

**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' BRIEF ON EXCEPTIONS**

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**AT&T ILLINOIS' BRIEF ON EXCEPTIONS**

Illinois Bell Telephone Company (“AT&T Illinois”), by its counsel, respectfully submits its Brief on Exceptions to the Proposed Arbitration Decision (“PAD”).

For each issue on which AT&T Illinois takes exception, this brief cites to the pages in the PAD where the issue is addressed and identifies the affected contract provision(s). Following the discussion of each exception, AT&T Illinois offers substitute language for the Commission Analysis and Conclusion in the PAD.

The PAD includes summaries of the parties’ arguments on each issue. Accordingly, this brief keeps to a minimum the reiteration of those arguments, and attempts to focus sharply on the aspects of the PAD’s recommended Commission Analyses and Conclusions that AT&T Illinois believes are flawed. AT&T Illinois therefore respectfully urges the Commission’s attention to the PAD’s recitations of AT&T Position on the issues addressed here for a summary of AT&T Illinois’ arguments on all aspects of each issue. AT&T Illinois’ arguments are set forth in full in its Initial Post-Hearing Brief, filed March 22, 2013 (cited herein as “AT&T Br.”), and its Post-Hearing Reply Brief, filed April 2, 2013 (“AT&T Reply”).

AT&T Illinois has taken no exception to a number of recommendations in the PAD with which AT&T Illinois disagrees. AT&T Illinois takes this approach in the hope of enabling the Administrative Law Judges and the Commission to devote increased attention to the few issues on which AT&T Illinois does take exception.

**ISSUE 17(a)                      Should Sprint be required to establish additional Points of Interconnection (POIs) when its traffic to an AT&T Tandem Serving Area exceeds 24 DS1s? (PAD at 37-39)**

**ISSUE 17(b)                      Should Sprint be required to establish an additional Point of Interconnection (POI) at an AT&T end office not served by an AT&T tandem when its traffic to that end office exceeds 24 DS1s? (PAD at 37-39)**

**Affected contract provisions: Attachment 2, sections 2.2.1.3; 2.2.1.3.1 and 2.2.1.3.2**

The PAD states that it “see[s] no basis for overturning” the decision in the *Level 3 Arbitration Order* adopting the OC-12 threshold and therefore recommends an OC-12 standard in this proceeding. PAD at 38. AT&T Illinois excepts to the OC-12 threshold. That level of traffic is just too high to provide a meaningful standard for establishing an additional POI and is – as a practical matter – the same as having no threshold at all. AT&T Br. at 60-62. Setting the threshold at an OC-3 level, rather than an OC-12 level, would provide a more reasonable standard for carriers in Illinois.

The PAD also makes an error in the way it applies the *Level 3 Arbitration Order* to the particular language in this case. The PAD fails to account for the fact that the OC-12 threshold in the *Level 3 Arbitration Order* was developed to apply to a single POI arrangement. *Level 3 Arbitration Order* at 30 (“Level 3 currently has one POI in the Chicago LATA . . .”). Thus, it operates to require a second POI when traffic between the carriers *throughout the entire LATA* reaches an OC-12 level. When the threshold applies to *all* traffic between the carriers in a LATA, there is at least some logic in establishing the threshold at a relatively higher level.

Here, in contrast, AT&T Illinois' language in section 2.2.1.3.1 applies on a per tandem ("TSA" or tandem serving arrangement) basis. For example, AT&T Illinois' proposal for section 2.2.1.3.1 provides that Sprint will establish an additional POI "at an AT&T ILLINOIS TSA separate from the existing POI arrangement *when traffic through the existing POI arrangement to that AT&T ILLINOIS TSA exceeds one (1) DS-3 at peak over three (3) consecutive months.*" (Italicized emphasis added). Per this language, AT&T Illinois' DS3 traffic threshold applies separately at each of its tandems in a LATA. Albright Rebuttal at 20-21. That is, Sprint would not be required to establish an additional POI at a tandem unless traffic between Sprint and AT&T Illinois *to that particular tandem* exceeds one (1) DS3.

The PAD uses the OC-12 standard without making any adjustment for the "per tandem" nature of AT&T Illinois' language. The danger created by this failing is evident. In the case of the Chicago LATA, there are 13 tandems. If the OC-12 standard is applied separately to each tandem, the actual traffic threshold standard as applied to the LATA as a whole would increase to OC-12 multiplied by 13 (i.e., 156 DS3s). That is, a carrier could have as much traffic as could be carried over 13 OC-12s and still not have to establish an additional POI. A carrier could, for example, establish a single POI in the Chicago LATA and potentially have a traffic volume of just under 13 OC-12s with AT&T Illinois through that single POI, destined for each of the 13 tandems in the Chicago LATA (an OC-12 exchanged with each tandem), and still not meet the threshold requirement to establish an additional POI based on the tandem-specific language proposed by AT&T Illinois, as modified only to change the proposed DS3 threshold to an OC-12 threshold, as recommended by the PAD. That is not consistent with the holding of the *Level 3 Arbitration Order*, and AT&T Illinois believes the Commission did not intend this consequence. This defect in the PAD must be corrected.

**Proposed substitute language for Commission Arbitration Decision**

Alternative A: The most appropriate way to correct this defect is simply to adopt a threshold lower than the OC-12 recommended in the PAD. This would be implemented by using AT&T Illinois' proposed language as it appears in the DPL and replacing "OC-12" with "one (1) DS3." While AT&T Illinois believes that one DS3 is the right standard, even an OC-3 standard would be more reasonable than an OC-12 standard. This solution would produce the following language:

**2.2.1.3 When Sprint has established a single POI (or multiple POIs) in a LATA, Sprint agrees to establish an additional POI:**

**2.2.1.3.1 at an AT&T ILLINOIS TSA separate from the existing POI arrangement when traffic through the existing POI arrangement to that AT&T ILLINOIS TSA exceeds one (1) DS3 [or one OC-3] at peak over three (3) consecutive months; or**

