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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company, Inc.	:	
-vs-	:	
Global NAPs Illinois, Inc.	:	
	:	
Complaint pursuant to Section 252(e) of the	:	**08-0105**
Federal Telecommunications Act of 1996, 47	:	
U.S.C. §252(e), and Sections 4-101, 10-101,	:	
and 10-108 of the Illinois Public Utilities Act,	:	
220 ILCS 5/4-101, 220 ILCS 5/10-101,	:	
and 220 ILCS 5/10-108.	:	

PROPOSED ORDER

On February 13, 2008, Illinois Bell Telephone Company, Inc. ("AT&T Illinois", "SBC" or "Ameritech") filed a Verified Complaint alleging that Global NAPs Illinois, Inc. ("Global Illinois" or "Global") had violated the parties' interconnection agreement ("ICA") and AT&T Illinois' ICC Tariff No. 21 by refusing to pay any of the amounts billed by AT&T Illinois for certain intrastate services and facilities, and further alleging that Global Illinois no longer satisfies the statutory requirements for maintaining certificates of service authority under Sections 13-403, 13-404, and 13-405 of the Illinois Public Utilities Act, 220 ILCS 5/13-403, 5/13-404, and 5/13-405.

Pursuant to due notice, a status hearing was held in the matter on February 27, 2008. On March 5, 2008, Global Illinois filed its appearance herein, and on March 31, 2008, simultaneously filed its Answer and Affirmative Defenses.

An evidentiary hearing was held on September 4, 2008. Admitted into the record was the testimony of Jeffrey Hoagg on behalf of Staff and the testimony of James Scheltema and Jeffrey Noack on behalf of Global Illinois. Patricia H. Pellerin, James W.

Hamiter, Barbara A. Moore (adopted by Heather Lenhart), Rebecca Harlen, William Cole, Yolanda Williams all testified on behalf of AT&T Illinois and each account was admitted into the record. At the conclusion of the hearing on September 4, 2008, the record was marked "Heard and Taken."

On October 3, 2008, initial briefs were filed by AT&T Illinois, Global and Staff. The reply briefs of the parties and Staff were filed on October 24, 2008.

The Administrative Law Judge ("ALJ") issued a Proposed Order on November 24, 2008.

On the allegations of the complaint, the record and the parties' arguments, the Commission observes that there are four billed, but unpaid, items in dispute between AT&T Illinois and Global Illinois. We begin to consider the matter issue by issue.

I. WHETHER GLOBAL HAS VIOLATED AT&T ILLINOIS' INTRASTATE TARIFF BY FAILING TO PAY FOR DS3S PURCHASED THEREUNDER.

In order to directly exchange traffic, a competitive local exchange carrier ("CLEC") like Global and an incumbent local exchange carrier ("ILEC") like AT&T Illinois must physically interconnect their networks. The point at which the two carriers' networks are physically interconnected is called the "point of interconnection," or "POI." Carriers generally interconnect their networks using high-capacity facilities, upon which lower-level circuits are established. To actually exchange traffic, the carriers must establish trunks over these circuits, where each trunk is a single talking path between the two carriers' switches.

Staff explains that a POI functions not only as a point on an incumbent carrier's network where traffic is exchanged by the incumbent and another carrier, but also as a bright line demarcation that indicates which carrier is responsible for costs. The Commission has long held, and often reiterated, that each carrier is responsible for the costs of facilities and carrying traffic on its own side of the POI. *See, e.g.*, Arbitration Decision at 81, Docket 04-0469 (November 30, 2004); Arbitration Decision at 22, Docket 03-0239 (August 26, 2008).

A. AT&T Illinois' Position

AT&T Illinois explains that, in August 2001, Global requested to negotiate an ICA with AT&T Illinois to interconnect the parties' networks. The parties were unable to reach agreement, and the matter went to arbitration (such that the parties' ICA was not effective until late July, 2003). In the meantime, however, in order to establish interconnection and exchange traffic prior to completion of the arbitration and approval process, the parties had, on January 28, 2002, entered into an "interim interconnection agreement" ("Interim Agreement"). In this Interim Agreement, AT&T Illinois states, the parties agreed that Global and AT&T Illinois would interconnect at a single POI in each local access and transport area, and agreed that Global "shall be responsible for the cost and placement of fiber cable on its side of the POI."

According to AT&T Illinois, the Interim Agreement was still insufficient to resolve all the disputes between the parties regarding how and where they would interconnect their networks. Therefore, on May 22, 2002, the parties entered into an "amendment to interim interconnection agreement" ("Interim Agreement Amendment") to more specifically set forth how and where the parties would interconnect. In particular, the parties agreed that they would interconnect using a "SONET system fiber meet" between AT&T Illinois' LaGrange tandem building and the York Road location in Oak Brook at which Global had placed its equipment.

Global's Oak Brook location did not (and does not) belong to AT&T Illinois, it contends, but AT&T Illinois already had a fiber loop facility extending to that location. The parties disputed whether Global was entitled to interconnect at its Oak Brook location using the pre-existing fiber loop facility, or whether Global was required to interconnect at AT&T Illinois' LaGrange building using facilities provided or purchased by Global (including, for example, paying for use of AT&T Illinois' existing fiber facility connecting the Oak Brook location to the LaGrange building). At this juncture, AT&T Illinois states, the parties agreed to use the existing fiber to interconnect on an interim basis, and further agreed on how they would resolve their dispute over financial responsibility for that facility. More specifically, Global agreed that "[w]ithin 60 days of approval of the Global/SBC interconnection agreement by the Illinois Commission, Global will seek a determination by the Illinois Commission . . . as to (a) whether Global NAPs can interconnect with SBC at GNAPs facility; (b) if Global NAPs cannot interconnect with SBC at GNAPs facility, at what location or type of location can Global NAPs interconnect with SBC; and (c) what, if anything, Global NAPs owes SBC for the use of its fiber while the issue of the appropriate interconnection point is being resolved."

The parties' ICA was approved on July 23, 2003, but, AT&T Illinois notes, Global did not thereafter seek from the Commission a determination regarding whether or not Global could interconnect at its Oak Brook location. The Interim Agreement Amendment provided for just such an eventuality by stating that:

> In the event that there is no ruling . . . within 12 months of the date of interconnection, Global NAPs shall either:

> a. provide two fibers from the Global NAPs location to the SBC location (as noted in paragraph 1, above) no later than 12 months after the Illinois Commission has issued the final arbitration award. . . . ; or,
>
> b. If Global NAPs chooses not to provide its two fibers to complete this joint fiber meet between the two Parties, SBC will charge GNAPs for the facilities in place to provide this interconnection at rates commensurate with the FCC-AIT Interstate Access Tariff Rates.

According to AT&T Illinois, Global did not provide its own fibers from its Oak Brook location to AT&T Illinois' LaGrange location. Instead, to this day, the parties use AT&T Illinois' fiber facility to connect those locations. As a result, AT&T Illinois claims, and pursuant to the Interim Agreement Amendment, it is entitled to charge Global for the fiber facility.

Instead of charging Global for the entire fiber facility between Oak Brook and LaGrange, AT&T Illinois states that it has billed Global only for the specific capacity of the facility ordered by Global and dedicated to Global. In particular, AT&T Illinois says that it has billed Global only for the particular DS3 high-capacity circuits ordered by Global that were established over the fiber facility. As AT&T Illinois witness Lenhart explained, Global submitted Access Service Requests ("ASRs") for eleven DS3 circuits between Global's Oak Brook location and AT&T Illinois' LaGrange tandem location. AT&T Illinois explains that ASRs are industry-standard forms used by carriers to order access services and certain local services from another carrier. In four of its ASRs, AT&T Illinois observed Global to indicate that the "percent interstate use" was zero. As such, AT&T Illinois contends, Global represented that the DS3s would not be used for interstate services, and thus were being ordered under AT&T Illinois' intrastate tariff. *See id.* at 5.

Pursuant to Global's ASRs, AT&T Illinois states that it provisioned the requested DS3 circuits, upon which trunks were subsequently established to exchange traffic between the parties. AT&T Illinois has billed Global the tariffed charges for these circuits every month, but Global has not paid a penny. Under these circumstances, AT&T Illinois asks the Commission to find Global in violation of the terms of AT&T Illinois' intrastate tariff, and order Global to pay the tariffed charges for these DS3 circuits.

According to AT&T Illinois, requiring Global to pay the intrastate tariffed charges for the intrastate DS3 circuits it ordered to connect its Oak Brook location to AT&T

Illinois' LaGrange location is entirely consistent with the parties' ICA. That is because, in the ICA, the parties agreed that AT&T Illinois' location (*i.e.*, its LaGrange tandem building) would be the POI, and agreed that Global would be responsible for all facilities on its side of that POI – *i.e.*, that Global would provide or pay for the facilities running to the LaGrange location.

In the Interim Agreement Amendment, AT&T Illinois points out, the parties agreed in paragraph 1, that "[t]he standards for interconnection both interim and final shall be those agreed upon by the Parties (as shown in the agreed upon language in the interconnection agreement filed by SBC in the Illinois arbitration proceeding)," and further "agree[d] that the interconnection method identified herein is consistent with design four (as noted in paragraph 1, above)." AT&T Ex. 1.0, Sch. PHP-2, at 1-2. "Design Four," as described in undisputed language of the final ICA, addresses the provision of fiber between the Global and AT&T Illinois locations, and specifies that "[t]he POI will be defined as being at the SBC-13STATE location." ICA, Appendix NIM, § 3.4.7.4; *see* AT&T Ex. 1.0 at 10. The final ICA makes clear that the parties chose this option, stating that "[t]he Parties agree to use the options set forth in 3.4.7.4." *Id.* § 3.4.7.

In short, AT&T Illinois contends, the final ICA makes clear that the POI is at AT&T Illinois' location, the LaGrange tandem, and not at Global's location in Oak Brook. As Global witness Noack stated, "Global chose to connect to the Illinois Bell network by connecting at a single point – the Illinois Bell tandem switch in LaGrange." Global Ex. 2.0 (Noack Direct) at 1. In addition, AT&T Illinois notes, the parties agreed that the POI "serves as a demarcation point between the facilities that each Party is responsible to provide," and agreed that "each party [is] financially responsible for all expenses relating to facilities on its side of the POI." ICA, Appendix NIM, § 1.11. Thus, it is clear under the ICA, AT&T Illinois argues, that Global is financially responsible for the facilities connecting its Oak Brook equipment (or more accurately, the equipment of Global's affiliates) to the POI, AT&T Illinois' LaGrange location.

For all the reasons set out on record and in argument, AT&T Illinois asks the Commission to find Global in violation of AT&T Illinois' intrastate tariff, and order Global to pay all past-due tariffed charges for the intrastate DS3 circuits ordered by Global.

B. Global Response

<u>Global was Entitled to Designate its Oak Brook Facility as the POI.</u>

For the Commission to understand Global's position on why the POI is located at Global's Oak Brook facility, Global believes it essential to review the sequence of events that led up to this proceeding. In this regard, Global agrees with the timeline provided by AT&T Illinois witness Pellerin with one exception, i.e., the date of execution of the Amendment to the Interim Agreement. While Ms. Pellerin claims that it was executed on May 22, 2002, Global points out that this is only the date that AT&T signed the Interim Amendment. For its part, Global had already signed that Interim Amendment on May 10, 2002. According to Global, both dates are important because Global executed the Interim Amendment prior to the entry of the Commission order in the Arbitration and AT&T executed it *after* the entry of that order.

One of the provisions in the Interim Amendment was that Global would obtain an ICC order if it wished to locate the POI at its Oak Brook location instead of the AT&T LaGrange tandem office. A few days after Global executed that agreement, however, the Commission entered its order in the arbitration case finding as follows:

> As to Issue 2, the Commission is of the opinion that Ameritech and Global should be responsible both financially and physically on its side of the single POI. Ameritech's arguments, while lengthy are not persuasive to require the adoption of the Ameritech proposal. The Commission concurs that the transportation of calls to a single POI in each LATA would not significantly increase transport costs, but rather the incremental costs that Ameritech would incur would be *de minimus*. Ameritech's position could have the effect of undermining the single POI requirement. *Arbitration Decision*, Docket 01-0786 at 8 (May 14, 2002).

Thus, Global contends, after it executed the amendment requiring it to obtain a Commission finding, Global received exactly that - a Commission finding. While AT&T appears to be arguing here that Global should have gone back to the Commission yet again and after the arbitration decision, and once again asked if the Commission really meant it when it said that Global could choose its POI, Global does not believe that such a nonsensical action was required.

Jeff Noack, who is the Director – Network Operations for Global, Inc., provided testimony regarding the process of interconnection of the AT&T and Global networks. He testified that Global had expected to pay for the facilities on its end of the SONET because he understood that the parties shared the cost of that SONET when it was built. During the hearing, he further explained that the SONET between the AT&T and Global facilities was already in existence when Global moved into that location and thus, Global expected to pay for the equipment on its side of the SONET and AT&T would pay for the equipment on its side of the SONET. Tr. 143-44.

It is clear to Global that the Commission order in the arbitration case allowed Global to connect to AT&T's network at any technically feasible location. Global established the POI at its Oak Brook facility. Given that AT&T owns the Fiber Distribution Frame that is the termination of the SONET in the Oak Brook facility, Global should be allowed to designate the POI to be that Fiber Distribution Frame.

AT&T's Network Extends Beyond its Central Offices.

Global notes AT&T witness Hamiter to have testified that the POI could not be located on the Global end of the SONET because the POI must be within an AT&T facility. Thus, Global argues, even though AT&T owns the SONET and owns the Fiber Distribution Frame located in Global's Oak Brook facility, AT&T claims that it is not technically feasible to interconnect at that point because in AT&T's mind, its network does not extend that far. According to AT&T, once the SONET leaves the AT&T tandem switch, it is no longer part of AT&T's network.

Global contends that AT&T's argument is contrary to the Federal Telecommunications Act of 1996 which clearly and simply states that incumbent local exchange carriers must allow competitive local exchange carriers to interconnect "at any technically feasible point within the carrier's network." 47 USCA 251 (c)(2)(B). There is no verbiage with the additional requirement that POIs be within an incumbent's facilities. Obviously it is technically feasible to interconnect with AT&T at the Fiber Distribution Frame at the end of its SONET because the parties have been exchanging traffic that way for years. AT&T cannot evade the requirement of the Federal Act and this Commission's order in the arbitration proceeding by arbitrarily declaring that the SONET and Fiber Distribution Frame are not really part of its network.

As to AT&T Illinois' own practice, Global notes Mr. Hamiter to have admitted that AT&T interconnects with other incumbent local exchange carriers at a "meet point" that can be outside of an AT&T owned facility: "it could be anywhere, out in the middle of a field or something like that, it's more of an administrative meet point." He adds that in such a situation, the parties are not literally placing interconnection equipment in the middle of a field, rather, that they arbitrarily assign responsibility for an existing cable to each carrier: "They provision and construct the cable, and then some point on that cable, the lengths are divided, and you know, on this side, it's ours and on this side, it's the other LEC's cable." Tr. 65. Thus, AT&T has no problem interconnecting with other incumbent local exchange carriers at a location outside its own central offices. There is no technical or legal reason why AT&T should not be required to provide CLECs with the same ability.

<u>It Is Irrelevant That Global "Ordered" Trunks Using AT&T's ASR Process.</u>

According to Global, paragraph 4 of the Interim Interconnection agreement required Global to provide AT&T with trunk forecasts. But, it claims that AT&T Illinois would not accept a simple estimate. Rather, it demanded that Global "order" these trunks using its ASR process. Global witness testified that the ordering of those circuits was one of the major frustrations Global had with Illinois Bell.

According to Global, the mere fact that it followed AT&T Illinois' demands and provided it with ASRs that identified the circuits AT&T Illinois would need to have on its side of the SONET ring in no way implies that Global is responsible for the cost of those circuits. Global maintains that it should never have been forced to submit ASRs in the first place.

Global submits that the Commission should not allow AT&T to benefit from its own internal processes that turns a trunk forecast into a request for services subject to charges by imposing on its competitors the burden of right-sizing AT&T's side of the network (the side that AT&T agrees is its responsibility in order to exchange traffic.

Global contends that a review of the ASRs, AT&T Schedules BAM-1 through BAM-3, demonstrates how AT&T Illinois not only forced Global into "ordering" services it was not obligated to order, but it also prevented Global from identifying the nature of the traffic it intended to transmit. In particular, Global claims that AT&T Illinois prevented it from providing AT&T with information that would show that the traffic would be subject to the enhanced service provider ("ESP") exemption. As Global witness Noack explained, "There was simply no way to indicate in these ASRs that traffic would be entirely that of ESPs. Virtually the only thing that AT&T would allow us to say was if traffic would be intra LATA or inter LATA." Global Ex. 2.0, at 7.

Global witness Noack also testified that the ASR process was so difficult to implement for the traffic that Global was transmitting that he is not certain how some of the ASRs resulted in "local" trunks and others resulted in "interstate" trunks. The traffic over all trunks was the same, so there was no intention to order different trunks. Mr. Noack further observed that:

> The fact that the ASRs resulted in charges under state and federal tariffs demonstrates both the difficulty of using the ASRs and the absurdity of using ASRs for this particular situation. All of the traffic passed on by Global to Illinois Bell is ESP traffic. The fact that some circuits are being charged under state and others under federal tariffs is most likely due

> to some confusion when attempting to complete these ASRS. The fact that different tariffs apply to circuits used for exactly the same thing demonstrates the problems Illinois Bell causes when, as here, it insists that Global fit a square peg into a round hole. Global Exhibit 2.0, at 8.

Global claims that it has been aggressively attempting to resolve its dispute with AT&T. Early in the companies' relationship, Mr. Noack had conversations with representatives of AT&T Illinois regarding the ASR form for not providing a proper option or an adequate manner to describe what Global was sought. He expressed the concern that Global might be improperly charged because it was submitting the ASRs demanded by AT&T. But, he was told that unless Global completed the form as presented a DS3 could not be ordered.

Global maintains that it did not "order" those DS3s as claimed by AT&T Illinois and it disputes AT&T Illinois use of the ASR submitted by Global as a commitment from Global to "order" and pay for certain circuits. According to Global, the Interconnection Agreement requires Global to provide AT&T Illinois with information on the traffic it expects to send to, or receive from, AT&T. Global contends that AT&T Illinois only needed a traffic estimate, and yet it AT&T required Global to provide it with specific network facilities information to right-size AT&T's side of the network using ASRs.

Global claims that, simply because it complied with AT&T's demand, does not mean that this action may now be used against Global as evidence that it "ordered" the DS3s necessary to carry that traffic. Very simply, Global argues, if the Commission determines (as it should) that the POI is at the Oak Brook facility, then these mandated ASRs cannot now be used as the premise upon which to base charges to Global for facilities that AT&T is otherwise obligated to provide under the parties' Interconnection Agreement.

Under the authority given it in the Commission's arbitration order, Global asserts, it chose to locate the POI at the AT&T Fiber Distribution Frame (obviously within AT&T's network) located in Global's Oak Brook facility. Thus, Global argues, it is responsible for all costs expended carrying traffic beyond that Fiber Distribution Frame and AT&T is responsible for the cost of carrying traffic on its side of the Fiber Distribution Frame. According to Global, the DS3s that AT&T is claiming Global "ordered" are on AT&T's side of the Fiber Distribution Frame meaning that Global is not responsible for the cost of those DS3s.

C. Staff Position

Staff details the course of events pursuant to which the parties here formed their ICA.

1. Global Illinois appears to have sought to interconnect with AT&T shortly after receiving its Certificate of Service Authority from the Commission. At this point, AT&T and Global Illinois executed an "interim ICA," pending resolution of disputed interconnection questions in a Section 252 arbitration proceeding. The interim ICA, dated January 28, 2002, provided that Global Illinois would be required to establish one POI in each LATA. Pursuant to the interim ICA, Global Illinois was responsible for the "cost and placement" of necessary fiber optic facilities on its side of the POI. The interim ICA further provided that, once the parties entered into a permanent ICA arrived at pursuant to arbitration, Global Illinois would have the option of: (a) establishing multiple POIs, on a facility lease basis at special access rates; or (b) establishing a single POI, on the terms and conditions set forth in the Network Interconnection Methods ("NIM") Appendix to the ICA ultimately arrived at through arbitration..

2. In May, 2002, AT&T and Global executed an amendment to the interim ICA. Pursuant to the interim ICA Amendment, Global Illinois was authorized, within 60 days of Commission approval of a permanent ICA, to seek a determination from the Commission regarding: (a) whether Global Illinois could interconnect with AT&T at a Global Illinois facility; (b) in the event the Commission determined that Global Illinois could not interconnect with AT&T at a Global Illinois facility, the location at which Global Illinois could interconnect with AT&T; and (c) what, if anything, Global Illinois owed AT&T for use of AT&T fiber optic facilities while the location of the POI was being resolved.

