. Thus, contrary to Mr. Felton’s suggestion (Felton Direct at 36), the FCC’s use of the word “toll” to describe the category of VoIP-PSTN traffic that will be subject to switched access charges cannot plausibly be read to mean only long distance VoIP-PSTN traffic for which the VoIP provider “charges extra.” Pellerin Rebuttal at 72.

In addition, the Commission should approve AT&T Illinois' proposed section 6.4.1.3, which requires Sprint to provide the JIP in its call records. Sprint should be obligated to populate JIP to enable AT&T Illinois to validate Sprint's usage (*i.e.*, IntraMTA vs. InterMTA traffic), and adjust the InterMTA percentage, so that AT&T Illinois is able to properly bill Sprint for the InterMTA traffic. Absent JIP, AT&T Illinois must be permitted to use alternate information to classify traffic as IntraMTA or InterMTA for billing purposes. This may be the Originating Location Routing Number ("OLRN"), CPN, or any other mutually agreed indicator of the originating cell site. Thus, if Sprint has what it believes to be a more accurate way of identifying the originating location than JIP (or OLRN or CPN), it is welcome to discuss that with AT&T Illinois, so that the parties may agree to use another indicator. Pellerin Direct at 76-77.

Staff witness Dr. Rearden recommended adoption of AT&T Illinois' language for section 6.4.1.3. Dr. Rearden correctly recognized that JIP is important for AT&T Illinois to be able to jurisdictionalize Sprint's traffic. This is consistent with Dr. Rearden's recommendation that the Commission adopt AT&T Illinois' position regarding the applicability of terminating switched access charges to mobile-to-land traffic. Rearden Direct at 26. For the reasons discussed, AT&T Illinois' proposed language should be adopted.

**ISSUE 41: Is AT&T entitled to collect switched access charges on its originating InterMTA traffic? If so, at what rate?**

**(Attachment 2, AT&T sections 6.4.2, 6.4.2.1, 6.4.2.2; Sprint section 6.1)**

**AT&T Illinois Position:** The Commission should approve AT&T Illinois' proposed language, which provides for the application of originating access charges to land-to-mobile InterMTA traffic routed by AT&T Illinois to Sprint over Interconnection trunks. AT&T Illinois' language is consistent with the FCC's rules and maintains the status quo with respect to originating access, as the FCC intended in the *CAF Order*. In support of its position that originating switched access charges are not applicable to land-to-mobile traffic, Sprint relies on the same "toll" v. "non-toll" distinction that it makes with respect

to terminating switched access. Sprint's argument should be rejected for the reasons fully discussed above with respect to Issues 39(a)-(d) and 40(a)-(b).

Whenever an AT&T Illinois end user dials a Sprint telephone number where both the calling and called telephone numbers are assigned within the same MTA, the call is routed over the IntraMTA Interconnection trunks. Because of the inherent nature of mobile telephony, however, that locally-dialed Sprint end user may or may not be physically within the same MTA. If the Sprint end user is outside his or her home MTA at the beginning of the call, then the call will cross MTA boundaries for termination, making what appears to be an IntraMTA call actually an InterMTA call that is properly subject to originating switched access charges. Pellerin Direct at 77-78.

AT&T Illinois' proposed language for Attachment 2, sections 6.4.2.1 and 6.4.2.2 is intended to cover this scenario. Section 6.4.2.1 provides that AT&T Illinois' originated land-to-mobile InterMTA traffic will be billed in accordance with the rates included in AT&T Illinois' federal and switched access tariffs.<sup>46</sup> Because the parties cannot directly measure originating land-to-mobile InterMTA traffic carried over Interconnection trunks, section 6.4.2.2 provides that the volume of such traffic will be estimated based on the surrogate usage percentage set forth in the Pricing Sheets (*i.e.*, 6%), which will be applied to the total minutes of use AT&T Illinois delivers directly to Sprint. Pellerin Direct at 79. AT&T Illinois' proposal is consistent with the parties' currently effective ICA, which permits AT&T Illinois to charge Sprint originating access on land-to-mobile InterMTA calls. Pellerin Rebuttal at 85.

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<sup>46</sup> AT&T Illinois' language assumes that the originating InterMTA traffic is 50% interstate and 50% intrastate and will bill Sprint at the blended access rate set forth in the Pricing Sheets. As a practical matter, however, the specific intrastate/interstate breakdown of traffic does not make a difference, since AT&T Illinois' intrastate access charges (originating as well as terminating) mirror its interstate switched access charges. Pellerin Direct at 79.

The currently effective arrangement for the application of originating access charges to land-to-mobile traffic, and AT&T Illinois' proposal to continue that arrangement, are supported by the *Local Competition Order*, which states that “most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some ‘roaming’ traffic that transits incumbent LECs’ switching facilities ...” *Local Competition Order* at ¶ 1043. Most, if not all, of the land-to-mobile InterMTA traffic at issue here is “roaming” traffic of the precise nature described in paragraph 1043, i.e., calls that AT&T Illinois' end users place that appear to be IntraMTA calls based on the calling and called parties' telephone numbers, but that Sprint actually transports outside the MTA to complete to Sprint's end users located (and roaming) anywhere in the world. Pellerin Rebuttal at 88.

Accordingly, land-to-mobile InterMTA calls are subject to originating switched access charges, just as mobile-to-land InterMTA calls are subject to terminating access charges. *See, In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9614 (2001) (referring to the FCC's access charge rules, “which govern payments that [IXCs] and *CMRS carriers* make to LECs to *originate* and terminate long distance calls”) (emphasis added); *Union Telephone Company v. Public Service Commission of Utah*, 2009 WL 2019062 (D. Utah 2009) (affirming Utah PSC decision approving ICA provisions that allow Qwest (an ILEC) to assess Union Telephone (a CMRS provider) originating switched access charges on land-to-mobile traffic and terminating switched access charges on mobile-to-land traffic, and rejecting Union's request that such provisions be made reciprocal).

Sprint witness Felton took the position that AT&T Illinois should not be entitled to assess originating access charges on land-to-mobile InterMTA traffic, a position with which Staff witness Dr. Rearden agreed. Felton Direct at 45-51; Rearden Direct at 27-29. Neither Mr. Felton nor Dr. Rearden, however, identified any change in circumstances or the law that would justify a departure from the parties' currently effective arrangement for originating access. Pellerin Rebuttal at 86. In fact, no such change has occurred. To the contrary, the FCC made clear in its *CAF Order* that it was not disturbing the existing access charge regime for originating traffic, other than to cap originating access charges at existing rates:

Although we conclude that the originating access regime should be reformed, at this time we establish a transition to bill-and-keep only with respect to terminating access charge rates.

*CAF Order* at ¶ 777.

In support of Sprint's position, Mr. Felton argued that land-to-mobile traffic does not constitute "toll" traffic. Felton Direct at 46. For the reasons fully discussed above with respect to Issues 39(a)-(d) and 40(a)-(b), Sprint's argument is unsupported. As in the case of a mobile-to-land call, compensation for a land-to-mobile call is not determined based on how the call is placed, or whether the end user of the originating carrier is charged a separate "toll" usage charge for making the call. Rather, the compensation is based on the originating and terminating points at the beginning of the call. *Local Competition Order* at ¶¶ 1043-1044. Accordingly, when an AT&T Illinois end user dials what appears to be an IntraMTA call, and the Sprint end user is outside the MTA at the beginning of the call, it is an InterMTA call subject to originating access. Pellerin Rebuttal at 82. Sprint is acting as an interexchange provider when it transports a call across MTA boundaries and, as such, it owes AT&T Illinois appropriate originating access compensation. *Id.*

Dr. Rearden's support of Sprint's position on this issue is puzzling since Staff rejected the very argument relied on by Sprint in support of its position, *i.e.*, that InterMTA traffic for which Sprint does not charge end users an extra "toll" charge is not "access" traffic for purposes of intercarrier compensation. Zolnierек Direct at 34-42; Rearden Direct at 26. As Dr. Rearden correctly concluded, "[t]he FCC made it quite clear in its *CAF Order* that interMTA traffic was to be viewed as access traffic for purposes of intercarrier compensation." Rearden Direct at 26 (emphasis added). Thus, at least in the context of mobile-to-land traffic, Staff correctly recognizes that it is the identification of a call as IntraMTA or InterMTA that determines terminating compensation, and, therefore, Staff properly rejects Sprint's position that all InterMTA Traffic should be exchanged at bill and keep (Issues 39-40). The same principle applies to land-to-mobile traffic. The only difference between originating and terminating InterMTA traffic is whether the rate is, per the *CAF Order*, on a six-year glide path to bill and keep (terminating) or simply capped at current rates (originating). Pellerin at 82.

Dr. Rearden's position is also inconsistent with Staff witness Zolnierек's testimony regarding AT&T Illinois' proposed language for Attachment 2, section 4.10.5, which is a subject of Issue 30(a) (discussed in Section II, above). In recommending approval of that language, subject to a modification that is not relevant here, Dr. Zolnierек agreed that "AT&T Illinois should be allowed to route InterMTA traffic destined for CMRS end users over Interconnection Trunks when that traffic appears to be IntraMTA traffic provided appropriate Originating InterMTA factors are applied to the Interconnection Trunks for billing purposes." Zolnierек Direct at 54. The only reason that an "originating InterMTA factor" would be necessary in this situation is to ensure the appropriate application of originating switched access charges to the portion of the traffic delivered to Sprint over Interconnection trunks that is destined for CMRS

customers located outside of the MTA in which the call originated (*i.e.*, InterMTA Traffic). Pellerin Rebuttal at 90. Thus, Dr. Zolnierek’s recognition of the need for “appropriate Originating InterMTA factors” is also a recognition of AT&T Illinois’ right to assess originating access charges on land-to-mobile InterMTA traffic. *Id.*

In support of his position, Dr. Rearden asserted that AT&T Illinois is acting as a “pseudo IXC” when its end-user places a land-to-mobile InterMTA call. Rearden Direct at 28. Dr. Rearden’s assertion is unsupported. As Mr. Felton, recognized, in the scenario at issue, AT&T Illinois “delivers the call to Sprint at the nearest point of interconnection and Sprint hauls the call to the terminating customer wherever the customer happens to be traveling.” Felton Direct at 46. Thus, when Sprint’s end-user is outside the MTA where the AT&T Illinois call originated, Sprint is the carrier that takes the call outside the MTA and, therefore, it is Sprint (not AT&T Illinois) that is acting as an IXC. Accordingly, Sprint is subject to originating access charges. Pellerin Rebuttal at 85.

For all the reasons discussed, the Commission should approve AT&T Illinois’ language providing for the application of originating access charges to land-to-mobile InterMTA traffic routed by AT&T Illinois to Sprint over Interconnection trunks. AT&T Illinois’ language is consistent with the FCC’s rules and maintains the status quo with respect to originating access, as the FCC intended in the *CAF Order*.

### C. Transit

**ISSUE 43: What is the appropriate rate that a Transit Service Provider should charge for Transit Traffic Service? (AT&T Pricing Sheets)**

**(AT&T Pricing Sheets)**

**AT&T Illinois Position:** Sprint should pay AT&T Illinois’ tariffed, Commission-approved transit rate – the same rate the Commission required another carrier, Big River, to pay when the Commission last arbitrated the transit rate issue less than two years ago.

Sprint contends that section 251(c)(2) of the 1996 Act requires AT&T Illinois to provide transit service to Sprint, and that section 252(d)(1), which mandates cost-based rates for section 251(c)(2) interconnection, therefore requires that the rate for transit service be TELRIC-based. Sprint's position is directly at odds with this Commission's precedents. The Commission has repeatedly held that the 1996 Act does *not* require AT&T Illinois to provide transit service, and that transit service need *not* be provided at TELRIC-based rates. Unless the Commission overturns those precedents, it must reject Sprint's request to reduce AT&T Illinois' transit rate, because the only ground Sprint asserts for that request – indeed the only ground Sprint could possibly assert – is that the 1996 Act compels TELRIC-based rates for transit service. The Commission should not overturn its precedents on this issue, because there has been no change in law – no change in the 1996 Act, and no change in the FCC's position on transit service – that would justify such a radical departure from the principles the Commission has established and repeatedly reaffirmed. Furthermore, the Commission's precedents are clearly correct: The 1996 Act does not require transit service, and does not require that transit service be provided at TELRIC-based rates.

The one thing that has changed since the Commission first ruled that the 1996 Act does not require transit service is that there is now robust competition for the provision of transit service in Illinois. Because of that competition, this Commission should not stretch, as some state commissions did in the past, to find a transit requirement in the 1996 Act in order to justify the regulation of transit rates. With market forces disciplining transit rates, as they indisputably are, the Commission should not be eager to intervene.<sup>47</sup>

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<sup>47</sup> The competitive market for transit service exists in the world of free market negotiation of *commercial* transit agreements in which AT&T Illinois and multiple competing providers of transit service operate – not in the world of regulation in which this arbitration proceeds. Thus, as evidence cited below shows, basic economic principles would predict that AT&T Illinois would propose a higher rate for transit service in this proceeding than AT&T

Even if the Commission were to decide that it has been consistently wrong, and that the 1996 Act does require AT&T Illinois to provide transit service at TELRIC-based rates, the tariffed rates that AT&T Illinois proposes to charge Sprint are TELRIC-based, as the Commission has previously found. Sprint contends that they are not based on *current* forward-looking costs, because the cost studies on which they were based do not assume the use of soft switches, as Sprint claims a current study would. That claim is incorrect. As AT&T Illinois' cost expert explained, a forward-looking cost study done today would *not* assume the use of soft switches. In fact, the one state commission that has previously addressed Sprint's argument that a current cost study should assume the use of soft switches rejected the argument for reasons that apply equally here. Decision, Docket No. 09-04-21, *DPUC Investigation into the Southern New England Telephone Company's Cost of Service*, 2010 WL 1821240 (Conn. Dept. Pub. Util. Control April 14, 2010),

Finally, even if AT&T Illinois could lawfully be required to provide transit service at TELRIC-based rates, and even if the rates AT&T Illinois is proposing were not current TELRIC-based rates, the Commission still could not properly adopt the rate proposed by Sprint. As Sprint acknowledges, it is not proposing an actual TELRIC-based rate based on Illinois costs, but is instead proposing a proxy, based on purported "benchmarks," all of which, as we demonstrate below, are badly flawed.

**1. Description of transit traffic**

Transit traffic is telecommunications traffic that originates on one carrier's network, passes through an intermediate network (AT&T Illinois' in this instance), and terminates on a

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Illinois would offer in a freely negotiated commercial agreement. AT&T Illinois has no interest in "competing" to provide transit service via regulated ICAs; that is why the real world competition about which AT&T Illinois' witnesses testified disciplines prices in that competitive realm (in which Sprint is welcome to participate by entering into a separate, commercial transit agreement with AT&T Illinois), but not in this arbitration.

third carrier's network. The intermediate carrier is said to be providing "transit service." Thus, AT&T Illinois provides transit service when an originating carrier delivers traffic to AT&T Illinois to be passed through AT&T Illinois' tandem switch and on to a terminating carrier. Traffic that AT&T Illinois transits does not involve an AT&T Illinois end user in any way. Direct Testimony of J. Scott McPhee ("McPhee Direct") at 3.

Transit traffic does not include long distance traffic, such as a call that originates with Sprint and that an IXC hands off to AT&T Illinois for delivery to a CLEC that terminates the call to its end user customer. Rather, the transit traffic that is the subject of this issue includes only traffic that would be considered "local" traffic, with no IXC or access charges involved. *Id.* at 4.

**2. This Commission has repeatedly ruled that the 1996 Act does not require AT&T Illinois to provide transit service and that there is no requirement that transit service be provided at TELRIC-based rates.**

The Commission first addressed the question whether the 1996 Act requires transit service in its January 6, 1997, Arbitration Decision in Docket No. AB-008, *Sprint Communications Company, L.P., Petition for Arbitration of Interconnection, Rates, Terms and Conditions, and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech Illinois*. It held (at p. 10): "The Act does not *require* transiting."

Later that year, in its Arbitration Decision in Docket Nos. 96-AB-003, *et al.*, *AT&T Communications of Illinois, Inc., Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech Illinois*, the Commission held (at p. 10): "Is transiting required by the Act, the [Local Competition] Order or state law? It is not."

The Commission reaffirmed those rulings in its November 30, 2004 *MCI Arbitration Decision* in Docket No. 04-0469, holding (at 123), "***the . . . rate for transit traffic is not required to be cost-based under either federal or state law.***" (Emphasis added.) See also *id.* at 160 ("As

Staff noted. . . , neither the 1996 Act nor [Illinois law] explicitly addresses issues related to transit services. . . . [N]o current rule requires SBC to provide transit service at TELRIC prices.”).

Staff witness Rearden acknowledges that the Commission has ruled that nothing in federal or state law explicitly addresses transit service and that there is therefore no requirement that transit be provided at TELRIC rates. Rearden Direct at 14-15.