**2.2.1.3.2 at an AT&T ILLINOIS End Office in a local calling area not served by an AT&T ILLINOIS Tandem for IntraMTA Traffic when traffic through the existing POI arrangement to that local calling area exceeds one (1) DS3 [or one OC-3] at peak over three (3) consecutive months.**

Alternative B: If the Commission adopts the OC-12 threshold, then the language in sections 2.2.1.3.1 and 2.2.1.3.2 must be revised to eliminate the unintended and harmful consequence described above. To do this, AT&T Illinois proposes the following language, which separately addresses single and multiple POI arrangements:

**2.2.1.3. When Sprint has established a single POI in a LATA, Sprint agrees to establish an additional POI at an AT&T ILLINOIS tandem separate from the existing POI arrangement when traffic through the existing POI arrangement exceeds one (1) OC-12 at peak over three (3) consecutive months.**

**2.2.1.3.1 When Sprint has established multiple POIs in a LATA, Sprint agrees to establish an additional POI at an AT&T ILLINOIS tandem separate from the existing POI arrangement when traffic through the existing POI arrangement to that AT&T ILLINOIS tandem serving arrangement exceeds one (1) DS3 [or one OC-3] at peak over three (3) consecutive months; or**

**2.2.1.3.2 Sprint agrees to establish an additional POI at an AT&T ILLINOIS End Office in a local calling area not served by an AT&T ILLINOIS Tandem for**

**IntraMTA Traffic when traffic through the existing POI arrangement to that local calling area exceeds one (1) DS3 [or one OC-3] at peak over three (3) consecutive months.**

In compliance with ICC Rule 761.430(b), AT&T Illinois offers the following suggested replacement language:

For Alternative A, the second paragraph under the heading “Commission Analysis and Conclusion” should be revised to read as follows:

With respect to whether Sprint must establish an additional POI if its traffic reaches a certain level, the Commission notes that AT&T provided evidence that with the traffic threshold set at an OC-12 level only two carriers have actually reached this level at an interconnection arrangement. The Commission accepts this as evidence that an OC-12 threshold is too high to provide an effective, real-world limit on the amount of traffic that flows through a single POI. In addition, we note that the OC-12 standard established in the *Level 3 Arbitration Order* involved just one POI, so the OC-12 standard counts all of a carrier’s traffic in a LATA to determine whether there should be an additional POI. AT&T Illinois’ proposed language, in contrast, establishes a traffic threshold on a per-tandem basis, i.e., it applies separately to every tandem in a LATA. So, it only counts the portion of a carrier’s traffic in a LATA that goes to a single tandem to determine whether there should be an additional POI. Therefore, it would be an inaccurate to simply graft the OC-12 standard from the *Level 3 Arbitration Order* into AT&T Illinois’ language. Instead, using the per-tandem approach in AT&T Illinois’ proposed language, it is reasonable for a carrier to establish an additional POI to a tandem when traffic to that tandem serving area reaches the level of one (1) DS3 [or one OC-3] for three consecutive months. A carrier can have up to 5,600,000 minutes of use per month to a tandem serving area without triggering a DS3 threshold, and the evidence shows that only about 20% of the current interconnection arrangements exceed this threshold. Accordingly, we adopt the language proposed by AT&T Illinois for this issue.

For Alternative B, the second paragraph under the heading “Commission Analysis and Conclusion” should be revised to read as follows:

With respect to whether Sprint must establish an additional POI if its traffic reaches a certain level, the Commission notes that AT&T provided evidence that with the traffic threshold set at an OC-12 level only two carriers have actually reached this level in an interconnection arrangement. The Commission accepts this, but does not agree that it shows that AT&T’s network has been negatively impacted. However, we also note that the *Level 3 Arbitration Order* involved just one POI. AT&T Illinois’ proposed language, in contrast, establishes a traffic threshold on a per-tandem basis, i.e., it applies separately to every tandem in a LATA. Therefore, it would be an inaccurate application of the *Level 3 Arbitration Order* to simply plug the “OC-12” threshold into AT&T Illinois’ language. Instead, we find that the OC-12 threshold should continue to apply if there is just one POI in a LATA, but in a LATA with multiple POIs, it is reasonable for a carrier to establish an additional POI to a tandem when traffic to that

tandem serving area reaches the level of one (1) DS3 [or one OC-3] for three consecutive months. Accordingly, we adopt the following language for sections 2.2.1.3, 2.2.1.3.1 and 2.2.1.3.2:

**2.2.1.3. When Sprint has established a single POI in a LATA, Sprint agrees to establish an additional POI at an AT&T ILLINOIS tandem separate from the existing POI arrangement when traffic through the existing POI arrangement exceeds one (1) OC-12 at peak over three (3) consecutive months.**

**2.2.1.3.1 When Sprint has established multiple POIs in a LATA, Sprint agrees to establish an additional POI at an AT&T ILLINOIS tandem separate from the existing POI arrangement when traffic through the existing POI arrangement to that AT&T ILLINOIS tandem serving arrangement exceeds one (1) DS3 [or one OC-3] at peak over three (3) consecutive months; or**

**2.2.1.3.2 Sprint agrees to establish an additional POI at an AT&T ILLINOIS End Office in a local calling area not served by an AT&T ILLINOIS Tandem for IntraMTA Traffic when traffic through the existing POI arrangement to that local calling area exceeds one (1) DS3 [or one OC-3] at peak over three (3) consecutive months.**

**ISSUE 20(b):           Should the ICA provide that Interconnection Facilities purchased at TELRIC rates may not be used for 911 and Equal Access trunks? (PAD at 9-12)**

**Affected contract provisions: Attachment 2, sections 3.4, 3.5.3**

Issue 20(b) involves a dispute over the language of Attachment 2, section 3.5.3, which identifies purposes for which TELRIC-priced Interconnection Facilities may not be used:

3.5.3 Sprint may not purchase Interconnection Facilities pursuant to this Agreement for any other purpose, including, without limitation (i) as unbundled network elements under Section 251(c)(3) of the Act, (ii) for backhauling traffic (e.g., to provide a final link in the dedicated transmission path between Sprint’s customer and Sprint’s switch, or to carry traffic to and from its own end users), **or (iii) 911 or Equal Access Trunk Groups.**

The bold, underlined language proposed by AT&T Illinois, to which Sprint objects, indicates that TELRIC-priced Interconnection Facilities may not be used by Sprint to carry (i) “Equal Access Trunk Groups,” which are used to exchange traffic between Sprint’s end users and the end users of IXC (“IXC Traffic”), and (ii) “911 Trunk Groups,” which are used by Sprint to send 911

calls made by Sprint's end users to Public Safety Answering Points ("PSAPs"). The PAD correctly rules that Interconnection Facilities may not be used for IXC Traffic, thereby approving the inclusion of the reference to "Equal Access Trunk Groups" in subsection 3.5.3 (iii). PAD at 12. AT&T Illinois fully supports this ruling.