3. Global Illinois and AT&T duly submitted their interconnection disputes to arbitration by the Commission. On May 14, 2002, the Commission entered its Arbitration Decision in that proceeding. Arbitration Decision, Docket 01-0786 (May 14, 2002) (hereafter "Arbitration Decision"). In the Arbitration Decision, the Commission determined that "Global [Illinois] should be permitted to establish one POI per LATA at any technically feasible location in [AT&T]'s network[,]" and that "[t]he language for Appendix NIM, Section 1.11 of the Interconnection Agreement should reflect this agreement." The Commission further determined that "[AT&T] and Global [Illinois] should be responsible both financially and physically on its side of the single POI." Id. The Commission directed AT&T and Global Illinois to file an ICA consistent with the Arbitration Decision for approval by the Commission.

4. AT&T and Global Illinois executed such an ICA and presented it to the Commission for approval on May 6, 2003. And, on July 23, 2003, the Commission approved the ICA. Order, Docket 03-0296 (July 23, 2003).

The ICA, Staff observes, contains two sections of importance to this case. The first is titled General Terms and Conditions, and it provides that:

> "Point of Interconnection" (POI) is a physical location at which the Parties' networks meet for the purpose of establishing Interconnection. POIs include a number of different technologies and technical interfaces based on the Parties' mutual agreement shall have the definition ascribed to "meet point" at 47 C.F.R. Sec. 51.5. ICA, General Terms *and Conditions*, ¶1.1.95

A second relevant section, Staff notes to be Appendix NIM, and it provides that: "Fiber Meet Interconnection between [AT&T] and [Global Illinois] can occur at any technically feasible point that GNAPs designates." ICA, Appendix NIM, ¶3.4.1. It further provides that: "[w]hen the Parties agree to interconnect their networks pursuant to the Fiber Meet, a single point-to-point linear chain SONET system must be utilized. Only Interconnection trunking shall be provisioned over this jointly provided facility[.]" Id., ¶3.4.2. Appendix NIM goes into further detail, providing four general network designs for interconnection, Id., ¶¶ 3.4.7.1 – 3.4.7.4, and further stating that the parties agree to use the interconnection designs set forth in Paragraph 3.4.7.4. Id., ¶3.4.7. Paragraph 3.4.7.4 provides for the following design for interconnection:

> Both [Global Illinois] and [AT&T] each provide two fibers between their locations to terminate at each parties' FOT. This design may only be considered where existing fibers are available and there is a mutual benefit to both Parties. [AT&T] will provide the fibers associated with the working side of the system. [Global Illinois] will provide the fibers associated with the protection side of the system. The Parties will work cooperatively to terminate each other's fiber in order to provision this *joint* point-to-point linear chain SONET system. Both Parties will work cooperatively to determine the appropriate technical handoff for purposes of demarcation and fault isolation. **The POI will be defined as**

> **being at the [AT&T] location.** ICA, Appendix NIM, ¶3.4.7.4 (emphasis added)

In Staff's opinion, this provision compels a decision in favor of AT&T's position that the POI is located in the building housing AT&T's La Grange tandem switch. If the ICA language is clear – and in this case, Staff maintains that the ICA language is <u>very</u> clear – there is no reason to consider arguments regarding where the parties intended the POI to be, or where one of the parties thought the POI was. The POI is where the ICA provides that it is: at the AT&T location in La Grange.

This is easily confirmed, Staff contends, by reviewing the language that describes the other, rejected, interconnection designs. The first of these, and described in Paragraph 3.4.7.1, calls for interconnection at a mutually agreeable mid-point between the AT&T location in La Grange, and the Global Illinois location in Oak Brook. ICA, Appendix NIM, ¶3.4.7.4.1. In this configuration, "[t]he POI will be at the fiber termination panel at the midpoint meet." <u>Id</u>. So too, the second rejected design, described in Paragraph 3.4.7.2, provides that Global Illinois will provide fiber optic cable up to the last entrance manhole at the AT&T tandem or end office switch. ICA, Appendix NIM, ¶3.4.7.4.3. In this configuration, the POI is the manhole. <u>Id</u>. In the third rejected design, while the design is somewhat different, the POI is the same – the last entrance manhole. ICA, Appendix NIM, ¶3.4.7.4.3.

In Staff's view, for the POI to be located where Global Illinois contends it to be – that is to say, located somewhere on, or generally on, the SONET facility running from the AT&T location in La Grange to the Global Illinois location in Oak Brook – the parties would have had to adopt the first design, described in Paragraph 3.4.7.1, which locates the POI at a mutually agreeable meet point on the SONET facility between the two locations. Yet, Staff observes, the parties specifically and explicitly agreed to use another design – the one in which the POI was at the AT&T location. Accordingly, Staff avers,Global Illinois' position finds no support whatever in the ICA itself.

In addition, Staff notes that Global Illinois' position finds no support in law or regulation. FCC rules establish general requirements regarding interconnection issues relating to the POI. In this regard, Staff sets out FCC Rule 51.305(a)(2), which speaks to carrier interconnection as occurring at a technically feasible point "within the incumbent LEC's network" 47 C.F.R. §51.305(a)(2).

While AT&T might, through negotiations, agree to locate the POI elsewhere, Staff asserts that it clearly has not done so here, and it is clearly not required by either FCC rule or the Arbitration Order to do so. This is fatal to Global Illinois' argument. Staff observes Global Illinois to contend that it did not agree to locate the POI at the La Grange tandem, but rather "intend[ed]" it to be the SONET facility. Global Illinois 2 at 2. Assuming the parties failed to agree regarding the location of the POI (and the terms of the ICA demonstrate conclusively to Staff that the parties *did* agree) Global Illinois' could not, consistent with law, suggest that the POI was anywhere not on the AT&T network.

Staff points out that the federal rules require the POI, all else equal, to be on the ILEC's network. 47 C.F.R. §51.305(a)(2). Just the same, Staff observes, the Commission found that the POI must be located on the AT&T network. Arbitration Decision at 8. Global Illinois, however, makes no case for the SONET facility being on AT&T's network; indeed, it appears to be Global Illinois' contention that the SONET facility was "jointly provisioned". In other words, Staff sees Global Illinois to contends that the POI was located somewhere that it could not be, as a matter of law, without AT&T specifically agreeing to it, which AT&T clearly never did.

Staff does not mean to suggest that Global Illinois might not have negotiated with AT&T to locate the POI somewhere other than on the AT&T network. And, Global Illinois might have sought a determination from the Commission that the POI should be located somewhere other than on the AT&T network; as noted, the terms of the interim ICA clearly permitted – indeed, arguably directed – Global Illinois to seek such a determination. But, Global Illinois did not avail itself of either of these avenues. Instead, Global Illinois appears to have proceeded on the assumption that the POI was somewhere other than where the ICA provided, with no basis for doing so other than its own view of the matter.

From its review and analysis, Staff concludes that the POI is located, by the plain terms of the ICA, at AT&T's facility in La Grange, precisely as AT&T contends. In Staff's view, Global Illinois' position is contrary to the ICA, the applicable law, and the Commission's Arbitration Order, and appears to be based entirely on self-interest.

D. Commission Analysis and Conclusion.

For reasons of importance to this and other issues, the Commission has found it necessary to identify the location of the POI between the parties' networks and to consider how it was established by the parties' agreements and subsequent actions and inactions. To be sure, there is a fundamental disagreement in this proceeding regarding the location of the point of interconnection between the two carriers' networks. AT&T contends that it is located in the building housing AT&T's La Grange tandem switch, located at 20 S. Ashland Ave., La Grange, Illinois. Global Illinois initially states that it chose to connect to the Illinois Bell network by connecting at a single point – the Illinois Bell tandem switch in La Grange, but it later contends that the POI is in fact a SONET ring constructed between the AT&T La Grange tandem, and the Global Illinois Point of Presence ("POP") located in Oak Brook, Illinois. Global maintains that it never intended the POI to be located at the La Grange tandem.

In the Commission's analysis of this issue, we examined the functions of the POI, in both practical and legal terms, and we further consider the sequence of interconnection agreements between the parties. Staff has provided important work to guide our review in these respects.

For its part, AT&T Illinois directs our attention to the provisions of the parties ICA. More specifically, AT&T Illinois points out, Appendix Network Interconnection Methods ("NIM") of the ICA, which governs the manner in which the parties interconnect their networks, states that, "[t]here are four basic Fiber Meet design options" for interconnecting the parties' networks, and "[t]he Parties agree to use the options set forth in 3.4.7.4." ICA, App. NIM, § 3.4.7. This Section 3.4.7.4, in turn, describes "Design Four," whereby each party is supposed to provide fiber and "[t]he POI will be defined as being at the SBC-13STATE location." This showing makes clear to the Commission that Global agreed in the final, binding ICA, submitted to and approved by the Commission, that the POI would be at AT&T Illinois' location, not at Global's facility.

On the other hand, we observe Global Illinois to maintain that its Oak Brook facility is the POI, and that since each party must bear the cost of facilities on its side of the POI, Global cannot be required to pay for the DS3s it ordered to connect its Oak Brook facility to AT&T Illinois' LaGrange tandem office.

To be sure, Global's position ignores the whole of the parties' ICA which states to the contrary. Instead, Global focuses exclusively, and draws our attention to its premise that, in the arbitration decision entered in Docket No. 01-0786, the Commission ruled that Global was entitled to establish the POI at its Oak Brook facility. Yet, a reasonable reading of the language on which Global relies and taken in full context, shows Global's assertion is simply not borne out. We see not one word in this Commission's arbitration decision that discusses whether the POI may be located at Global's Oak Brook facility - simply because that particular issue was not at hand.

Both Staff and AT&T Illinois address and explain the nature of the POI issue resolved by the Commission in the arbitration. They show that a very different matter was considered at the arbitration. It concerned whether, if Global designated a single POI rather than multiple POIs, AT&T Illinois should be permitted to impose transport charges for what AT&T Illinois' proposed ICA language called "long haul calls," or calls to or from AT&T Illinois end-users located in a different "tandem sector area" and a different local exchange than the POI. In the portion of the arbitration decision relied on by Global in its brief, the Commission rejected AT&T Illinois' proposal, and held that whether Global designates one POI or multiple POIs, each party must bear its own costs on its side of the POI(s). In the end, the Arbitration Decision says nothing about where the POI is – *i.e.*, at AT&T Illinois' LaGrange location or at Global's facility in Oak Brook. Thus, Global's arguments in this regard are flatly rejected and the Commission must rely on the parties' ICA.

To be sure, the parties' ICA confirms that the Commission did not rule that Global may select its Oak Brook facility as the POI. The final, conforming ICA, submitted to the Commission after the arbitration decision, does not identify Global's Oak Brook facility as the POI, but specifies, with certainty, that the POI is at AT&T Illinois' location, *i.e.*, its LaGrange tandem office.

The record informs this Commission further. It shows that Global agreed, in the Interim Agreement Amendment, that if it wanted to interconnect with SBC at GNAPs facility, *i.e.*, at Global's Oak Brook facility, it would seek a determination by the Illinois Commission within 60 days of approval of the Global/SBC interconnection agreement. This same agreement set out that, if Global did not seek and obtain such a ruling "within 12 months of the date of interconnection," then Global would either (1) provide two fibers of its own from the Global NAPs location to the SBC location, or (2) pay AT&T Illinois for the facilities in place. It cannot be disputed that Global did not seek a ruling from this Commission as to whether Global may interconnect at Global's Oak Brook facility rather than the LaGrange location, and, AT&T Illinois' assertion that Global has never provided any fibers of its own between those locations is unrefuted. This brings us to the determination that Global must pay AT&T Illinois for the facilities in place. If the arrangements were not to Global's liking, it has only itself to blame.

We understand Global to argue that it is "technically feasible" to interconnect at Global's facility in Oak Brook, and given that AT&T owns the Fiber Distribution Frame that is the termination of the SONET in the Oak Brook facility, Global should be allowed to designate the POI to be that Fiber Distribution Frame." We consider these Global's arguments to be both untimely and irrelevant to this proceeding. As Staff has correctly put the matter into perspective, the ICA makes clear that the parties did *not* designate Global's Oak Brook location as the POI. Rather, in the ICA, Global agreed that the POI would be at AT&T Illinois' location, and the parties also agreed how they would resolve whether Global could instead designate its Oak Brook location as the POI. We agree with Staff's analysis that, whether interconnecting at Global's Oak Brook facility is theoretically "feasible" today (or yesterday) is wholly beside the point, because the binding ICA says the POI is at AT&T Illinois' location, and Global never sought a ruling from the Commission as to whether it could instead designate its Oak Brook facility as the POI.

The Commission is not at all persuaded by Global's assertion that AT&T Illinois inappropriately "forced" Global to submit ASRs requesting trunks, when Global only wanted to submit a "trunk forecast," and, for all this time, Global believes that all it needs to provide to AT&T Illinois is an estimate of the traffic it expects to send to AT&T Illinois. The record shows, that Global agreed, in the parties' ICA, that ASRs would be used to establish trunks, and further agreed that, for two-way trunks, Global would bear the responsibility to *submit* ASRs. Appendix ITR § 8.1 states that "[o]rders between the Parties to establish, add, change or disconnect trunks shall be processed by using an Access Service Request (ASR)," and "CLEC will have administrative control for the purpose of issuing ASR's on two-way trunk groups." Global's position here, that all it needs to provide to AT&T Illinois is an estimate of the traffic and its contention that AT&T Illinois inappropriately "forced" it to submit ASRs for trunks is unsustainable in light of the language of the parties' ICA.

Even more important to the dispute, AT&T Illinois tells this Commission that Global's trunk ASRs have nothing to do with the DS3 charges AT&T Illinois is seeking to collect. AT&T Illinois explains that it is not claiming it is owed charges for trunks, and has never claimed any such thing. It further explains that "trunks" are individual call paths that connect two switches and AT&T Illinois does not charge for trunks. To fulfill its responsibility to provide the transport facilities between those locations, Global submitted ASRs for high capacity DS3s (wholly apart from its ASRs for trunks), and AT&T Illinois provisioned the requested DS3s. At bottom, AT&T Illinois is seeking to recover the tariffed charges for these DS3s, and not any charges for trunks. In light of this clarification, the Commission seriously questions whether Global is so ill-informed about the nature of its business or whether it is so desperate to avoid making payments that it needs to distract the Commission from the real issues at hand.

We are not persuaded by Global's assertion of an inability to include its ESP exception on the ASRs. This claim is flatly contradicted by the objective record evidence of a screen shot of a blank ASR which shows that the longest field entry in the ASR is the "Remarks" field at the bottom, where Global would be free to provide whatever information it chose. According to AT&T Illinois, Global did not indicate in the Remarks field of any of the ASRs it filled out and submitted that it would be delivering purported "ESP" traffic. This shows that despite full opportunity to do what Global says it wanted to do, Global took no action. This is nothing short of unreasonable.

The Commission observes Global to continue with the argument that some of the ASRs resulted in charges under the state tariff and others in charges under the federal tariff as showing the absurdity of using ASRs, because, according to Global, all of the traffic passed on by Global to Illinois Bell is ESP traffic. We see no proof of this claim. In any event, we agree with AT&T Illinois' assertion that, whether Global's traffic was all ESP, ISP, local, or any other sort of traffic is simply beside the point, in the situation where Global is required to pay for the facilities connecting its Oak Brook facility to the POI in LaGrange. From the record, we ascertain that the only concern was which tariff (state or federal) the DS3s would be provided and charged under, and we further note that Global itself made that choice. As a result, AT&T Illinois billed some of the DS3s under its intrastate tariff and others under its interstate tariff because on some of its ASRs Global indicated the "percent interstate use" was zero, and on other DS3 ASRs it indicated that the DS3s would be used for interstate traffic. In the end, the Commission sees no merit to Global's contentions in the matter.

As an overall theme, we observe Global to express confusion about the ASRs. The Commission is surprised by such a charge. The record shows that these ASRs are standard industry forms that have been used for many years across the industry, and were created by an industry group (not AT&T Illinois), which publishes a comprehensive guide available to subscribing carriers to use when populating ASRs. The record shows too, that Global witness Noack (who was personally responsible for the submission of Global's ASRs), has decades of experience working with ASRs. To the extent that Mr. Noack was truly confused about the ASRs for DS3s or did not agree with them, he need not have submitted them to AT&T Illinois. Yet, the record works against that notion because it shows that in its ASRs for the intrastate DS3s, Global tried to get the best rate available, and chose a long-term commitment with a lower rate. This objective evidence effectively demonstrates to this Commission that Global knew well that AT&T Illinois would be billing Global for the DS3s it ordered. In these premises, Global's self-serving claim of confusion has no merit and does nothing to absolve Global of liability.

As Staff has well observed, Global Illinois assiduously avoids any mention of the specific terms and conditions of the ICA. It relies instead, and exclusively, on the Arbitration Decision. And, in the end, it provides no analysis of the events different from Staff or AT&T Illinois, and makes no challenge to the constructions of the Arbitration Decision, or the ICA language that Staff and AT&T Illinois discussed. This is assuredly for the reason that Global cannot legitimately or meaningfully dispute what has been provided on this record.

In the final analysis, we find that the POI is (by virtue of the specific terms of the Commission-approved ICA between the parties), located at the AT&T switch in La Grange. Identifying the location of the POI at the AT&T La Grange tandem resolves the ordering of facilities question in favor of AT&T as well. Consistent with our prior announcements in this area and as the Commission determined in the Arbitration Decision at 8, each party is responsible for the cost of providing facilities and transporting traffic on its own side of the POI. This means that Global Illinois is financially responsible for the facilities necessary to transport traffic to the AT&T La Grange tandem and responsible for the facilities that it ordered from AT&T to accomplish this.

The Commission thus finds Global's failure to pay as billed by AT&T Illinois for the cost of the interconnection facilities to be a violation of the ICA. In this regard, we direct that Global make payments currently owing and with due haste, i.e., within 5 business days of the entry of this Order.

II. WHETHER GLOBAL'S FAILURE TO PAY FOR TRANSITING IS A VIOLATION OF THE PARTIES' ICA.

The record explains "transiting" to be a service whereby a carrier agrees to act as a middleman. For this service, a transit provider accepts traffic from one carrier, transports the traffic across its network, and delivers it to a third-party carrier. The traffic thus, only "transits" the transit provider's network; it does not originate or terminate on the transit provider's network. By way of example, if Global has traffic from one of its affiliates' customers that is supposed to be delivered to an end-user customer of Comcast in Illinois, but Global is not directly interconnected with Comcast, Global can deliver the traffic to AT&T Illinois instead, and AT&T Illinois will "transit" the traffic across its network and deliver it to Comcast on Global's behalf.

A. AT&T Initial Position.

Under the parties' ICA, AT&T Illinois states, it agreed to provide transiting service to Global, and Global agreed to pay for that service. In particular, section 4.3 of Appendix Interconnection Trunking Requirements provides that, at least until certain events occur, "SBC-13STATE will provide CLEC with transit service." And, section 9.1 of Appendix Reciprocal Compensation states that "[a] Transiting rate element applies to all MOUs ("minutes-of-use") between a Party and third party networks that transits an SBC-13STATE network," and the "rates that SBC-13STATE shall charge for transiting

CLEC traffic are outlined in Appendix Pricing." See AT&T Ex. 1.0 at 27. According to AT&T Illinois' account, Appendix Pricing of the ICA in turn sets forth three rate elements and rates for transiting service.

AT&T Illinois contends that Global has for years took advantage of the transiting service offered by AT&T Illinois, delivering to AT&T Illinois significant amounts of traffic that were not destined to AT&T Illinois' end-user customers, but that instead were destined to end-users of third-party carriers in Illinois. In accordance with the ICA, AT&T Illinois says, it transited these calls on behalf of Global, and billed Global for transiting pursuant to the terms of the ICA. Global, however, has refused to pay AT&T Illinois for transiting.

AT&T Illinois asks the Commission to hold Global to its contractual commitment, find that Global has breached the ICA by failing to pay for transiting, and order Global to pay AT&T Illinois all overdue charges for transiting service.

<u>The FCC's ISP Remand Order Does Not Relieve Global Of Its Obligations.</u>

AT&T Illinois points out that, under the provisions of the parties' ICA, and in order to contest a bill from AT&T Illinois, Global was required to notify AT&T Illinois of the precise nature of the dispute. See ICA, General Terms and Conditions § 10.4. Global purported to do so, according to AT&T Illinois, by submitting dispute forms asserting that AT&T Illinois was seeking to assess charges on "ISP-bound traffic," and claiming that "compensation for this traffic is defined solely and exclusively by the Federal Communications Commission" and "any additional charges upon such traffic violate Federal law." AT&T Ex. 6.0 at 14. But, AT&T Illinois challenges the validity of that assertion.

In AT&T Illinois' view, Global's reliance on the FCC's rules for ISP-bound traffic, promulgated in the ISP Remand Order, lacks merit because that order only applies to dial-up Internet access traffic delivered to an Internet service provider (ISP) (i.e., "ISP-bound" traffic originating with the end-users of AT&T Illinois and delivered to Global) which, AT&T Illinois maintains, is not the type of traffic at issue here. Instead, Global delivered the traffic to AT&T Illinois, and AT&T Illinois transited the traffic to other local exchange carriers in Illinois for termination to their end-users.