**3. This Commission’s precedents are correct.**

In the years since the Commission first ruled that the 1996 Act does not require transit service, there has been no change in law that would justify a reconsideration of the Commission’s established precedent. Sprint admits this. Tr. at 195-196 (Farrar).<sup>48</sup> In other words, Sprint is arguing that the Commission got it wrong the three previous times it looked at this issue. But it is Sprint that is wrong.

Sprint relies on two provisions of the 1996 Act: section 251(c)(2), which requires incumbent LECs to provide interconnection, and section 251(a)(1), which requires all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Sprint contends that section 251(c)(2) imposes a transit requirement, and that the indirect interconnection duty that section 251(a) imposes on all carriers would be meaningless if incumbent LECs were not required to provide transit service.

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<sup>48</sup> Q: Now, since the Illinois Commerce Commission made those three rulings, Congress has not amended the ‘96 Act, correct?

A: That’s correct.

Q: And it is also correct, is it not, that the FCC has not at any time particularly since the Illinois Commerce Commission three times ruled that the Act does not require transit service the FCC has not ruled that the Act does require transit service, correct?

A: That’s correct. . . .

Sprint does not contend that any FCC Rule requires transit service, and cannot, because none does. Rather, the FCC has repeatedly observed that nothing in the 1996 Act or the FCC's Rules imposes such a requirement. *E.g., Application of Qwest Commc 'ns Int'l, Inc.*, 18 FCC Rcd. 7325, n.305 (2003) ("we find no clear Commission precedent or rules declaring such a duty" to provide transiting under section 251(c)(2)); *Application of BellSouth Corp.*, 17 FCC Rcd. 25828, ¶ 155 (2002) (same); *Joint Application by BellSouth Corp., et al.*, 17 FCC Rcd. 17595, n.849 (2002) (same).

Moreover, on the one occasion when the FCC had to answer the question whether an ICA should include a transit requirement, it reached the same conclusion as this Commission. In 2002, the FCC's Wireline Competition Bureau was called upon to decide whether section 251(c)(2) requires transit service in an arbitration where the Bureau stood "in the shoes" of a state commission.<sup>49</sup> The Bureau, recognizing the FCC's repeated statements that there is no Commission precedent or rule declaring such a duty, declined "to determine for the first time" that transiting was required under section 251(c)(2). *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5)*, 17 FCC Rcd. 27039, ¶¶ 117 (Wireline Competition Bureau, 2002).

By any reasonable reading, section 251(c)(2) does not require transit service. The statute merely requires AT&T Illinois to provide Sprint with interconnection with AT&T Illinois' network. FCC Rule 51.5, which implements section 251(c)(2), provides:

Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

That FCC definition supports this Commission's precedents in three ways. First, it limits interconnection to the linking of two networks. In the 1996 *Local Competition Order*, in which

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<sup>49</sup> When a state commission declines to arbitrate an interconnection agreement, the FCC may take the case. 47 U.S.C. § 252(e)(5). In such instances, the FCC typically assigns the case to its Wireline Competition Bureau, which then stands in for the state commission.

the FCC promulgated Rule 51.5, the FCC emphasized at ¶ 176 that interconnection is the “*physical linking* of two networks” (emphasis added). Transit service is not physical linkage – rather, it is the transport of traffic. The courts have consistently confirmed this. *E.g.*, *Competitive Telecomm. Ass’n v. FCC*, 117 F.3d 1068, 1071-72 (8th Cir. 1997) (affirming FCC’s definition of “Interconnection,” which excluded transport and termination of traffic, because transmission and routing of traffic is a separate service that merely describes what interconnection, *i.e.*, the actual physical linking of two networks, would be used *for* after it was established); *AT&T Corp. v. FCC*, 317 F.3d 227, 234 (D.C. Cir. 2003) (definition of interconnection does not include the exchange of traffic between networks, because “to interconnect and to exchange traffic have distinct meanings” and the definition of interconnection does not refer to “the provision of any service”). *See also MCI Metro Access Transmissions Servs., Inc. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872, 879 (4th Cir. 2003) (the cost of transporting traffic to and from a point of interconnection (*i.e.*, where the “physical linking” of two networks occurs) could not be deemed part of the cost of interconnection because the cost of transporting traffic is separate from the cost of physically linking the equipment for interconnection).

Second, the FCC states that interconnection is “for the mutual exchange of traffic.” Transit service does not involve the *mutual* exchange of traffic; rather, it involves the exchange of traffic between one of the interconnected carriers (Sprint, in this instance) and a third party carrier, through the intermediation of, in this instance, AT&T Illinois.

Third, Rule 51.5 states that interconnection “does not include the transport and termination of traffic.” Transit, of course, is the transport of traffic.

The FCC’s discussion of interconnection in the *Local Competition Order* includes additional support for AT&T Illinois’ position and this Commission’s precedents. Some commenters in the FCC proceeding argued that “interconnection” in section 251(c)(2) should be defined to include not only the physical linking of facilities, but also the transport and termination of traffic across that link. *Local Competition Order* at ¶ 174. One such commenter, CompTel, contended that “it would make no sense for Congress to require an incumbent LEC to engage in a physical linking with another network without requiring the incumbent LEC to route and terminate traffic from the other network.” *Id.* This is the same argument Sprint makes here when it contends that the interconnection requirement in section 251(c)(2) implies that AT&T Illinois will route and terminate to third parties traffic originated by Sprint.

The FCC ruled that “the term ‘interconnection’ under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic,” and does not include the transport or termination of traffic. When it made that ruling, the FCC explained why it rejected CompTel’s argument:

We . . . reject CompTel’s argument that reading section 251(c)(2) to refer only to the physical linking of networks implies that incumbent LECs would not have a duty to route and terminate traffic. That duty applies to all LECs and is clearly expressed in section 251(b)(5).<sup>50</sup>

That statement by the FCC refutes Sprint’s position here, because it says that the duty to route traffic under the 1996 Act is imposed *not* by section 251(c)(2), but by section 251(b)(5). And section 251(b)(5) has nothing to do with transit traffic. Rather, it requires LECs to enter into reciprocal compensation arrangements – arrangements, as section 252(d)(2) explicitly states, for the “reciprocal recovery by each carrier of costs associated with the transport and termination

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<sup>50</sup> *Id.* ¶ 176. The Eighth Circuit affirmed the FCC’s decision and rejected CompTel’s view. *Competitive Telecomm. Ass’n v. FCC*, 117 F.3d 1068, 1071-72 (8th Cir. 1997).

*on each carrier's network facilities of calls that originate on the network facilities of the other carrier.*" (Emphasis added.) As applied here, in other words, the only duty the 1996 Act imposes on AT&T Illinois with respect to routing traffic delivered to it by Sprint is the duty to terminate Sprint's traffic to AT&T Illinois' end user customers; the 1996 Act imposes on AT&T Illinois no duty to transit Sprint's traffic to other carriers.

Finally, the FCC's *Talk America amicus* brief also made clear that transit is not interconnection. *See supra* at 22-23.

Sprint argues that section 251(c)(2) implies a requirement to provide transit service because it "does not contain any qualifier to limit the transmission and routing that AT&T must provide on a non-discriminatory basis to transmission and routing between only Sprint and AT&T end offices." Farrar Direct at 16. But that is essentially the same argument that CompTel made and that the FCC and the courts have rejected. What section 251(c)(2) requires is the establishment of the physical link. To be sure, section 251(c)(2) states that the link is "for the transmission and routing of telephone exchange service and exchange access," but that language merely *describes* what the physical linking of the networks is used for once it is established – it does not *require* anything. As noted above, the courts have consistently recognized this distinction between the physical linking of networks (interconnection) and the exchange, transmission, or routing of traffic between the networks after the link is established, which is separate from the interconnection duty. *See supra* at 124 (quoting decisions of Eighth Circuit, D.C. Circuit and Fourth Circuit). The requirement to transmit and route the traffic is, as the FCC ruled, in section 251(b)(5), not section 251(c)(2).

In sum, section 251(c)(2) does not require AT&T Illinois to provide transit service; as this Commission has repeatedly held, nothing in the 1996 Act does. This takes us to section 251(a)(1), on which Sprint also relies. Sprint's argument (Farrar Direct at 17) is that:

- (i) section 251(a)(1) requires each local exchange carrier to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers, which means that
- (ii) the carrier on whose network a call originates is entitled to choose whether to deliver its traffic directly or indirectly to the terminating carrier, from which it follows that
- (iii) AT&T Illinois must be required to provide transit service, because otherwise, the originating carrier's right to choose to deliver its traffic indirectly to the terminating carrier would be meaningless.<sup>51</sup>

That argument is without merit. Sprint is correct about point (i): Section 251(a)(1) does require each local exchange carrier to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. As to point (ii), that inference is not as clear and certain as Sprint suggests – but AT&T Illinois will accept it for the sake of discussion. In other words, AT&T Illinois will assume, *arguendo*, that under section 251(a), if Carrier X tells Carrier Y that X is going to deliver its traffic to Y indirectly – *i.e.*, through a provider of transit service – Y cannot insist that X deliver its traffic directly.

But Sprint is mistaken when it reasons that because Y must accept X's decision to deliver its traffic indirectly, AT&T Illinois must have a duty to transit X's traffic. That inference simply does not follow. The fact that Congress gave X the right – *as between X and Y* – to deliver its

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<sup>51</sup> It appears that Sprint relies on section 251(a) to buttress its losing section 251(c)(2) argument, rather than as a separate and independent source of a purported ILEC duty to provide transit service. In any event, an argument that section 251(a) requires transit service would not advance Sprint's cause. While the interconnection that ILECs provide under section 251(c)(2) is subject to the TELRIC-based pricing requirement in section 252(d)(1) of the 1996 Act, the interconnection required by section 251(a)(1) is not. *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5)*, 17 FCC Rcd. 27039, ¶ 108 (Wireline Competition Bureau, 2002) (“[A]ny [hypothetical] duty Verizon may have under section 251(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.”). Consequently, Sprint cannot establish that transiting must be provided at TELRIC-based rates based on the interconnection requirement in section 251(a)(1).

traffic indirectly to Y does not mean that Congress also gave X the right to demand that AT&T Illinois (or any other provider of transit service) transit X's traffic to Y.

Moreover, Sprint is incorrect when it asserts that carrier X's right to deliver its traffic indirectly to carrier Y would be meaningless if ILECs were not required to provide transit service. That is demonstrated by real world facts. This Commission has repeatedly ruled that the 1996 Act does not require AT&T Illinois to provide transit service, and the FCC has repeatedly said that it has never imposed a duty on ILECs to provide transit service. Nonetheless, AT&T Illinois voluntarily provides transit service at its tariffed, Commission-approved rates,<sup>52</sup> and carriers, including Sprint, exercise their right (vis-a-vis the third party terminating carriers to which they wish to deliver their traffic) to indirect interconnection by purchasing AT&T Illinois' transit service at those rates. In addition, Sprint can deliver its traffic indirectly to third party carriers by obtaining transit service from carriers other than AT&T Illinois, as we discuss below. Obviously, carriers in Illinois have not been inhibited in their exercise of their rights under section 251(a)(1) by this Commission's rulings that the 1996 Act does not require transit service.

Most important, though, Carrier X's right – *vis-a-vis Carrier Y* – to send its traffic to Y through an intermediary cannot properly be read to impose a statutory duty on AT&T Illinois to be that intermediary. The only rights and obligations that section 251(a) speaks to are the rights and obligations of the carriers that are interconnecting (directly or indirectly). Even if section 251(a) means that Carrier Y cannot demand that Carrier X send its traffic directly to Carrier Y, that is as far as it goes – it does not give Carrier X any rights *vis-a-vis* AT&T Illinois.

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<sup>52</sup> Or at negotiated rates in commercial transit agreements.

4. **Even if a transit requirement could somehow be read into the 1996 Act, nothing in the 1996 Act suggests that AT&T Illinois is required to provide transit service at cost-based rates.**

Section 251(d)(1) of the 1996 Act requires cost-based pricing for section 251(c)(2) interconnection, and Sprint's theory is that if section 251(c)(2) requires transit service, it follows that that service must be provided at the cost-based rates mandated by section 252(d)(1). But section 251(c)(2) does not require transit service, and that should be the end of the analysis; Sprint does not suggest that the Commission should or could require AT&T Illinois to provide transit at cost-based rates if the 1996 Act does *not* require transit service, and there is no lawful basis for any such suggestion.

But even if section 251(c)(2) did require transit service, Sprint's conclusion is wrong: transit service still would not be subject to the cost-based rate requirement in section 252(d)(1).

Section 252(d)(1) provides in pertinent part:

Determinations by a State commission of the *just and reasonable rate for the interconnection of facilities and equipment* for purposes of section (c)(2) of section 251 . . . shall be . . . based on *the cost of providing the interconnection*. (Emphasis added.)

Undeniably, that language addresses only the rate for the physical link. The subject matter is the rate for “the interconnection of facilities and equipment” (not the traffic flowing over the interconnection), and that rate must be based on “the cost of providing the interconnection” – again, the physical link. Section 251(d)(1) says nothing about the rate (or cost) of carrying traffic through that interconnection.

It is indisputable that section 252(d)(1) does not establish a pricing standard for usage, *i.e.*, for traffic flowing over the interconnection. This is crystal clear in the direct interconnection scenario, where Sprint and AT&T Illinois exchange traffic that originates on one of their networks and terminates on the other. We know that the pricing standard in section 252(d)(1)

does not apply to that traffic. Rather, the *traffic* (as opposed to the physical link) is subject to the separate pricing standard in section 252(d)(2), *i.e.*, reciprocal compensation. And just as section 252(d)(1) pricing applies only to the physical link in the case of direct interconnection that everyone agrees is governed by section 251(c)(2), section 252(d)(1) pricing would also apply only to the physical link, and not the transit traffic that flows over the link, if one were to read a transit requirement into section 251(c)(2).

The FCC has recognized that the 1996 Act does not mandate cost-based rates for transit service. In a 2005 Notice of Proposed Rulemaking, the FCC solicited “comment on whether there is a statutory obligation to provide transit services under the Act, and, if so, what rules the Commission should adopt to advance the goals of the Act.” Further Notice of Proposed Rulemaking, CC Docket No. 01-92, *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, 20 FCC Rcd. 4685 (rel. March 3, 2005), ¶ 121. Without prejudging the question whether there is such an obligation, the FCC also sought comment on whether the FCC, if it did have statutory authority, “should exercise that authority to require the provision of transit service.” *Id.* ¶ 129. The FCC stated,

[I]f the Commission determines that rules governing transit service are warranted, we seek additional comment on the appropriate pricing methodology, if any, for transit service. The reciprocal compensation provisions of the Act address the exchange of traffic between two carriers, but do not explicitly address the inter-carrier compensation to be paid to the transit service provider for carrying section 251(b)(5) traffic. Similarly, section 251(a)(1) does not address pricing. . . . [W]e seek further comment on the appropriate pricing methodology, including the possibility of requiring that transit service be offered at the same rates, terms, and conditions as the incumbent LEC offers for equivalent exchange access services (*e.g.*, tandem switching and tandem switched transport) and how this option would be affected by our proposals to alter the current switched access regime. . . . Parties should provide evidence of the degree to which there is, or could be, competition for transit services and how the level of competition should be reflected in our choice of a pricing methodology.

Id. ¶ 132 (footnotes omitted). Eight years have passed since the FCC posed those questions, and the FCC has not ruled that there is a statutory requirement that incumbent LECs (or any carriers) provide transit service, and has expressed no view on what pricing methodology, if any, should apply to transit service IF it is required. Most important, though, the FCC's discussion makes plain that a conclusion that the 1996 Act requires transit service does not imply a conclusion that transit service must be provided at TELRIC-based rates.

5. **The Commission should not stretch to conclude that the 1996 Act requires TELRIC-based rates for transit service on the theory that such a conclusion would serve the public interest.**

Staff witness Rearden opines that the public interest would be served by reducing AT&T Illinois' transit rate, and states, "One way to accomplish this goal is for the Commission to find that Transit Traffic Service is subject to federal requirements." Rearden Direct at 17. Dr. Rearden expresses no view one way or the other, however, on whether the 1996 Act actually imposes a transit requirement or requires that AT&T Illinois provide transit at TELRIC-based rates.