AT&T Illinois takes exception, however, to the PAD's finding that "Sprint 9-1-1 traffic to AT&T served PSAPs can be sent over Interconnection Facilities." PAD at 11. This finding must be reversed because it is directly contrary to agreed language, included elsewhere in the proposed ICA, which makes clear that Sprint may *not* send 911 traffic (including 911 traffic to PSAPs served by AT&T Illinois) over Interconnection Facilities.

*First*, as AT&T Illinois pointed out both in testimony and on brief, Sprint has agreed, in Attachment 2, section 3.4, that it shall be "solely responsible, including financially, for the facilities that carry 911 trunks." AT&T Br. at 25.

*Second*, the parties' agreed language recognizes 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. AT&T Br. at 25. Rather, 911 facilities are connected all the way from Sprint's network to the "Meet Point" for 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.

*Third*, consistent with the agreed language discussed above, Sprint has also agreed to language included in the Pricing Attachment that expressly states that the rates for AT&T

Illinois' facilities used by Sprint to transport 911 and E911 calls "can be found in the State Special Access Tariff." AT&T Br. at 25.<sup>1</sup>

In sum, Sprint has agreed to ICA language making clear that (i) Sprint is solely responsible for the cost of 911 facilities; (ii) traffic will not (and, indeed, cannot) be sent over "Interconnection Facilities," as that term is defined in the ICA (because Interconnection Facilities, by agreed definition, terminate at the POI, whereas 911 facilities bypass the POI and connect all the way to the selective router serving the PSAP); and (iii) to the extent Sprint leases those facilities from AT&T Illinois, it must do so pursuant to AT&T Illinois' intrastate special access tariff. Thus, the PAD's finding that "Sprint 9-1-1 traffic to AT&T served PSAPs can be sent over Interconnection Facilities" is wrong as a matter of fact and, for that reason alone, must be reversed.

In support of its finding that "Sprint 9-1-1 traffic to AT&T served PSAPs can be sent over Interconnection Facilities," the PAD concludes that such traffic constitutes "Section 251(c)(2) traffic." PAD at 11. In light of the agreed language discussed above, however, the question of whether Sprint's 911 traffic would, in the absence of that agreed language, constitute section 251(c)(2) traffic eligible for sending over Interconnection Facilities is an academic issue that need not be resolved in this case. Rather, the Commission need only find that the language agreed to by Sprint precludes it from sending 911 traffic over Interconnection Facilities. The Commission should also approve AT&T Illinois' proposal to include a reference to "911 Trunk Groups" in the section 3.5.3 list of prohibited uses of Interconnection Facilities because it is fully consistent with the agreed language. Even if the reference to "911 Trunk Groups" were removed

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<sup>1</sup> While the PAD recommends, for Issue 70, elimination of the Pricing Attachment on the grounds that it is unnecessary, the PAD agrees with AT&T Illinois that the agreed language referring to the State Special Access Tariff for 911/E911 facilities be preserved and placed in a new section 1.4.3 of the Pricing Schedule. PAD at 65-66.

from section 3.5.3, however, the agreed language would necessarily preclude Sprint from using Interconnection Facilities to carry 911 trunks. Accordingly, while AT&T Illinois continues to believe that its proposed language for 3.5.3 is appropriate in all respects, it would not object to the removal of the words “911 or” from the language of that section, as quoted above, if the Commission determines that the inclusion of those words is unnecessary.

If the Commission nevertheless decides to address the question of whether, in the absence of the agreed language, Sprint’s 911 traffic would constitute section 251(c)(2) traffic eligible for sending over TELRIC-priced Interconnection Facilities, the Commission should find that it is not. In support of its finding that Sprint’s 911 traffic is section 251(c)(2) traffic, the PAD states that “Sprint is providing a local exchange service to its customer that is calling 9-1-1.” PAD at 11. This statement, however, does not support the PAD’s decision. The issue here is not whether one party (Sprint) is providing a “local exchange service” to its customer.<sup>2</sup> Rather, the issue is whether the facilities used to transport such calls to a PSAP are being used for Interconnection, as defined in FCC Rule 51.5, i.e., to “link” the networks of Sprint and AT&T Illinois for the “mutual exchange of traffic.”

Trunks used to carry 911 traffic do not facilitate the “mutual exchange of traffic” and, therefore, 911 traffic is not Interconnection Traffic within the meaning of section 251(c)(2) and Rule 51.5. As recognized by the U.S. Supreme Court and numerous other courts, the purpose of section 251(c)(2) Interconnection, as defined in Rule 51.5, is to “ensure[] that customers on a competitor’s network can call customers on the incumbent’s network, and vice versa.” *Talk America v. Michigan Bell Tel. Co.*, 131 S.Ct. 2254, 2258 (2011). See also the cases cited in AT&T Illinois’ Reply Brief (pp. 8-9). As the Commission has recognized, the 911 service

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<sup>2</sup> In fact, the service provided by Sprint to its end users is commercial mobile radio service, not “local exchange service.”

provided to PSAPs (including service provided to PSAPs by AT&T Illinois) does not constitute “telephone exchange service,” in part because that service does not enable PSAPs to originate calls. 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), at 18-19, 21. Thus, Sprint’s 911 trunks are not used for Interconnection, within the meaning of Rule 51.5, because there can be no “mutual exchange” of telephone exchange service traffic between customers of Sprint and customers of AT&T Illinois over those trunks.