In the *ISP Remand Order*, AT&T Illinois observes the FCC to have explained that its order addresses intercarrier compensation for "the delivery of calls from one LEC's [local exchange carrier's] end-user customer to an ISP in the same local calling area that is served by a competing LEC," whereby "(a) consumer with access to a standard phone line is able to communicate with the Internet." Id. ¶¶ 13, 18. See also id. ¶¶ 1, 10 (describing the Internet access at issue in the order). Here, the traffic that AT&T Illinois transited for Global was not "dial-up Internet" traffic that AT&T Illinois or Global delivered to an ISP, allowing end-users to surf the Internet. Rather, Global delivered the calls to AT&T Illinois, and AT&T Illinois transited those calls to other local exchange carriers, for termination to those latter carriers' end-users. AT&T Ex. 1.0 at 28; AT&T Ex. 5.0 at 3-4. In other words, AT&T Illinois asserts, this is "end-user-bound" traffic – and not ISP-bound traffic. Thus, AT&T Illinois asserts, Global can find no refuge in the FCC's ISP Remand Order.

<u>The FCC's "ESP Exemption" Does Not Relieve Global Of Its Obligation To Pay For Transiting Service.</u>

AT&T Illinois notes Global to have more recently suggested that it has no obligation to pay for transiting because the traffic it sends AT&T Illinois is "enhanced service provider" ("ESP") traffic or, more specifically, voice over Internet protocol ("VoIP") traffic.

As an initial matter, AT&T Illinois suggests that Global should be precluded from contesting AT&T Illinois' charges on any basis other than its oft-repeated assertion that the FCC's ISP Remand Order prohibits the charges in question. Pursuant to the parties' ICA, AT&T Illinois points out, in order to dispute any of the charges it was billed by AT&T Illinois, Global must specifically identify the basis for its dispute, in order to permit AT&T Illinois to investigate the merits of the dispute. ICA, General Terms and Conditions § 10.4. In this instance, AT&T Illinois observes that Global disputed AT&T Illinois' bills for transiting (and all other charges) on the singular ground that the traffic is "ISP-bound traffic, and not on the grounds that an "ESP exemption" prohibited the charges. Thus, AT&T Illinois argues, Global should not be allowed to raise any new claims now.

In any event, AT&T Illinois asserts, Global's suggestion that an "ESP exemption" relieves it of its contractual obligation to pay for transiting falls flat, for at least three independent reasons: (1) the parties' ICA requires Global to pay for transiting irrespective of any "ESP exemption"; (2) the "ESP exemption" has nothing to do with transiting charges or with one carrier's delivery of traffic to another carrier; and (3) in any event, Global has failed to prove that the traffic it delivered to AT&T Illinois was "ESP" or "VoIP" traffic.

Global is bound by its ICA irrespective of any "ESP exemption."

The "ESP exemption" is irrelevant here, AT&T Illinois argues, because Global is bound by the ICA. As a matter of federal law, it explains, interconnection agreements are the binding statement of the parties' rights and obligations. In the Telecommunications Act of 1996 ("1996 Act"), AT&T Illinois explains, Congress mandated that carriers implement the duties imposed by the Act through interconnection agreements. See 47 U.S.C. § 251(b)-(c); AT&T *Corat v. Iowa Utils. Board,* 525 U.S. 366, 372 (1999). Highly significant, AT&T Illinois asserts, is that the 1996 Act requires carriers to negotiate their agreements in the first instance, and permits carriers to enter into a "binding agreement . . . without regard to the standards" set forth in § 251. 47 U.S.C. § 251(c)(1), § 252(a)(1).

According to AT&T Illinois, Global agreed to pay for transiting in its ICA with AT&T Illinois, and under section 252 of the 1996 Act, this Commission's approval of the ICA "made it finally binding on the private parties involved," and, to this end, "(f)ederal law thus gives [AT&T Illinois] the right to insist that it be held only to the terms of the interconnection agreement to which it actually agreed." *Verizon Maryland, Inc. v. RCN Telecom Servs.*, 232 F. Supat 2d 539, 551, 555 (D. Md. 2002). Having agreed in the ICA to pay for transiting, AT&T Illinois maintains that Global cannot now claim that some FCC ESP exemption "effectively changes the terms of" its ICA. Pacific Bell, 325 F.3d at 1127. AT&T Illinois points out that Global agreed to pay for transiting in the ICA, never sought arbitration of that issue, and cannot now avoid its contractual commitment.

The "ESP exemption" only exempts ESPs from certain originating interstate access charges, and not CLECs from other types of charges.

AT&T Illinois explains that the "ESP exemption" that was created by the FCC, only exempts ESPs from originating interstate access charges for traffic between the ESP and its customers. It does not exempt a carrier like Global from transiting charges, AT&T Illinois asserts, and thus does not help Global in this dispute even if its traffic were "ESP" or "VoIP" traffic.

In 1983, AT&T Illinois explains, and in connection with the break-up of "Ma Bell," the FCC created the "access charge" regime to govern payments from long distance (or "interexchange") carriers to local telephone companies (local exchange carriers, or LECs), for access to and use of the latter's networks. For example, when an end-user places a long distance call from New York to Illinois, the call would originate on the network of the end-user's local carrier in New York, would be handed-off to the end-user's long distance carrier for transport across the country, and would then be handed-off to the appropriate local carrier in Illinois for delivery to the Illinois end-user being called. Under the access charge regime, the long distance carrier pays the New York

LEC "originating access" charges for originating the call on its network, and pays the Illinois LEC "terminating access" charges for terminating the call on its network.

At the same time, the FCC considered whether ESPs should be required to pay originating interstate access charges. An ESP, just like a long distance carrier, may access its customer by using the local network of the customer's local carrier (LEC), and, like a long distance carrier, after receiving the call from the LEC, the ESP may then transport that traffic outside of the local exchange. For example, an Internet service provider providing dial-up Internet access (which is one species of an ESP) uses the local networks of LECs to connect to its customers; that is, customers place calls to the ISP from their computer modems, and those calls originate on and travel over the local network of the customer's local exchange carrier. After receiving the calls, the ISP may transport the calls to distant points just like a long distance carrier; in particular, the ISP transports the calls to servers located around the country or the world, allowing customers to surf the Internet.

As a policy matter, the FCC concluded in 1983, that ESPs should not have to pay access charges for using LEC networks in this manner, but instead should be treated by the LEC like business customer end-users (not like residential customer end-users or like long distance carriers). That is, for example, just as an auto mechanic or dentist's office purchases local business service in order to receive calls from customers, and is not required to pay additional access charges on every call received, so too the FCC concluded that ESPs should be permitted to purchase local business service in order to receive calls from their customers, without paying additional access charges even though the ESP may engage in additional transport of the call. In the ISP Remand Order at ¶ 11, AT&T Illinois notes the FCC to have explained that:

> In the [1983] MTS/WATS Market Structure Order, the Commission acknowledged that ESPs were among a variety of users of LEC interstate access services. Since 1983, however, the Commission has exempted ESPs from the payment of certain interstate access charges. Consequently ESPs, including ISPs, are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network (PSTN).

"This policy is known as the 'ESP exemption.'" Id at n.18.

This "ESP exemption," AT&T Illinois asserts, plainly has no application here. AT&T Illinois is not seeking to recover interstate access charges from an ESP. It is seeking to recover transiting charges from a carrier, Global, which has admitted that it does not claim to be an ESP. Tr. at 195, 201. This transiting service was very valuable to Global, AT&T Illinois contends, because it allowed Global to avoid directly interconnecting with multiple carriers in Illinois to deliver traffic destined to the end-users of those carriers. Instead, AT&T Illinois agreed that Global could deliver this traffic to AT&T Illinois, and that AT&T Illinois would use its local network to transport or "transit" the traffic to the appropriate carriers in Illinois. Nothing in the "ESP exemption" requires AT&T Illinois to provide this service to Global for free, AT&T Illinois argues, and nothing in the "ESP exemption" allows Global to renege on its contractual commitment to pay for this transiting service.

Global has failed to prove that the traffic it delivered AT&T Illinois was "ESP" or "VoIP" traffic.

AT&T claims that Global has failed to prove that any (much less all) of the traffic it sent to AT&T Illinois was "ESP" or "VoIP" traffic. While Global's witnesses asserted that its customers are "enhanced service providers" or "VoIP" carriers, no competent evidence was introduced to support these bald assertions. The only objective evidence on point, AT&T Illinois asserts, are the actual traffic studies conducted by AT&T Illinois, and these prove that significant portions of the traffic at issue were plain old long distance telephone calls.

In his direct testimony, AT&T Illinois notes, Global witness Noack had simply asserted that "(a)ll of Global's outbound traffic comes to it from ESPs." Global Ex. 2.0 at 5. At the hearing, however, Mr. Noack admitted that Global has no way of telling what format (e.g., Internet protocol (IP) or traditional time-division-multiplexing (TDM)) the calls it carries originate in. Tr. at 141. Similarly, AT&T Illinois observes Mr. Noack to have admitted that Global does not know whether the traffic it carries originates in the ordinary manner with an end-user picking up a phone and dialing 1, an area code, and a telephone number. Tr. at 142.

Maintaining that Global had every opportunity (in the two years since AT&T Illinois first filed suit) to procure reliable evidence to show that its traffic is "ESP" or "VoIP" traffic, AT&T Illinois points out that Global only introduced in the proceeding two letters that were attached to the testimony of its witness Scheltema. In AT&T Illinois' view, these letters prove nothing.

First, AT&T Illinois claims, Global has not demonstrated that any significant portion of the traffic it delivered to AT&T Illinois came from these two customers, as opposed to other customers of Global's affiliates. Second, AT&T Illinois contends, the letters are unreliable and should be given no weight. AT&T Illinois explains that the letters in question are unsworn statements from third parties and are plainly hearsay. Neither the parties nor the Commission, AT&T Illinois points out, were able to test the veracity of the authors' statements at the hearing or by any other means. And, there is no indication that the letters are reliable. Among other things, they were plainly solicited by Global NAPs and prepared specifically for Global NAPs' use in litigation, and there is no indication of the basis for the statements in the letters. Further, AT&T Illinois argues, it is not clear whether the authors of these letters have any personal knowledge regarding the nature of the traffic those customers carry or, more particularly, the nature of the traffic they delivered to Global's affiliates for termination in Illinois.

According to AT&T Illinois, the only real evidence submitted in this proceeding regarding the nature of Global's traffic conclusively proves that it is not VoIP traffic. As AT&T Illinois' witness James Hamiter explained, for one day each month between January 2005 and April 2008, AT&T Illinois tested the traffic that Global delivered, by matching the terminating records of Global's traffic to the originating records for regular "1+" long distance calls (of at least 3 minutes in duration) that originated from end users on AT&T's public switched telephone network ("PSTN") in twelve states. AT&T Ex. 2.1 at 12-15. AT&T Illinois found that on each of the tested days, Global sent AT&T Illinois hundreds or thousands of such calls – *i.e.*, calls that were not IP-originated VoIP at all, but were ordinary "1+" long distance calls that originated on the network of one of the AT&T ILECs that collectively operate in twelve states. *Id.* at Sch. JWH-9.

This data conclusively proves that Global sent AT&T Illinois many thousands of calls that were not VoIP, because they originated as ordinary long distance calls on AT&T's PSTN. At the same time, this data does not show that any calls were VoIP. AT&T Illinois' test was limited to records readily available to AT&T Illinois, i.e., the originating records of AT&T Illinois' ILEC affiliates in the twelve state geographic area where those ILEC affiliates operate. AT&T Illinois could not test calls coming from other geographic areas or even from other ILECs within those twelve states, and it further limited its population of tested calls to calls that were three minutes or more in length. See id. at 13-15. But given the fact that, within this limited sampling, on each day that was tested Global delivered hundreds or thousands of ordinary long distance calls that were longer than three minutes and originated from AT&T's PSTN in these twelve states, then it stands to reason that Global delivered many thousands more calls of less than three minutes in length that originated on AT&T's PSTN in the twelve states. It also stands to reason that Global also delivered many thousands more calls that originated on the PSTN of other incumbent carriers, both in the areas of the twelve states that AT&T examined that are served by other incumbents (e.g., Verizon's ILEC territory in Illinois) and in the other 39 states.

In short, AT&T Illinois asserts, there is no evidence that a single call delivered by Global to AT&T Illinois was VoIP; and, the only testing undertaken conclusively establishes that Global delivered many thousands of calls to AT&T Illinois that were not VoIP.

On the whole of the record, AT&T Illinois asks the Commission to find that Global has breached the ICA by failing to pay AT&T Illinois for transiting, and order Global to pay AT&T Illinois all amounts owed for such service under the parties' ICA.

B. Global Position.

Global Has Not Violated The Parties' ICA By Failing To Pay For Transiting.

Global rejects the claim that it should be liable for transiting charges being assessed by AT&T. It maintains that the charges that AT&T is attempting to assess against Global are for traffic that is interstate in nature. According to Global, that traffic is both ISP bound, and thus subject to the FCC's rules for ISP bound traffic. So too, it is ESP traffic using VoIP technology and thus subject to the FCC's ESP exemption. Global asserts that such traffic is not subject to AT&T's intrastate tariffs and instead is subject to charges that the FCC must determine. On this basis, and in Global's view, AT&T cannot assess intrastate charges for that traffic and this Commission has no jurisdiction to determine if those charges, i.e., interstate charges, are owed by Global.

Global notes AT&T Illinois to admit that Global brought the issue of the ISP bound nature of its traffic to AT&T Illinois' attention when it first received bills from AT&T for transiting traffic. As such, Global contends, it has acted in good faith throughout the time of dispute and this proceeding.

Global claims, generally, that its business plan evolved as Global found itself transmitting traffic from its ESP customers using VoIP technology. Quite simply, Global maintains, dial-up internet access became antiquated in light of other broadband alternatives. To be sure, Global observes AT&T Illinois tries to dismiss this latter justification as being brought too late for consideration in this proceeding. Global points out, however, that it did raise the issue from the early onset of this proceeding when it filed the direct testimony of James Scheltema . Simply because Global's initial dispute letters several years ago did not discuss the ESP exemption is not, Global argues, good reason for ignoring the fact that it has brought the matter in timely fashion to this Commission.

Global sees AT&T to assert that the parties' interconnection agreement overrides any FCC orders on charges for transiting traffic. But, Global disagrees with this proposition on grounds that, if the traffic in question is itself interstate in nature, the parties cannot override that status by calling it something else in their interconnection agreement. According to Global, it is necessary to remember that this is an interconnection agreement that sets the terms and conditions for the parties to connect their networks and exchange local traffic. By definition therefore, Global argues, it is not intended as a means of establishing terms and conditions for exchange of interstate traffic. In any event, Global asserts, such a direct override of federal law, even if it was possible, should be done explicitly and clearly. Yet, Global claims that there is nothing set out by AT&T Illinois other than the general transiting language in the Interconnection Agreement.

Global observes AT&T to argue that the ESP exemption is not an exemption from transiting charges and does not apply to CLECs like Global. And, according to AT&T, the ESP exemption "only exempts ESPs from originating interstate access charges for traffic between the ESP and its customers." (AT&T Brief at 14). While Global agrees that AT&T has correctly recited the history of the ESP exemption and its application in the assessment of interstate access charges, it maintains that none of the FCC orders addressing the ESP exemption prohibit the application of that exemption to transiting traffic.

As such, Global believes that the rationale behind the ESP exemption should be applied in this situation. It was noted in the ISP Remand Order, Global observes, that the FCC's 1983 MTS/WATS Market Structure Order "had acknowledged that ESPs were among a variety of users of LEC interstate access services." It is necessary, Global asserts, to start with the first step, i.e., if ESP traffic is interstate traffic, one need not reach the next step of determining if intrastate transiting charges should apply. That latter question is preordained by the answer to the first question. Here, Global claims, the traffic is ESP traffic. Thus, transiting charges cannot apply. According to Global, if the ESP exemption was applicable to ESPs but not to carriers, then the traffic could never terminate without it being subject to the very charges it is exempt from. AT&T would achieve through the back door what the FCC has explicitly prohibited it from doing. Thus, Global maintains, the traffic is exempt from the source to its destination, regardless of the nature of the entity that carries the traffic.

Global notes AT&T to argue that the traffic of Global is not VoIP on the claim that neither of Global's two witnesses Scheltema and Noack, could definitively state that all of Global's traffic was VoIP. While it is true, Global admits, that it cannot prove that each and every one of its calls was VoIP, Global witness Noack provided unrebutted testimony that Global markets its services to a handful of ESPs and that the nature of its traffic is indeed VoIP. He stated that, "All of Global's outbound traffic comes to it from ESPs, not individual customers making voice calls or third party carriers transmitting voice calls." Global Exhibit 2.0 at 5. Similarly, Global points out that its witness Scheltema testified that Global does not provide dial tone to end users in Illinois and instead provides outbound services for Global's ESP customers and inbound services for Internet Service Providers.

Global further responds to the evidence of AT&T's traffic studies showing that *significant portions of the traffic at issue were plain old long distance telephone calls.* Assuming arguendo that AT&T is correct in this assertion, Global maintains that "significant portions" is not good enough in this context. According to Global, the FCC had long ago decided that lines carrying both intrastate and interstate traffic are subject to the FCC's jurisdiction where it is not possible to separate the uses of the special access lines by jurisdiction. And, in the *MTS/WATs* Market Structure Order, the FCC found that special access lines carrying more than a *de minimis* amount of interstate traffic should be assigned interstate jurisdiction. Global explains that the FCC defined de minimis as when the interstate traffic is less than ten percent of the total traffic of the special access line. The AT&T evidence, Global argues, proves only that some of Global's traffic may not be VoIP. It does not prove, Global asserts, that less than ten percent of Global's traffic is VoIP. Moreover, Global contends that its VoIP traffic is nomadic, and thus, it is not possible to determine from an NXX code the origination point of a call. In Global's view, therefore, AT&T's traffic studies are useless for present purposes.

Reviewing the same information provided in this proceeding, Global notes that the New York Commission determined that Global's traffic is nomadic VoIP traffic, and not, as AT&T claims here, local traffic or 1+ traffic from a fixed location. Similarly too, Global points out, the Nebraska Federal District Court has determined that it is impossible to make an accurate breakdown of intra versus interstate jurisdiction of VoIP traffic and thus rejected the application of access charges to VoIP. Vonage Holdings Corp. v. Nebraska Public Service Commission, 2008 WL 584078, (D. Neb.2008)

Global asks this Commission to determine that Global's traffic is VoIP and that it is not subject to the charges claimed by AT&T.

C. Commission Analysis and Conclusion.

As a preliminary, the Commission finds itself concerned about what occurred during the parties' dispute process. We are made to understand that the parties' ICA, much like the statutory process for perfecting an appeal of Commission's orders, essentially requires an exhaustion of remedies. In other words, to properly dispute its billing charges with AT&T Illinois, Global was required to specifically identify the basis for its dispute. This was critical to giving AT&T Illinois fair notice as it begins an investigating of the matter.

To be sure, Global does not deny that the ICA requires such an undertaking in the agreed dispute process. Nor does Global deny that its articulated ground, during the dispute process, was the assertion of an ISP exemption only. Yet, Global professes to have acted timely and in good faith because it identified new grounds with pre-filed testimony in this proceeding. This assertion flatly fails and raises questions about Global's business acumen, if not its credibility. While the Commission itself has concerns in the situation, we will consider the substantive arguments and evidence in reliance on the fact that AT&T Illinois has pushed forward with a position on the merits.

The situation does not get better. Global initial brief barely mentions, much less discusses the transiting charges. Global simply asserts that the FCC does not allow any of the charges that AT&T Illinois is attempting to recover in this proceeding, including special access, local, intrastate toll, and transiting charges, because its traffic is "enhanced services traffic." We question Global's failure to be upfront on the issue in a way that would both inform the Commission at the outset, and also permit AT&T Illinois to directly respond to its arguments.

With respect to what Global ultimately does put forward on the merits, we are not persuaded. While Global would represent to this Commission that the FCC does not allow transiting charges on enhanced services traffic, it does not cite to a single FCC order to that effect. For its part, AT&T Illinois contends that none exists. And, AT&T further shows that none of the FCC orders that Global does cite, addresses transiting charges, much less hold that enhanced services traffic is exempt from transiting charges.

Global claims that it has an exemption and does not need to pay AT&T Illinois anything for transiting. The Commission is not convinced in these premises. The "exemption" on which Global would rely, is the FCC's "enhanced service provider" (ESP") exemption, that exempts *ESPs,* and only *ESPs,* from certain access charges. We are never shown, however, what this exemption has to do with transiting charges.