The quoted statement by Dr. Rearden could be read as a recommendation that the Commission find a way to conclude that transit is required by the 1996 Act in order to serve the public interest. That would not be good advice. The Commission should decide – as it has in past – whether the 1996 Act requires transit service according to the law; it should not decide what outcome would be desirable from a policy perspective and then tailor its reading of the statute to achieve that outcome. When regulatory agencies take that approach, their decisions are liable to be overturned.<sup>53</sup>

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<sup>53</sup> As the United States Court of Appeals for the Seventh Circuit noted in a decision in which it overturned an order of the Wisconsin Public Service Commission, "The commission and WorldCom argue that. . . the state's. . . requirement promotes the procompetitive policy of the [1996] act. But to identify the policy underlying a statute

Furthermore, it would *not* serve the public interest to find that the 1996 Act requires transit service as a justification for reducing transit rates. As Dr. Rearden acknowledged, he did “not have an understanding or opinion about the extent to which there is competition for AT&T Illinois’ Transit Traffic Service” when he wrote his testimony (Staff Response to AT&T Illinois Data Request 1(d) (Schedule OAO-3)), and it appears he assumed there is little or no competition. That would have been an understandable assumption at the time Dr. Rearden prepared his testimony, because neither AT&T Illinois nor Sprint addressed the state of competition for transit service in its direct testimony, though Sprint tried to create the impression that there is none. *See* Farrar Direct at 19. In fact, however, there is ample competition to provide transit service in Illinois, and it would therefore be contrary to the public interest for the Commission to regulate the rates for that service. While it might be good public policy to regulate the prices that a firm with monopoly power charges for bottleneck facilities, it is bad public policy (and contrary to economic principle) to regulate prices of products for which there is a competition. Rebuttal Testimony of Dr. Ola A. Oyefusi (“Oyefusi Rebuttal”) at 8-9.<sup>54</sup> In fact, this Commission has expressed its support for market-based transit rates “once sufficient competition develops.” Further Notice of Proposed Rulemaking, CC Docket No. 01-92, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685 (rel. March 3, 2005), ¶ 132 n. 381. The evidence shows that sufficient competition has developed.

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and then run with it is a dangerous method of interpretation . . . .” *Wisconsin Bell, Inc. v Bie*, 340 F.3d 441, 445 (7th Cir. 2003).

<sup>54</sup> The only things the 1996 Act requires ILECs to provide at cost-based rates are “bottleneck facilities” – facilities that *only* the ILEC can provide. *Only* the ILEC can provide interconnection with the ILEC’s network (section 251(c)(2)); *only* the ILEC can provide access to elements of the ILEC’s network (section 251(c)(3)); and *only* the ILEC can provide collocation for purposes of interconnection and/or access to unbundled network elements (section 251(c)(6)). Accordingly, Congress required ILECs to provide those things at cost-based rates. *See* McPhee Rebuttal at 29.

The significance of the evidence of competition in this case should not be misunderstood. AT&T Illinois is *not* trying to prove that a transit requirement in the 1996 Act should be relaxed because competition makes the requirement obsolete. Quite the opposite, AT&T Illinois' point is that the 1996 Act, properly read, does not require transit service, and that the Commission should not stretch to find such a requirement, because there has been no showing that AT&T Illinois has a monopoly for transit service that warrants artificial regulation of AT&T Illinois' prices. Indeed, with the Commission having repeatedly found that the 1996 Act does not require transit service, and that nothing in federal or state law requires AT&T Illinois to provide transit at TELRIC-based rates, the burden should be on Sprint to prove that a complete absence of competition warrants a change of course. (Though even then, there would not be a sound legal basis for a change of course.)

There is a second potential misunderstanding the Commission must avoid: The evidence we discuss below proves that there is a competitive market for transit service in Illinois, and that competition is disciplining prices in that marketplace. As a result, transit rates in that marketplace are typically lower than the rate AT&T Illinois is proposing here. *But this arbitration is not part of the competitive marketplace.* Thus, the Commission should not be surprised if AT&T Illinois's proposed transit rate in this regulated proceeding is higher than rates that are available in the unregulated marketplace of commercial transit agreements, and it would be a mistake for the Commission to require AT&T Illinois to give Sprint the same price in a regulated interconnection agreement that Sprint could obtain in the unregulated free market.

AT&T Illinois witness Dr. Oyefusi holds a Ph.D. in Economics and is responsible for managing AT&T's wholesale costs of providing long distance service and the costs that AT&T's CMRS arm, AT&T Mobility, incurs when it provides CMRS service. Oyefusi Rebuttal at 1-2.

Dr. Oyefusi has first-hand knowledge about competition for the provision of transit service; his job responsibilities include negotiation of agreements for transit service to facilitate the indirect exchange of traffic between AT&T Mobility and other carriers. *Id.* at 3. Dr. Oyefusi testified that “there is robust competition for the provision of transit service, both nationwide and in Illinois, and that competition disciplines the rates at which transit service is available to carriers, including Sprint, in the competitive marketplace.” *Id.* at 2.

Some transit service agreements that Dr. Oyefusi negotiates on behalf of AT&T Mobility are with ILECs, such as AT&T Illinois; others are with carriers that are not ILECs. *Id.* at 4. Such carriers are typically called “alternate tandem” providers, because “these companies evolved to provide competitive alternatives to the ILEC’s services, including transit service.” *Id.*

The most prominent of these alternate tandem providers are Neutral Tandem (now Inteliquent), Level 3 and Peerless, all of which have an almost nationwide presence – including Illinois – and also Common Point, LLC, which has a tandem presence only in Illinois, according to the LERG. *Id.* at 4-5. All these companies provide transit service in Illinois and have listed tandem switches in Illinois in the LERG. *Id.* at 5.<sup>55</sup>

Dr. Oyefusi verified in the LERG that the transit providers identified above are listed as owning tandem switches that either are currently subtended or could be subtended by end offices assigned an Illinois code, *i.e.*, they are performing or could perform transit function or similar alternate tandem service. In fact, in all the LATAs where AT&T Illinois currently has a tandem switch according to the LERG, there is at least one other carrier that also shows tandem presence

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<sup>55</sup> The LERG is a routing database that stores information necessary to properly route traffic throughout the North American Numbering Systems, which includes the United States. It contains the industry standard North American Numbering Plan data, such as NPA-NXX “Block” information, switch identification or location information, and the operating company information (“OCN”) of the carrier to which the NPA-NXX “Blocks” and the switches are assigned. It is possible to determine from the LERG how each carrier’s switch (end office or tandem) relates to all other switches in the LERG. The LERG data can be used to determine where carriers’ switches are located and the carriers’ network designs. *Id.*

and that alternate tandem is currently being subtended by carriers in Illinois. Furthermore, in the Chicago LATA (LATA 358) – in which Sprint is very active – the LERG shows that at least three alternate providers have tandems that are subtended by other carriers. *Id.* at 6.

There can be no disagreement but that Neutral Tandem, Peerless and Common Point provide competitive transit services. In fact, their public statements say that they do. For example, in its comment on AT&T’s petition to transition from TDM to IP, Peerless proclaimed that it “operates as a CLEC, competitive tandem provider, and long distance company throughout the United States.” *See* Oyefusi Rebuttal at 6-7. Peerless also claims it is able to offer local transit service at 70 – 90% lower than current ILEC rates,” and that its “tandem switched access rates are up to 50% less than when all costs are included.” *Id.* at 7.

Likewise, Inteliquent (Neutral Tandem) touts its competitive presence and successes. In its brochure (Schedule OAO-1), Inteliquent states, “we make interoperability as easy, efficient, and effective as communicating face-to-face. We accomplish this by leveraging our robust and dynamic MPLS network, which supports the traffic of some of the largest carriers in the world. It is the backbone that enables us to provide . . . . the best possible voice, IP transit, Ethernet and hosted services available.”

In addition to the alternate tandem providers whose activities Dr. Oyefusi found a manifestation of a competitive market, other providers – XO, Big River, Broadwing, and Bullseye have filed tariffs to provide transit service in Illinois. *McPhee Rebuttal* at 30-31; Schedule JSM-4. Further evidence of a competitive transit market appears in Schedule JSM-5, which is Reply Comments that one provider of alternate tandem service, Neutral Tandem, filed at the FCC last March in a docket in which the FCC is considering transit service issues. *McPhee Rebuttal* at 31. In those comments, Neutral Tandem pointed out that:

- “[T]he transit service market represents ‘the hallmark of a competitive market’ and therefore, setting ILEC tandem transit service rates at TELRIC levels would stifle competition and inhibit network investment.” Neutral Tandem Comments at 2.
- “Local tandem service is widely available and the market for this service is competitive.” *Id.*
- “Neutral Tandem provides service in 189 of the 192 LATAs in the contiguous United States [including all LATAs in Illinois].” *Id.* at 2-3.
- “Lower prices, better service and innovation solutions for local tandem transit service are the direct result of the competitive tandem transit service marketplace.” *Id.* at 3.

*See also* Schedule JSM-6 (discussed in McPhee Rebuttal at 31-32, these comments to the FCC note that “there is no sound policy reason for subjecting transit services to TELRIC rate regulation,” because, among other reasons, “the transit marketplace is competitive in the vast majority of locations,” and that “Peerless Network notes that it ‘is now connected to nearly every major domestic carrier offering call origination and termination service in over 100 LATAs and 30 MTAs,’ and that Level 3 has “approximately six million *active* numbers that are being homed behind Level 3 tandems, and a voice network that carries eight billion minutes per month and processes more than 80 million calls every day”).

At the evidentiary hearing, Sprint went to considerable lengths to make the point that AT&T Illinois did not prove that Sprint can use an alternate tandem provider to reach each and every carrier that terminates traffic to end users in Illinois. Tr. at 711-720. But AT&T Illinois is not trying to prove that Sprint can take *all* its transit business to one alternate tandem provider and obtain no transit service from AT&T Illinois. Rather, AT&T Illinois’ point is that there is “sufficient competition,” in this Commission’s words (*see supra* at 132) so that the Commission should not be looking for a justification to regulate AT&T Illinois’ transit rates.

In short, Dr. Rearden's statement that it would be in the public interest to reduce AT&T Illinois' transit rate "closer to cost" is not supported by the reality in Illinois. Oyefusi Rebuttal. at 8. The transit market is competitive, so the appropriate standard for judging competitive service rates should be a market-based one. While it might be good public policy to regulate the prices that a firm with monopoly power charges for bottleneck facilities, it is bad public policy (and contrary to economic principle) to regulate prices of products for which there is competition. *Id.* at 8-9.

As discussed at the evidentiary hearing, the AT&T ILECs, including AT&T Illinois, have negotiated a 22-state commercial transit agreement AT&T Mobility that has a uniform rate for transit service, applicable in all states, that is considerably lower than the rate AT&T Illinois proposes to charge Sprint in the parties' arbitrated interconnection agreement. Because the rate in that AT&T Mobility agreement applies in all 22 AT&T ILEC states and is "like an average rate that was negotiated" (Tr. at 769 (Oyefusi)), it is impossible to determine, based on the evidence of record, what rate the agreement assumes for Illinois. But one would expect the assumed Illinois rate to be lower than the tariffed rate that AT&T Illinois proposes to charge Sprint. The competitive marketplace in which transit agreements are commercially negotiated and in which pricing is disciplined by competition is one thing, and this arbitration proceeding is quite another thing. As Dr. Oyefusi testified, one would *not* expect AT&T Illinois to seek to compete in the transit market by means of arbitrated interconnection agreements (Tr. at 773), and one would expect AT&T Illinois to offer Sprint a lower transit rate if the parties were negotiating a commercial transit agreement, unfettered by the regulatory process, than AT&T Illinois is proposing in this proceeding (*id.* at 774-776). Dr. Oyefusi also testified that he would expect the AT&T ILECs to make available to Sprint the same rates, terms and conditions for transit service

as the AT&T ILECs have made available to AT&T Mobility (*id.* at 771), and the AT&T ILECs are in fact willing to do exactly that – in a commercial, negotiated agreement.

**6. The Commission should direct the parties to include AT&T Illinois’ tariffed, Commission-approved transit rate in their ICA.**

AT&T Illinois’ proposed rate for transit service, which is composed of the same rate elements contained in AT&T Illinois’ Commission-approved tariff for transit service, should be incorporated into the ICA. McPhee Direct at 6. AT&T Illinois’ rate elements for transiting are in its Tariff No. 22, Part 23, section 2, 1<sup>st</sup> Revised Sheet 4, as set forth in Schedule JSM-1. The transit rate AT&T Illinois proposes for Sprint’s ICA is the sum of the transit rate elements in AT&T Illinois’ tariff. Specifically, AT&T Illinois is proposing a rate of \$0.005034 per MOU, which is the sum of the rates contained in AT&T’s tariff. McPhee Direct at 6. It is undisputed that the Commission has reviewed and approved those rates. *See id.* at 7.

As noted above, the Commission approved the use of AT&T Illinois’ tariffed transit rates in the AT&T Illinois/MCI ICA that was the subject of arbitration in Docket 04-0469. And less than two years ago, the Commission again adopted the same tariffed transit rates for an arbitrated interconnection agreement. Arbitration Decision, Docket No. 11-0083, *Illinois Bell Telephone Company Petition for Arbitration of Interconnection Agreement with Big River Telephone Company, LLC* (June 14, 2011) (“*Big River Arbitration Decision*”), at 38-39.

Sprint contends that AT&T Illinois’ Commission-approved transit rate is outdated, and that there have been “dramatic changes in switching technology and network costs that make such rates, necessarily, no longer TELRIC-compliant.” Farrar Direct at 28. Specifically, Sprint claims that a forward-looking TELRIC cost study at this time would have to assume packet switching or soft switch technology, rather than the circuit switches upon which the rates the

Commission approved in Docket No. 98-0396 were based. *Id.* at 29. As AT&T Illinois witness Dr. Kent Currie explained, that is incorrect.

Dr. Currie is a cost expert. For the last thirteen years, he has developed methods that determine the costs incurred by the AT&T ILECs, including AT&T Illinois, for providing telecommunications services. He also supervises the production of cost studies, and analyzes cost study results. Before that, he had similar responsibilities at Ameritech, where he developed and maintained the methodological framework for economic cost studies for Ameritech's telecommunications services. These cost methods are used in many types of studies, including TELRIC studies. Rebuttal Testimony of Dr. Kent A. Currie ("Currie Rebuttal") at 1. Sprint's witness on Issue 43 is a "Regulatory Policy Manager." Farrar Direct at 1. He cannot match Dr. Currie's credentials as a cost expert. *See id.* at 1-3.

As Dr. Currie explained, even if TELRIC rules applied to transit service, they do not require an assumption that the network would use packet switching or soft switches, much less that the network would *only* use such switches, as Sprint assumes. Currie Rebuttal at 3. Today, a TELRIC-compliant cost study should be based on a network design that is economically and technically compatible with handling voice traffic over the PSTN based on existing wire center locations. At present, PSTN switches handle voice traffic using a Time Division Multiplexing ("TDM") format over circuits. Switches that exclusively use data packets for handling voice traffic, such as packet switches or soft switches, are not compatible with the current PSTN. AT&T Illinois' current voice network contains no switch using data packets for handling voice traffic to or from other PSTN switches. *Id.* at 3-4.<sup>56</sup>

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<sup>56</sup> AT&T Illinois does have one switch that could be used as a soft switch, but that is not. Tr. at 555-556 (Albright).

In addition, TELRIC requires that the network equipment assumed in a cost study be efficient for the job the ILEC has to do. 47 C.F.R. § 51.505(b)(1). While some small carriers may have deployed soft switches, that does not mean that soft switches could or would be employed on a large-scale basis in AT&T Illinois' network, which transmits voice traffic using only the TDM format. Soft switches using data packets for handling voice traffic need additional equipment to work with the existing PSTN. Since AT&T Illinois and other AT&T ILECs today have, and must have, switches that handle voice traffic using a TDM format rather than using data packets, trying to construct and project costs for a hypothetical network that exclusively relies on handling voice traffic using data packets would, for TELRIC-costing purposes, be excessively speculative. *Id.* at 4.

In a state commission proceeding in Connecticut, Sprint argued, exactly as it does here, that, "AT&T's cost studies [for reciprocal compensation and transit service] are not forward looking, because they exclude soft switch technology. According to Sprint, developing costs that use the most efficient technology and configurations and use the 'long run' time horizon, as required by TSLRIC,<sup>57</sup> requires that soft switches be included in the study." Decision, Docket No. 09-04-21, *DPUC Investigation into the Southern New England Telephone Company's Cost of Service*, 2010 WL 1821240 (Conn. Dept. Pub. Util. Control April 14, 2010), at 8.<sup>58</sup> The Connecticut commission rejected Sprint's argument, and its rationale applies equally here:

[W]hen conducting a TSLRIC cost study, there is a fine line between estimating forward-looking costs using the most efficient technology available and the lowest cost network configuration versus estimating entirely hypothetical costs that have no basis in relation to the ILEC. While the record indicates that soft switching technology is available, if employed,

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<sup>57</sup> TSLRIC is very similar to, and for present purposes identical to, TELRIC.

<sup>58</sup> The Connecticut decision as reported on Westlaw does not show pagination in the text. The cite to page 8 refers to the page number on the upper right hand corner of the page when the decision is printed.