Furthermore, as the Court of Appeals for the Ninth Circuit has observed, the key distinction between the use of Interconnection Facilities for backhauling (which the PAD (at 25) correctly finds is not permitted) and the use of such facilities for Interconnection, is that, in the case of backhauling, “*only the competitive LEC benefits*” whereas, in the case of Interconnection, “*both competitor and incumbent benefit: the incumbent's customers can reach customers of the competitor, and vice versa.*” *Pacific Bell Telephone Co. v. California Public Utilities Comm'n*, 621 F.3d 836, 847 (9th Cir. 2010) (emphasis added). As AT&T Illinois and Staff explained, and as the Commission has previously determined, a competitor’s 911 trunks are used to provide service solely on behalf of the customers of the competitor and, therefore, such trunks benefit only the competitor’s customers, not the ILEC’s customers. AT&T Br. at 20; Staff Br. at 6; 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), at 84. For this reason, the Commission has held that facilities used by a competing carrier to carry 911 trunks, which do not connect that

carrier's end users with the ILECs' end users, are the competing carrier's sole financial responsibility. *Id.*; Pellerin Direct at 27.

For these reasons, Sprint's use of entrance facilities to carry 911 trunks does not constitute section 251(c)(2) Interconnection. Thus, Sprint would have no right to place such trunks on TELRIC-priced Interconnection Facilities even if Sprint had not already agreed to the previously discussed contract provisions which preclude it from doing so.

**Proposed substitute language for Commission Arbitration Decision**

For the reasons discussed, the Commission should revise the PAD's "Commission Conclusion and Analysis" for Issue 20, as follows:

1. The last paragraph on page 11 should be deleted in its entirety and replaced with the following language:

AT&T's language is adopted. As AT&T correctly notes, with respect to 911 trunks, Sprint has agreed to ICA language making it clear that (i) Sprint is solely responsible for the cost of 911 facilities; (ii) traffic will not (and, indeed, cannot) be sent over "Interconnection Facilities," as that term is defined by the Parties (because Interconnection Facilities, by agreed definition, terminate at the POI, whereas 911 facilities bypass the POI and connect all the way to the selective router serving the PSAP); and (iii) to the extent Sprint leases those facilities from AT&T Illinois, it must do so pursuant to AT&T Illinois' intrastate special access tariff. These agreements preclude Sprint from using Interconnection Facilities to carry 911 trunks. It is, therefore, unnecessary for the Commission to resolve the question of whether Sprint's 911 traffic would, in the absence of that agreed language, constitute section 251(c)(2) traffic eligible for sending over Interconnection Facilities.

[**Note:** If the Commission determines it is necessary to address the question of whether, in the absence of the agreed language, Sprint's 911 traffic would constitute section 251(c)(2) traffic eligible for sending over TELRIC-priced Interconnection Facilities, the Commission should adopt the language shown above, with the exception of the last sentence, and further state as follows]:

The Commission further finds that, even in the absence of this agreed language, Sprint would not be entitled to send 911 traffic over Interconnection Facilities. As recognized by the FCC, the U.S. Supreme Court and numerous other courts, the purpose of section 251(c)(2) Interconnection, as defined in Rule 51.5, is to "ensure[] that customers on a competitor's network can call customers on the incumbent's network, *and vice versa.*" *Talk America v. Michigan Bell Tel. Co.*, 131 S.Ct. 2254, 2258 (2011)(emphasis added).

The 911 service provided by AT&T Illinois to its PSAP customers does not enable those PSAPs to originate calls and does not constitute telephone exchange service. Thus, Sprint's 911 trunks are not used for Interconnection, within the meaning of Rule 51.5, because there can be no "mutual exchange" of telephone exchange service traffic between customers of Sprint and customers of AT&T over those trunks. Furthermore, as the Court of Appeals for the Ninth Circuit observed in *Pacific Bell Telephone Co. v. California Public Utilities Comm'n*, 621 F.3d 836, 840 (9th Cir. 2010), the key distinction between the use of Interconnection Facilities for backhauling (which is not permitted) and the use of such facilities for Interconnection, is that, in the case of backhauling, "only the competitive LEC benefits" whereas, in the case of Interconnection, "both competitor and incumbent benefit: the incumbent's customers can reach customers of the competitor, and vice versa." 621 F.3d at 847 (emphasis added). Sprint's 911 trunks are used to provide 911 service solely on behalf of its customers, and, therefore, such trunks benefit only Sprint's customers, not AT&T Illinois' customers. For this reason, the Commission has previously held that facilities used by a competing carrier to carry 911 trunks, which do not connect that carrier's end users with the ILECs' end users, are the competing carrier's sole financial responsibility. 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.

2. The last sentence of the first paragraph on page 11 should be deleted in its entirety and replaced with the following sentence:

Accordingly, AT&T's language is adopted in its entirety.

**ISSUE 43: What is the appropriate rate that a Transit Service Provider should charge for Transit Traffic Service? (PAD at 39-46)**

**Affected contract provision: Pricing Sheets**

The PAD correctly recognizes that neither federal law nor state law authorizes the Commission to require AT&T Illinois to provide transit service at TELRIC-based rates. PAD at 45. Nonetheless, the PAD recommends that the Commission require AT&T Illinois to do so because "AT&T's transit rate was initially required to be TELRIC based." *Id.* But the Commission cannot lawfully require something that neither federal law nor state law authorizes just because it was required before.

Sprint argued that federal law – namely, the 1996 Act – requires AT&T Illinois to provide transit service at cost-based (TELRIC) rates. *See id.* at 39. Indeed, that was the *only* basis Sprint offered for requiring TELRIC-based pricing for transit service. This Commission has ruled, however – repeatedly and correctly – that the 1996 Act does *not* require AT&T Illinois to provide transit service at TELRIC-based rates. *See AT&T Br.* at 121-128. Thus, Sprint’s proposed resolution of Issue 43 could not be sustained on the grounds advocated by Sprint.