Nor is it even established that Global is an ESP. The ISP Remand Order, we observe, explains the "ESP exemption" to be a long-standing FCC policy that affords one class of entities using interstate access, i.e., information service providers, the option of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs, rather than from interstate access tariffs used by IXCs, such that ESPs may choose to pay local business rates, rather than the tariffed interstate access charges that other users of interstate access are required to pay. And, these access charges are payments "made to local exchange carriers (LECs) to originate and terminate long-distance calls" on the LEC's local network.

The Commission observes Global attempt to force a law upon us when the relevant facts that such law intended to address are missing. In this respect, we observe that the transiting charges AT&T Illinois seeks to collect are not access charges, because these are not charges for originating or terminating traffic on AT&T Illinois' network. On this record, AT&T Illinois explains that the transiting charges here at issue, are for traffic that AT&T Illinois agreed to transport across its network and hand-off to third party carriers on Global's behalf. Nothing in the FCC's rules, AT&T Illinois asserts, exempts enhanced services traffic (or any other communications traffic) from such charges, even if some "access charge" exemption applied here. While Global claims to the contrary that "the FCC has been clear with respect to information services being entitled to exemption from both access "and other charges" provides us with no authority in support of that assertion. As such, the Commission rejects Global's assertions. The law is what it is and not what Global wants it to be.

We find it highly telling that the FCC has itself confirmed that it has not promulgated rules governing compensation for transit service. And, AT&T Illinois informs that this is why the FCC has called for comments on transit service in its *Intercarrier Compensation NPRM.* In its Notice, the FCC explained that transiting involves the exchange of traffic by "two carriers that are not directly interconnected . . . by routing the traffic through an intermediary carrier's network," and "[t]ypically, the intermediary carrier is an incumbent LEC." *Intercarrier Compensation NPRM,* ¶ 120. The FCC also stated that it "has not had occasion to determine whether carriers have a duty to provide transit service," and "the Commission's reciprocal compensation rules do not directly address the intercarrier compensation to be paid to the transit service provider." Id. So too, the FCC acknowledged that "many incumbent LECs . . . currently provide transit service pursuant to interconnection agreements," and "[t]he intermediary (transiting) carrier . . . charges a fee for use of its facilities." Id. These introductory pronouncements by the FCC identify the situation here, where AT&T Illinois agreed in the parties' ICA to provide transiting service to Global, and did provide such service, for a fee. And, where, pursuant to the ICA, Global agreed to pay that fee for AT&T Illinois' provision of transiting service. All of this shows the Commission that the FCC is only beginning to assess transiting matters, and thus, the issues are not settled in any way that favors Global.

That said, the Commission turns its attention to the real authority that governs this dispute. What Global fails to recognize, to its detriment, is that this dispute is governed by the parties' ICA, not the FCC's rules. And, both AT&T Illinois and Global are bound by the ICA irrespective of the FCC's rules. Under the 1996 Act, and as a matter of federal law, it is well settled that parties can negotiate ICA terms without regard to the FCC's rules, and these ICAs are binding. *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1151 (9th Cir. 2006) (stating that parties who enter into a voluntary interconnection agreement need not conform to the requirements of the Act, and that an ICA departing from the FCC's rules would be binding on the parties regardless of" the FCC's orders); Pacific Bell v. *Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) (holding that the 1996 Act mandates that interconnection agreements have the binding force of law); *Verizon Maryland, Inc. v. RCN Telecom Servs.*, 232 F. Supp. 2d 539, 551, 555 (D. Md. 2002) (same). These are the standards that inform our decision.

The courts have held that interconnection agreements have the force of law. These are binding on the parties. And, it is certainly not for this Commission to change its language, terms or conditions. Our role is to interpret enforce the parties' agreements as written. In the case at hand, the Commission finds that Global agreed in the ICA to pay for transiting service. By not paying AT&T Illinois as agreed, Global is in violation of the parties ICA. Under our enforcement authority, we direct Global to pay the amounts owing to AT&T Illinois current to the date of this order and within five (5) days of the entry of this order.

III. WHETHER GLOBAL'S FAILURE TO PAY RECIPROCAL COMPENSATION AND INTRASTATE ACCESS CHARGES VIOLATES THE PARTIES' ICA AND AT&T ILLINOIS' INTRASTATE TARIFF

AT&T Illinois explains that it "transited" only that portion of the traffic delivered by Global that was destined to the end-users of third party carriers in Illinois. For the portion of the traffic delivered by Global that was destined to end-users of AT&T Illinois, AT&T Illinois routed the traffic across its network and delivered (or "terminated") it to the appropriate end-users. It then billed Global the reciprocal compensation and intrastate access charges required under the ICA and AT&T Illinois' intrastate tariff for terminating this traffic for Global. According to AT&T Illinois, Global has refused to pay a single penny of these charges for the same reasons it has refused to pay a single penny for transiting

A. AT&T Illinois' Position

Pursuant to the ICA, AT&T Illinois points out, Global ordered the establishment of combined local/intraLATA toll trunks (which are reserved for transmitting local and intraLATA toll traffic) to deliver traffic to AT&T Illinois. Global then began delivering traffic to AT&T Illinois over those trunks and, pursuant to its agreement under the ICA, AT&T Illinois terminated the traffic on its network and billed Global the rates specified by the agreement – local reciprocal compensation charges for local traffic and tariffed intrastate access charges for intraLATA toll traffic. Global, however, has refused to pay a penny of these charges, in violation of the ICA and the state tariff.

The parties entered into the ICA in order to exchange traffic. In Appendix NIM (Network Interconnection Methods), the parties agreed how they would physically interconnect their networks using high-capacity facilities. *See* Appendix NIM § 1.1 ("This Appendix describes the physical architecture for Interconnection of the Parties' facilities . . . ."). To actually exchange calls, however, the parties must establish "trunks" over those facilities. A trunk, AT&T Illinois explains, is a dedicated call path capable of carrying an individual call and because a single trunk can carry only one call at a time, multiple trunks are established together in arrangements known as trunk groups.

In Appendix ITR (Interconnection Trunking Requirements), AT&T Illinois points out, the parties specified the six different types of trunks that could be established between the parties to exchange traffic. In particular, in section 5.1 of Appendix ITR, the parties agreed: "The following trunk groups *shall* be used to exchange various types of traffic between CLEC and SBC-13STATE": (1) "Local and IntraLATA Interconnection Trunk Group(s)" (§ 5.3); (2) "InterLATA (Meet Point) Trunk Group" (§ 5.4); (3) "800/(8YY) Traffic" trunk groups (§ 5.5); (4) "E911 Trunk Group" (§ 5.6); (5) "High Volume Call In (HVCI)/Mass Calling (Choke) Trunk Group" (§ 5.7); and (6) "Operator Services/Directory Assistance Trunk Group(s)" (§ 5.8). The parties further specified that local and intraLATA toll traffic may be combined on the "Local and IntraLATA Interconnection Trunk Groups" (§§ 5.3.1.1, 5.3.2.1), while "InterLATA traffic shall be transported . . . over a 'meet point' trunk group separate from local and IntraLATA toll traffic" (§ 5.4.1).

AT&T Illinois points out that the parties' ICA also specifies the compensation that Global must pay AT&T Illinois for terminating local and intraLATA toll traffic. In particular, section 5 of Appendix Reciprocal Compensation states that Global will pay AT&T Illinois reciprocal compensation for the termination of local calls: "The Parties agree to compensate each other for the termination of Local Calls . . . on a 'bifurcated' basis, meaning assessing an initial Call Set Up charge on a per Message basis, and then assessing a separate Call Duration charge on a per Minute of Use (MOU) basis." ICA, Apat Reciat Comat § 5.2. Appendix Reciprocal Compensation describes the particular rate elements that apply, and incorporates the rates "shown in Appendix Pricing." Id. §§ 5.2 – 5.4. The same appendix addresses compensation for intraLATA toll traffic, stating that "[f]or intrastate intraLATA toll traffic, compensation for termination of intercompany traffic will be at terminating access rates . . . as set forth in each Party's Intrastate Access Service Tariff." Id. § 13.1.

Upon agreeing to these provisions, Global proceeded to order combined local/intraLATA toll trunks from AT&T Illinois. Appendix ITR § 8.1 states that "[o]rders between the Parties to establish, add, change or disconnect trunks shall be processed by using an Access Service Request (ASR)," and "CLEC will have administrative control for the purpose of issuing ASR's on two-way trunk groups" (*i.e.*, trunk groups, like those used by AT&T Illinois, that are capable of carrying traffic in both directions). As Ms. Harlen explained, Global submitted 74 separate ASRs to AT&T Illinois requesting the establishment of combined local/intraLATA toll trunks, representing to AT&T Illinois that it would be delivering local and intraLATA toll traffic over those trunks. AT&T Ex. 4.0 (Harlen Direct) at 2-5.

After the local/intraLATA toll trunks were established, Global began delivering local and intraLATA toll traffic over those trunks, AT&T Illinois terminated the traffic to its end-users, and AT&T Illinois billed Global the termination charges specified by the ICA for the local and intraLATA toll traffic. As Mr. Hamiter explained, carriers traditionally use the Calling Party Number ("CPN") (*i.e.*, the telephone number of the person placing the call) to determine whether a call is local, intraLATA toll, or interLATA in nature. AT&T Ex. 2.0 (Hamiter Direct) at 12. In accordance with this standard practice, the parties' ICA contemplated that the parties would use CPN to determine the appropriate compensation for terminating traffic. Among other things, in Appendix Reciprocal Compensation, the parties agreed to pass "the original and true Calling Party Number (CPN)" where available (§ 4.2), agreed that if less than 90% of a party's calls had CPN then "all calls passed without CPN will be billed as intraLATA switched access" (§ 4.4), and agreed that if more than 90% of the calls had CPN, then "all calls exchanged without CPN information will be billed as either Local Traffic or intraLATA Toll Traffic in direct proportion to the minutes of use (MOU) of calls exchanged with CPN information" (*id.*).

Mr. Cole explained how AT&T Illinois used the CPN of the traffic delivered by Global to identify which traffic was local and which was intraLATA toll, and to bill the traffic accordingly. AT&T Illinois' switches recorded information for every call delivered by Global, including the CPN. AT&T Ex. 5.0 (Cole Direct) at 8-9. To determine which calls were local and which calls were intraLATA toll, AT&T Illinois' systems compared the telephone numbers of the calling and called parties. *Id.* This information was then used to automatically generate bills to Global for reciprocal compensation (for the local calls) and intrastate access charges (for the intraLATA toll calls). *Id.*

Global has refused to pay AT&T Illinois' bills for local reciprocal compensation and intrastate access charges. As explained above, under the ICA, Global is obligated to pay AT&T Illinois local reciprocal compensation charges for the local traffic and intrastate access charges at the tariffed rate for the intraLATA toll traffic that Global delivered over the combined local/intraLATA toll trunks and that AT&T Illinois terminated for Global. Moreover, AT&T Illinois contends, Global's excuses for refusing to pay these charges are baseless. As a result, AT&T Illinois requests that the Commission hold Global to its contractual commitment, find that Global has breached the ICA by failing to pay AT&T Illinois local reciprocal compensation and intrastate access charges for the traffic terminated by AT&T Illinois, and order Global to pay AT&T Illinois all amounts owed for such services.

The FCC's ISP Remand Order Does Not Exempt Global From These Charges.

When it disputed AT&T Illinois' bills pursuant to the ICA's dispute procedures, Global asserted that the traffic it sent to AT&T Illinois was ISP-bound traffic such that the FCC's *ISP Remand Order* governed intercarrier compensation, and trumped the compensation provisions of the parties' ICA. According to AT&T Illinois, however, the traffic at issue here is not ISP-bound traffic addressed by the *ISP Remand Order*. The traffic handed off by Global and which AT&T Illinois then terminated to its own end-users was not ISP-bound traffic, but was AT&T Illinois-end-user-bound traffic that was terminated on AT&T Illinois' local network.

The FCC's "ESP Exemption" Does Not Exempt Global From These Charges.

AT&T Illinois observes Global to also suggest that it is exempt from local reciprocal compensation and intrastate access charges because of the FCC's "ESP exemption." According to AT&T Illinois, Global is wrong for a number of reasons.

First, AT&T Illinois argues, Global should be precluded from contesting AT&T Illinois' charges on the ground that the "ESP exemption" applies, because the only ground Global asserted when it disputed AT&T Illinois' bills was that the traffic was "ISP-bound."

Second, it contends that Global's reliance on the "ESP exemption" is misplaced because this dispute is governed by the parties' ICA, and Global cannot avoid its contractual obligations by pointing to any FCC exemption.

Third, AT&T Illinois maintains that Global has failed to prove that any, much less all, of the traffic it delivered to AT&T Illinois for termination to AT&T Illinois end-users was "ESP" or "VoIP" traffic. To the contrary, AT&T argues, Global's Director of Network Operations disclaimed any real knowledge of the nature of the traffic coming from Global's purported "ESP" customers. Tr. 141, 142.

Fourth, AT&T points out that the "ESP exemption" does not exempt a CLEC from reciprocal compensation and intraLATA toll charges. The "ESP exemption" exempts an *ESP* from certain *originating interstate access* charges for traffic between the ESP and its customers. AT&T Illinois is not seeking to recover any interstate access charges from any ESP for any traffic between the ESP and its customers. Rather, AT&T Illinois is seeking to recover (i) local reciprocal compensation and intrastate access charges, (ii) from Global, which does not purport to be an ESP; (iii) for termination of traffic, (iv) that originated from end-user customers of other carriers (the calling party) and is terminated by AT&T Illinois to its own end-user customers (the called party).

AT&T Illinois maintains that the "ESP exemption" is irrelevant here, because that exemption applies only to the connection between an ESP and the ESP's customers. As explained above, the purpose of the exemption is to exempt ESPs from originating interstate access charges that would otherwise apply to the ESP when it uses the public switched telephone network (PSTN) to connect to and receive calls from the ESP's customers. As the FCC explained in the *ISP Remand Order* (¶ 11), under the exemption ESPs are "entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network." But the charges at issue here have nothing to do with the ESPs' connections to their customers, which occur before Global even receives the traffic from its alleged "ESP" customers. Rather, the local reciprocal compensation and intrastate access charges AT&T Illinois seeks to collect are for terminating traffic on the PSTN to *AT&T Illinois'* end users.

Indeed, other state commissions and at least one federal court have rejected attempts (including by Global's affiliates) to avoid charges under the "ESP exemption."

For example, the California Public Utilities Commission ("CPUC") has recognized that the "ESP exemption" has no application to traffic *from* an ESP that is terminated on the PSTN. In the Pacific Bell/MCI arbitration, the parties asked the CPUC to arbitrate appropriate ICA language governing the exchange of and compensation for such traffic. The CPUC concluded that "not all information or enhanced services qualify for the ESP exemption." *Pacific Bell/MCI Decision* at 127-29. Rather, the CPUC agreed with AT&T California that the exemption "applies only to an ESP's use of the PSTN as a link between the ESP and its subscribers," and thus concluded that the exemption does not apply to "IP-PSTN" traffic, or traffic *from* an ESP in the Internet protocol (IP) format that is then terminated on the PSTN like any other call. *Id.* at 127.

According to AT&T Illinois, the CPUC recently reached the same conclusion in the *Cox v. Global NAPs California* case, involving the same type of traffic (*i.e.*, traffic from the purported "ESP" customers of Global California's affiliates that Global California delivered to Cox in California for termination on the PSTN). The CPUC held that Global California was obligated, pursuant to an ICA, to pay Cox intrastate access charges for Cox's termination of the intraLATA toll traffic at issue, and rejected Global California's argument that it should be exempt from such intrastate access charges. *Cox/Global California Decision* at 5. On appeal, the federal district court rejected Global California's request for a preliminary injunction, agreeing with the CPUC that state commissions may "enforc[e] ICAs that require the payment of interconnection charges on VoIP calls that terminate on the PSTN." *Global California, Inc. v. Public Utilities Commission of the State of California*, Case No. CV 07-04801 (C.D. Cal. Aug. 28, 2007), at 13-15. The court also rejected Global California's suggestion that by enforcing the compensation provisions of an ICA, "the CPUC has impermissibly set rates for VoIP traffic," noting that "[a] state commission can enforce the terms of an ICA even if the agreement is not consistent with the federal baseline." *Id.* at 15 n.34. The court concluded that "the traffic that was the subject of the CPUC's order was not ISP-bound, but PSTN-bound, traffic," noted the FCC's statement that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations," and held that "[t]he fact that the traffic that came into Global NAPs' facility in Los Angeles was IP-originated does not necessitate a finding that it is exempt from regulation by the CPUC because that traffic was bound for, and terminated on, the PSTN." *Id.* at 16. Finally, the court concluded that Global California had not even demonstrated that it was a VoIP provider. "The fact that Global NAPs may use Internet protocols to receive traffic from its ESP customers before transmitting that traffic to an end point on the PSTN through Cox's facility does not make it a VoIP provider." *Id.* at 18.

More recently, AT&T Illinois notes, the CPUC again rejected Global California's arguments and found that Global California is liable to AT&T Illinois' affiliate, Pacific Bell, under the parties' ICA for nearly $19 million in transiting charges, local reciprocal compensation charges, and intrastate access charges for the traffic that Global California delivered to Pacific Bell and Pacific Bell then transited or terminated pursuant to the ICA. *Pacific Bell/Global California Order* at 1. The CPUC rejected Global California's argument that such charges "cannot be applied to its VoIP or IP-enabled traffic," and concluded that "intrastate access charges may apply to VoIP traffic that begins and ends as landline-based phone calls over the PSTN." *Id.* at 10. The CPUC also concluded that, notwithstanding Global California's repeated reliance on various FCC pronouncements, the charges in question "are contractual charges arising out of the parties' interconnection agreement," and it rejected any suggestion "that IP-enabled traffic is exempt from charges under the interconnection agreement." *Id.* at 11, 15.

In short, the Commission should reject Global's suggestion that the "ESP exemption" permits Global to evade local reciprocal compensation and intrastate access charges for traffic terminated by AT&T Illinois on the PSTN.

<u>In Any Event, Global Has Not Proven Its Traffic Was Enhanced Services Or IP Traffic.</u>

Wholly apart from Global's faulty construction of the FCC's orders granting a limited exemption to ESPs from certain interstate access charges, AT&T Illinois contends that Global's arguments are fatally flawed because Global has failed to prove that the traffic it handed off to AT&T Illinois was enhanced services, IP-enabled, or VoIP traffic (terms Global uses interchangeably).

AT&T Illinois observes that Global points to the testimony of its witness Noack stating that Global does not "receive traffic from any carrier using a 1+ method" and "[a]ll of Global's outbound traffic comes to it from ESPs," and to the testimony of its other witness Scheltema stating that Global sends AT&T Illinois traffic from the "ESP customers" of Global's affiliates. But, AT&T Illinois itself points out that Global offered no competent evidence to back up those assertions. Simply because Global, Mr. Noack, and Mr. Scheltema call the customers of Global's affiliates "ESPs" proves nothing in AT&T Illinois' view. And, in light of the long track record of Global's officers and affiliates in making misrepresentations to adjudicators, the Commission should be especially hesitant to accept Global's representations at face value without concrete, objective evidence to support them.[1]

Indeed, AT&T Illinois contends, Mr. Noack's own testimony completely undermines Global's speculation that the traffic it handed off to AT&T Illinois was VoIP traffic. At the hearing, Mr. Noack conceded that Global has no way of telling what format (*e.g.*, Internet protocol (IP) or traditional time-division-multiplexing (TDM)) the calls it delivers to AT&T Illinois originate in. Tr. at 141. Similarly, Mr. Noack admitted that Global does not know whether the traffic it delivers to AT&T Illinois originates in the ordinary manner with an end-user picking up a phone and dialing 1, an area code, and a telephone number.

According to AT&T Illinois, Global's unsupported assertions also are refuted by the only *objective* evidence regarding the traffic Global handed off to AT&T Illinois: the traffic studies performed by AT&T Illinois and described by Mr. Hamiter. As AT&T Illinois' explained, those studies prove that much of the traffic in question is not VoIP, but originated as ordinary long distance calls on the public switched telephone network of one of AT&T Illinois' incumbent local exchange carrier affiliates.

Global also points to a decision of the New York Public Service Commission ("NYPSC") that accepts an NYPSC Staff finding that most of the traffic that Global's affiliate, Global NAPs, Inc., delivered to TVC Albany, Inc. in New York is "nomadic VoIP." In AT&T Illinois' view, this too proves nothing. The traffic Global NAPs, Inc. delivered to TVC Albany in New York is not at issue here; rather, this proceeding concerns traffic delivered by Global to AT&T Illinois in Illinois. While the Staff of the NYPSC may have concluded that Global's affiliate Global NAPs, Inc. presented evidence that its New York traffic delivered to TVC Albany largely consists of VoIP traffic, Global has presented no evidence to *this* Commission that the traffic at issue here is "nomadic VoIP" – and indeed Global admitted here that it has no way of telling whether the traffic originated in IP format like nomadic VoIP does. Tr. at 141 .