[AT&T Connecticut] can only begin deploying soft switches as a hybrid network in conjunction with its existing circuit based switches. Such a hybrid network would require a seamless transmission of switched traffic encompassed with ancillary facilities and costs for the protocol conversions. Thus, while on a standalone basis soft switches are presumably more efficient (and lower in cost) than the legacy circuit switches in the ILEC networks, there is no evidence in the record that a hybrid network of soft switches and circuit switches is necessarily the least cost configuration for AT&T in Connecticut at this time. . . .

[T]he most efficient technology must be available to the industry as well as “compatible with the existing infrastructure.” There is no information on the record which indicates that replacement of all of AT&T’s digital switches with soft switches would be operationally feasible or compatible with [AT&T’s] existing infrastructure. The fact that AT&T is not using soft switches and has no plans to use them in the foreseeable future raises questions as to whether the mere availability of soft switches necessarily translates into operational feasibility or compatibility with [AT&T’s] existing infrastructure. . . .

[R]equiring AT&T to assume the presence of soft switches in its cost study, in the absence of any reliable pricing information or vendor contracts for switches, would result in an entirely hypothetical network at this time. The Department finds that such an outcome would calculate costs that are unlikely to accurately reflect the forward-looking costs AT&T would incur in providing . . . TTS [transit traffic service]. Additionally, even if AT&T were to have plans to deploy some soft switches, the cost studies would have to reflect a hybrid network of soft switches and circuit switches, which may not necessarily result in lower overall costs due to the possible integration of circuit and soft switches.

Therefore, the Department will not require AT&T to assume the presence of soft switches in its . . . TTS studies at this time. Accordingly, [the] recommendation to reduce AT&T’s switching costs by one-third is hereby denied as [is] the Sprint . . . recommendation[] to reject AT&T’s cost studies outright.

*Id.* at 18.<sup>59</sup>

The only concrete basis for Sprint’s assertion that AT&T Illinois’ Commission-approved cost-based transit rate is obsolete is Sprint’s contention that a current cost study would assume

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<sup>59</sup> See footnote immediately above.

the use of soft switches.<sup>60</sup> Sprint has offered no competent evidence to prove that contention – only the self-serving pronouncements of its policy witness. AT&T Illinois, in contrast, offered expert testimony that a current TELRIC study would *not* assume the use of soft switches. Sprint has not carried its burden of proof on this point, and Sprint’s argument was rejected, based on the eminently cogent analysis quoted above, by the one state commission that considered it. The Commission should therefore reject Sprint’s contention, and approve the tariffed rate for use in Sprint’s ICA, just as it approved the same rate for us in Big River’s ICA less than two years ago. Nothing has changed that would warrant a different decision here.

7. **In no event should the Commission adopt any of Sprint’s “benchmark” rates.**

Even if AT&T Illinois were required to provide transit service at a cost-based rate (which it is not), and even if AT&T Illinois’ current cost-based transit rate were obsolete (which it is not), the Commission still could not adopt any transit rate that Sprint has proposed. Sprint states that we are “without a valid cost study to evaluate AT&T’s transit costs” (Farrar Direct at 29), and so offers four “benchmark” rates for the Commission to consider in order to arrive at an interim proxy rate (*id.*) One of those four “benchmarks” is AT&T’s current reciprocal compensation rate for carriers that opt for it (\$0.0007 per minute of use). In the end, Sprint proposes that the Commission cut that rate in half to yield a transit rate of \$0.00035, which it proposes the Commission impose until such time as a new TELRIC-based rate is established. *Id.* at 37. Sprint’s proposed rate is about 7% of AT&T Illinois’ current, Commission approved rate

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<sup>60</sup> Sprint also suggests the rate is obsolete because the studies on which it is based are old, but costs do not necessarily decrease over time. As Dr Currie testified, one would expect some cost inputs to have decreased and others to have increased. Tr. at 313. For example, Illinois labor costs have increased significantly since the last transit cost study was performed. Tr. 313-14.

– the tariffed rate that almost all carriers in Illinois pay.<sup>61</sup> In other words, Sprint is proposing a rate reduction of about 93% – a reduction that, at least for some time, would apply only to Sprint.

Sprint’s highest “benchmark” is roughly four and a half times greater than Sprint’s lowest “benchmark.”<sup>62</sup> This wide variation shows that what Sprint is proposing is, at the end of the day, a guess. In the Big River arbitration, Staff expressed a view that applies here as well. In its brief in that proceeding. Staff stated:

The Commission is offered two choices here. The first is to adopt a rate based on Illinois-specific TELRIC studies that it and the Staff have thoroughly reviewed in several contested proceedings. The second is to adopt a rate from another state, supported by no cost information. Very obviously, the Commission should follow the former course.

McPhee Rebuttal at 56 (discussing Docket No. 11-0083, Initial Brief of the State of the Illinois Commerce Commission (April 18, 2011) (“Staff Big River Brief”), at 18).

The Commission is offered much the same choice here. It can adopt a rate for the Sprint ICA – the same rate it adopted for the Big River ICA – based on Illinois-specific TELRIC studies that it and the Staff have thoroughly reviewed in several contested proceedings. Or it can, as Staff witness Rearden put it in this case, adopt “a non-Illinois, non-TELRIC rate that is a proxy for TELRIC in this state” (Rearden Direct at 18) based on Sprint’s supposed benchmarks, which we discuss next.

**a. Sprint “benchmark”: Reciprocal compensation rate**

We address this benchmark first, because Sprint ultimately proposes a transit rate that uses what Sprint calls AT&T Illinois’ current reciprocal compensation rate as a starting point.

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<sup>61</sup> The exceptions are any carriers that have entered into negotiated commercial transit agreements with a different rate, as Sprint is welcome to do.

<sup>62</sup> Sprint’s lowest “benchmark” is “\$.0.00017 per minute, plus a small incremental amount for . . . transport.” Farrar Direct at 31. Sprint’s highest “benchmark” is \$0.000947 – the Texas rate. *Id.* at 33. In the Big River arbitration, it was this Texas rate that Big River proposed, and the Commission rejected, as a substitute for the Commission-approved Illinois transit rate. MCPhee Rebuttal at 35 n.59.

Sprint recognizes that the \$0.0007 reciprocal compensation rate is “not necessarily cost-based,” but speculates that AT&T would not have agreed to that rate if it did not at least recover AT&T’s costs. Farrar Direct at 62. Sprint admits it does not actually know this, but is merely assuming it. *Id.*

Sprint’s assumption is irrational. As the Commission is aware, the \$0.0007 rate was promulgated by the FCC in its *ISP Remand Order*.<sup>63</sup> Recognizing that CLECs were manipulating the reciprocal compensation system (*i.e.*, engaging in “arbitrage”) by generating huge volumes of terminations to ISP customers – terminations for which the CLECs charged ILECs reciprocal compensation – the FCC sought to mitigate the problem by, among other things, subjecting reciprocal compensation rates for ISP-bound traffic to a series of reductions pursuant to a schedule under which the current rate is \$0.0007. In each state, an ILEC could take advantage of the reduced reciprocal compensation rates for the huge volumes of ISP-bound traffic on which it paid reciprocal compensation by agreeing to charge the same rate for reciprocal compensation-eligible traffic that it terminated. If an ILEC was originating more reciprocal compensation eligible traffic (including ISP-bound traffic) than it was terminating, the ILEC would rationally agree to exchange all traffic at the low, non-cost based \$0.0007 rate. Thus, the fact that an ILEC chose to exchange traffic at this rate absolutely does not imply that the rate allows the ILEC to recover its costs; far more likely, it means that the ILEC sought to reduce its net reciprocal compensation payments by obtaining a low (possibly even below-cost) rate.

Thus, common sense tells us that AT&T Illinois voluntarily agreed to the \$0.0007 rate offered by the FCC because that reduced rate would lower AT&T Illinois’ net reciprocal

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<sup>63</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd. 9151(2001) (“*ISP Remand Order*”) (subsequent history omitted), available at 2001 WL 455869.

compensation expense. It stands to reason that AT&T Illinois would have agreed to a \$0.00007 rate, or a \$0.000007 rate, or a rate of zero. There is no reason to think that the decision had anything to do with AT&T Illinois' costs.

Consequently, Sprint's proposed \$0.00035 transit rate is a non-starter, because there is no basis for Sprint's assumption that the \$0.0007 reciprocal compensation rate on which it is based has any relationship whatsoever to AT&T's costs.

The reasoning behind Sprint's proposal to cut the \$.0007 reciprocal compensation rate in half to arrive at a transit rate is also flawed. Given that reciprocal compensation covers both tandem switching and end office switching, while the transit rate covers only tandem switching, and assuming that tandem switching and end office switching have equal costs, Sprint hypothesizes that rough justice will be done by cutting the reciprocal compensation rate in half to arrive at a transit rate.

Sprint's logic falls apart, however. There are costs that are assigned to end office switching for purposes of calculating reciprocal compensation costs but that must be assigned to tandem switching for purposes of calculating transit costs. Currie Rebuttal at 7. As a result, Sprint is simply wrong when it posits that it is reasonable to cut the reciprocal compensation rate in half in order to arrive at a transit rate.

This Commission has previously considered, and rejected an argument much like Sprint's. In its *MCI Arbitration Decision*, the Commission rejected a proposal by MCI to set the transit tandem switching rate equal to the tariffed reciprocal compensation tandem switching rate. MCI, like Sprint, asserted that the underlying costs of tandem switching are the same for transit traffic and reciprocal compensation traffic. The Commission found MCI's assertion irrelevant, stating (at 123):

Even if that is true, however, it is not sufficient grounds for setting transit tandem-switching rate equal to the tandem-switching rate for reciprocal compensation traffic, as transit traffic is not subject to the same set of rules and regulations. Unlike the tandem switching rate for reciprocal compensation traffic, *the tandem switching rate for transit traffic is not required to be cost-based under either federal or state law. MCI's cost-based justification thus is not appropriate.* (Emphasis added.)

**b. Sprint “benchmark”: AT&T ILEC rates in other states**

Sprint absurdly suggests that a reasonable benchmark would be the “lowest AT&T transit rates in Interconnection agreements from other states.” Farrar at 32. Sprint gives no explanation why the *lowest* rates in other states would be a reasonable benchmark, rather than the highest rates, or an average rate, but the reason is obvious: Sprint wants the lowest possible rate. This proposal merely underscores the randomness of Sprint’s approach to transit rates in general.

Apart from that, it would not be reasonable to use other states’ rates to set rates for Illinois. In the first place, the very rates that Sprint displays in its testimony show that there is a considerable variance from state to state (contrary to Sprint’s claim that “transit costs do not vary significantly between the various AT&T states” (*id.*)). Sprint states that the three rates displayed in its testimony (*id.* at 33) are AT&T’s three lowest rates, so if Sprint’s claim that that rates should be relatively constant from state to state were correct, one would expect these three rates – clustered together at the bottom – to be quite close. In fact, however, the second lowest rate is about 50% higher than the lowest, and the third lowest is more than double the lowest. That alone, without even considering the higher rates in other AT&T states,<sup>64</sup> refutes Sprint’s contention. Given the wide variation in transit rates from one state to another, Sprint’s unexplained proposal to cherry-pick the lowest rates is patently unreasonable.

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<sup>64</sup> In Nevada, Sprint pays AT&T more for transit service than AT&T Illinois proposes to charge. In Ohio, Sprint pays AT&T \$0.005001, virtually the same as AT&T Illinois’ proposal. In Indiana, Sprint pays AT&T \$0.004539, only somewhat less than what AT&T Illinois proposes but 1,000% of the Michigan rate Mr. Farrar quotes. In Kansas, Sprint pays \$0.002363/MOU, about 510% the Michigan rate. Sprint pays a bit less in Arkansas (\$0.002146). McPhee Rebuttal at 41 n.70.

Furthermore, the notion of basing an Illinois rate on rates in other states is counter to the core precept that TELRIC-based rates are state-specific rates established on a state-by-state basis by individual state commissions. When the Commission ordered that the same transit rate that AT&T Illinois is proposing here be included in Big River's ICA in Docket 11-0083, the Commission rejected the rate proposed by Big River precisely because that rate was not based on AT&T Illinois' costs, while AT&T Illinois' proposed rate was. The Commission concluded:

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

*Big River Arbitration Decision* at 38.

**c. Sprint “benchmark”: Frontier’s transit rate**

As its third “benchmark,” Sprint proposes the rate Frontier charges Sprint for transit service. Farrar Direct at 35. This is the height of silliness. The Commission should attach no significance to the rate that Frontier agreed to charge Sprint, in exchange for who knows what. Recall that FCC Rule 809, 47 C.F.R. § 51.809, requires a carrier that wants to adopt an interconnection agreement under section 252(i) of the 1996 Act must adopt the agreement in its entirety. The rationale for that Rule is that parties can agree to whatever they wish in an interconnection agreement, regardless of the requirements of section 251(b) and 251(c) of the 1996 Act. As a result, parties may horse trade, and it would be unfair to allow a third party to adopt (for example) a low rate that the incumbent agreed to for one service without also accepting (for example) the high rate that the other carrier agreed to for another service. The bottom line is that the rate that Frontier agreed to charge Sprint for transit service has absolutely no bearing on the rate AT&T Illinois should charge Sprint.

**d. Sprint “benchmark”: an AT&T letter.**

Sprint’s fourth and final “benchmark” is an AT&T letter that Sprint contends supports a transit rate of “\$.00017 per minute, plus a small incremental amount for the transport between the AT&T switch and terminating network.” Farrar Direct at 31. This is another absurd suggestion. It is unthinkable that the Commission would establish a rate based on a letter. And AT&T Illinois witness Dr. Currie explains why Sprint’s reliance on this particular letter is misplaced. Currie Rebuttal at 5.

**Conclusion on Issue 43**

For the reasons set forth above, the parties’ ICA should include AT&T Illinois’ tariffed, Commission-approved transit rate, \$0.005034 per MOU.

**VII. GENERAL TERMS AND CONDITIONS ISSUES; DEPOSIT, ESCROW AND TERMINATION (50, 51, 52, 53, 57, 58, 60)**

**ISSUE 50: Should the definition of “Cash Deposit” and “Letter of Credit” be Party neutral?**

**(GT&C sections 2.20, 2.68)**

**ISSUE 51(a): Should the deposit requirement apply to both parties or only to the requesting carrier?**

**(GT&C section 9.0 and all subsections)**

**ISSUE 51(b): Should the ICA provide that no deposit requirement is required as of the Effective Date based upon Sprint’s and AT&T’s dealings with each other under their previous interconnection agreements?**

**(GT&C section 9.1)**

**ISSUE 51(c): Under what circumstances should a deposit be required and what should be the amount of the deposit?**

**(GT&C sections 9.2 and 9.5)**

**ISSUE 51(d): What other terms and conditions governing deposits should be included in the ICA?**

**(GT&C sections 9.3, 9.4, and 9.6 - 9.14)**

**AT&T Illinois Position:** The ICA should allow for a deposit not only when a party fails to promptly pay its bills, as Sprint unreasonably proposes, but also when a party's financial condition is sufficiently poor to call into question its ability to pay its bills, such as when the party files for bankruptcy. The deposit amount at three months' anticipated billings, as AT&T Illinois proposes and Staff recommends. In addition, the Commission should adopt AT&T Illinois' proposed language, and reject Sprint's proposed language, concerning the return of deposits; deposit demands on the Effective Date; other deposit language; and the use of the AT&T Illinois letter of credit form. If the Commission resolves those matters in favor of AT&T Illinois, AT&T Illinois does not object to making the deposit language apply equally to both parties; otherwise, the language should apply only to Sprint, and any carriers that adopt Sprint's ICA.

The parties agree that the ICA will include language governing deposits, and Issues 50, 51(a), 51(b), 51(c) and 51(d) concern that language. These issues encompass the following matters:

1. Whether the deposit requirement should apply to AT&T Illinois or only to Sprint and any carrier that adopts Sprint's ICA (Issues 50 and 51(a))
2. Circumstances in which a deposit may be demanded (Issue 51(c))
3. Deposit amount (Issue 51(c))
4. Return of deposit (Issue 51(d))
5. Whether a deposit can be demanded on the Effective Date (Issue 51(b))
6. Other terms and conditions governing deposits (Issue 51(d))
7. Whether AT&T Illinois' Letter of Credit form should be used (Issue 50)

We first explain the purpose of the deposit requirement, and then address the matters listed above in the indicated order.

When AT&T Illinois provides products and services pursuant to the ICA, it is providing those products and services on credit, because it does not bill the other carrier until after the products and services are provided. Like other businesses that sell on credit, AT&T Illinois, and other carriers, typically wish to be able to obtain a deposit from their customers – especially

customers that are a credit risk – in order to be assured that they will receive the payment that is due. Direct Testimony of William E. Greenlaw (“Greenlaw Direct”) at 5.<sup>65</sup>

Deposits are a critically important protection against excessive losses resulting from non-payment of bills. Just as any company that sells on credit may reasonably ask purchasers for a deposit, and is most apt to want a deposit from newer customers or customers whose financial condition is uncertain, so AT&T Illinois reasonably asks carriers that do not have an established credit history with AT&T Illinois or whose financial condition is shaky to make appropriate deposits. Greenlaw Direct at 7.