Staff recognized this fact (*see Staff Br.* at 40), but wanted the Commission to impose TELRIC-based pricing on AT&T Illinois’ transit service on policy grounds (*id.*). Also, however, Staff knew that the Commission can only do that which the law authorizes it do to. In fact, Staff’s senior witness, Dr. James Zolnierек, testified that, “The Commission is a creature of the legislature. So we respond [to] what the legislature dictates in terms of what authority we have and don’t.” Hearing Transcript (“Tr.”) at 872. Dr. Zolnierек was correct. It is well established that “[t]he Commission, because it is a creature of the legislature, derives its power and authority solely from the statute creating it, and its acts or orders which are beyond the purview of the statute are void.’ The Commission’s authority to enter [an] order . . . must, therefore, find its source in the Act.” *Commonwealth Edison Co. v. Ill. Commerce Comm’n*, 332 Ill. App. 3d 1038, 1048 (2d Dist. 2002) (quoting *City of Chicago v. Ill. Commerce Comm’n*, 79 Ill. 2d 213, 217-18 (1980)).

Faced with this conundrum – a desire to impose a requirement on policy grounds but a recognition that the Commission could do so only if the legislature authorized it to – Staff tried to find an Illinois statute that could be read as authorizing the Commission to require TELRIC-based transit rates. What Staff came up with was section 13-801 of the Public Utilities Act. *See Staff Br.* at 38-39. As AT&T Illinois demonstrated, however, that attempt was futile, for two

reasons: (i) section 13-801 cannot be read to authorize the Commission to require transit service at TELRIC-based rates, and (ii) even if it could, section 13-801 would not provide the necessary authorization, because AT&T Illinois is not subject to alternative regulation and therefore cannot, as a matter of law, be subjected to any requirement under section 13-801 that exceeds the requirements of federal law – as Staff itself has previously explained. *See* AT&T Reply at 61-63.

In sum, the PAD could not, consistent with the Commission’s precedents, recommend that the Commission require AT&T Illinois to provide transit service at TELRIC-based rates under either federal law or state law. This left only one legitimate resolution to Issue 43: adopt AT&T Illinois’ proposed rate for transit service and leave it at that, without erroneously concluding that TELRIC-based pricing applies and therefore, also erroneously, requiring a TELRIC cost study. But the PAD spurns that legitimate resolution and instead – even while acknowledging that there is no basis in federal or state law for its proposed conclusion – recommends that the Commission impose TELRIC-based pricing on transit service merely because “AT&T’s transit rate was initially required to be TELRIC based.” PAD at 45. That recommendation is contrary to law and must be rejected. The Commission should draw the only conclusion that permissibly follows once it is determined that neither federal nor state law requires TELRIC-priced transit service, namely, that AT&T Illinois’ proposed rate should be adopted, with no further discussion.

The only explanation the PAD offers for its recommendation is that “[r]ecord evidence has sufficiently raised the question of whether AT&T’s TELRIC-based rate, established over ten years ago, remains valid.” PAD at 45. There can be no good reason for the departure from the law that the PAD recommends, but the reason given is a conspicuously bad one. In the first

place, the PAD does not conclude that AT&T Illinois' current rate is not "valid," only that there is a question whether it is. That is hardly a compelling reason for ordering a TELRIC study for transit service when there is no basis in law for requiring transit service to be provided at TELRIC-based rates.

In addition, the PAD does not say what record evidence supposedly calls into question the validity of AT&T Illinois' current rate. And there was in fact no such evidence. Sprint suggested just one way in which the cost study that was the basis for AT&T Illinois' current rate is now supposedly outdated, and that was that a forward-looking TELRIC cost study done today would have to assume the use of packet switching or soft switch technology, rather than the circuit switches assumed by the Commission-approved cost study on which the current transit rate was based. *See* AT&T Br. at 138-139. But AT&T Illinois demonstrated that Sprint was mistaken, and that a forward-looking TELRIC cost study done today would *not* assume the use of packet switches or soft switches, as Sprint claimed. *Id.* at 139-142. Thus, the PAD's purported policy reason for requiring a cost study – namely, that unspecified "[r]ecord evidence has sufficiently raised the question of whether AT&T's TELRIC-based rate, established over ten years ago, remains valid" (PAD at 45) – is incorrect.

There is one last reason for the Commission to reject the PAD's recommendation that it order a TELRIC study: Less than two years ago, another carrier challenged AT&T Illinois' tariffed, Commission-approved transit rate – the same rate that AT&T Illinois proposes to charge Sprint. The Commission rejected that challenge, and ordered the parties' ICA to include AT&T Illinois' tariffed rate – with no suggestion that that rate should be revisited.<sup>3</sup> There is no reason for the Commission to take a different approach here.

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<sup>3</sup> Arbitration Decision, Docket No. 11-0083, *Illinois Bell Tel. Co. Petition for Arbitration of Interconnection Agreement with Big River Tel. Co., LLC* (June 4, 2011), at 38-39.

For the foregoing reasons, and the additional reasons set forth in AT&T Illinois' briefs, the Commission should rule, as the PAD proposes, that the parties' ICA will include AT&T Illinois' current tariffed transit rate, but should not adopt the PAD's recommendation that the Commission require AT&T Illinois to file new TELRIC cost studies.