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[1] For example, as noted in AT&T Illinois' initial brief (at 35), Global's affiliates and parent company were recently sanctioned by the federal court in Connecticut for, among other things, lying to and committing a fraud upon the court. More recently, the court refused to credit conclusory assertions in declarations submitted by Global's President and CEO and bookkeeper, where the defendants "offered no objective information to support these declarations." *See* Exhibit B hereto, at 4.

In addition, we do not know what evidence Global NAPs, Inc. presented to the NYPSC Staff upon which the NYPSC Staff based its conclusion that the New York traffic delivered to TVC Albany appears to be nomadic VoIP. Perhaps the New York commission and staff, unaware of Global NAPs, Inc.'s track record, made the fatal mistake of accepting Global NAPs, Inc.'s representations at face value, in the absence of objective, verifiable evidence. In any event, the New York commission and staff plainly did not have the benefit of AT&T Illinois' traffic studies.

Finally, AT&T asserts, while Global or its affiliates or their customers may transmit traffic in the IP format, that is not enough to show that the traffic is "enhanced" or "information services" traffic of the sort that might entitle *an ESP* to the benefit of interstate access charge exemption. The FCC has made clear that traffic that originates like ordinary telephone service on the public switched telephone network ("PSTN"), that is merely converted to Internet Protocol for some portion of its transport, and that is then terminated on the PSTN like ordinary traffic, is not subject to any special treatment. In particular, AT&T Illinois notes, in the *IP Access Charge Order*, the FCC held that such services are "telecommunications services," not "enhanced" services, and that interexchange carriers who carry such traffic must pay applicable access charges. In that proceeding, AT&T had petitioned the FCC for a declaration that its "phone-to-phone IP telephony services" were exempt from access charges. *Id.* ¶ 1. The services at issue used IP only in the middle: an interexchange call would be "initiated in the same manner as traditional interexchange calls," once the call "reaches AT&T's network, AT&T converts it from its existing format into an IP format and transports it over AT&T's Internet backbone," and "AT&T then converts the call back from the IP format and delivers it to the called party through [the local exchange carrier's PSTN]." *Id.*

AT&T Illinois asserts that the FCC rejected the very "policy" argument that Global makes here (that IP-enabled traffic should be exempt from access charges to promote the deployment of IP networks), and held that such traffic remains subject to access charges. The FCC concluded that "IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid paying access charges." *IP Access Charge Order*, ¶ 18. Moreover, "under the current rules," the FCC squarely held, this kind of IP-enabled service "is a telecommunications service upon which interstate access charges may be assessed." *Id.* Thus, "when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges," and this is the case "regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport." *Id.* ¶ 19. Further, AT&T Illinois points out, the FCC expressly noted that "carriers such as competitive LECs may qualify as interexchange carriers for purposes of this rule."

AT&T Illinois observes Global to concede that it does not know whether the "IP-enabled" traffic it delivered to AT&T Illinois is true IP-originated VoIP traffic or whether it is traffic that originated and terminated on the PSTN like ordinary telephone traffic and was merely converted to the IP format somewhere along its transmission path. Tr. at 141-42. As a result, Global has failed to demonstrate that the traffic it delivered is of the sort that even implicates the ESP interstate access charge exemption, as opposed to the sort of "IP-enabled voice services" traffic that the FCC squarely held remains subject to interstate access charges.

In short, AT&T argues, Global's assertions regarding the purported "VoIP" nature of the traffic it delivered to AT&T Illinois are not only a red herring (since this case does not involve interstate access charges to ESPs), but also completely unproven.

B. Global's Position.

Global contends that one of the problems with AT&T's ordering system is that Global was treated like any other telephone company providing traditional local exchange and intrastate toll services. Yet, Global claims that its witness Noack showed that Global's traffic is not "traditional" telephony when he explained that Global is not a long distance carrier; nor does Global receive traffic from any carrier using a 1+ method, nor does Global have interconnection directly with long distance carriers. According to Noack, Global's traffic is not local exchange traffic subject to reciprocal compensation and of Global's outbound traffic comes to it from ESPs, not individual customers making voice calls or third party carriers transmitting voice calls.

According to Mr. Noack, Global can receive and terminate traffic in both asynchronous transmission ("ATM") and IAT. Although Global would prefer to deliver traffic to AT&T in IP format through *an optical interconnect*, Illinois Bell requires Global to translate the traffic into time division multiplexing ("TDM") to accommodate their network. Because it is using ATM for transport, Global is not using feature group D trunks, for which the competitive carrier paid originating access.

Mr. Noack explained that under TDM, each communication requires a dedicated slot on a circuit that is established when the call begins and is freed when the call ends. An IP telephony solution, on the other hand, allows telephone conversations to travel over the same IP networks used for data communications. Such packet-switched communications rely on "connectionless routing", in which calls are divided into digital packets that are dispersed among multiple circuits that travel different paths to their destinations, and are transmitted only with other packets carrying other information. The use of IP to transmit voice enables a wide range of capabilities that are not available with traditional phone service - and to integrate various capabilities seamlessly, enabling more efficient communications.

Global's Outbound Traffic To AT&T Illinois Is ESP/VoIP.

Global contends that the nature of Global's network is important because it affects the charges it must pay AT&T. As shown by Mr. Noack above, however, Global's network is not a traditional telecommunications network. Rather Global uses an IP network to provide enhanced services and VoIP. Global witness James Scheltema, Vice President of Regulatory Affairs for Global NAPs, Inc., provided testimony on the nature of Global's traffic and he stated that Global does not provide dial tone to end users in Illinois. Instead, Global provides outbound services in Illinois for Global's customers, which are Enhanced Service Providers ("ESPs") whose outbound traffic is sent by Global to Illinois Bell. The traffic that Global sends to Illinois Bell in Illinois is solely ESP traffic. And, Global's customers for its inbound traffic received from Illinois Bell are typically Internet Service Providers ("ISPs"). In summary, Global argues, *all* of Global traffic is enhanced services traffic and has thus been incorrectly characterized by Illinois Bell as special access, local, intrastate toll traffic or transit traffic. And, because Global traffic is enhanced services traffic, the allowable charges for that traffic are set by the FCC. At the current time, Global notes, the FCC does not allow any of the charges that Illinois Bell is attempting to recover in this proceeding.

Global maintains that its traffic is the same type of traffic that the New York Public Service Commission found to be Voice over Internet Protocol ("VoIP"), and more specifically, that much of the traffic was "nomadic" VoIP that is not associated with a fixed location. Mr. Scheltema explained that nomadic VoIP allows the caller to place a call from anywhere that the user has access to the Internet. As such, the NXX codes are inapplicable as a means to measure distance. NXX codes are arbitrary and only when the user is in the same geographic region as the assigned number will such measurement of distance be accurate. Thus, even if the user is assigned a geographically-correlated NXX code, his movement can and does eliminate this correlation.

Global asks the Commission to find, as did the New York Commission, that Global's traffic is VoIP that is not subject to access charges. In the alternative, Global asks the Commission to determine, as did the Florida commission, that it should defer judgment until such time as the FCC clarified many of the issues surrounding this national Internet-based traffic. In Global's view, deferring or dismissing the present proceeding is also justified by the simple circumstance that, as noted by the Nebraska Federal District Court, it is impossible to make an accurate breakdown of intra versus interstate traffic. For that reason, the Nebraska Court did not apply access charges to VoIAT The difficulty of determining jurisdiction of VoIP is complicated by the fact that much VoIP, such as Global's is "nomadic". The Nebraska District Court relied upon the FCC determination in *Vonage* and the 8th Circuit's affirmance of that FCC decision to determine that it is impossible to distinguish between interstate and intrastate traffic when faced with nomadic VoIP:

> The Defendants' position is largely overcome by the Eighth Circuit Court's affirmance of the FCC Preemption Order, and the Eighth Circuit Court's observation that the basis for the FCC's preemption ruling was that, as least with interconnected VoIP service that is nomadic (including DigitalVoice), it is impossible to distinguish between interstate and intrastate calls. *See Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007), affirming *In re Vonage Holdings Corat Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 F.C.C. Rcd. 22,404 (Nov. 12, 2004). The Eighth Circuit Court stated, "[t]he impossibility exception, if applicable, is dispositive of the issue whether the FCC has authority to preempt state regulation of VoIP services." *Minn. Pub. Utils. Comm'n*, 483 F.3d at 578. There is not a shred of evidence that takes this case outside the "impossibility exception."

The concept of ESP traffic is based on the Telecommunications Act of 1996 (the "1996 Act"), which describes these services as "information services." Information services are not regulated as common carrier services under Title II of the Communications Act of 1934, as amended by the 1996 Act, including the imposition of access charges. All of the services that the FCC has considered "enhanced services" are "information services." However, "information service" is broader even than "enhanced service"; *e.g.*, under FCC precedent, enhanced services are limited to services offered over common carrier transmission facilities, and services that are not enhanced services but are offered "via telecommunications," such as live operator telemessaging services that do not involve computer processing applications, are information services.

IP-enabled services include VoIP, and are broadly defined by the FCC to include:

> services and application relying on the Internet Protocol family. IP-enabled 'services' could include the digital communications capabilities of increasingly higher speeds ... IP-enabled 'applications' could include capabilities based in higher-level software that can be invoked by the customer...to provide functions that make use of communications services.

The FCC has concluded that "[w]hen VoIP is used, a voice communication traverses *at least a portion of* its communications path in an IP packet format using IP technology and IP networks." Since 1983 the FCC has held that interstate access charges may not be applied to traffic that is delivered from ESPs. The FCC also has exempted IP-enabled traffic delivered to the PSTN from access charges.

This FCC exemption must be honored by this Commission. In *Vonage* the FCC preempted state jurisdiction purporting to regulate IP-PSTN transmissions of IP-enabled traffic, specifically, VoIP. The FCC found that IP-PSTN communications, although jurisdictionally mixed, are subject to the FCC's exclusive jurisdiction, thus preempting inconsistent state regulation in order to fulfill a valid federal regulatory objective. Although the subject service in that case clearly facilitated intrastate communications, the FCC determined that state efforts to regulate the intrastate components of IP-enabled communications relating to rates would negate critical federal regulatory objectives, and would retard the growth of the Internet, including VoIP and other IP-enabled services.

Thus, Global observes, the FCC preempted state jurisdiction, not because separate federal or state regulation is literally impossible, but because dual regulation would negate or defeat FCC policies. The FCC clearly stated the federal policy justifying preemption:

> The fact that a particular service enables communication within a state does not necessarily subject it to state economic regulation. We have acknowledged similar

> 'intrastate' communications capabilities in other services involving the Internet, where for regulatory purposes, treatment as an interstate service prevailed despite this 'intrastate' capability.

In so holding, the FCC analogized to its *GTE ADSL* order in which the FCC concluded that, even if some traffic using GTE's service would, in fact, be terminated in the state where it originated, or even locally, the service nonetheless is an interstate service and is properly tariffed at the federal level.

Accordingly, the FCC III *Vonage* determined that the attempts by states to exercise jurisdiction:

> were inconsistent with the FCC's deregulatory policies, and that preemption was consistent with federal law and policies intended to promote the continued development of the Internet, broadband and interactive services. Divergent state rules ... could impede the rollout of such services that benefit consumers by providing them with more choice, competition and innovation.

In that case, the FCC dismissed the suggestion made by many commenting in *Vonage* that the "traditional dual regulatory scheme must nevertheless apply to DigitalVoice because it is functionally similar to traditional local exchange and long distance voice service."

Rather than specifying the parameters of the services at issue, the FCC broadly preempted state jurisdiction regarding IP-PSTN transmissions. Again, the FCC, "not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities." Thus "questions regarding the regulatory obligations of providers of IP-enabled services", will be addressed by the FCC in its *IP-Enabled Services Proceeding,* in a manner fulfilling Congress' directions "to promote the continued development of the Internet" and to "encourage the deployment" of advanced telecommunications capabilities

TheFCC's preemption in *Vonage* is consistent with other FCC actions regarding IP enabled services. The FCC's conclusion is consistent, for example, with the FCC's determination in the *IP-Enabled Services Proceeding* that "[p]ackets routed across a global network with multiple access points defy jurisdictional boundaries." Thus, the FCC addressed "the fact that multiple state regulatory regimes would likely violate the Commerce Clause because of the unavoidable effect that regulation on an intrastate component would have on interstate use of this service or use of the service within other states." Indeed, "the fact that a particular service enables communication within a state does not necessarily subject it to state economic regulation." Consequently, the FCC, "not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities."

As for "questions regarding the regulatory obligations of providers of IP-enabled services", the FCC in its *ISP Remand Order* reiterated its plan to address those issues in its *IP-Enabled Services Proceeding,* in a manner fulfilling Congress' directions "to promote the continued development of the Internet" and to "encourage the deployment" of advanced telecommunications capabilities. Thus, while the FCC may not yet have announced new regulatory policy regarding the treatment of VoIP traffic, it has been explicit in asserting that *it,* and not others, will set that policy. Moreover, the FCC has been clear with respect to information services being entitled to exemption from access and other charges. Thus, although there are currently proposals to change the exemption, the exemption is binding federal law operating to preclude the assessment of access charges unless and until such law is changed.

The policy supporting the ESP exemption has been reviewed by the FCC on a number of occasions and has been retained each time. First, access charges on ESP-related traffic would discourage investment in and the design and operation of IP-enabled technologies, and correspondingly discourage the availability and use of such services to consumers, negating the national policy of ensuring broad penetration of IP-enabled services. Second, promoting the use of the Internet· and providing innovative communications products is why the FCC found in 1988 that "the imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired."[2] Again in 1997 the FCC held that

> [m]aintaining the existing pricing structure avoids disrupting the still evolving information services industry and advances the goals of the 1996 Act 'to preserve the vibrant and competitive free market that presently exists for the Internet ... unfettered by Federal and State regulation.'[3]

Hence, like originating access charges, the imposition of terminating access charges on traffic that is transmitted through ESPs would be inconsistent and interfere with the goals and policies that the FCC has fostered in developing the market for alternatives to traditional telephony. Additionally, the efficient routing of IP traffic, and the development of new and innovative IP-enabled services, depends on the free flow of packets irrespective of the kind of point-to-point routing and the location of servers or switches characteristic of circuit-switched networks. The open architecture of the Internet allows data to be transmitted in a way fundamentally different from circuit-switched service. As explained by Mr. Noack, packet-switched communications are different from the traditional circuit-switched communications and enable a wide range of capabilities that are not available with traditional phone service. Global Ex. 2.0, at 6. Part of the federal interest in IP-enabled services is the extent to which innovative applications and service arrangements will develop that will allow consumers to send and receive communications from many points, some of which may be fixed end points on managed networks, and some of which even may be "nomadic" end-points on IP networks; some of which may be within a given state and some between states. By effecting a national policy, a coordinated regulatory scheme can be applied in a

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[2] *Amendments of Part* 69 *of the Commission's Rules Relating to Enhanced Service Providers,* Order, *supra,* 3 FCC Rcd at 2633.

[3] *Access Charge Reform Order, supra,* 12 FCC Rcd at 16133, *quoting* 47 U.S.C. § 230(b) (2).

cohesive manner across state borders to reduce or even eliminate barriers that might otherwise be erected to thwart the free-flow of IP-enabled services.

Global notes that the FCC is revisiting the ESP exemption. Communications services have been radically altered by the advent of the Internet and the nature of Internet communications. Given increasing competition and new technologies, such as Internet and Internet-based services, the FCC has commenced a comprehensive re-examination of all currently-regulated forms of intercarrier compensation, including for IP-enabled services. (*Developing a Unified Intercarrier Compensation Scheme,* Notice of Proposed Rulemaking, CC Docket No. *01-92,16 FCC* Rcd 9610 (2001), Further Notice of Proposed Rulemaking, *FCC* 05-33 (rel. March 3, 2005) (hereinafter, the *"Intercarrier Compensation Proceeding").* But while the FCC is considering these issue, this Commission must abide by the current status of the law and give deference to the FCC. The resolution of issues regarding ESP, ISP-bound traffic, VoIP and the matrix of national policy, technology and legal issues informing it, are within the exclusive jurisdiction of the FCC, which is currently, actively and comprehensively reviewing these and related issues in its *IP- Enabled Services Proceeding* and *Intercarrier Compensation Proceeding.* In any event, it is unlikely that any decisions made will be applied retroactively to affect the current law imposing the mandatory exemption from access charges.

C. Staff's Position.

<u>Global Illinois is Not Entitled to the ISP / ESP or VoIP Exemptions From Access Charges</u>

Staff observes Global Illinois to claims that the traffic it delivers to AT&T is enhanced service provider ("ESP") or Voice over Internet Protocol ("VoIP") traffic. It further claims that the Commission has no authority to require Global Illinois to pay access charges on such traffic, which is exempt from interstate access as a result of certain FCC orders. Global Illinois is incorrect, Staff says, and the Commission should ignore its arguments, as have the California and Georgia Commissions. Simply put, the traffic Global Illinois delivers to AT&T is not ESP / ISP traffic, and the evidence indicates that much of it cannot possibly be VoIP traffic. Further, Staff points out, the parties' ICA governs the jurisdictional nature of the traffic.

In its ESP Order, Staff observes, the FCC determined that enhanced services providers ("ESPs") were to be treated as end users rather than telecommunications carriers for purposes of assessing intercarrier access charges. <u>ESP Order</u>, ¶17; *see* *also* n.8 (By previous FCC decision, ESPs are "end users" under 47 C.F.R. §69.2(m), and thus exempt from access charges). In Staff's view, however, this exemption appears to be of no relevance to this proceeding.

Staff notes that the ESP Order is over 20 years old, and therefore, at the risk of stating the obvious, predates the enactment of the federal Telecommunications Act of 1996 by nearly eight years. This has led to changes in terminology relevant to this proceeding. The FCC has recognized that the term "enhanced service" as used prior to the advent of the Telecom Act is intended to be identical to "information service" as defined in Section 153(20) of the Act. *See, e.g.,* Memorandum Opinion and Order, n. 11, <u>In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas</u>, FCC No. 07-212; 22 FCC Rcd 21293; 2007 FCC Lexis 9071; 43 Comm. Reg. (P & F) 377 (Rel. December 5, 2007)("Although the [FCC] used the term 'enhanced service' in [prior] decisions and the Act uses the term 'information service,' the [FCC] has determined that 'Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definitions of 'basic service' and 'enhanced service' developed in [prior] proceeding[s]'")

According to Staff, what Global Illinois is asserting here is essentially an ISP exemption.

In Staff's view, however, Global Illinois is not entitled to an ISP exemption at least with respect to AT&T. Global Illinois, by its own admission, is seeking to assert the ISP exemption with respect to traffic it receives from other carriers and <u>delivers</u> to AT&T for termination to AT&T end user customers. Staff explains, however, that the ISP exemption applies, by its terms, to traffic that is originated on the public switched network and terminated by an ISP. As the FCC stated in its *Access Charge Order*:

> We explained [in the NPRM leading to this Order] that ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because **ISPs use incumbent LEC networks to receive calls from their customers.** [fn] We solicited comment on the narrow issue of whether to permit incumbent LECs to assess interstate access charges on ISPs. [fn] In the companion Notice of Inquiry (NOI), we

> sought comment on broader issues concerning the *development of information services and Internet access.* [fn]
>
> *First Report and Order*, ¶343, In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges, FCC No. 97-158; CC Docket No. 96-262; CC Docket No. 94-1; CC Docket No. 91-213; CC Docket No. 95-72; 12 FCC Rcd 15982; 1997 FCC Lexis 2591; 7 *Comm.* Reg. (P & F) 1209 (Rel. May 16, 1997) (hereafter "Access Charge Order") (footnotes omitted; emphasis added)

Staff asserts that other portions of the Access Charge Order indicate that the FCC intended the ISP exemption to apply primarily to dial-up internet access, and exclusively to calls to ISPs. The FCC noted that:

> ISPs ... pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services. Access Charge Order, ¶346

And, Staff observes that the FCC has reiterated this position on several occasions. In its ISP-Bound Traffic Order, the FCC described ISP-bound traffic as follows:

> An ISP is an entity that provides its customers the ability to obtain on-line information through the Internet. ISPs purchase analog and digital lines from local exchange carriers to connect to their dial-in subscribers. [fn] Under one typical arrangement, **an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area**. The ISP, in turn, combines "computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." [fn] Under this arrangement, the end user

> generally pays the LEC a flat monthly fee for use of the local exchange network and generally pays the ISP a flat, monthly fee for Internet access. [fn] **The ISP typically purchases business lines from a LEC, for which it pays a flat monthly fee that allows unlimited incoming calls.**

Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, ¶4, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, FCC No. 99-38; CC Docket No. 96-98; CC Docket No. 99-68; 14 FCC Rcd 3689; 1999 FCC LEXIS 821; 15 Comm. Reg. (P & F) 201 (Rel. February 26, 1999) (footnotes omitted; emphasis added)

Staff maintains that clearly none of this applies in the current matter. According to Staff, Global Illinois purports to deliver traffic <u>to</u> AT&T <u>from</u> ISPs. It cannot, therefore, claim an exemption applicable to ISP *bound* traffic, terminated to an end user that is an ISP. In any case, the exemption runs in favor of the ISP, not Global Illinois, inasmuch as Global Illinois is, at best not clear as to whether any Global entity is itself an ESP or ISP. Tr. at 194-95.