In the retail context, the Illinois Administrative Code is consistent with AT&T Illinois’ position here. Section 735.100 of Title 83 allows carriers to demand deposits from new customers that do not provide satisfactory credit information, and section 735.110 allows carriers to demand deposits from existing customers that pay their bills late. Section 735.120 caps deposit amounts at two months’ estimated charges for residential customers and four months’ for business customers. AT&T Illinois does not contend that the deposit provisions in a wholesale interconnection agreement should exactly track the rule that applies to retail customers. The Code provisions are significant, however, because they recognize that a deposit is a reasonable and accepted mechanism to minimize a service provider’s losses to customers that are credit risks – including (as we emphasize below) not only customers that pay their bills late, but also new customers that do not provide satisfactory credit information. *See* Greenlaw Direct at 7. And indeed, the Commission has previously taken guidance from these Code provisions in determining the deposit provisions that should be included in an ICA.

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<sup>65</sup> Sprint has suggested that normal commercial considerations do not apply because Sprint and AT&T Illinois are co-carriers rather than buyer and seller. That suggestion is baseless. To be sure, the Sprint/AT&T Illinois relationship is not *merely* a buyer/seller relationship, but AT&T Illinois does sell services to Sprint, and it is just as important that Sprint pay for those services as it is for any purchaser to pay for what it buys.

Sprint has generally not been a significant credit risk. Nonetheless, there are compelling reasons for including the same deposit language in Sprint's ICA that would be included in the ICA of a less substantial company: First, other carriers may adopt Sprint's ICA under section 252(i) of the 1996 Act. Because of that, AT&T Illinois needs the ICA to include deposit terms that are reasonable vis-à-vis other carriers, not just Sprint. Commission Staff has recognized that this is a valid consideration, stating, "Staff concurs . . . that SBC must establish deposit standards that will not negatively impact it if and when other carriers seek to opt in to the ICA." *MCI Arbitration Decision*, Docket No. 04-0469, at 15. Second, the Commission's resolution of the deposit issues in this case will establish a precedent to which other carriers will point when they are negotiating, or arbitrating, an ICA. And third, while Sprint has not been a significant credit risk in the past, Sprint's financial condition, and thus Sprint's creditworthiness, could change.

1. **Whether the deposit requirement should apply to AT&T Illinois or only to Sprint and any carriers that adopt Sprint's ICA (Issues 50 and 51(a))**

There are sound reasons that only Sprint (and any carrier that adopts Sprint's ICA) should be subject to the ICA's deposit requirements, and that AT&T Illinois should not. *See* Greenlaw Direct at 9-13; Rebuttal Testimony of William E. Greenlaw ("Greenlaw Rebuttal") at 5. It is more important, however, that the ICA include the substantive provisions AT&T Illinois is proposing in connection with items 2-6 below. If AT&T Illinois' proposed deposit language discussed in those subsections is approved, AT&T Illinois would not object to having those provisions apply to both parties. Tr. at 676-677.

2. **Circumstances in which a deposit may be demanded (Issue 51(c))**

AT&T Illinois' proposed language for GT&C subsections 9.2.1 through 9.2.4 provides that a deposit may be requested under the following circumstances:

- 9.2.1 If based on AT&T Illinois' analysis of the AT&T Illinois Credit Profile and other relevant information regarding Sprint's credit

and financial condition, there is an impairment of the credit, financial health, or credit worthiness of Sprint. Such impairment will be determined from information available from Third Party financial sources; or

- 9.2.2 Sprint fails to timely pay a bill rendered to Sprint by AT&T Illinois (except such portion of a bill that is subject to a good faith bona fide dispute and as to which Sprint has complied with all requirements set forth in Section 11.3 below); and/or
- 9.2.3 Sprint's gross monthly billing has increased, AT&T Illinois reserves the right to request additional security (or to require a security deposit if none was previously requested) and/or file a Uniform Commercial Code (UCC-1) security interest in Sprint's "accounts receivables and proceeds"; or
- 9.2.4 When Sprint admits its inability to pay its debts as such debts become due; has commenced a voluntary case (or has had an involuntary case commenced against it) under the U. S. Bankruptcy Code or any other law relating to insolvency, reorganization, winding-up, composition or adjustment of debts or the like, has made an assignment for the benefit of creditors or is subject to a receivership or similar proceeding.

Those are appropriate triggers for a deposit request, because the purpose of the deposit requirement is to provide assurance of payment, taking into account both a carrier's payment history and its ability to pay its bills in the future. Each of the four enumerated conditions appropriately serves that purpose. Plainly, it may be appropriate for AT&T Illinois to request a deposit if Sprint's creditworthiness or financial health is impaired (§ 9.2.1), or if Sprint fails to pay its bills (§ 9.2.2) or is demonstrably unable to pay its debts as they come due (§ 9.2.4). Likewise, if Sprint's purchases under the ICA increase, it may be appropriate for AT&T Illinois to request an increased deposit or, if no deposit was previously required, an initial deposit (§ 9.2.3).

Significantly, AT&T Illinois' language does not *require* a deposit in any of these circumstances. Instead, it provides only that AT&T Illinois *may* request a deposit. If an established carrier like Sprint fails to timely pay a bill or increases its monthly purchases, AT&T

Illinois may well decide, taking all pertinent factors into account, not to request a deposit. In practice, AT&T Illinois is selective in exercising its right to demand a deposit; in fact, it is currently holding a deposit from only 19 of the 143 CLECs and CMRS providers with which it has ICAs that allow it to demand a deposit, by way either of the explicit language within the ICAs or the underlying tariff provisions referenced therein. Greenlaw Direct at 12; Tr. at 652. Based on AT&T Illinois' history with Sprint, there would likely be circumstances in which AT&T Illinois reasonably would not request a deposit from Sprint even though it would request a deposit from a less established carrier under the same circumstances. *Id.* at 15.

Sprint's proposed language would permit a deposit request only if the Billed Party actually fails to pay its bills. Thus, it would not allow for a deposit under practically any of the circumstances in which a deposit might reasonably be required. For example, under Sprint's language, AT&T Illinois could not request a deposit even if Sprint suffered enormous financial set-backs that utterly destroyed Sprint's creditworthiness, or if Sprint filed for bankruptcy or admitted it could not pay its debts when they came due – which Staff witness Omoniyi acknowledged are circumstances when a deposit demand should be permitted. Tr. at 936-937. Specifically, Sprint's proposed GT&C section 9.2 states that the Billing Party may request a deposit only ***“If, (i) the Billed Party does not pay undisputed charges due under this Agreement for more than fifteen (15) business days after the original Bill Due Date(s), (ii) Billed Party does not cure such failure to pay within ten (10) days of Billing Party's subsequent written notice to Billed Party of such non-payment, and (iii) Billed Party's total unpaid undisputed charges due under this Agreement is more than one-hundred thousand dollars (\$100,000.00).”***

That proposal is unreasonable and inconsistent with normal commercial practice. The notion that a purchaser of goods or services on credit would be subject to a deposit requirement only after it has actually failed to pay its bills is nonsensical. No rational business would limit itself to demanding a deposit only when its customer has actually failed to pay its bills. Given that AT&T Illinois should be able to request a deposit from a carrier that presents a credit risk, which Sprint does not appear to dispute, it follows that it would be unreasonable to allow AT&T Illinois to request a deposit only after the carrier has actually failed to pay its bills and – as Sprint proposes – has failed to cure the non-payment to the tune of \$100,000 or more. Surely AT&T Illinois should be allowed to request a deposit from a customer that (for example) is rated as a serious credit risk by an impartial third party (such as Dun & Bradstreet or Moody’s) that assesses creditworthiness, or that admits it is unable to pay its debts as they come due. AT&T Illinois’ proposed language appropriately allows for that, while Sprint’s does not.

In his prefiled testimony, Staff witness Omoniyi supported Sprint’s position on this issue, and recommended that a deposit request be permitted only based on whether a party is actually paying its bills, and not on the party’s ability or inability to pay. Direct Testimony of A. Olusanjo Omoniyi (“Omoniyi Direct”) at 13. However, the basis for that recommendation is demonstrably weak, as we demonstrate below, and at the evidentiary hearing, Mr. Omoniyi backtracked on his written recommendation (Tr. at 936-937):

Q. All right. You know that in this case, Mr. Omoniyi, we are – AT&T Illinois is proposing that we have the possibility of asking for a deposit under several circumstances, right?

A. Yes.

Q. And one of those circumstances is if the other party files for bankruptcy, right?

A. I believe that was one of your suggestions.

Q. Would you agree with me that if Sprint files for bankruptcy that we should be able to ask for a deposit? I don't think they're gonna, but if they do, wouldn't you agree with me we should be able to ask for a deposit?

A. Yes, I do.

JUDGE HAYNES: What?

BY THE WITNESS:

I do.

BY MR. FRIEDMAN:

Q. What if Sprint publicly declared that it was unable to pay its debts as they come due, shouldn't we then be able to ask for a deposit?

A. That would not be too far from what I just said.

In addition to the fact that Mr. Omoniyi backed away from his prefiled recommendation at the hearing, that recommendation was inappropriately based on the Commission's decision in the 2000 arbitration between Level 3 and Ameritech Illinois, Docket no. 00-0332. Omoniyi Direct at 15. It would be more appropriate for the Commission to look to its more recent 2004 *MCI Arbitration Decision*. Mr. Omoniyi relies on that decision several times elsewhere in his testimony. Omoniyi Direct at 5 & n.11; 18 & n.47; 19 & n.48. But even though the Commission addressed deposit triggers in its *MCI Arbitration Decision*, and even though that decision is more recent and thorough than the Level 3 decision on which Mr. Omoniyi relies, Mr. Omoniyi disregards, and departs from, the Commission's *MCI Arbitration Decision* on the question of deposit triggers.

In the MCI arbitration, MCI contended that a deposit demand was appropriate only "based on the other party's failure to make timely payments under the ICA" (*MCI Arbitration Decision* at 14) – exactly as Sprint contends here. SBC Illinois (as AT&T Illinois then was) proposed deposit triggers very similar to what AT&T Illinois is proposing here, and MCI, like

Sprint here, argued that “SBC’s proposal would permit . . . a deposit based on any number of various triggers . . . even if that party were honoring its payment obligations under the ICA.

Such a result is not commercially reasonable.” *Id.* Staff rejected MCI’s position and

recommended the adoption of SBC Illinois’ proposed deposit triggers, stating (*id.* at 15):

Staff concurs in the proposition that SBC must establish deposit standards that will not negatively impact it if and when other carriers seek to opt in to the ICA. Staff asserts that such protection is particularly important in scenarios where the relationship between SBC and the requesting carrier are vastly different, thereby potentially leading to discriminatory outcomes. To accommodate both parties, Staff recommends the Commission to adopt the following:

- (1) Accept the four bases outlined in Sections 9.2.1 to 9.2.4 proposed by both parties that could trigger a demand assurance of payments.

The Commission adopted that aspect of Staff’s recommendation. Thus, the Commission approved the four triggers for a deposit that AT&T Illinois (SBC Illinois at the time) proposed.

And those triggers were very similar to what AT&T Illinois is proposing here. *See* Greenlaw Rebuttal at 8-9.

In its *MCI Arbitration Decision*, the Commission correctly recognized that AT&T Illinois should be allowed to request a deposit not only when the other party fails to make a timely payment, but also when the other party’s ability to pay is questionable. The Commission should follow the precedent it set there and adopt the language AT&T Illinois is proposing here for GT&C subsections 9.2.1 through 9.2.4 – or, if the Commission finds it preferable, the language it adopted in the MCI arbitration, quoted in Greenlaw Rebuttal at 8-9.

At hearing, Mr. Omoniyi noted that at the time of the MCI arbitration, MCI “had actually filed for bankruptcy or [was] in the process of seeking bankruptcy,” and suggested that “the situation is a little different.” Tr. at 930. But the *MCI Arbitration Decision* cannot be distinguished on that ground, for several reasons. First, while a carrier’s financial condition obviously bears on whether it should be subject to a deposit demand, it does not follow that the

triggers for a deposit set forth in an ICA should vary depending on the carrier's financial condition. In other words, the ICA should provide that a deposit may be demanded from a carrier that admits its inability to pay its debts as they come due or that fails to timely pay its bills, *and that is what the contract should say regardless of the financial condition of the carrier*. In other words, there is no reason that the deposit triggers should vary from one ICA to another, even though the carriers' financial condition, and thus their susceptibility to the triggers, will vary. Second, Staff acknowledged in the MCI arbitration that the ICA needs to include deposit conditions that take into account the possibility that other carriers may adopt the ICA, stating, "Staff concurs in the proposition that SBC must establish deposit standards that will not negatively impact it if and when other carriers seek to opt in to the ICA." *MCI Arbitration Decision* at 15. Thus, Staff's support of the deposit triggers SBC Illinois proposed in that arbitration cannot have been based on MCI's financial condition at the time, because Staff knew the triggers would apply to any carrier that adopted the ICA. And third, the Commission's rationale for approving SBC Illinois' deposit triggers in its *MCI Arbitration Decision* did not even mention MCI's financial condition. *Id.* at 15-16.

### **3. Deposit amount (Issue 51(c))**

Under AT&T Illinois' proposed GT&C section 9.5, the deposit amount is capped at three months' anticipated billings. Sprint's proposed section 9.5, in contrast, would limit the deposit to the lesser of "the Billed Party's total monthly billing under this Agreement for one month or fifty-thousand dollars (\$50,000.00)."

AT&T Illinois' proposal is reasonable, because it corresponds with the risk against which the deposit requirement is designed to protect. Under sections 10 and 11 of the ICA, if a carrier stops paying its bills, AT&T Illinois must continue to provide service to the carrier until (i) the Bill Due Date has passed, (ii) AT&T Illinois has issued a Discontinuance Notice, and (iii)

additional time has passed without the non-paying carrier curing its default. AT&T Illinois and Sprint do not agree about the timing of that sequence (see Issue 58). All told, though, AT&T Illinois' exposure to a carrier that stops paying its bills is approximately equal to three months' billings. Accordingly, in order to avoid loss, AT&T Illinois proposes that it be permitted to request a deposit in an amount up to three months' anticipated billings. Greenlaw Direct at 17-18.

Sprint's proposal is unreasonable. Indeed, it confirms that Sprint, while unwilling to stake out the conspicuously weak position that there should be no deposit requirement, is, as a practical matter, seeking no deposit requirement. If a carrier's bills run to more than \$50,000 per month, then a deposit cap of \$50,000 would obviously fail to provide the assurance of payment that is the universally understood purpose of a deposit requirement. *Id.* at 18. And the \$50,000 is even more obviously unreasonable when it is joined with Sprint's proposal that no deposit can be requested unless a party is in arrears by at least \$100,000. For that matter, even the one-month cap is unreasonable.

This Commission has previously decided what is an appropriate deposit amount in an arbitration, and its decision strongly supports AT&T Illinois' position. In the MCI arbitration, MCI, proposed that the deposit amount be capped at one month's billings, as Sprint proposes here, while AT&T Illinois (SBC Illinois, as it then was) proposed three months. *MCI Arbitration Decision* at 13. The Commission resolved the issue in favor of AT&T Illinois, stating (*id.* at 15):

Both parties to the Agreement understand and accept the role deposits play in this ICA, particularly based on the past history of the parties. SBC seems to accept Staff's proposal . . . that the terms regarding deposit be consistent throughout the Agreement. Both Sections 9.3.3 and 9.10 should request a three-month payment requirement . . . . Although 83 Ill. Adm. Code 735.120(a) caps the amount at four months, it leaves

room for the parties to agree to a lesser amount. It appears from SBC's statements that three months' deposit is sufficient, and that will be adopted.

Staff agrees with AT&T Illinois on this point. Omoniyi Direct at 12-13; 14; 18-19. For its part, Sprint has said nothing to justify its patently unreasonable proposal.<sup>66</sup>

#### **4. Return of deposit (Issue 51(d))**

Sprint proposes a GT&C section 9.7 that would provide for a deposit to be returned if the party that made the deposit establishes 12 consecutive months of good credit history. AT&T Illinois' proposed GT&C sections 9.12 – 9.12.2, in contrast, provide for a deposit to be returned based on a more comprehensive consideration of the party's payment history. AT&T Illinois' language even allows for one bill during a twelve month period to be paid after the Bill Due Date, provided that the carrier has complied with the terms and conditions regarding the handling of billing disputes and payment/disposition of Disputed Amounts. More importantly, AT&T Illinois' language also addresses the issue of the carrier's overall creditworthiness.