**Proposed substitute language for Commission Arbitration Decision**

The last two paragraphs of the Commission Analysis and Conclusion at pages 45-46 of the PAD should be modified as indicated below, with the struck-through language deleted and the underscored language added:

~~The Commission does not need to address whether we can obligate AT&T to provide transit service because AT&T states it will provide such service to Sprint. The question remaining is the rate that AT&T should charge for transiting service. Upon review of the extensive arguments regarding transit service, the Commission agrees that the provision and pricing of transit services at TELRIC is not explicitly required by the 1996 Act or the Illinois Public Utilities Act for the reasons set forth in AT&T Illinois' briefs. Accordingly, the Commission rejects Sprint's proposal that the Commission require AT&T Illinois to provide transit service to Sprint at revised TELRIC-based rates. The Commission also notes that even if the 1996 Act or Illinois law did require AT&T Illinois to provide transit service at TELRIC-based rates, the Commission would not adopt. Nevertheless, as Staff notes, AT&T's tariff rate was initially required to be TELRIC based. Record evidence in this matter has sufficiently raised the question of whether AT&T's TELRIC-based rate, established over ten years ago, remains valid. Accordingly, the Commission finds that there shall be an investigation to determine AT&T's updated TELRIC-based transit service rate. AT&T must file with the Commission updated cost studies consistent with TELRIC methodology within 90 days from the date of this Arbitration Decision.~~

~~Pending the outcome of the investigation, the Commission finds that AT&T may charge its current TELRIC transit rates on an interim basis. The Commission rejects the proxy rates suggested by Sprint and Staff because they are either based on commercially negotiated agreements or non-Illinois costs.~~

**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? (PAD at 66-70)**

**ISSUE 51(c):**            **Under what circumstances should a deposit be required and what should be the amount of the deposit? (PAD at 66-70)**

**Affected contract provisions: GT&C sections 9.1, 9.5<sup>4</sup>**

AT&T Illinois does not object to anything the PAD says on Issues 50 and 51, but respectfully requests that the Commission make two points more explicit in its Arbitration Decision in order to avoid possible disagreements when the parties prepare their conforming interconnection agreement.

One of the parties’ disagreements concerning deposits was what the maximum amount of the deposit should be. As the PAD notes (at p. 68), Staff recommended that “the amount of the deposit should be an amount up to three months’ anticipated billing for each party.” This was AT&T Illinois’ proposal. *See* AT&T Br. at 157. Sprint, in contrast, unreasonably proposed to limit the deposit amount to the lesser of “the Billed Party’s total monthly billing under this Agreement for one month or fifty thousand dollars.” *See id.* at 157-158. The Commission Analysis and Conclusion in the PAD does not specifically address this disagreement, but concludes by stating, “The Commission finds AT&T’s remaining terms and conditions are reasonable, and should be adopted, also with the exception that the language shall be party-neutral.” PAD at 70. AT&T Illinois understands that this was intended to include AT&T Illinois’ proposed GT&C section 9.5, and thus in effect approves the deposit amount language proposed by AT&T Illinois and endorsed by Staff, but suggests that the Commission add a

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<sup>4</sup> The PAD addresses all the parties’ disagreements concerning deposit language at pages 66-70, under Issues 50 and 51. Issues 51(b) and (c), as displayed above, are referenced at page 66 under “AT&T Issue 51.”

reference to the deposit amount to the concluding sentence in order to eliminate any doubt on this score.

Second, Sprint proposed language providing that as of the effective date of the ICA, no deposit will be required. The PAD notes this in its summary of Sprint's Position (at p. 66), but does not explicitly address the point. Staff opposed Sprint's proposed language (*see id.* at 69), which was patently unreasonable (*see AT&T Br.* at 160-161). Again, AT&T Illinois understands that the PAD intended to reject Sprint's proposal by adopting "AT&T's remaining terms and conditions" as noted above, but suggests that the Arbitration Decision make this explicit.

**Proposed substitute language for Commission Arbitration Decision**

The following sentence should be added at the end of the Commission Analysis and Conclusion at pages 69-70 of the PAD, immediately after the words "... with the exception that the language shall be party-neutral":

Thus, AT&T Illinois' proposed language for GT&C Section 9.5 shall be included in the ICA, and Sprint's proposed language prohibiting a deposit request on the Effective Date of the ICA is rejected.

**ISSUE 52:                    Is it appropriate to include good faith disputes in the definitions of "Non-Paying Party" or "Unpaid Charges?" (PAD at 70-73)**

**Affected Contract Language: GT&C sections 2.77 and 2.124**

Issue 52 is a relatively minor definitional issue that must be resolved in a manner consistent with Issue 53, which we discuss below. It concerns the way the ICA will define two terms. Each definition includes a reference to "charges," and in each instance, Sprint proposes to insert the word "undisputed" before "charges." AT&T Illinois opposes the addition of that word.

In its briefs, AT&T Illinois explained that if the Commission adopted the AT&T Illinois-proposed escrow language that is the subject of Issue 53, the Commission must also resolve Issue 52 in favor of AT&T Illinois in order to make the contract language work properly. AT&T Br.

at 163-166; AT&T Reply at 71-72. In addition, AT&T Illinois argued that the Commission should resolve Issue 52 in favor of AT&T Illinois for a separate reason, unrelated to Issue 53.

*Id.*

The PAD resolves Issues 52 and 53 in favor of Sprint.

AT&T Illinois takes exception on Issue 53 (see discussion immediately below), and if the Commission resolves Issue 53 in favor of AT&T Illinois, it must also resolve Issue 52 in favor of AT&T Illinois, for the reasons AT&T Illinois explained in its briefs. However, AT&T Illinois has decided not to pursue the *additional* argument it previously asserted in support of its position on Issue 52. Consequently, AT&T Illinois' exception on Issue 52 should be granted if, but only if, the Commission resolves Issue 53 in favor of AT&T Illinois.

#### **Proposed substitute language for Commission Arbitration Decision**

The Commission Analysis and Conclusion at page 72 of the PAD should be modified as indicated below, with the struck-through language deleted and the underscored language added:

Sprint and AT&T are disputing the appropriate language for “Non-Paying Party” and “Unpaid Charges” to be used in the ICA. Sprint proposes to insert the word “undisputed” within the definitions. Sprint argues that the Billed Party has a right to dispute amounts on a bill without being labeled a “Non-Paying Party,” and without the disputed amount being labeled an “Unpaid Charge.”

AT&T argues that the terms only have their intended meaning if defined as AT&T proposes, especially if the Commission decides in favor of AT&T in Issue 53, wherein AT&T proposes escrow language using the terms “Non-Paying Party” and “Unpaid Charges” that will only work if the terms are defined in accordance with AT&T’s proposed definitions.