Staff notes that at least one state Commission has rejected Global Illinois' argument that it is entitled to an ISP exemption. The California Public Utilities Commission (hereafter "CPUC") noted that "the only relevant exemption from the access charge regime under Federal law is for *ISP-bound* traffic rather than *ISP-originated* traffic[.]" *Opinion Granting Complainant's Motion for Summary Judgment* at 5 (Decision No. 07-01-004), <u>Cox California Telecom, LLC v. Global NAPs California, Inc.</u>, CPUC Docket No. 06-04-026 (January 11, 2007) (italics in original).

Staff questions Global Illinois assertion that the traffic it delivers to AT&T is not subject to access charges because it is VoIP traffic. What has been offered as evidence, however, does not persuade Staff of Global's assertion that <u>all</u> of the traffic it delivers to AT&T is VoIP traffic. And, Staff provides reasons to support its position on the matter.

First, Staff claims that the confidential evidence offered by Global does not bear scrutiny. For its part, AT&T produced evidence showing that a considerable portion of the traffic in question - depending upon which group of three minute reports are used – unquestionably originates on the public switched network with AT&T end-user customers. AT&T Ex. 2.1 at 14. And, Staff observes, these figures appear not to include traffic originated by customers of other landline carriers. Id.at13. Accordingly, in Staff's view, the statements set out in Global's confidential evidence are clearly not correct. Moreover, Staff points out, the statements in question are unsworn, the declarants have not been subjected to cross-examination, and the statements were, as the ALJ notes, prepared for purposes of this litigation. All of this, Staff charges, leaves Global's evidence markedly less reliable of where such traffic originates than the evidence presented by AT&T, which analyzes the originating and terminating point specific individual phone calls delivered by Global Illinois to AT&T for completion, and shows that a great many of the calls in question originate on the PSTN. This is especially true, Staff observes, to the extent that the customer carriers might, by so asserting, themselves avoid obligations to pay access charges. Further, Global Illinois urges the Commission to make a substantial cognitive leap from the proposition Global suggests in the evidence, to the ultimate proposition it hopes to establish, i.e., that all traffic delivered by Global Illinois to AT&T is VoIP traffic. The Staff urges the Commission not to make such a leap.

In light of the fact that a substantial amount of the traffic handed off by Global Illinois to AT&T does indeed originate on the PSTN, Staff considers Global Illinois' assertion that it is responsible for absolutely no access charges to fail. The FCC has addressed precisely this issue in the past, in its Order, <u>In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges</u>, FCC No. 04-97, WC Docket No. 02-361 (Rel. April 21, 2004)(hereafter "AT&T VoIP Order"). There, AT&T sought a declaration that its "phone-to-phone" VoIP telephone services were exempt from access charges applicable to circuit-switched interexchange calls. <u>AT&T VoIP Order</u>, ¶1. The record reflected that AT&T provisioned the calls in question in the following manner:

> AT&T's specific service consists of a portion of its interexchange voice traffic routed over AT&T's Internet backbone. [fn] Customers using this service place and receive calls with the same telephones they use for all other circuit-switched calls. The initiating caller dials 1 plus the called party's number, just as in any other circuit-switched long distance call. These calls are routed over Feature Group D trunks, and AT&T pays originating interstate access charges to the calling party's LEC. [fn] Once the call gets to AT&T's network, AT&T routes it through a gateway where it

> is converted to IP format, then AT&T transports the call over its Internet backbone. This is the only portion of the call that differs in any technical way from a traditional circuit-switched interexchange call, which AT&T would route over its circuit-switched long distance network. [fn] To get the call to the called party's LEC, AT&T changes the traffic back from IP format and terminates the call to the LEC's switch through local business lines, rather than through Feature Group D trunks. [fn] Therefore, AT&T does not pay terminating interstate access charges on these calls.[fn]. AT&T VoIP Order, ¶11 (footnotes omitted).

The FCC rejected the notion that service thus provided was VoIP service or exempt from access charges, instead finding it to be telecommunications service. Id., ¶12. In support of this finding, the FCC stated as follows:

> AT&T's specific service consists of a portion of its interexchange voice traffic routed over AT&T's Internet backbone. [fn] Customers using this service place and receive calls with the same telephones they use for all other circuit-switched calls. The initiating caller dials 1 plus the called party's number, just as in any other circuit-switched long distance call. These calls are routed over Feature Group D trunks, and AT&T pays originating interstate access charges to the calling party's LEC. [fn] Once the call gets to AT&T's network, AT&T routes it through a gateway where it is converted to IP format, then AT&T transports the call over its Internet backbone. This is the only portion of the call that differs in any technical way from a traditional circuit-switched interexchange call, which AT&T would route over its circuit-switched long distance network. [fn] To get the call to the called party's LEC, AT&T changes the traffic back from IP format and terminates the call to the LEC's switch through local business lines, rather than through Feature Group D trunks. [fn] Therefore, AT&T does not pay terminating interstate access charges on these calls. [fn]. Id. (footnotes omitted).

The FCC determined that such services were, moreover, subject to intercarrier access charges, stating as follows:

> [W]e clarify that AT&T's specific service is subject to interstate access charges. End users place calls using the same method, 1+ dialing, that they use for calls on AT&T's circuit-switched long-distance network. Customers of AT&T's specific service receive no enhanced functionality by using the service. AT&T obtains the same circuit-switched interstate access for its specific service as obtained by other interexchange carriers, and, therefore, AT&T's specific service imposes the same burdens on the local exchange as do circuit-switched interexchange calls. [fn] It is reasonable that AT&T pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN, pending resolution of these issues in the Intercarrier Compensation and IP-Enabled Services rulemaking proceedings. [fn]. Id., ¶15.

Staff can discern little or no difference between the service provided by AT&T and the service provided by Global Illinois here. As noted, the evidence points to traffic delivered by Global Illinois to AT&T originating substantially on the PSTN. The traffic undergoes a protocol conversion, is transported on Global Illinois' network, and undergoes another protocol conversion before Global Illinois delivers it to AT&T. Global Ex. 1 at 13-14. In the Staff's opinion, therefore, Global Illinois is liable for applicable access charges.

Finally, the FCC stated its high-level views on intercarrier compensation in its *IP-Enabled Services NPRM*, where it stated that:

> As a policy matter, we believe that any service provider that sends traffic to the [public switched telephone network] should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways. *Notice of Proposed Rulemaking*, ¶33, <u>In the Matter of IP-Enabled Services</u>, FCC No. 04-28;

WC Docket No. 04-36; 19 FCC Rcd 4863; 2004 FCC Lexis 1252 (Rel. March 10, 2004).

Staff considers this assessment is important. Here, it notes, the FCC expresses the view that cost causers should pay the costs thus caused, regardless of the manner in which traffic is delivered. Global Illinois, and the whole family of Global entities, appear more averse to paying the costs and charges they incur and cause than any other corporate family with which Staff is familiar. Staff recommends that the Commission not countenance this, and find that Global Illinois is obliged to pay access charges with respect to at least a fair portion of the traffic in question.

D. Commission Analysis and Conclusion.

Once again, we observe Global to attempt to excuse its refusal to pay local reciprocal compensation and intrastate access charges for traffic terminated by AT&T Illinois by raising the FCC's "ESP exemption." But, AT&T Illinois and Staff inform, and correctly so, that this exemption does not shield Global from local reciprocal compensation and intrastate access charges any more than it shields Global from the transiting service charges it owes AT&T Illinois under the parties' ICA.

Once again, Global causes a mismatch of fact to law by asserting that, since 1983, the FCC has held that interstate access charges may not be applied to traffic that is delivered from ESPs. To be sure, there is no relevancy to that assertion where, as here, AT&T Illinois is not seeking recovery of any interstate access charges. In any event, it is well established on record, and to more than a reasonable degree of certainty, that the FCC's ESP exemption applies only to ESPs themselves, and is only an exemption from certain (*i.e.*, originating) "interstate access charges." As such, the ESP exemption has no application to the charges at issue here, which are all *intra*state charges (*i.e.*, local reciprocal compensation and intrastate access charges, as well as the transiting charges that we addressed above), and, not interstate access charges. Even more to the point, the FCC's exemption does not apply "to traffic that is delivered from ESPs." Rather, it applies *to ESPs themselves*, exempting *ESPs* from certain interstate access charges. Global is a carrier, not an ESP, and hence the ESP exemption does not apply to Global, even if the customers of Global's affiliates (and Global itself has no customers) were in fact ESPs. Thus, the ESP exemption offers Global no relief.

We observe Global to assert that, the FCC also has exempted IP-enabled traffic delivered to the PSTN from access charges, but there is nothing specific on which Global can rely on for this proposition. Nothing on record shows the FCC to have ever held that IP-enabled traffic or enhanced service traffic delivered to the PSTN is exempt from access charges (or local reciprocal compensation or other charges). The only authority Global does cite in support of its assertion is the FCC's *Vonage Order*. In that federal Order, however, the FCC says nothing about access charges either on the pages Global cites or anywhere else. To be sure, the term "access charges" does not even appear in the *Vonage Order* and for good reason. The FCC was addressing its authority to preempt state regulation (including regulation of rates) for services that have both interstate and intrastate aspects in the situation where separating the service into interstate and intrastate communications is impossible or impractical. Neither that situation nor the FCC's holding in the matter have anything to do with the issues in the case. There is *no proposal from* AT&T Illinois *or any other party to have the* Commission regulate the rates charged by Vonage or any of the purported "ESP" customers of Global's affiliates for any IP-enabled or enhanced services they may provide to subscribers. AT&T Illinois here seeks compensation from another carrier – Global – for terminating traffic delivered by Global. The *Vonage Order* says nothing about compensation between carriers for terminating traffic, including IP-enabled or enhanced services traffic.

To be sure, the greater bulk of Global's arguments are confusing and geared to expounding on the FCC's purported exclusive jurisdiction over interstate "IP-enabled" services. These arguments never get to the point at hand. For its part, AT&T Illinois explains that Global's jurisdictional discussion is wholly irrelevant because neither Global nor its affiliates provide VoIP or other IP services to subscribers, including services that enable those subscribers to make or originate calls in an IP format. In fact, Global has no customers at all, and its affiliates (Global NAPs, Inc. and Global NAPs Networks, Inc.) likewise have no end-user subscribers. Neither Global nor its affiliates provide, either through tariffs or contracts, IP-based services to subscribers that enable those subscribers to make IP-based calls. In short, we are told, Global is not Vonage, and does not offer subscribers *any* of the IP-based services that Vonage and other VoIP service providers offer.

In this regard, the Commission believes it necessary to address Global's claim that all of the traffic it delivers to AT&T Illinois is VoIP traffic. As we consider this claim, the Commission sees nothing to support Global's assertion other than a certain confidential document. But, the record shows that Staff has no confidence in Global's evidence. Indeed, both Staff and AT&T Illinois have persuasively challenged that evidence on several grounds. On the record as a whole as well on the specifics of the challenges to Global's evidence, the Commission is not convinced that these documents show what Global intends for it to show. In other words, the evidence is incomplete for that proposition and raises far more questions than it answers. As such, Commission is persuaded to give it minimal weight.

In the end, this Commission concludes that it is in no way intruding on FCC matters or anything else outside its jurisdiction. Our role here is only to interpret and enforce ICAs. In this instance, AT&T Illinois asks nothing more than to have the Commission to interpret and enforce AT&T Illinois' ICA with Global, including the provisions of the ICA requiring Global to pay for certain services (such as the termination of local and intraLATA toll traffic). This is a serious matter because provisions in the ICA are not to be considered lightly either by the parties or this Commission.

What is at issue is the compensation that applies under the parties ICA to the traffic delivered by Global to AT&T Illinois for termination. And, we do not observe Global to directly challenge the ICA language that specifies how the parties are to determine what compensation applies. To be specific, the terms in the parties' ICA contemplates that the parties will use the Calling Party Numbers of the traffic, *i.e.*, the parties will look at the telephone numbers, to determine whether, for compensation purposes, the traffic is local (so that local reciprocal compensation charges apply), intraLATA toll (so that intrastate access charges apply), or interstate (so that interstate access charges apply). *See* ICA, App. Recip. Comp. §§ 4.2, 4.4. According to the telephone numbers, much of the traffic that Global handed off to AT&T Illinois and that AT&T Illinois terminated for Global was local traffic, and much was intraLATA toll traffic. Thus, under the ICA, AT&T Illinois is entitled to charge local reciprocal compensation and tariffed intrastate access charges for terminating this traffic. Global has not shown why it should be released from the terms of the parties' agreement. Notably too, Global has not challenged the particulars or amounts of AT&T Illinois actual billings. It has simply not paid them.

In further but related respects, we observe that the FCC, and the courts have consistently been attentive to, and upheld the sanctity of contract as written. For example, in its first ISP compensation order, the FCC concluded that ISP-bound traffic is largely interstate," yet, noted that where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions. *ISP Compensation Order*, ¶ 23. ¶ 22. Similarly, upon remand from the D.C. Circuit Court, the FCC again concluded in the *ISP Remand Order* that "ISP traffic is properly classified as interstate" and is thus subject to regulation by the FCC, and the FCC proceeded to promulgate a new compensation regime for dial-up ISP traffic. *ISP Remand Order*, ¶ 53. Nevertheless, the FCC once again acknowledged that its new compensation regime for this species of enhanced services traffic "does not alter existing contractual obligations." *Id.* ¶ 82. In the opinion of *Verizon California*, 462 F.3d at 1151 (the court concluded that because "[p]arties who enter into a voluntary interconnection agreement need not conform to the requirements of the Act," where parties entered into a "private agreement imposing reciprocal compensation on ISP-bound traffic above the FCC's mandated rate caps [in the *ISP Remand Order*] . . . that agreement would be binding on the parties regardless of the *ISP Remand Order*"). The lesson gleamed from all these pronouncements is that if ICAs survive through FCC regulatory regime changes, they most certainly survive changes in business plans.

On all the evidence of record and in full consideration of the arguments, the Commission finds that Global Illinois is in violation of the parties' ICA and AT&T Illinois' intrastate tariff for failing to pay reciprocal compensation and intrastate access charge. Global is directed to immediately pay AT&T Illinois the charges owing current to the date of this Order and within 5 days thereof.

IV. WHETHER THE COMMISSION SHOULD REVOKE GLOBAL'S CERTIFICATES OF SERVICE AUTHORITY.

Section 13-403 of the Public Utilities Act ("Act") provides, in relevant part, that the Commission shall approve an application for a Certificate of Interexchange Service Authority only upon a showing that the applicant "possesses sufficient technical, financial and managerial resources and abilities" to provide interexchange telecommunications service. The same standards appear in Section 13-405 of the Act where the Commission is to approve an application for a Certificate of Exchange Service Authority only upon a showing that the applicant possesses sufficient technical, financial, and managerial resources and abilities to provide local exchange telecommunications service. 220 ILCS 5/13-405. Finally, the directives and the standards for approval in Section 13-404 are the same. 220 ILCS 5/13-404.

On October 24, 2001, the Commission granted Global certificates to provide facilities-based local exchange service, resold service, and interexchange service. Order, Docket 01-0445 (Oct. 24, 2001) ("Certification Order"). This certification was granted pursuant to Sections 13-403, 13-404 and 13-405 of the Act.

A. AT&T Illinois' Position.

AT&T Illinois takes the position that the Commission should revisit its certification of Global because it is apparent that it no longer possesses sufficient technical, financial and managerial resources and abilities" to provide such services. 220 ILCS 5/13-403, 13-404, & 13-405. According to AT&T Illinois, it is undisputed that Global has no assets; it is undisputed that Global has no employees; it is undisputed that Global has no network or other equipment to provide communications services; and, it is undisputed that Global has no revenues or customers. On this evidence, AT&T Illinois argues, Global lacks the financial and technical resources necessary to provide services in Illinois.

Being devoid of assets, equipment, employees, or revenues, indicates to AT&T Illinois that Global has no ability to provide the services for which it obtained certification, or to provide the services described in the tariff it filed with the Commission. As importantly to AT&T Illinois, it does not have the financial and technical resources necessary to satisfy any of its obligations as a certificated carrier in Illinois, including obligations it incurs to other Illinois carriers with whom it exchanges traffic.

In the application process, AT&T Illinois notes, Global made a number of representations to the Commission, including representations that it intended to provide facilities-based and/or resale services in Illinois, that it utilizes its own equipment and/or facilities, that it would bill directly for its services, that it intended to hire employees, and that it proposed to offer local data and point to point services throughout the state. As it turned out, AT&T Illinois asserts, none of these representations were true. Instead, Global was created as a mere "paper company" with no assets, income, customers, employees, or operations.

Contrary to their representations to the Commission, AT&T Illinois avers, Global's managers never intended for Global to have actual operations in Illinois or to stand on its own feet as a viable carrier in Illinois. Rather, the sole purpose of the creation and certification of "Global NAPs Illinois" appears to have been to defraud creditors and the Commission, and shield any revenues and assets associated with providing service in Illinois from legitimate creditors like AT&T Illinois. AT&T Illinois maintains that Global was created to obtain from this Commission certificates to provide telecommunications services in Illinois, and thereafter enter into the arrangements with other telecommunications carriers, including the ICA with AT&T Illinois, necessary to provide service in Illinois. The customers and revenues associated with these operations, however, were assigned to different Global NAPs entities, such that Global has always remained as "assetless" shell.

In addition, AT&T Illinois argues, Global has conspired to allow its affiliates to provide service in Illinois without obtaining certificates from the Commission, and hence to avoid the Commission's regulatory oversight and authority. Global's affiliate Global NAPs, Inc. ("Global NAPs") entered into contracts with customers to terminate traffic in Illinois (and other states), and later purportedly assigned those contracts to yet another affiliate, Global NAPs Networks, Inc. Further, Global NAPs purportedly owned much of the Global NAPs organization's network, but that network is now purportedly owned and operated by Global NAPs Networks, including in Illinois. To be sure, AT&T Illinois points out, neither Global NAPs nor Global NAPs Networks are certificated in Illinois. This misuse of Global's certification by other, non-certificated entities to offer and provide service in Illinois, AT&T Illinois contends, further confirms Global's lack of appropriate managerial resources and abilities.

AT&T Illinois further asserts that Global violated the conditions imposed by the Commission when it granted Global's certificates. It points out that Global requested a waiver from the requirement to maintain its accounting records in accordance with the USOA, claiming that by using Generally Accepted Accounting Principles (GAAP) instead "the Commission will be able to obtain any information necessary to evaluate the Applicant's performance," and it claimed that its accounting system would "provide an equivalent portrayal of operating results and financial conditions as the USOA." AT&T Ex. 1.0 at 35 (quoting portions of Global's application papers). AT&T Illinois notes that the Commission granted this waiver request, but ordered Global to "establish books of account such that revenues from its telecommunications services . . . are segregated from the revenues derived from other business activities not regulated by the Commission," and to "maintain its accounting records in accordance with Generally Accepted Accounting Principles and at a level of detail substantially similar to the accounting system which it currently uses pursuant to its Chart of Accounts." Certification Order at 3, 5. But, AT&T Illinois contends, Global has never kept such records. In AT&T Illinois' view, given that its representations to the Commission were false, Global stands in violation of the express conditions of its certification.

AT&T Illinois points out that the activities of Global's affiliates in other states (also owned by Ferrous Miner and operated under the direction of Ferrous Miner's sole owner, Frank Gangi), reveal a lack of appropriate managerial resources and abilities. In this regard, AT&T Illinois informs that Global's California affiliate (Global NAPs California, Inc., or "Global California") recently lost its certification to provide service in California, and the *California commission ordered other local carriers in California* to cease exchanging traffic with it. That proceeding arose where Global California, like Global Illinois here, had refused to pay other carriers for terminating traffic in California, while its affiliates reaped revenues. The California commission found Global California liable to Cox Communications for about $1 million in intrastate access charges for terminating intraLATA toll traffic, and revoked Global California's certification when Global California violated the commission's order to pay Cox.

More recently, AT&T Illinois points out, the California commission found Global California liable to AT&T California for nearly $19 million in unpaid local reciprocal compensation, transiting, and intraLATA toll charges, not including any late payment or interest charges. See Pacific Bell/Global California Order at 1. Yet Global California purported to have about $100 to its name, with no liquid assets, offices, or real or personal property in California. AT&T Ex. 1.0 (Pellerin Direct) at 47. That is, Global California was structured by its managers just like Global here – as an empty shell without any assets to pay any creditors in connection with the provision of certificated services.