The parties' disagreement concerning the return of a deposit parallels their disagreement concerning the circumstances under which a deposit can be requested in the first place. In both instances, Sprint's proposal is inappropriately simplistic, while AT&T Illinois' appropriately takes into account the whole constellation of considerations that a rational business would take into account in deciding when to request a deposit and, here, when to return a deposit. Sprint might say that its proposals have the virtue of being more black-and-white than AT&T Illinois'. Sprint's black-and-white proposals, however, are unreasonable.

If a carrier whose financial condition was shaky enough to warrant a deposit timely pays its bills for twelve months, that would certainly weigh in favor of the return of the carrier's

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<sup>66</sup> Sprint witness Burt did not address this issue in his direct testimony, and his rebuttal merely nitpicks AT&T Illinois' testimony on the subject, but does not offer one word of support for Sprint's proposal. Burt Rebuttal at 55-57.

deposition, but it is not the only pertinent consideration. A carrier in shaky financial condition could short-pay or default on other obligations in an effort to meet the limited criteria for return of deposit with AT&T Illinois if its ICA permitted a return of the deposit based only on twelve months of good payment history. The carrier could then, upon obtaining return of that deposit, stop paying the AT&T Illinois invoices on a timely basis and potentially default on a past due amount.

**5. Whether a deposit can be demanded on the Effective Date (Issue 51(b))**

Sprint proposes that the ICA provide that no deposit will be required as of the Effective Date of the ICA. Specifically, Sprint's proposed GT&C section 9.1 states:

*Based upon the Parties' experience throughout the time any interconnection agreement between the Parties has been in effect, no deposit amount is required from either Party as of the Effective Date.*

Sprint's proposal makes no sense. Regardless of which party's proposed deposit trigger(s) the Commission adopts, if the circumstances that permit a deposit demand under the language the Commission approves are present on the Effective Date, it should be permissible to demand a deposit.

AT&T Illinois is not currently holding a deposit from Sprint, and does not expect to request a deposit on the Effective Date of the ICA the parties are arbitrating. But in the unlikely event that Sprint's financial condition deteriorates by the Effective Date to a point that would permit a deposit request during the term of the new ICA, there is no reason that a deposit request should not be permitted on the Effective Date. Bizarrely, if Sprint's proposed language for GT&C section 9.1 were adopted, AT&T Illinois would be prohibited from requesting a deposit on the Effective Date, but could make such a request the next day – if a trigger the Commission adopts in its resolution of Issue 53(c) is met. It simply does not make sense to include language

in the ICA that would prohibit AT&T Illinois from requesting a deposit on just that one day. Staff agrees. Omoniyi Direct at 21-22.

In addition, AT&T Illinois must make its ICA with Sprint available for adoption by other carriers pursuant to section 252(i) of the 1996 Act. If Sprint's proposed section 9.1 were included in the ICA, any carrier that adopted the ICA would likely take the position that AT&T Illinois could not request a deposit on the Effective Date of that carrier's ICA, no matter how poor the carrier's credit.

**6. Other terms and conditions governing deposits (Issue 51(d))**

AT&T Illinois' proposed deposit language includes some provisions that are disputed, in the sense that AT&T Illinois has proposed them and Sprint has not accepted them, but that the parties did not discuss in their position statements on the Decision Point List ("DPL") or in their direct testimony.

In light of such provisions, the Commission should use AT&T Illinois' proposed deposit language as a starting point, and should adopt that language in its entirety, excepting only such language (if any) as the Commission may reject in light of the parties' presentations on the matters discussed above. In other words, the Commission should accept the language that Sprint has nominally opposed but that the parties have not otherwise addressed, because that language serves a useful purpose.

For example, AT&T Illinois' proposed GT&C section 9.14 addresses what happens upon the expiration of a Letter of Credit or Surety Bond that is provided as a deposit. Sprint's proposed language ignores that subject. AT&T Illinois' proposed language is important because without clearly defined terms and conditions addressing conditions such as how a Letter of Credit shall be renewed or what should occur if the rating of the bonding company guaranteeing

the Surety Bond changes, there is a real possibility that AT&T Illinois (or the Billing Party, if the deposit requirement is made reciprocal) may be left unprotected.

**7. Whether AT&T Illinois' letter of credit form should be used (Issue 50)**

When a deposit is required, it may be provided in the form of a letter of credit. AT&T Illinois would define "Letter of Credit" in GT&C § 2.68 in a manner that would require Sprint, or a carrier adopting Sprint's ICA, to use the AT&T Illinois letter of credit form. Sprint opposes that requirement.

Sprint has never given a reason for its opposition to the AT&T Illinois form. It did not address the point in its Position Statement on the DPL or in its direct testimony (*see* Burt Direct at 3-4 (purporting to address Issue 50, but making no mention of letter of credit form)),<sup>67</sup> and all it says in its rebuttal testimony is that its position is that the Billed Party should be allowed to choose the form it will use, and that "to my knowledge, such a form has never been shared with Sprint." Burt Rebuttal at 42. The reason such a form was not shared with Sprint is that Sprint never asked to see it. Tr. at 64-65 (Burt). And the reason for not giving the Billed Party free rein to use whatever letter of credit form it wants to use is that the Billed Party may choose a form that is not commercially reasonable.

Staff recognizes that the Billed Party should be required to use a commercially reasonable form, and recommends that the ICA so require, rather than providing that AT&T Illinois' form will be used. Omoniyi Direct at 7-8. The problem with that suggestion, though, is that it may lead to disputes over whether a particular form chosen by the Billed Party is or is not "commercially reasonable." That problem can easily be avoided by adopting AT&T Illinois'

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<sup>67</sup> *See* Burt Direct at 3-4 (purporting to address Issue 50, but making no mention of letter of credit form).

proposed language – which is the appropriate resolution of this issue in light of Sprint’s failure to say anything in support of its position.

### **Conclusion Concerning Deposit Issues**

For the reasons set forth above, the Commission should adopt the deposit triggers proposed by AT&T Illinois for GT&C sections 9.2.1 – 9.2.4 or, in the alternative, the very similar deposit triggers the Commission approved in its *MCI Arbitration Decision*. The Commission should cap the deposit amount as AT&T Illinois proposes, and as Staff recommends, and should adopt AT&T Illinois’ proposed language, and reject Sprint’s proposed language, concerning the return of deposits; deposit demands on the Effective Date; other deposit language; and the use of the AT&T Illinois letter of credit form. If the Commission resolves the foregoing matters in favor of AT&T Illinois, AT&T Illinois does not object to making the deposit language apply equally to both parties; otherwise, the language should apply only to Sprint, and any adopting carriers, for the reasons AT&T Illinois has provided.

**ISSUE 52:                    Is it appropriate to include good faith disputes in the definitions of “Non-Paying Party” or “Unpaid Charges”?**

**(GT&C sections 2.77 and 2.124)**

**AT&T Illinois Position:** AT&T Illinois’ proposed definitions for “Non-Paying Party” and “Unpaid Charges” should be adopted, because the contract provisions in which those terms appear have their intended meaning only if those two terms are defined as AT&T Illinois proposes.

The ICA uses the terms “Non-Paying Party” and “Unpaid Charges,” and both terms are defined in the GT&C. Each definition includes a reference to “charges,” and Sprint proposes to insert the word “undisputed” before each of those references. AT&T Illinois opposes the addition of that word.

Sprint bases its proposal on a contention that “[a] party . . . should be entitled to file good faith disputes without the ‘disputed’ amount being considered ‘Unpaid.’” Burt Direct at 56.

That contention is superficially appealing, but it has absolutely nothing to do the question presented by Issue 52. There is only one way to resolve a disagreement about how a term in a contract should be defined, and it is not by means of an abstract contention like Sprint's, because a definition in a contract is not right or wrong in the abstract. Rather, the definition of a contract term either yields the appropriate result when one looks at how the defined term is used in the contract, in which case the definition is appropriate, or it yields an undesired or inappropriate result, in which case the definition is inappropriate.

AT&T Illinois would define "Non-Paying Party" to mean a party that has not made payments of all billed amounts by the Bill Due Date, while Sprint would define "Non-Paying Party" to mean a Party that has not made payments of all *undisputed* amounts by the Bill Due Date. Similarly, AT&T Illinois would define "Unpaid Charges" as any and all charges that have not been paid, while Sprint would define "Unpaid Charges" as undisputed charges that have not been paid. Based on the definitions alone, neither party is "right" or "wrong." To resolve the disagreement, one must look at how the terms "Non-Paying Party" and "Unpaid Charges" are used in the ICA, and decide which definitions yield the right results.

When one looks at how the terms "Non-Paying Party" and "Unpaid Charges" are used in the ICA, it becomes apparent that those terms yield the right results only when they are defined as AT&T Illinois proposes to define them. This is indisputably the case if the Commission decides the next issue, Issue 53, in favor of AT&T Illinois by ruling that a party that wishes to dispute a bill must deposit the disputed amount in escrow, because AT&T Illinois' proposed escrow language uses the terms "Non-Paying Party" and "Unpaid Charges," and the escrow language works as intended only if the word "undisputed" is not added to the definition of those terms. Greenlaw Direct at 27, 28-29. Indeed, neither Sprint nor Staff disputes that if AT&T

Illinois' proposed escrow language is adopted, Issue 52 must be resolved in favor of AT&T Illinois.

But Issue 52 should be resolved in favor of AT&T Illinois even if Issue 53 is not, because *agreed* GT&C section 11.3 works properly only if the terms “Non-Paying Party” and “Unpaid Charges” are defined as AT&T Illinois proposes. Section 11.3 provides, “If the Non-Paying Party desires to dispute any portion of the Unpaid Charges, the Non-Paying Party must complete all of the following actions . . . .” As used in that sentence, “Non-Paying Party” obviously means a Party that has not paid any amounts, including Disputed Amounts. Likewise, “Unpaid Charges” obviously includes charges the Non-Paying Party wishes to dispute. If Sprint’s proposed definitions of “Non-Paying Party” and “Unpaid Party” were adopted, section 11.3 – upon which the parties have agreed – would be rendered meaningless. The point of section 11.3 is that if a party disputes a bill, that party – which the ICA denominates the “Non-Paying Party” – must do certain things. Sprint wants “Non-Paying Party” to mean a party that does not pay *undisputed* charges. If Sprint’s view were adopted, then a party disputing its bill would not be a Non-Paying Party and, therefore, would not have to do the things set forth in section 11.3. That, in turn, would mean that section 11.3 would never apply.

Staff proposes to remedy this problem by modifying section 11.3. Omoniyi Direct at 24. But it is not appropriate to resolve an issue by directing the parties to modify language on which the parties have already agreed. This is especially so here, where there is no possible downside to adopting AT&T Illinois’ proposed definitions. And indeed, *neither Sprint nor Staff has identified any such downside*. If the Commission resolves Issue 53 – the escrow issue – in favor of Sprint, the adoption of AT&T Illinois’ definition of “Non-Paying Party” and “Unpaid

Charges” will not in any way undermine that result; it would only make GT&C section 11.3 work the way it is supposed to work.

**ISSUE 53(a):**            **Should a Party that disputes a bill be required to pay the disputed amount into an interest bearing escrow account pending resolution of the dispute?**

**(GT&C sections 10.8, 10.8.1 – 10.9.2.5.3, 10.12, 10.12.1 – 10.12.4, 10.13, 11.3.3, 11.3.4, 11.5.2 and 12.4.2)**

**ISSUE 53(b):**            **Should a Party that disputes a bill be required to use the preferred form or method of the Billing Party to communicate the dispute to the Billing Party?**

**(GT&C section 10.8)**

**ISSUE 53(c):**            **Should the ICA refer to the Party that disputes and does not pay a bill as the “Disputing Party” or the “Non-Paying Party”?**

**(GT&C sections 10.8, 10.8.1 – 10.9.2.5.3, 10.12, 10.12.1 – 10.12.4, 10.13, 11.3.3, 11.3.4, 11.5.2 and 12.4.2)**

**AT&T Illinois Position:** A party that disputes a bill should be required to deposit the disputed amount in escrow in order to ensure that if the dispute is resolved in favor of the Billing Party, funds will be on hand to pay the bill.

AT&T Illinois proposes that if either party disputes the other’s bill, the disputing party must, subject to several significant exceptions, deposit the disputed amount in an escrow account, so that once the dispute is resolved, the escrowed funds, along with the interest those funds earn, can be disbursed in accordance with that resolution. Sprint objects to having any escrow language in the ICA. That disagreement is the subject of Issue 53(a).

Issue 53(b) concerns the form to be used by a party that disputes a bill. This is addressed below under Issue 60.

Issue 53(c) concerns whether the Party that disputes and does not pay a bill should be referred to as the “Disputing Party” or “Non-Paying Party.” The answer to that question depends on the outcome of Issue 53(a): If the Commission rules that the ICA should require disputed

amounts to be deposited in escrow, then the term “Non-Paying Party” meshes properly with the escrow language, while the use of “Disputing Party” does not; if the Commission rules against AT&T Illinois on the inclusion of escrow terms and conditions in the ICA, then the use of the term “Disputing Party” would be appropriate.

The purpose of AT&T Illinois’ proposed escrow language is to ensure that if the Billed Party disputes a bill and the dispute is resolved in favor of the Billing Party, there will be funds available to pay what is owed. AT&T ILECs, including AT&T Illinois, have lost tens of millions of dollars in the following scenario: A carrier disputes the ILEC’s bills, sometimes with no good faith basis; the dispute is resolved a year or two later in favor of the AT&T ILEC; the carrier files for bankruptcy; and the ILEC ultimately must write off the wrongfully disputed amounts as uncollectible expense. If the carrier is required to escrow disputed amounts, the ILEC is protected against such losses. Greenlaw Direct at 30-31.

Sprint has asserted that an escrow requirement is inappropriate because if a bill is disputed, it is “presumptively erroneous.” Burt Direct at 57. That simply is not so. Sprint’s assertion assumes that parties that dispute their bills are usually correct, but there is no evidence that that is the case. On the contrary, AT&T Illinois knows from experience that many carriers dispute their bills not because the bills are erroneous, but in order to defer their payments – often, until they go bankrupt and are no longer in a position to pay. Greenlaw Rebuttal at 16.

AT&T Illinois’ proposed language requires the Disputing Party to deposit any Disputed Amount (other than for reciprocal compensation and subject to the additional exceptions discussed below) into an interest-bearing escrow account to be held by a qualifying financial institution designated as a Third-Party escrow agent. Disbursement from the escrow account would occur upon resolution of the disputed issues in accordance with the ICA’s dispute

resolution provisions. If the Disputing Party loses the dispute, the Disputed Amounts held in escrow would be disbursed to the Billing Party. If the Disputing Party wins the dispute, it gets its money back, with interest. If there is a split decision on the dispute, the Billing Party and the Disputing Party will be reimbursed from the escrow account proportionately according to the resolution of the dispute. Greenlaw Direct at 32.

GT&C sections 10.8.1.1 – 10.8.1.3 set forth three major exceptions to the escrow requirement:

*First*, subsection 10.8.1 provides that the disputing party need not escrow disputed amounts if the total disputed amounts do not exceed \$15,000. This exclusion recognizes that if the disputed amounts are relatively small, the associated risk is correspondingly small, and there is less justification for any burdens or costs associated with establishing or maintaining an escrow account. *Id.*

*Second*, subsection 10.8.2 provides that the disputing party does not have to escrow the disputed amount if it has established 12 consecutive months of timely payment history and the total amount of its unpaid invoices does not exceed 10% of the then current monthly billing to that party. This recognizes that the risk that the escrow requirement seeks to protect against is reduced when the disputing party is a timely payer and is disputing only a relatively small portion of its total bill. *Id.* at 33.

*Third*, subsection 10.8.1.3 provides that if the billed party believes a billed amount is incorrect because of an arithmetic or clerical error, the billed party can dispute the bill by bringing the error to the billing party's attention without putting the erroneously billed amount into escrow. This exclusion recognizes that there are sometimes readily correctible errors in

bills, and that the billed party should be able to bring such errors to the billing party's attention without escrowing the affected amounts. *Id.*

AT&T Illinois is proposing its standard escrow language. That language evolved from an earlier version that required carriers to deposit *all* disputed amounts in escrow, with none of the exclusions that appear in the current language. AT&T Illinois added these exclusions in order to accommodate concerns that some carriers expressed about what they saw as the burdens of the escrow requirement, and the Commission should attach weight to the accommodations that AT&T Illinois has made. *Id.* at 34.