As discussed immediately below, the Commission has resolved Issue 53 in favor of AT&T Illinois. As AT&T pointed out in its briefs, definitions in a contract are not inherently “right” or “wrong.” Rather, the test of a definition in a contract is whether it yields the intended results when the defined term is used in the contract. AT&T Illinois is correct that its language for Issue 53, which we have adopted, functions as intended only if “Non-Paying Party” and “Unpaid Charge” are defined as AT&T proposes. Accordingly, we adopt AT&T’s proposed definitions.

~~The Commission agrees that AT&T's language would include good faith disputes within the definitions of "Non-Paying Party" or "Unpaid Charges," which, as Staff asserts, could improperly constrain a Billed Party from disputing charges in good faith. AT&T's language carries the implication that the billed amount is accurate, and the Billed Party is failing to pay. There should be no implication that the Billed Party should pay for improper charges. Furthermore, the Commission notes that it did not find in favor of AT&T in issue 53. The Commission adopts Sprint's language for "Non-Paying Party" and "Unpaid Charges."~~

~~AT&T states that should the Commission adopt Sprint's language for "Non-Paying Party" and "Unpaid Charges," then it will be inconsistent with the Parties agreed language in GT&C section 11.3. AT&T further argues that it is improper for the Commission to modify agreed language by the Parties. AT&T is incorrect. As Staff notes, the resolution of Issue 52 materially affects other language in the ICA, and as such a modification of the other language is necessary. Sprint does not oppose Staff's modification to section 11.3. Therefore, the Commission adopts Staff's recommended language. *Supra*; Staff Ex. 3.0 at 25.~~

**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? (PAD at 73-76)**

**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?" (PAD at 73-76)<sup>5</sup>**

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 earned, can be disbursed in accordance with that resolution. The purpose of the proposed escrow language is simply 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

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<sup>5</sup> The principal issue is Issue 53(a); the resolution of that issue necessarily drives the resolution of Issue 53(c). Thus, the discussion in the text focuses on Issue 53(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. *See* AT&T Br. at 166-167.

The PAD recommends that the Commission reject AT&T Illinois' proposed escrow language, but the reasons the PAD offers for that recommendation are weak, and the PAD overlooks an important consideration.

The first reason the PAD offers for its recommendation is that AT&T Illinois' proposed escrow requirement "has the effect of requiring pre-payment." PAD at 76. But there is a huge difference between AT&T Illinois' escrow proposal and "pre-payment," because (i) AT&T Illinois does not get to make use of escrowed funds, as it would pre-paid funds, and (ii) with an escrow requirement, the disputing party gets its money back, with interest, if its dispute is well-taken. To be sure, AT&T Illinois' proposed requirement that the billed party set aside funds to pay what it is later required to pay may impact the disputing party in ways that are akin to pre-payment – but so what? It certainly isn't pre-payment to AT&T Illinois. And, most important, the question is whether the escrow language AT&T Illinois proposed is a reasonable means to ensure that AT&T Illinois winds up getting paid a disputed amount when the dispute is eventually resolved in AT&T Illinois' favor, and to say that the proposed escrow requirement is akin to a pre-payment requirement sheds absolutely no light on the answer to that question.

The PAD may have intended to say that what AT&T Illinois is proposing is similar to the arrangement the FCC disapproved in the *Northern Valley Communications* decision cited by Sprint (*see* summary of Sprint Position at PAD p. 75), and that the Commission should follow the FCC's lead. But apart from the fact that the word "escrow" does not even appear in that

decision, the bill dispute provision that the FCC found unreasonable in that case bears no resemblance to AT&T Illinois' proposed escrow language. As the FCC stated,

[T]he Tariff provision that requires all disputed charges to be paid “in full prior to or at the time of submitting a good faith dispute” is unreasonable. As written, this provision requires everyone to whom Northern Valley sends an access bill to pay that bill, no matter what the circumstances (including, for example, if no services were provided at all), in order to dispute a charge. Further, the Billing Disputes provision states that Northern Valley is “the *sole judge* of whether any bill dispute has merit.” This provision is unreasonable, because it conflicts with *sections 206 to 208* of the Act, which allow a customer to complain to the Commission or bring suit in federal district court for the recovery of damages regarding a carrier's alleged violation of the Act.

Memorandum Opinion and Order, *Sprint Commc'ns Co. L.P. v N. Valley Commc'ns, LLC*, 26 FCC Rcd 10780, ¶ 14 (2011) (emphasis in original; footnotes omitted). Obviously, what concerned the FCC was that if the billed party wanted to dispute a bill – *any* bill, unlike the limited billings to which AT&T Illinois' escrow language would apply – the billed party had to pay the disputed amount in full (to the billing party – not into escrow), *and* the billing party was the sole judge of the dispute, so that, at the billing party's discretion, the billed party would not get its money back, even if the billed party was correct. That is grotesquely unreasonable – and it could hardly be more unlike AT&T Illinois' escrow proposal.

The PAD then attempts to distinguish away the Commission's decision in a precedent cited by AT&T Illinois, but the attempt fails. In Docket No. 05-0442, there was an issue concerning an SBC Illinois proposal that CLECs be required to escrow disputed amounts relating to so-called High-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 Tel. Co. 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 strongly supports AT&T Illinois' position here.

The PAD states, "Docket 05-0442 is distinguishable in that it required disputed amounts relating to High-Cap EELs be placed in escrow, whereas in the instant arbitration AT&T is proposing to require that *all* disputed amounts be placed in interest-bearing escrow accounts." PAD at 76 (emphasis in original). That is absolutely wrong, for two reasons. *First*, AT&T Illinois is *not* proposing that all disputed amounts be placed in escrow. On the contrary, one of the strengths of AT&T Illinois' proposed escrow language is that it excludes sweeping categories of disputes – including such things as small disputes and disputes concerning arithmetic or clerical errors – that probably encompass most disputes that Sprint might assert. *See* AT&T Br. at 168-170. *Second*, it makes no difference that the Commission's adoption of escrow language in Docket No. 05-0442 concerned only High-Cap EELs. The Commission's rationale, quoted

above, applies equally to any and all disputes; there is nothing about it that is unique to disputes about High-Cap EELs.