A similar story recently played out in Connecticut, according to AT&T Illinois, where Southern New England Telephone ("SNET") sued the certificated Global affiliate in that state, i.e., Global NAPs, to recover more than $5 million in unpaid tariff charges. After the federal court awarded SNET a prejudgment remedy of $5.25 million, Global NAPs (the entity that Global claims here to "guarantee" Global's financial obligations) purported to have virtually no assets, virtually no network equipment, and no customers, because it had transferred its equipment and customer contracts – without compensation – to Global NAPs Networks. See AT&T Ex. 1.1 at 36-37, 48-51. When SNET attempted to pursue discovery of the financial and accounting records of Global NAPs, and its affiliated co-defendants, including the parent company Ferrous Miner, it was determined that these entities concealed and destroyed records, and lied to both SNET and the federal court. This behavior, AT&T Illinois observe, lead the court to impose the ultimate sanction of a default judgment against Global NAPs and its affiliated co-defendants. Id. In AT&T Illinois' view, the conduct of Global NAPs, Ferrous Miner, and their affiliated co-defendants in the Connecticut case, is a clear evidence of a lack of appropriate managerial resources and abilities.

AT&T Illinois notes Global to have pointed out in testimony that, in granting Global the certificates it requested, the Commission relied upon a financial guarantee provided to Global by its affiliate Global NAPs. GNAPs Ex. 1.0 at 27. And, in connection with that guarantee, Global provided a Global NAPs "financial statement" showing millions in revenues and more millions in assets. AT&T Ex. 1.1 at 37. AT&T Illinois contends, however, that this financial guarantee, and those revenues and assets, are illusory. According to AT&T Illinois, when Global NAPs itself became the target of creditors, all those revenues and assets were shuffled to yet other affiliates, to the point that Global NAPs has stated it is unable to pay the judgment entered against it by the Connecticut court. Thus, AT&T Illinois contends, Global NAPs' "guarantee" of Global's obligations here, is worth nothing.

Even before the Connecticut district court's entry of default judgment against Global NAPs and its co-defendants, AT&T Illinois points out, Global NAPs represented to a federal court in Massachusetts (in litigation with Verizon New England for Global NAPs' non-payment of more than $70 million in charges due to Verizon New England) that it lacked the financial resources to post a cash bond to cover its potential obligations to Verizon New England pending the filing of an interlocutory appeal in that case. In connection with Global NAPs' request that the Massachusetts district court not dissolve a temporary injunction previously entered against Verizon New England, pending Global NAPs' interlocutory appeal, Verizon New England had proposed that the Court require Global NAPs to post a $55 million cash bond as additional security; Global NAPs had proposed a non-cash assignment of approximately $16 million in debt that Global NAPs asserted it was owed by Verizon (but which Verizon New England pointed out was more than offset by the amounts Global NAPs owed Verizon New England).

In its filings with the Massachusetts district court, Global NAPs represented that the "combined Global entities" had "accumulated a deficit in excess of $1 million" in the first nine months of 2005. AT&T Illinois Exhibit B. The Massachusetts district court ultimately agreed with Global NAPs' request that Global NAPs only be required to assign its alleged "Verizon debt" (in the amount of $15 million) as additional security for the court not dissolving its temporary injunction pending Global NAPs' interlocutory appeal. AT&T Illinois Exhibit C. Moreover, when the district court had earlier required Global NAPs to post $1 million in security in June 2005 in connection with the court's issuance of a temporary injunction against Verizon New England (AT&T Illinois Ex. D), Global NAPs purportedly financed that security by obtaining a $1 million "loan" from its affiliate Chesapeake Investment Services, Inc. ("Chesapeake"), another wholly-owned subsidiary of Ferrous Miner, which loan Global NAPs has never repaid. In exchange for this "loan," Global NAPs purportedly gave Chesapeake a lien on all of Global NAPs' assets, whether existing or thereafter acquired, which lien Chesapeake recorded through the filing in Massachusetts of an UCC-1 financing statements. AT&T Ex. E When Global NAPs lost its interlocutory appeal, the temporary injunction was dissolved and both the $1 million cash bond and the $15 million assigned "Verizon debt" were awarded to Verizon New England. AT&T Ex. F.

AT&T Illinois makes one last point. It asserts that Global's lack of appropriate financial, technical, and managerial resources and abilities harms Illinois carriers and consumers. By operating Global as a shell company, AT&T Illinois argues, Global's managers are attempting to enjoy a free ride on AT&T Illinois' public switched network, while shielding their revenues from creditors. While AT&T Illinois (and ultimately its customers) is thus forced to subsidize Global's "business" in Illinois, other CLECs and carriers pay for the services they receive from AT&T Illinois. As a result, AT&T Illinois contends, Global's managers obtain an unfair and inappropriate competitive advantage over other carriers, distort the market and harm competition.

For these reasons, AT&T Illinois asks the Commission to conclude that Global does not "possess sufficient technical, financial and managerial resources and abilities" to provide the services for which it is certificated (220 ILCS 5/13-403, 13-404, & 13-405), and, on this basis, revoke Global's certificates.

B. Global's Response.

As part of its effort to collect the charges that it is claiming in this proceeding, Global maintains that AT&T Illinois has raised the totally irrelevant issue of Global's fitness to continue to provide telecommunications service in Illinois. According to Global, AT&T's claim in this regard is an inappropriate collection mechanism in what is essentially a billing dispute. Global views AT&T's request to be nothing more than a strong-arm tactic to eliminate Global as a competitive threat. Contrary to AT&T's claims, Global has met and continues to meet the technical, managerial and financial requirements set forth in the Illinois Public Utilities Act.

Global considers it is entirely inappropriate for the incumbent local exchange carrier to attempt to have the Commission revoke the certificate of one of its competitors in the context of a billing dispute. It was noted by Global witness Scheltema, Global asserts, that this case is a business dispute over the nature of the responsibilities of each of the parties to an interconnection agreement approved by this Commission. He concluded that the remedies available to each of the parties should be those available to any dispute based on an interconnection agreement and not involve attacks on each other's certificates to provide telecommunications service. To be sure, Global argues, AT&T Illinois is a competitor of Global. As a general matter, Global maintains that this Commission should be hesitant in allowing an incumbent local exchange carrier to challenge the certificates of its competitors.

Substantively, Global asserts that the facts at hand do not justify the relief requested by AT&T Illinois. At the outset, it points out that none of the judgments or claims cited by AT&T Illinois and that are against Global have been directed against Global Illinois. All of those cases, Global notes, are in other states. This proceeding is the only case in Illinois that has involved Global. So too, Global argues, no Illinois customer has ever complained about the service they receive, or charges that they pay to Global. Moreover, Global explains that all of the complaints in other jurisdictions that have been identified by AT&T Illinois are all billing disputes raising the same issue before this Commission, i.e., the attempt by AT&T affiliates and other incumbent local exchange carriers to impose charges on Global that the FCC has determined are not allowable.

So too, Global takes issue with AT&T Illinois' argument that, Global's corporate structure impacts its ability to maintain financial viability. It points out that there was a guarantee provided to Global Illinois, Inc. by Global NAPs Inc. and it states that: "Please be advised that Global NAPs, Inc. will guarantee all obligations of Global NAPs Illinois, Inc. until such time as Global NAPs Illinois is financially able to meet its own obligations." This guarantee was sufficient when submitted to the Commission to obtain certification, Global argues, and it remains sufficient today.

According to Global, AT&T has not shown how the Global corporate structure has affected its technical or managerial ability. Global believes it telling that there have been no complaints against Global for either technical failures or managerial failures.

Global observes Staff witness Hoagg to expresses concern with Global having provided information in its certificate proceeding about plans for financing, staffing and technology, that he finds to be no longer accurate. These concerns, Global asserts, should not lead to the revocation of Global's certificates. Global asserts that changes to its business plan, from the time it received its certificates, is hardly unique in the telecommunications industry. According to Global, those carriers who did not alter their plans are, generally speaking, defunct, e.g., WorldCom and other CLECs. On the other hand, Global asserts, the carriers that have survived since they obtained their certificates are those that modified their business plans in the face of those changes.

Global questions whether this Commission is really interested in bringing in each of the certificated carriers in this state and determining if they are operating exactly as they said they would when they first obtained their certificates. In Global's view, the inquiry should not be whether a carrier has modified the style of its business following certification but whether a carrier is currently providing service to their customers in a manner that shows technical and managerial competence and financial viability. And, in Global's view, to the extent that carriers are still operating, it is a testament to their financial depth, their management and their technical expertise.

Global notes its witness Scheltema to have explained how the changes in Global's business plan have been justified and have resulted in a company that is providing service to its customers with an efficient, streamlined network. For example, he testified that Global had a switch technician in Illinois for extended periods but found it uneconomical to have a full-time dedicated employee given the level of business it had garnered. Instead, technical and managerial assistance is provided through Global's affiliated companies, such as legal and administrative from Global NAPs, Inc. and physical and technical support through Global NAPs Networks, Inc. Global points out Mr. Scheltema's testimony stating that many telecommunications carriers use a corporate structure such as Global's, and that Global's corporate structure was modeled after Verizon's corporate structure. There were business considerations,Global avers, that effectively precluded it from making additional investments that would imperil its financial condition. According to Global, this course of action proved to be prudent given the number of bankruptcies in the telecommunications industry. Additionally, Global contends that technology has changed since it first obtained its certificate. This increasingly efficient technology, it argues, has reduced need for the facilities Global had first envisioned.

With respect to Staff witness Hoagg's concern about Global's lack of customers, Mr. Scheltema explained that Global's customers are enhanced service providers with nomadic VoIP customers. He testified that a particular customer of any jurisdiction may be within Illinois or an Illinois customer may be elsewhere at any given time. When viewed strictly in the light of a traditional PSTN regime, Global may or may not have customers within Illinois, Mr. Scheltema observed, but it is more likely that they serve affiliates' customers through facilities in Illinois, hence the traffic being exchanged.

In sum, Global argues, the record shows no threat to the safety of Illinois' citizens or even to the loss of their dial tone. Few, if any of the currently certified carriers in Illinois are providing service exactly as they planned when they first obtained their certificates of service. According to Global, this Commission should only consider examining the fitness of a carrier when there is evidence of failures of management, technology or financial viability. In other words, Global believes that the Commission should not be in the business of micro-managing what few competitive carriers remain. There are no management, technological or financial viability concerns here, Global avers, as this is a billing dispute and nothing more.

C. Staff's Position.

As a matter of statutory law, Staff asserts, a certificated carrier in Illinois must show and maintain sufficient technical, financial and managerial resources and abilities to provide any services it seeks to provide. In Staff's view, Global Illinois very clearly no longer possesses adequate financial or managerial resources and abilities to provide service in Illinois and these three competencies are not severable.

Financial resources and abilities

There is no dispute, Staff points out, but that Global Illinois has no employees or assets other than its Certificate of Service Authority. In its Application for Certificate of Service Authority, and associated filings, Staff notes Global Illinois to have asserted that it intended to invest the sum of $100,100 in telecommunications facilities within Illinois. Global Illinois further produced a pro forma balance sheet showing $1 million in investment in Illinois. Further, Global Illinois stated in support of its Application that it intended to hire two employees in Illinois. Id. at 9-11. It is undisputed, Staff says, that Global Illinois currently has no assets (save, perhaps, a de minimus bank account) and no employees, in Illinois or elsewhere.

Staff observes Global Illinois to claim that it nonetheless possesses financial resources and abilities sufficient to justify retention of its certificate, as a result of and through its affiliate, Global NAPS, Inc. And, Global Illinois states that, since Global NAPs, Inc., possesses adequate financial resources and abilities, and guarantees Global Illinois' obligations, the Commission has no basis for concern regarding Global Illinois' financial resources and abilities. Staff urges the Commission to reject this contention.

It is true, Staff observes, that the Commission granted Global Illinois a Certificate of Service Authority based, in part, upon a July 27, 2001 statement by Global NAPs, Inc. and offered as a late-filed exhibit in Docket 01-0445, setting out that, "Global NAPs, Inc. will guarantee all obligations of [Global Illinois] until such time as [Global Illinois] is financially able to meet its own obligations." Global Illinois Ex. 1.0, Sched. JS-5. By way of demonstrating that it was able to satisfy Global Illinois' obligations, Staff explains that Global NAPs submitted, along with the guarantee, a document, "prepared exclusively for the Illinois Commerce Commission," which purported to "summarize the financial performance and condition of Global NAPs, Inc. as of September 30, 2000." Id. According to Staff, this "confidential" financial summary purported to show a certain approximate net profit and a certain approximate net worth. In this proceeding Staff understands Global Illinois to states that, in light of the fact that it has no customers or revenues, this guarantee remains in effect. Global Illinois Ex. 1.0 at 27. Accordingly and as Global Illinois concedes, Staff believes it appropriate to evaluate Global Illinois' financial resources and abilities with reference to Global NAPs, Inc.'s financial resources and abilities.

As an initial matter, Staff observes, even if Global NAPs were financially robust (and, as will be seen, it is not) the task of assessing Global NAPs' financial position is near impossible. This is so, Staff explains, because Global NAPs, based on its own representation, lacks a great many of the financial records necessary to show its financial state. Tr. at 237-38. Specifically, Staff points the Commission to a litigation in Connecticut, i.e., Southern New England Telephone Co. v. Global Naps, Inc., where a U.S. District Court ordered Global NAPs to produce its corporate books, including but not limited to "'balance sheets, cash statements, registers, journals, ledgers' in 'the form in which the records are kept,' [and] ... other financial documents that may have had to be gathered from third parties." AT&T Ex. 1.1, Sched. PHP-27 at 7. Staff observes that Global NAPs failed or refused to make any such production, claiming that responsive documents were in possession of third-party accountants and bookkeepers, who refused to turn the said documents over to it. Id. The court later found these assertions to be "lie[s] intended to delay the production of financial records[.]" Id.

After Global NAPs' misrepresentations were, in the court's words, "exposed", Id. at 5-6, Staff notes that Global NAPs claimed the records had been destroyed when a third-party bookkeeper's computer either "crashed", or was otherwise accidentally destroyed. Id. at 7-8. According to Staff, the Court viewed this contention as entirely false and completely risible, Id. at 18-22, especially since another computer's hard drive, which was subsequently recovered, proved to have been permanently erased using two data-wiping programs several days before Global NAPs would have been required to turn over the information on it. Id. at 9-10. The Court found that Global NAPs had destroyed financial documents in bad faith rather than produce them. Id. at 18, 20.

What this means to the Commission, Staff asserts, is that even in the light most favorable to Global NAPs and Global Illinois, Global NAPs has no present ability to make a showing regarding its current financial state. Whether one chooses to believe that the records in question were accidentally destroyed, as Global NAPs argued, or that Global NAPs intentionally destroyed them, as the U.S. District Court found, they simply do not exist. As such, Staff argues, the Commission will be without an objective basis at this point in time for determining whether Global NAPs can satisfy Global Illinois' obligations.

At hearing, Staff observes Global Illinois witness Scheltema to have reiterated the untenable and incredible position that Global NAP's financial information is not relevant to this proceeding. He did so, Staff argues, despite Global Illinois' admitted total reliance upon Global NAPs to guarantee its financial obligations. Staff offers a portion of that questioning, to wit:

> Q: So if I could just summarize your testimony, in one respect it is your testimony here today and it is Global NAPs-Illinois' position, and presumably Global NAPs, Inc.'s position, that notwithstanding the requirement that telecommunications carriers have sufficient financial, and managerial resources, and abilities, and notwithstanding the fact that Global-Illinois relies for all of its financial resources and abilities on Global NAPs, Inc. -- Global NAPs, Inc.'s financial information is not relevant to this proceeding?
>
> A: Yes, with explanation. Global NAPs currently provide service. It has zero registered complaints at the Commission and, obviously, has financial and managerial capabilities to do so over a number of years without any complaints reported. Tr. at 244

In Staff's view, the Commission should not countenance such an evasion. The Public Utilities Act requires that an applicant demonstrate it has sufficient financial resources and abilities as a condition for certification. Staff believes that subsequent to certification, where – as here – the financial soundness of a telecommunications provider operating in Illinois is under serious question, the Commission can and must require a demonstration of adequate financial resources and capabilities. And, in Staff's view, a failure to provide such demonstration is grounds for revocation of an existing certificate. Here, Global Illinois declines and/or is unable to provide such a demonstration for its purported financial guarantor – Global NAPs. This fact alone, Staff asserts, is sufficient grounds for the Commission to revoke the operating certificate currently held by Global Illinois.

This record, Staff asserts, contains evidence of Global NAPs' financial state, and it is not such as would afford the Commission much confidence that Global NAPs has any ability to meet its own obligations, much less those of Global Illinois. For example, Staff points out, Global NAPs owes – jointly and severally – a judgment debt to the Southern New England Telephone Company in the amount of approximately $5.9 million. And, Global NAPs has asserted, in affidavits attached to a motion to stay execution of the judgment in question, that it lacks sufficient assets to obtain an appeal bond. So too, Staff notes, the Georgia Public Service Commission ("GPSC") has found Global NAPs liable for an unliquidated sum of to a number of independent telephone companies in that state, based upon unpaid intrastate access charges which the GPSC found to be due and owing. This is not even the full extent of Global NAPs, Inc.'s liabilities, Staff observes. In Global NAPs, Inc. v. Verizon New England, 2006 U.S. Dist. Lexis 65458 (D. Mass. 2006), a U.S. District Court found Global NAPs, Inc., liable in damages to Verizon New England for an unliquidated amount, based on claims similar to those advanced by AT&T here, and determined that Verizon New England had made a showing entitling it to a prejudgment attachment of $70 million, subject to calculation of Verizon's actual damages. Id. at 22-24.

According to Staff, Global affiliates have fared no better. For example, Staff notes that the California Public Utilities Commission ("CPUC") has entered judgment against Global NAPs California, Inc. ("Global California") in the amount of $985,439.38 in favor of Cox California Telecom, LLC. Further, on September 22, 2008, the CPUC entered judgment against Global California in the amounts of $18,589,494.17, in favor of the Pacifica Bell Telephone Company. Modified Presiding Officer's Decision Finding Global Naps California in Breach of Interconnection Agreement at 18 (Decision No. 08-29-07), Pacific Bell Telephone Company, d/b/a AT&T California v. Global NAPs California, Inc., CPUC Docket No. 07-11-018 (September 22, 2008). Staff notes that Global California, like Global Illinois here, has no assets. Notably, Staff observes, the CPUC has directed other carriers to cease exchanging traffic with Global California.

While Global NAPs has not undertaken to guarantee Global California's obligations – which, as noted, now exceed $19 million in judgment debt alone, Staff does not believe that judgment creditors will not seek recourse against Global NAPs. In California, as in Illinois, creditors with a judgment against an insolvent corporation can seek recourse against its shareholders on a "piercing the corporate veil" theory. One of the factors that courts have used to determine whether piercing the corporate veil is appropriate, i.e., whether recognition of the corporate limitation of personal liability of shareholders would be unjust, is whether the corporation totally lacks assets or capital. Global California clearly has no assets of any sort, so that entities holding judgments against Global California may well seek recourse against its shareholders and affiliates, including Global NAPs. Further, Staff notes that the Global entities, while they allegedly supply various services and resources to one another, appear not to reduce agreements to provide such services and resources to writing. Tr. at 228-29. In any case, Global California, and by extension, the other Global affiliates, are effectively prohibited from doing business in the nation's most populous state, and that cannot give the Commission confidence in Global NAPs' ongoing solvency, or that of any of the Global entities, which in Staff's view, appear to be inter-related to the point of being indistinguishable.

In sum, Staff points out, Global NAPs currently owes a great deal of money (millions of dollars in judgment debt alone), to a number of entities, and its representatives have attested to the fact that it lack assets even sufficient to obtain an appeal bond such as would enable it to stay enforcement of one of those obligations. The Global affiliates owe millions more, and are without assets. This shows that Global NAPs is thus unable to satisfy its own obligations, much less those of Global Illinois. Since Global Illinois is likewise unable to satisfy its own obligations, Staff recommends that the Commission conclude that it lacks financial resources and abilities sufficient to hold a Certificate of Service Authority.

Managerial resources and abilities

Staff sees Global Illinois to contend that it possesses adequate managerial resources and abilities to maintain its Certificate of Service Authority. In particular, it claims to obtain such managerial and administrative resources as it requires, from its *affiliates Global* NAPs, *Inc. and Global* Realty.

As Global Illinois has no employees, Staff understands that it must necessarily rely upon its affiliates for managerial and administrative support. Again, Global Illinois relies in part on Global NAPs for such support, so that, notwithstanding Global NAPs protestations to the contrary, a review of Global NAPs' managerial abilities is warranted.

Staff notes that Global NAPs has experienced, in the past, a great difficulty – to put it charitably) producing documents pursuant to court orders, obeying court orders, and making truthful representations to courts generally. Staff maintains that a more detailed review of the matter is warranted, and thus, begins its account.