In response to carrier objections that they should not be burdened with an escrow requirement for small disputed amounts, AT&T Illinois added the \$15,000 threshold – and then the related, but different, exclusion for carriers that are timely payers and that are not disputing the bulk of their bills. *Id.*<sup>68</sup> In response to carrier objections that no escrow should be required when the dispute is about a routine clerical or arithmetic error, AT&T Illinois added that exclusion. *Id.*<sup>69</sup> And the exclusion for reciprocal compensation disputes was also prompted in part by carrier concerns: At one time, the standard escrow language applied only to CLEC and CMRS provider disputes, on the theory that ILECs were not bankruptcy risks. Carriers complained about what they viewed as a lack of parity in that approach, and it was partly in response to that view that the exclusion for reciprocal compensation was added. That exclusion

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<sup>68</sup> One of Sprint's objections to an escrow requirement is that it "would be particularly burdensome given the fact that there can be a large number of billing disputes, many for relatively small dollar amounts." Burt Direct at 58. That objection is baseless, because AT&T Illinois' escrow proposal does not apply to relatively small dollar amounts.

<sup>69</sup> Sprint's objection to the escrow requirement is based in significant part on billing *errors*. For example, Sprint says, "Billing disputes are necessitated when the Billing Party issues inaccurate bills;" "If there is a billing error, Sprint has the right to dispute the bill;" and "AT&T could reap a windfall generated by its own erroneous billing practices." Burt Direct at 57, 58, 59. But under AT&T Illinois' language, Sprint would not have to escrow amounts that it disputes because of such things as arithmetic or clerical errors. Thus, much of Sprint's stated concern is baseless.

maintains the position that ILECs are not bankruptcy risks (and thus need not escrow disputed amounts) while at the same time achieving parity of treatment, because AT&T Illinois' language now applies equally to the carriers and AT&T Illinois. Greenlaw Direct at 33.

AT&T Illinois' proposed escrow language seeks to achieve, and does achieve, a balance between AT&T Illinois' legitimate need for protection against undeserved losses to CLECs and CMRS providers that dispute their bills and are then unable to pay them when this Commission or a court rules that they must and, on the other hand, legitimate carrier concerns about the scope and particulars of the escrow requirement.

In addition to protecting against losses from unpaid bills, the escrow requirement should discourage the assertion of frivolous billing disputes. With no escrow requirement, the Billed Party can, in effect, make the Billing Party its banker by submitting a dispute rather than paying its bill – and some carriers have in fact done that. If the Billed Party is required to escrow the disputed amounts, that behavior should be discouraged. AT&T Illinois does not suggest that Sprint would engage in such machinations. However, AT&T Illinois must concern itself with the likelihood that other carriers will adopt Sprint's ICA pursuant to section 252(i) of the 1996 Act – as should this Commission.<sup>70</sup>

The Commission approved an escrow provision in Docket 05-0442, which was an arbitration to amend existing interconnection agreements to address certain FCC orders concerning unbundled network elements. In that case, there was an issue concerning an SBC Illinois proposal that CLECs be required to escrow disputed amounts relating to so-called High-

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<sup>70</sup> Sprint claims that an escrow requirement would discourage the billed party from asserting legitimate disputes. Burt Direct at 59, lines 1304-1311. That is not a plausible claim. If the ICA includes an escrow requirement and the billed party believes a bill is wrong, the billed party can either (a) dispute the amount it believes is wrong and place the disputed amount in escrow, or (b) pay AT&T Illinois and not dispute the bill. Obviously, a rational billed party will choose (a). Greenlaw Rebuttal at 18.

Cap EELs pending resolution of the dispute. In its resolution of that issue, the Commission ruled:

The issue here is who controls the money for previously provided service and bears the risk of loss for past service during an expedited dispute resolution process after an independent auditor has made a determination that the CLEC has obtained high capacity EELs improperly.

It seems to us that it is commercially reasonable to expect the CLEC, if it is convinced that the auditor's determination was in error, to set aside the contested sums pending the outcome of the dispute. . . . [F]orm escrow agreements requiring signatures from both parties or an order from the Commission in order to release funds need be neither complex nor administratively burdensome. The alternative requires complete resolution of the dispute before payment is due, even though the CLEC has had the use of the funds from the time service began until after a preliminary determination of liability by the auditor. This procedure rewards delay by the CLEC in the resolution of the dispute and increases the risk of defalcation. The Commission finds SBC's proposal requiring an escrow account to be reasonable and accept it contingent upon its utilization of an appropriate joint escrow arrangement.

Arbitration Decision, Docket No. 05-0442. *Access One, Inc. et al. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order* (Nov. 2, 2005), at 145. Although that decision dealt with a disputed amount in a specific situation relating to High-Cap EELs, the rationale supports AT&T Illinois' position here.

Undeniably, Issue 53(a) requires the Commission to resolve a conflict between two legitimate competing interests: AT&T Illinois' interest in avoiding loss to carriers that dispute their bills, either frivolously or erroneously, and then are unable to pay when the dispute is resolved in AT&T Illinois' favor, and Sprint's interest in not having capital tied up unnecessarily in the event of a legitimate dispute. If there were evidence that showed whether most disputes are ultimately resolved in favor of the Billing Party or the Billed Party, that would shed light on

how the conflict should be resolved. There is no such evidence, however.<sup>71</sup> Consequently, a reasonable way to resolve the issue is to answer the following question: Which is the greater harm – for the Billed Party to escrow disputed amounts that, looked at in hindsight, need not have been escrowed because the Billed Party’s dispute was well taken, or for the Billing Party not to escrow amounts that, looked at in hindsight, should have been escrowed because the Billed Party’s dispute was not well taken and the Billed Party was unable to pay when that determination was made? The answer is obvious: The latter harm is greater, because it is worse for the Billing Party never to receive payment that it was owed than it is for the Billed Party to escrow money that is later returned to the Billed Party, with interest.

The Commission should approve AT&T Illinois’ proposed escrow language. With Issue 53(a) thus resolved in favor of AT&T Illinois, it follows that the Commission should also resolve Issue 53(c) in favor of AT&T Illinois. Finally, the Commission should resolve Issue 53(b) in favor of AT&T Illinois for the reasons discussed below under Issue 60.

**ISSUE 57: Under what circumstances may a Party disconnect the other Party for nonpayment, and what terms should govern such disconnection?**

**(GT&C sections 10.14, 11.1, 11.2, 11.3.2 - 11.3.4; and 11.5 – 11.8.3)**

**AT&T Illinois Position:** When the ICA authorizes AT&T Illinois to discontinue service to Sprint (or another carrier that adopts Sprint’s ICA) due to non-payment of undisputed bills, AT&T Illinois should not be required to obtain the Commission’s approval before it discontinues service. Instead, the ICA should include the compromise language proposed by Staff, which requires AT&T Illinois to notify the Commission of the threatened disconnection. Also, in the event that disconnection is warranted due to non-payment of undisputed bills, AT&T Illinois should be permitted to terminate the ICA in its entirety, rather than only to discontinue the service(s) for which payment was not made.

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<sup>71</sup> There is evidence, though, that significant numbers of disputes are resolved in favor of AT&T Illinois. See Greenlaw Direct at 30– 31; Greenlaw Rebuttal at 16.

Issue 57 comprises four disagreements: (1) whether Commission approval should be required before services are disconnected for non-payment; (2) the scope of a disconnection for non-payment; (3) whether a party that wishes to dispute a bill must deposit the disputed amount in escrow; and (4) the time period for disconnection after a Discontinuance Notice. The third of those disagreements is addressed above under issue 53(a), and the fourth is addressed below under Issue 58. In this section of the brief, we address the pre-approval issue and the scope issue.

**1. Disconnection for non-payment should not require Commission pre-approval**

GT&C section 11 authorizes AT&T Illinois to cease providing service to Sprint (or a carrier that adopts Sprint's ICA) if (i) the carrier fails to pay undisputed charges by the date they are due (or to escrow disputed charges if the Commission approves AT&T Illinois' escrow language); (ii) AT&T Illinois sends the carrier a notice stating that service may be discontinued if the carrier does not cure its breach; and (iii) the carrier fails to cure the breach within the time period specified in the ICA.<sup>72</sup> In that context, the language that AT&T Illinois proposed for GT&C section 11.2 provides:

**AT&T ILLINOIS will also provide any written notice of disconnection to any Commission as required by any State Order or Rule.**

Sprint's proposed language for section 11.2 provides:

***Disconnection for non-payment will only occur as expressly ordered by the Commission.***

Staff has proposed a resolution of this issue that is acceptable to AT&T Illinois, namely, that "the Commission allow AT&T Illinois to disconnect . . . services under the ICA for non-payment without prior approval of the Commission. However, [Staff] recommend[s] that the

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<sup>72</sup> The parties disagree about whether that time period should be 15 days or 45 days. See Issue 58.

Commission require AT&T Illinois to provide written notice to the Commission when AT&T Illinois intends to disconnect a carrier for non-payment under the ICA. Specifically, this notice should be provided to the Commission at the same time AT&T Illinois provides the Discontinuance Notice to Sprint and the notice to the Commission should be captioned as an ‘Emergency Notice.’ . . . [T]he notice should be simultaneously provided to both the Commission’s Office of the Executive Director and the Commission’s Director of Policy, Public Utilities Bureau.” Omoniyi Direct at 32.

The Commission should adopt Staff’s proposal. As Sprint has noted, that proposal does not “eliminate the Commission’s involvement from the process of discontinuing service,” because “the next step in the progression” (after the sending of the notice) will be for Sprint to likely contact AT&T and, at the same time, likely file a formal complaint with the Commission.” Burt Rebuttal at 69. Consequently, Staff’s proposal differs from Sprint’s only in that it “shifts the burden of filing the complaint from AT&T to Sprint.” *Id.* This should not be objectionable to Sprint. On the contrary, there are many reasons that AT&T Illinois should not be required to act affirmatively to obtain Commission approval before disconnecting a carrier for non-payment:

*First*, the Commission has adopted language in a number of arbitrations that provides for disconnection for non-payment with no prior Commission approval. As a result, ICAs in Illinois typically do not require AT&T Illinois to obtain Commission approval before discontinuing service based on a material breach of the ICA, such as a wrongful failure to pay. There appears to be no Illinois ICA that requires such pre-approval (Greenlaw Direct at 41), and there is no reason that Sprint’s ICA should depart from the norm in this respect.

*Second*, when a party materially breaches a contract, Illinois law permits the other party to terminate the contract – and that includes the situation in which a party fails to pay its bills.

See cases cited below in subsection 2. There is no good reason for a different rule to apply in the event of a failure to pay amounts due under an interconnection agreement.

*Third*, if a carrier does not pay its undisputed bills and still fails to do so even after receiving a Discontinuance Notice, AT&T Illinois could be seriously injured if it were required to continue providing service to the carrier, possibly for many months, during which the carrier continues not to pay its bills, while awaiting a green light to disconnect from the Commission. AT&T Illinois knows this from bitter experience, including a recent instance in which AT&T Illinois opted to file a complaint against a carrier, Halo, that was not paying its bills, rather than exercising its contractual right to terminate. Although the Commission acted reasonably promptly in that case, it still took seven months for the Commission to rule that there was a breach and that AT&T Illinois was entitled to terminate service to Halo. By that point, Halo owed AT&T Illinois more than \$2.25 million and was in bankruptcy. Greenlaw Direct at 42. The net result was that AT&T Illinois provided service to Halo for seven months for free even after AT&T Illinois had a contractual right to terminate service. Depending on the circumstances of the particular case, AT&T Illinois might opt again to initiate a Commission proceeding rather than to exercise its right to terminate,<sup>73</sup> but AT&T Illinois should not be *required* to initiate a Commission proceeding to get permission to disconnect a non-paying carrier.

*Fourth*, the one state commission decision on this issue of which AT&T Illinois is aware rejected a CLEC proposal that the ILEC be required to obtain the commission's approval before disconnecting the CLEC for non-payment. See Greenlaw Direct at 44– 45 (discussing

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<sup>73</sup> AT&T Illinois is extremely cautious about discontinuing service to its wholesale. One reason for this is that if AT&T Illinois were to discontinue service under circumstances where that was not warranted, AT&T Illinois would face potentially enormous liabilities. The Commission need not be concerned about AT&T Illinois precipitously discontinuing service to Sprint, or to any carrier that might adopt Sprint's ICA. Greenlaw Direct at 43.

Arbitration Decision, PSCW Docket No. 05-MA-123, *TDS Metrocom Petition for Arbitration of Interconnection Terms, Conditions, and Prices from Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin* (March 12, 2001), at 8-9).

*Fifth*, while this Commission has not explicitly addressed the issue, it has resolved disagreements about disconnection language in a manner that yielded provisions that permit disconnection for non-payment with no prior Commission approval. *Greenlaw Direct* at 46-47 (discussing *MCI Arbitration Decision*, at 17; and Arbitration Decision, Docket No. 00-0332, *Level 3 Commc'ns, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois* (Aug. 30, 2000), at 16).

Sixteen years into arbitrating and approving ICAs that do not make prior Commission approval a prerequisite for disconnection based on non-payment of undisputed bills, the Commission should not now, for the first time, impose such a requirement. Indeed, it is more apparent now than ever, in light of AT&T Illinois' losses to irresponsible carriers like Halo (which was operating under an adopted ICA – and recall that AT&T Illinois' principal concern here relates to carriers that might adopt Sprint's ICA) that AT&T Illinois should not be required to obtain Commission approval before disconnecting a carrier for non-payment under an ICA. The Commission should direct the parties to include the following language, which implements Mr. Omoniyi's recommendation, for GT&C section 11.2:

At the same time that it provides a Discontinuance Notice, AT&T ILLINOIS will provide a copy of said notice to the Commission. The notice to the Commission will be captioned "Emergency Notice," and will be simultaneously provided to both the Commission's Office of the Executive Director and the Commission's Director of Policy, Public Utilities Bureau.

**2. When a carrier is subject to disconnection for non-payment, AT&T Illinois should be permitted to disconnect all services.**

Under AT&T Illinois' proposed language for GT&C sections 10.14 and 11.1, if AT&T Illinois is entitled to discontinue service to Sprint due to Sprint's failure to pay its bills, AT&T Illinois may cease providing all services to Sprint under the ICA. Sprint, in contrast, proposes language for section 11.1 that would allow AT&T Illinois to discontinue only the service(s) for which Sprint failed to pay.

AT&T Illinois' proposed language should be adopted for two reasons. In the first place, it is consistent with Illinois contract law, while Sprint's language is not. It is well-established that "a breach of a material condition of [a] contract . . . entitles[s the non-breaching party] to terminate the contract." *Burt v. Garden City Sand Co.* 141 Ill. App. 603, 610 (Ill. App. 1st Dist. 1908), *aff'd* 273 Ill. 473. Thus, when amounts owed under a contract are not paid, the non-breaching party may abandon the contract. 141 Ill. App. at 611 ("The law is well settled that the non-payment of the installment . . . was a breach of a material condition of the contract, and entitled appellee to abandon the contract and sue for the amount actually due thereunder.") *See also, e.g., Village of Fox Lake v. Aetna Cas. & Sur. Co.*, 179 Ill. App. 3d 887, 900-901 (Ill. App. 2d Dist. 1993) (contract may be terminated for substantial or material breach). There can be no question but that a failure to pay for services provided under an ICA is a material breach that warrants termination, and there appears to be no authority for the proposition that a material breach warrants termination only of the affected portion of the contract.

Second, Sprint's position makes no sense. The disconnection at issue arises only in the event of non-payment of *undisputed* amounts, and following a Discontinuance Notice, which gives the Non-Paying Party fair notice that it has failed to pay and must pay. If, after receiving such a notice, the Non-Paying still does not pay its bill in full, even though it does not dispute it

(as it is permitted to do after it receives a Discontinuance Notice (*see* GT&C § 11.3)), there is no justification for requiring AT&T Illinois to continue to provide service to a party whose behavior establishes that it is a deadbeat.

On the other side of the coin, Sprint has provided no support for its position. In its direct testimony, Sprint offered only a bit of rhetoric about disconnection affecting end user customers and being a last resort (Burt Direct at 65); in its rebuttal, Sprint offered no answer to AT&T Illinois' arguments, but only declared, without elaboration, that it agreed with the recommendation of Staff witness Omoniyi that disconnection should only be for the services for which payment was not made (Burt Rebuttal at 68).

But Mr. Omoniyi's recommendation on this question is not persuasive. It was based *solely* on what he mistakenly referred to as a Commission decision (Omoniyi Direct at 32), which was actually an ALJ's proposed decision. A proposed decision is not a precedent, and therefore carries only such weight as it may deserve based on strength of its reasoning. In this instance, the ALJ's recommendation carries no weight, because it was based on the notion that other provisions in the ICA he was considering adequately protected the ILEC.<sup>74</sup> That rationale was unpersuasive even with respect to the ICA at issue in that docket, and it is not clear that it applies here at all.

For the foregoing reasons, and those set forth above in connection with Issue 53(a) and below in connection with Issue 58, the Commission should (1) rule that AT&T Illinois is not required to obtain Commission approval before disconnecting a carrier for non-payment, and adopt the language set forth above concerning notice to the Commission; (2) adopt AT&T

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<sup>74</sup> See Administrative Law Judge's Proposed Decision, Docket No. 04-0428, *Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Illinois Bell Telephone Company (SBC Illinois)* (Dec. 23, 2004), at 19.