Finally, the PAD asserts that “a requirement to escrow all disputed amounts may have a negative effect on the Billed Party in that the Billed Party has incentive to not question a bill.” PAD at 76. There is no reasonable basis for that speculation. Under AT&T Illinois’ proposed language, a carrier with a legitimate billing dispute can either (a) pay AT&T Illinois the billed amount and forego the dispute forever, or (b) deposit the disputed amount in escrow and dispute the bill, knowing that it will get its money back, with interest, if it prevails. A rational carrier with a legitimate dispute will choose (b) 100% of the time. If there is any unhealthy incentive here, it is the incentive to raise frivolous billing disputes that would be encouraged by having no escrow requirement. Under Staff’s recommendation, a carrier with shaky finances has everything to gain and nothing to lose by disputing a bill – no matter how baselessly – knowing that by doing so, it is delaying payment by months, if not years, while the dispute is resolved.

In short, *none* of the reasons the PAD offers for rejecting AT&T Illinois’ proposed escrow language actually supports the PAD’s recommendation.

There is one arguable downside to an escrow requirement, namely, that it deprives the billed party of the use of its money until the dispute is resolved. There is nothing wrong with that when the dispute is ultimately resolved in favor of the billing party (since in that scenario the billed party “should have” paid the bill and was thus “correctly” deprived of the use of its money), but when the dispute is resolved in favor of the billed party, that party has been “incorrectly” deprived of the use of its money – though it eventually gets its money back, with interest. Undeniably, therefore, this issue 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,<sup>6</sup> 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. Consequently, the most reasonable way to resolve the issue is to answer the following question: Which is the greater harm: (1) for the Billed Party to escrow disputed amounts that, looked at in hindsight, "should not" have been escrowed because the Billed Party's dispute was well taken, or (2) 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 evident: 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. AT&T Illinois made this point loud and clear in its briefs (AT&T Br. at 171-172; AT&T Reply at 73), but the PAD does not address it. AT&T Illinois respectfully suggests that the escrow issue cannot properly be decided without addressing this key point, and that the only possible resolution of the issue when the point is considered is to adopt AT&T Illinois' proposed escrow language.

For the foregoing reasons, the Commission should reject the PAD on Issue 53(a) and adopt AT&T Illinois' proposed escrow language. It necessarily follows that Issue 53(c) should also be resolved in favor of AT&T Illinois. *See* AT&T Br. at 166, 172.

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<sup>6</sup> Note that because other carriers may adopt Sprint's ICA, AT&T Illinois has good reason to be concerned about frivolous billing disputes, even if Sprint itself would only assert disputes in good faith.

### Proposed substitute language for Commission Arbitration Decision

The Commission Analysis and Conclusion at page 76 of the PAD should be modified as indicated below, with the struck-through language deleted and the underscored language added:

AT&T proposes that subject to certain enumerated exceptions, disputed amounts should be paid into interest-bearing escrow accounts pending resolution of the dispute. AT&T provides language in the GT&C detailing the terms and conditions of an escrow provision when there is a billing dispute between the Parties. AT&T Illinois explains that the purpose of its language is to ensure that if a carrier disputes its bill and the dispute is ultimately resolved in AT&T's favor, there will be funds on hand to pay the bill. Sprint and Staff oppose AT&T's proposal arguing that the FCC and the Commission previously determined that it is an unreasonable practice for a billing carrier to require a disputing party to pre-pay good faith disputed amounts pending resolution of the dispute. Sprint and Staff argue that the escrow provision here would have the same effect as requiring Sprint to pre-pay.

AT&T's proposed language addresses a legitimate concern, and the Commission finds the language appropriately tailored to that concern, particularly in light of the exclusion of certain categories of disputes from the escrow requirement that AT&T has built into its language. The Commission does not agree with Sprint and Staff that ~~AT&T's proposed language that all disputed amounts should be paid into interest bearing escrow accounts pending resolution of the dispute has the effect of requiring pre-payment of the sort that the FCC disapproved in the *Northern Valley Communications case* cited above, because the offending tariff provision in that case was very different from the escrow language that AT&T proposes here. AT&T relies on Docket 05-0442, wherein the Commission required CLECs to escrow disputed amounts relating to High-Cap EELs, to support its use of an escrow provision here; however, Docket 05-0442 is distinguishable in that it required disputed amounts relating to High-Cap EELs be placed in escrow accounts, whereas, in the instant arbitration AT&T is proposing to require that *all* disputed amounts be placed in interest bearing escrow accounts. Furthermore, the Commission notes that a requirement to escrow all disputed amounts may have a negative effect on the Billed Party in that the Billed Party has incentive to not question a bill.~~

To be sure, AT&T's proposed escrow language deprives the party that disputes a bill of the use of its capital until the dispute is resolved, which is an undesired consequence if the dispute is ultimately resolved in favor of the disputing party. The question thus becomes: Which is the greater harm – for the Billed Party to escrow disputed amounts that, looked at in hindsight, “should 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? We conclude that 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.

Accordingly, Wwith respect to Sprint's Issue 53, and AT&T's Issue 53(a), the Commission finds in favor of AT&T's ~~Sprint's~~ language.

Regarding AT&T Issue 53(b), the Commission finds that the Disputing Party should use the internal dispute form of the Billing Party. This is consistent with the Commission's determination in Issue 60.

Since the Commission ~~adopted~~ rejected AT&T's language in Issue 53, the Commission also adopts AT&T's language ~~only remaining issue~~ with respect to AT&T Issue 53(c), ~~which is a corollary of Issue 53(a) is whether to keep Sprint's use of the term "Disputing Party," or to adopt Staff's recommended change. Since both AT&T and Sprint used the term "Disputing Party" in their respective proposed language, the Commission declines to adopt Staff's recommendation.~~

~~The Commission adopts Sprint's language for Issue 53, with the exception of the language in section 10.8 that is the subject of Issue 60.~~

Dated: May 6, 2013

Respectfully submitted,

By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **AT&T ILLINOIS' BRIEF ON EXCEPTIONS** was served on the following parties by U.S. Mail and/or electronic transmission on May 6, 2013.

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