Illinois' proposed language for GT&C sections 10.14 and 11.1 concerning the scope of a disconnection for non-payment; (3) rule that a party that wishes to dispute a bill must deposit the disputed amount in escrow; and (4) rule that in order to avoid disconnection, payment of undisputed amounts must be made within 15 days after a Discontinuance Notice.

**AT&T ISSUE 58: Should the period of time in which the Billed Party must remit payment in response to a Discontinuance Notice be forty-five (45) or fifteen (15) days?**

**(GT&C sections 2.40, 11.1 and 11.3)**

**AT&T Illinois Position:** Consistent with Staff's recommendation, the ICA should give the Billed Party 15 days, not 45 days, to pay its undisputed bill after it receives a Discontinuance Notice following its failure to pay the bill by the Bill Due Date.

Agreed language in GT&C section 11.1 provides that non-payment is grounds for disconnection of products and services furnished under the ICA, and that in the event of non-payment, the Billing Party may send a "Discontinuance Notice" to the Non-Paying Party. Section 11.1 further provides, "The Non-Paying Party must remit all unpaid charges, excluding disputed amounts, to the Billing Party" within a specified period after the date of the Discontinuance Notice. The question presented by Issue 58 is whether that period should be 45 days, as Sprint proposes, or 15 days, as AT&T Illinois proposes. Staff agrees with AT&T Illinois that it should be 15 days.

Fifteen days is ample time for a party to pay a bill that it has not disputed, has not paid on time, and has been formally notified it must pay. Indeed, the Discontinuance Notice cannot be sent until *at least* 31 days after the date of the bill. Greenlaw Direct at 50. Consequently, a requirement that the Billed Party pay within 15 days of the Discontinuance Notice means that the Billed Party will have had *at least* 46 days from the invoice date to pay its undisputed bill. Furthermore, when the Billed Party receives a Discontinuance Notice, it can still avoid disconnection by disputing the bill. *See* GT&C § 11.3. The 45 days that Sprint proposes is

unreasonably long; in effect, it would give the Billed Party *at least* 76 days to pay an undisputed bill.<sup>75</sup>

Staff witness Omoniyi recommends that the Commission adopt AT&T Illinois' proposal, noting that "[f]ifteen days from the Discontinuance Notice is sufficient time within which Sprint could remit payment of an undisputed charge," and that "Sprint's proposal . . . is unreasonably long, and . . . could lead to unnecessary additional financial loss." Omoniyi Direct at 35, 36.

In addition, the Proposed Arbitration Decision ("PAD") in Docket No. 04-0428, which settled before the Commission issued its decision, supports AT&T Illinois' position. In that PAD, Administrative Law Judge Gilbert addressed a CLEC's disagreement with AT&T Illinois (SBC Illinois as it then was) concerning how soon the CLEC must act after receiving an overdue notice in order to avoid disconnection. He stated:

[W]e find that SBC's proposal that Level 3 act within ten business days of an overdue notice is reasonable. As SBC emphasizes, Level 3 will have already had 30 days to evaluate SBC's charges. . . . Level 3 offers little to support its contention that ten business days are insufficient. Viewed pragmatically, if Level 3 remains unconvinced about the validity of a bill as the tenth business day approaches, it may choose to invoke dispute resolution procedures, averting disconnection.

Administrative Law Judge's Proposed Arbitration Decision, Docket No. 04-0428, *Level 3 Communications, L.L.C. Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Illinois Bell Telephone Company (SBC Illinois)* (Dec. 23, 2004), at 20.<sup>76</sup>

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<sup>75</sup> Sprint's 45-day proposal is not only unreasonable, but also at odds with its proposed deposit language (Issue 51(c)), which would limit the amount of a deposit to one month's billing (capped at \$50,000). It would make no sense to limit the Billing Party's protection to the equivalent of one month's billing while at the same time allowing the Billed Party two and a half months to pay its bill.

<sup>76</sup> The cited ALJ recommendation is not a binding Commission precedent, but is well-reasoned and therefore persuasive.

Sprint has said practically nothing in support of its position on this issue. The only point of any substance that Sprint made in its testimony is that Sprint may need 45 days because “it is entirely possible that one of [AT&T Illinois’] invoices could be lost in its electronic transmission. If that happens, it is overly harsh for the first notice Sprint receives regarding the misplaced invoice to be notice of an impending discontinuance of service in 15 days.” Burt Direct at 66-67.<sup>77</sup> That is too slender a reed to bear the weight of Sprint’s position. While it may be conceivable that an electronic bill could get lost in the ether, Sprint is apparently unable to say that it has ever happened in the 15 years that AT&T Illinois and Sprint have been exchanging traffic under interconnection agreements. And if it ever did happen, it would be a non-issue: either Sprint would expedite payment to avoid disconnection or, if that were problematic for some reason, Sprint would call AT&T Illinois, explain that the bill was lost, and make appropriate arrangements. AT&T is extremely cautious about exercising its disconnection rights, and is not going to disconnect Sprint (or anyone else) for failing to pay a bill that got lost. Greenlaw Rebuttal at 30.

**AT&T ISSUE 60: Should the ICA require the Disputing Party to use the Billing Party’s preferred form in order to dispute a bill?**

**(GT&C sections 10.8 and 12.4.1)**

**AT&T Illinois Position:** Every carrier with which AT&T Illinois has an ICA except Sprint uses AT&T Illinois’ bill dispute form, and Sprint should too. Either AT&T Illinois is going to have to continue to incur costs because Sprint refuses to use the same form that everyone else uses, or Sprint is going to have to incur costs by converting to AT&T Illinois’ form. In fairness, since it is Sprint that wants to bring the disputes, Sprint should be required to conform with AT&T Illinois’ process, rather than the other way around.

AT&T Illinois proposes language that would require the Billed Party to submit Billing Disputes on the Billing Party’s dispute form. Sprint proposes language that would permit the

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<sup>77</sup> Sprint did not address Issue 58 in its rebuttal testimony.

Billed Party to submit Billing Disputes on its own dispute form, or, in the alternative, to recover from the Billing Party any costs it incurs to modify its processes to use the Billing Party's form.<sup>78</sup>

Of all the carriers with which AT&T Illinois has an ICA, only Sprint refuses to use AT&T Illinois' form. Greenlaw Rebuttal at 21. In fact, the Commission has approved approximately 80 ICAs with language similar to what AT&T Illinois is proposing here. Greenlaw Direct at 53. Furthermore, it is undisputed that Sprint's refusal to use AT&T Illinois' form imposes additional costs on AT&T Illinois. AT&T Illinois' form is compatible with AT&T Illinois' billing and collection systems (*id.*), while Sprint's form is not, and Sprint's unwillingness to use the same form that everyone else uses makes AT&T Illinois' processing of Sprint's disputes inefficient (*id.*). In particular, when Sprint submits billing disputes, it does so in a format that requires AT&T Illinois to spend a disproportionate amount of time, and therefore money, to investigate and reconcile the disputes. AT&T Illinois must correct Sprint's billing information, populate the missing and incomplete data, look up accounts, and reformat the dispute forms. *Id.* at 54. In many instances, for example, the information Sprint provides is embedded in a "Comments" section, and the amounts disputed are aggregated over multiple bill periods, with no itemization provided. The AT&T Illinois billing dispute form avoids such problems by having the billed party provide the proper information in fields that provide clarity as to the amounts, circuits, BANS, and bill periods in question. Greenlaw Rebuttal at 21.

Sprint asserts it will incur costs if it is required to use AT&T Illinois' form. Burt Direct at 68. Taking that as true, the question becomes: As between AT&T Illinois and Sprint, which party should incur costs associated with Sprint's submission of bill disputes to AT&T Illinois?

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<sup>78</sup> There is disputed language in AT&T Illinois' proposed GT&C section 10.8 (which is the subject of this issue) that provides that by the Bill Due Date, the Billed Party must pay undisputed amounts and must place all Disputed Amounts in escrow. That language is comprised by Issue 53.

To answer that question, the Commission might want to know whether most billing disputes are valid (which would weigh in favor of imposing the cost on AT&T Illinois) or invalid (which would weigh in favor of imposing the cost on Sprint). The Commission might also want a quantification of the additional costs AT&T Illinois incurs as a result of Sprint's refusal to use the same form as everyone else, and of the costs Sprint would incur to use AT&T Illinois' form. There is no such information in the record, however, so the Commission must answer the question in the abstract. And the fair and reasonable answer is that since it is Sprint that wishes to take the action, *i.e.*, to dispute the bill, it is Sprint that should bear the cost. And, of course, AT&T Illinois should bear any costs it might incur when it uses Sprint's preferred form to dispute Sprint's bill, as AT&T Illinois' proposed language requires.

Staff witness Omoniyi states, "AT&T Illinois should be responsible for ensuring its internal systems are appropriate for its regular business needs. Sprint and other carriers should not have to conform to AT&T Illinois' specialized requirements" (Omoniyi Direct at 39), but that is inconsistent with universally accepted business practice. When a company has many customers, the customers conform with the vendor's systems. This is true of a credit card company vis-à-vis its customers, an airline vis-à-vis its customers, and a hospital with respect to its patients. The reason is obvious: If a credit card company's millions of customers could choose their own individualized means of communicating with the company, chaos would result. Likewise for the airline and the hospital. And for AT&T Illinois with respect to its hundreds of wholesale customers – as all of those customers except Sprint accept by using AT&T Illinois' standard form. Greenlaw Rebuttal at 23.

Mr. Omoniyi also opines that if AT&T Illinois' proposal were adopted, legitimate disputes might not be considered, because if Sprint failed to submit a dispute on AT&T Illinois'

form, the dispute would be rejected. Omoniyi Direct at 39. That is not a valid concern. If the Commission requires Sprint to use AT&T Illinois' form for billing disputes, Sprint will use the form; it will not choose to forego its billing disputes. Greenlaw Rebuttal at 24. That, no doubt, is why Sprint did not raise this concern itself.

There may be a cost to Sprint if AT&T Illinois' language is adopted, but it is the cost of conforming with the same system that every other carrier with an ICA with AT&T Illinois uses. And it is more appropriate for Sprint to absorb that cost than for AT&T Illinois to absorb the cost of processing Sprint's disputes outside its normal process.

## **VIII. PRICING ATTACHMENT**

### **ISSUE 70: Which Party's Pricing Sheets and Rates should be adopted?**

**AT&T Illinois Position:** The one page summary Pricing Attachment should not include specific rates. Rather, it should refer to the detailed Pricing Sheets that are attached to the Pricing Attachment. Accordingly, the Commission should reject Sprint's proposal to list the transit rate and the facility sharing factor on the summary Pricing Attachment. If the Commission adopts Staff's proposal to eliminate the Pricing Attachment, the Commission should also direct that certain agreed provisions of the Pricing Attachment be moved to other sections of the ICA, as proposed by AT&T Illinois.

Despite the wording of Issue 70, above, that issue no longer involves the question of "which Party's Pricing Sheets and Rates should be adopted." Rather, the issue has evolved into one that relates solely to the format of the "Pricing Attachment (Wireless) – Illinois" ("Pricing Attachment"), which is a one page summary to which is attached a detailed spreadsheet (called the "Pricing Sheets") listing all the prices for services and facilities subject to the ICA. With the exception of differences in certain of the parties' pricing proposals, which are addressed as part of other issues (*e.g.*, Issue 43 (Transit Service Rate)), all previously open issues related to the Pricing Sheets have been resolved. Pellerin Rebuttal at 109. The current version of the Pricing

Attachment and Pricing Sheets is contained in Schedule PHP-6 attached to Ms. Pellerin's Rebuttal Testimony (Corrected).<sup>79</sup>

The only remaining dispute between Sprint and AT&T Illinois regarding the format of the Pricing Attachment involves the issue of whether, as Sprint proposes, the transit rate and the facility sharing factor should be listed on the Pricing Attachment or, as AT&T Illinois proposes, the summary Pricing Attachment should simply refer to the detailed Pricing Sheets attached to the Pricing Attachment. Pellerin Rebuttal at 107-108. In support of Sprint's position, Mr. Felton asserted that Sprint personnel would find it "useful." Felton Direct at 63. This is not a sufficient reason to adopt Sprint's position. It does not make sense to populate the same rates in two places in the ICA (the Pricing Attachment and the Pricing Sheets) since that could lead to confusion if the ICA is amended to change one or both of the rates. Pellerin Rebuttal at 108.

The only other dispute mentioned by Mr. Felton in his Direct Testimony was one related to the wording of section 1 of the Pricing Attachment. Felton Direct at 63. As Ms. Pellerin discussed in her Rebuttal Testimony, this issue should be considered resolved by the parties' agreement to the following language for section 1:

Compensation for IntraMTA Traffic Transport and Termination (Per Conversation MOU). References in the attached Pricing Sheets to "Section 251(b)(5) Calls" shall be read as references to IntraMTA Traffic.

Pellerin Rebuttal at 108. This language is important because the *CAF Order* brought all telecommunications traffic under section 251(b)(5), including traffic still subject to access charges. This language makes it clear that the zero rate in the Pricing Sheets associated with

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<sup>79</sup> The Pricing Attachment was originally called the "Price Sheet," but the parties agreed to change its name to "Pricing Attachment" to minimize confusion. Pellerin Rebuttal at 107.

“Section 251(b)(5) Transport and Termination” applies only to IntraMTA traffic and not to InterMTA traffic, removing any confusion regarding such traffic and minimizing disputes. *Id.*<sup>80</sup>

Staff witness Dr. Liu recommended that the summary Pricing Attachment be excluded from the ICA entirely. Liu Direct at 95. AT&T Illinois disagrees with this recommendation because the Parties have agreed to include the Pricing Attachment in the ICA and have agreed to all but two of its provisions. Pellerin Rebuttal at 109. In addition, there are agreed provisions of the summary Pricing Attachment that do not appear in the attached Pricing Sheets or with similar clarity elsewhere in the ICA. *Id.*

If the Commission decides to order the elimination of the summary Pricing Attachment, it will be necessary to amend other portions of the ICA to include three provisions that are currently included in the Pricing Attachment. First, the underlined language in section 1, discussed above, would need to be placed at the end of section 1.1 of the attachment known as the “Pricing Schedule,” which would then read as follows:

This Pricing Schedule attachment sets forth the pricing terms and conditions that apply to the Parties’ Two-Way Wireless Interconnection Agreement - (the “Agreement”). References to the Agreement include all Attachments thereto, including this Pricing Schedule attachment. The rate tables included in the Pricing Sheets may be divided into categories. These categories are for convenience only and shall not be construed to define or limit any of the terms herein or affect the meaning or interpretation of the Pricing Schedule attachment, the Pricing Sheets, or the Agreement. References in the attached Pricing Sheets to “Section 251(b)(5) Calls” shall be read as references to IntraMTA Traffic.

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<sup>80</sup> On February 22, 2013, Sprint submitted to Staff and the Administrative Law Judges a “Joint Decision Points List – Open Issues” which purported to show, for Issue 70, that there is still a dispute regarding the language for section 1 of the Pricing Attachment. In fact, the language for that section shown in the “AT&T Language” column for Issue 70 is the language that was agreed upon by the Parties, as shown above. The version of the proposed language shown in the Sprint Language column of the Joint DPL is inconsistent with that agreement and was not supported by Sprint in any testimony.

Pellerin Rebuttal at 110. Second, the following agreed language for “Other Charges” from section 7.1 of the Pricing Attachment would need to be placed in a new section 1.4.3 of the Pricing Schedule:

Charges for miscellaneous other items such as Service Establishment, Change in Service Arrangement, Changes in Trunk interfaces, Additional Engineering, Additional Labor Charges, Access Order Charge, Design Change Charge, Service Date Change Charge, ACNA, Billing Account Number (BAN) and Circuit Identification Change Charges, and Supercedure charges are governed by AT&T ILLINOIS’ applicable interstate Access Services tariff.

Pellerin Rebuttal at 111. Third, the following agreed language that appears at the bottom of the Pricing Attachment would need to be placed at the end of section 4.2.1 of Attachment 5, “911/E911”: “Facility rates can be found in the State Special Access Tariff.” *Id.*

To summarize, the Commission should approve (i) the language for section 1 of the Pricing Attachment, as discussed (above), and (ii) AT&T Illinois’ references to the Pricing Sheets for the transit rate and the Shared Facility Factor. In the alternative, if the Commission decides to require the removal of the summary Pricing Attachment, the Commission should also order that three provisions currently included in the Pricing Attachment be moved to other sections of the ICA, as discussed above.

Dated: March 22, 2013

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Dennis G. Friedman, an attorney, certify that a copy of the forgoing AT&T Illinois' Initial Post-Hearing Brief was served on the following parties by U.S. Mail and/or electronic transmission on March 22, 2013.

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