Staff points out the U.S. District Court for the District of Connecticut noted in its Second Amended Ruling *Re: Plaintiff's Redacted Motion for Default Judgment, Plaintiff's Motion for Default Judgment*, and *Defendant's Motion to Modify the Court's October 19, 2007 Order* in *Southern New England Telephone Co v. Global NAPs, Inc., et al*, 3:04 – cv – 2075, 2008 U.S. Dist. Lexis 49061 (D. Conn. July 1, 2008), Global NAPs has been singularly dishonest in its dealing with that court. The court observed that, on May 5, 2006, and again on May 26, 2006, it ordered Global NAPs to produce certain financial documents to the Southern New England Telephone Company (hereafter "SNET"). AT&T Ex. 1.0, PHP-27 at 3; 2008 U.S. Dist. Lexis 49061 at 5. Global failed to do so, whereupon the court found that "Global [NAPs] had failed to 'comply to date in any acceptable manner.'" Id. The court ordered Global NAPs to produce an employee for deposition, and to produce the financial records in question at the deposition. Id.; 2008 U.S. Dist. Lexis 49061 at 5-6. Global NAPs produced its treasurer, Richard Gangi, for this deposition. Id.; 2008 U.S. Dist. Lexis 49061 at 6. Mr. Gangi testified that he had brought no records with him, that he had "never seen" a financial statement for any Global entity, and that the only financial statement that was prepared was that of corporate parent Ferrous Miner. Id. Likewise, Mr. Gangi testified, and Global NAPs thereafter stated, that Global NAPs was unable to obtain general ledgers and tax records from third-party bookkeeping services and accountants, despite having specifically requested them. Id. at 4; 2008 U.S. Dist. Lexis 49061 at 7-8.

The court found that these statements were all "patently untrue", in light of Mr. Gangi's prior identification of financial statements at a deposition in different litigation. Id., and n.2. The court determined that Global NAPs's failure or refusal to produce financial documents was a "clear" violation of the court's order, in light of Mr. Gangi's "demonstrably false" statements regarding their nonexistence. Id. at 4; 2008 U.S. Dist. Lexis 49061 at 8. The court further found that Global NAPs had been "'anything but forthcoming in complying with the court's May 5 and 26 Orders[.]'" Id. The court ordered

Global NAPs to produce the requested documents or face judgment by default. Id. at 5; 2008 U.S. Dist. Lexis 49061 at 8-9. Global still refused to produce the documents. Id.; 2008 U.S. Dist. Lexis 49061 at 9.

The court subsequently found Global NAPs' assertion that third-party accountants and bookkeepers had refused to surrender financial documents "was a lie intended to delay the production of financial records in compliance with SNET's discovery requests and the court's discovery Orders." Id. at 5; 2008 U.S. Dist. Lexis 49061 at 9. Even after this "fiction" was exposed, however, Global NAPs refused to turn over ledgers. Id. at 6; 2008 U.S. Dist. Lexis 49061 at 10. As the court noted:

> On May 2, 2008, almost exactly two years after the court originally ordered Global to produce its financial records, when asked by the court why Global had failed to produce its general ledger, Global's counsel was unable to offer any credible explanation. Id.

In this matter, Staff observes Global NAPS to have next asserted that it was unable to produce certain financial records because a computer hard drive upon which the data had been stored was "dropped" by the third-party bookkeeper using it, or otherwise "crashed," in either case destroying the records in question. Id. at 8; 2008 U.S. Dist. Lexis 49061 at 14. Neither this computer, nor any of its component parts were ever produced. Id. at 9; 2008 U.S. Dist. Lexis 49061 at 15. According to Global NAPs, a second computer, used by the same third-party bookkeeper, met with a similar fate; very little Global NAPs data could be discovered on it. Id. at 9-10; 2008 U.S. Dist. Lexis 49061 at 16. The court found, however, that this was due to the fact that the third-party bookkeeper used a utility called "Window Washer," ostensibly to destroy personal data; the utility was used in its most potent "Wash with Bleach" configuration. Id. at 10-11; 2008 U.S. Dist. Lexis 49061 at 17-18.

Next, Global NAPs next asserted that some financial documents could not be produced due to the regrettable intervening circumstance of Richard Gangi's death. Id. at 12; 2008 U.S. Dist. Lexis 49061 at 20. According to Global NAPs, Mr. Gangi died intestate, and as such any Global NAPs financial documents in his possession could not, as a matter of Massachusetts probate law, be removed from his house. Id. The court, however, preferred to give credence to the testimony of Mr. Gangi's ex-wife, who stated that Global NAPs representatives removed all such records from Mr. Gangi's house, the niceties of Massachusetts probate law notwithstanding. Id. at 12-13; 2008 U.S. Dist. Lexis 49061 at 20-21.

Having previously found Global NAPs in civil contempt for failure to produce the records in question; Id. at 25; 2008 U.S. Dist. Lexis 49061 at 40; the court determined that holding Global NAPs in default was the appropriate sanction. Id. at 28; 2008 U.S. Dist. Lexis 49061 at 45. In so holding, the court found that: "[a] clear and unambiguous warning that default would enter is apparently not enough to cause Global to comply with this court's Orders." Id. at 27; 2008 U.S. Dist. Lexis 49061 at 44

As noted above, the court found that Global NAPs and its representatives made "patently untrue" and "demonstrably false" statements to the court, in some cases on their oath; "lie[d] ... to delay the production of financial records," and regarding other matters. The court found that Global NAPs "ha[s] demonstrated that [it] will mislead, and ha[s] misled, the court." Id., n.7. The court further found "[t]he suggestion that [the Global defendants] have no complete financial records as a matter of practice, rather than because they willfully destroyed them to avoid discovery, is incredible[,]" Id., n.5, and therefore found that the company destroyed records rather than turn them over as ordered.

The events described above bear on the question of Global NAPs' managerial resources and abilities in an obvious way. A federal court has found as a fact that Global NAPs either does not maintain adequate records, or – more probably - intentionally destroys them in the event that their production would expose it to legal jeopardy. It repeatedly violates court orders. Adequately managed companies do none of these things.

More particularly, the Commission relies heavily upon the integrity of the entities it regulates to file accurate and truthful reports, responses to data requests, and other documents. It is apparent from the Connecticut litigation that Global NAPs lacks the willingness to do so. This alone should disqualify it from holding a Certificate of Service Authority.

Global NAPs' unwillingness to produce financial documents is amply demonstrated by reference to this record. Global NAPs claims to guarantee the obligation of Global Illinois, and urges the Commission to accept this guarantee as having some value, but nonetheless insists that its financial resources are irrelevant to the proceeding, and refuses to produce them -even upon Staff's request. Tr. at 240-41.

This is not indicative of corporate management being prepared to satisfy regulatory requirements.

Global Illinois, likewise, cannot argue that it is differently managed than other Global entities. It is clear from its own testimony that Global Illinois is for all intents and purposes managed by Global NAPs. In any case, since Global Illinois' and Global NAPs' officers of record appear to be identical – namely, Frank Gangi – this is, at best, a distinction without a difference.

In Staff's view, Global Illinois' assertion that the Commission has received no complaints against it, is entirely meretricious. By its own admission, Staff notes, Global Illinois has no customers. Global NAPs provides service in Illinois exclusively to carrier customers. Ignoring for the moment the fact that Global NAPs has no Certificate of Service Authority, it (or one or another of the other Global entities) provides service exclusively to other carriers, a group unlikely to complain to the Commission's Consumer Services Division. Further, Staff considers that Global's carrier customers may have no reason to complain, insofar as they are evading potential intercarrier compensation obligations as a result of Global Illinois' and Global NAPs' complete lack of inquisitiveness regarding the type and nature of traffic that the Global entities deliver to AT&T on their behalf.

Staff notes that while Global Illinois asserts that all of the traffic it delivers to AT&T originates with VoIP providers, it concedes that it makes no attempt whatsoever to independently verify this, apparently choosing to rely upon its carrier-customers' representation that the traffic is in all cases VoIP traffic. See Tr. at 141 (Global Illinois witness Jeffrey Noack states that Global Illinois has no way of knowing the format that traffic it receives from other carriers for completion to AT&T originated in); Tr. at 142 (Mr. Noack concedes that Global Illinois has no knowledge of whether traffic it receives from other carriers for completion to AT&T is 1+ dialed PSTN traffic); Tr. at 160 (Global Illinois' counsel states that the only way for Global Illinois to determine the nature of such traffic is to rely on customer representations).

Global Illinois has no explanation whatsoever for the fact that, contrary to its assertions, a considerable portion of the traffic in question, depending upon which group of three minute reports are used – unquestionably originates on the public switched network with AT&T end-user customers. AT&T Ex. 2.1 at 14. These figures appear not to include traffic originated by customers of other landline carriers. Id. at 13. It appears possible to Staff that some of the carriers with which Global Illinois (or whatever affiliate is providing service that day) does business may be utilizing Global Illinois' service to avoid paying intercarrier compensation to terminating carriers, which is of course unlawful. To the extent this is the case, the Global entities are making it possible, which the Commission should not countenance.

Finally, Staff notes that, in terms of Global operations generally, Global Illinois does nothing whatever but possess a certificate. It appears not to provide service or have customers, or any contact with customers. All actual service appears to be provided by Global Networks, an un-certificated entity. To the extent that Global is providing service through an un-certificated entity, it again bespeaks a lack of managerial resources and abilities.

Staff is recommending revocation here based on the facts and circumstances before the Commission. Staff informs, however, that were the Commission to to revoke Global Illinois' certificate, it will not be the first state commission to take such action against a Global entity, given that the California PUC has suspended Global California's certificate in that state, and directed carriers to cease exchanging traffic with it. Staff believes it clearly established that Global Illinois lacks managerial resources and abilities adequate to maintain its Certificate of Service Authority, which the Commission should therefore revoke.

D. Commission Analysis and Conclusion.

There is not a shred of evidence, Global argues, to show that it is not providing reliable service in the State of Illinois. According to Global, the only reason this Commission should be investigating a carrier's fitness is if there is evidence that it is not providing service to its customers in an adequate manner and there is a threat of harm to Illinois customers as a result. There is no allegation of such harm in this case, Global contends, and thus, this Commission should reject the revocation relief sought by AT&T Illinois and supported by the Staff.

We disagree with Global in many respects. This Commission is bound to follow the law. And, the certification statutes direct precisely in what matters the Commission need satisfy itself before giving its approval. Such approval, when given, is ultimately set out in a formal order. This Commission knows of no order that does not make findings on a carrier's suitability to provide service in Illinois. That is because, on each request for a certificate, the Commission requires the applicant to satisfactorily show that it possesses the requisite "financial," "managerial" and "technical" resources and abilities required to provide services in Illinois. Each of these terms has meaning. Each must be independently assessed and satisfied. Each of these statutorily-ordained qualifications, we submit, is intended to promote fair dealing, business competence, financial integrity and ethical practices in service to the citizens of the State of Illinois.

Once a certificate is granted, the Commission assumes a supervisory role. In this capacity, we are not to remain blind to facts put before us in any type of proceeding or independently ascertained by our Staff. We would be woefully derelict of our duties to not take action in the face of a showing of failure in statutory certification standards. The General Assembly has delegated the task of approval to the Commission. And, it has also provided the Commission with authority to revoke approval.

On the record before us today, Global makes no effort to demonstrate that it possesses the requisite financial, managerial and technical resources and abilities essential to its continuing certification in Illinois. Given what AT&T Illinois and our Staff have provided to this Commission, there may be nothing for Global to say.

On the other hand, Staff has comprehensively and convincingly shown this Commission that Global Illinois lacks financial resources and managerial abilities to maintain certification. Most particularly, Staff's detailed account of Global NAPs' behavior in court proceedings raises in this Commission a loss of trust that Global NAPs or interchangeably Global Illinois, will file accurate and truthful reports, answers to data requests or other documents as we may require, or that its books and records are properly maintained.

For its part, AT&T Illinois tells us that this case is much more than a billing dispute and that it is directly harmed by Global's lack of appropriate qualifications. Because Global was certificated by the Commission, AT&T Illinois explains, it was forced to enter into an ICA and do business with Global. Yet, Global not only has refused to pay AT&T Illinois a single penny for any of the services provided by AT&T Illinois, but Global was managed and structured as an empty "assetless" shell. What this means , AT&T Illinois asserts, is that Global has no financial ability to pay a single penny to AT&T Illinois, or any other creditor, for liabilities incurred as a result of providing service in Illinois.

To be sure, Global does not dispute that it has no assets, no revenues, and no income. It points, however, to a "guarantee" provided by Global NAPs, Inc. Yet, Global has made no attempt to demonstrate that Global NAPs, Inc. has any financial resources of its own, as would make its "guarantee" sufficient to establish Global's financial viability and cover the payments it owes.

It is true, AT&T Illinois says, that the multitude of judgments and claims identified in the record were made against affiliates of Global, as well as Global's parent company (Ferrous Miner Holdings), in other states. But, it argues, that this does nothing to negate the significance of these judgments and claims in the situation here where Global has no employees of its own, but is managed and operated entirely by the same persons that manage and operate Ferrous Miner and Global's affiliates in other states. We agree with AT&T Illinois that the conduct exhibited before the Connecticut federal court (which imposed judgment for unpaid charges brought by another local exchange carrier, SNET as a sanction for lying to, and committing a fraud upon the court) demonstrates a deep level of managerial incompetence, if not outright malfeasance, of the persons who control and manage Global. This is far from keeping to the statutory standards for holding a certificate in Illinois.

Having not addressed its management abilities in any meaningful way, the Commission observes Global to settle on the singular claim that no customer has ever complained about the service they receive or charges that they pay to Global. On the evidence of record, this assertion rings hollow. It is well-evident that Global has no customers, and no one pays anything to Global, and hence there is no one to complain. And, this evidence informs the Commission that, if it revokes Global's certificates, no Illinois citizens will lose their dial tone or have their safety threatened (e.g. by the loss of 911 service), because Global does not provide dial-tone service to any end users in Illinois.

Staff expresses deep concern in that Global Illinois only possesses a certificate and relies on Global Networks, an un-certificated entity, to provide all actual services. This brings up AT&T Illinois' concern of having to do business with an empty shell. The Commission can draw nothing good from such a situation that is unlike anything we, or our Staff, have ever seen. Indeed, it has become obvious to the Commission that Global has structured itself and operated in this manner in order to defraud its creditors in Illinois, and to make Global "judgment-proof" with respect to the operations of Global and its affiliates in Illinois. The Commission cannot condone nor need it ignore such a ploy. If nothing else, we must uphold our integrity as much as we rely on the integrity of the entities we supervise.

All of the evidence on record, viewed in reasonable light, demonstrates to the Commission, and with great certainty, that Global lacks the requisite financial, managerial, and technical resources and abilities that it required to possess under the law. That said, we might agree with Global in one minor respect. Despite the evidence that the Commission has heard, this proceeding may not be the proper vehicle for revoking a certificate of authority. But, that can easily be remedied and should be done expeditiously. As such, we direct Staff to immediately initiate a citation proceeding. On the record before us, we conclude that time is of the essence. Thus, within 5 business days of opening of the docket, Global will appear and show cause why its certificates of authority should not be revoked. And, it will bring to that proceeding all records, financial statements and other documents relevant to the matter there at hand.

We further direct that the record in this case will be input and adopted into that docketed proceeding.

Finally, Global is being directed in this proceeding to pay the full amount owed to AT&T Illinois and current to the date of the instant order. It shall do so by a date certain, i.e., 5 business days after the entry of this order. Its timely payment and proof thereof is *a requirement for the citation proceeding.*

V. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having reviewed the entire record herein and being fully advised in the premises, is of the opinion and finds that:

1) the Commission has jurisdiction over the parties and the subject matter herein;

2) the findings and conclusions stated in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and Conclusions of law.

3) on the complaint filed on February 13, 2008, by Illinois Bell Telephone Company (AT&T Illinois) and against Global NAPs Illinois, Inc., and alleging violations of the these parties' interconnection agreement ("ICA"), the Commission finds that:

a. Global is in violation of the parties' ICA and is directed to pay AT&T Illinois all amounts owing for DS3 and current to the date of entry of this Order with payment to be made within 5 days thereof.

b. Global is in violation of the parties' ICA and is directed to pay AT&T Illinois all amounts owing for Transiting and current to the date of entry of this Order with payment to be made within 5 days thereof.

c. Global is in violation of the parties' ICA and is directed to pay AT&T Illinois all amounts owing for reciprocal and current to the date of entry of this Order with payment to be made within 5 days thereof.

4) The record in this proceeding shows that Global no longer possesses the qualifications that are statutorily required under Section 13-403, 13-404, and 13-405 of the Act.

5) Staff is directed to initiate a emergency citation proceeding and issue a rule to show cause notice for Global to show cause why its certificates should not be revoked.

6) Global is directed to appear at the hearing in that docket with all records, financial statements and other relevant documents to make a relevant showing.

IT IS ORDERED that the Complaint filed by AT&T Illinois and against Global is granted.

IT IS FURTHER ORDERED that Global will pay the total amounts owed within 5 days of the entry of this Order.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code Section 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED:	November 24, 2008
BRIEFS ON EXCEPTIONS ARE DUE	December 12, 2008
REPLIES TO EXCEPTIONS ARE DUE	DECEMBER 23, 2008

Eve Moran

Administrative Law Judge

PHR9 /11

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of TelCove Operations, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Ohio Bell Telephone Company d/b/a SBC Ohio.	)	Case No. 04-1822-TP-ARB

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of TelCove Operations, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms, and Conditions of Interconnection with The Ohio Bell Telephone Company d/b/a SBC Ohio.[1]	Case No. 04-1822-TP-ARB

ARBITRATION AWARD

The Commission, considering the petition, the evidence of the record, post-hearing briefs, the applicable law, and otherwise being fully advised, hereby issues its arbitration award.

APPEARANCES:

LeBoeuf, Lamb, Greene and McRae, LLP by Mr. Brian T. FitzGerald, 99 Washington Avenue, Suite 2020, Albany, New York 12210-2820, and Bricker & Eckler, LLP by Mr. Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215-4291, on behalf of TelCove Operations, Inc.

Mayer, Brown, Rowe and Maw, LLP by Messrs. Theodore A. Livingston, Clark M. Stalker, Michael T. Sullivan, 190 South LaSalle Street, Chicago, Illinois 60603-3441, and Ms. Mary Ryan Fenlon, Senior Counsel, Legal Department, 150 East Gay Street, Floor 4, Room C, Columbus, Ohio 43215, on behalf of The Ohio Bell Telephone Company d/b/a SBC Ohio.

I. BACKGROUND

Under Section 252(b)(1) of the Telecommunications Act of 1996 (the 1996 Act),[2] if parties are unable to reach agreement on the terms and conditions for interconnection, a requesting carrier may petition a state commission to arbitrate any issues that remain unresolved despite voluntary negotiation under Section 252(a) of the 1996 Act.

On July 18, 1996, this Commission established Mediation and Arbitration Guidelines (Arbitration Guidelines) in order to carry out its duties under Section 252 of the 1996 Act. *See In the Matter of the Implementation of the Mediation and*

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1 The Commission notes that on November 3, 2005, The Ohio Bell Telephone Company filed an application, under Case No. 05-1445-TP-ACN, to change its trade name from SBC Ohio to AT&T Ohio. This application was approved on January 4, 2006. For purposes of this Arbitration Award, however, we will refer to the company as SBC Ohio or SBC.

2 The 1996 Act is codified at 47 U.S.C. 151, *et seq.*

Arbitration Provisions of the Federal Communications Act of 1996, Case No. 96-463-TP-UNC (Entry issued July 18, 1996). Under those Guidelines, an internal arbitration panel is assigned to recommend a resolution of the issues in dispute if the parties cannot reach a voluntary agreement.

II. HISTORY OF THE PROCEEDING

TelCove Operations, Inc. (TelCove) received authority from the Commission on July 8, 2004, under Case No. 04-887-TP-ACN, to provide competitive local exchange service, exchange access, and interexchange services in the State of Ohio.[3] On December 6, 2004, TelCove timely filed a petition (TelCove Petition) to arbitrate the terms of an interconnection agreement with The Ohio Bell Telephone Company d/b/a SBC Ohio (SBC).[4] In its Petition, TelCove stated that it is a facilities-based competitive local exchange carrier (CLEC). TelCove further stated that it has operated in Ohio pursuant to the terms and conditions of an "opted-into interconnection agreement." (TelCove Petition at 4.)[5] In its Petition, TelCove submitted an unresolved issues list, or Decision Points List (DPL), which identified 89 issues for arbitration. (TelCove Petition, Exhibit B.) TelCove asserted that the DPL was jointly prepared by the parties.

On December 29, 2004, SBC filed a response to the TelCove Petition. SBC, in its response, agreed with TelCove's assertion that this Commission has jurisdiction of the TelCove Petition pursuant to Section 252(b)(1) of the 1996 Act. SBC also agreed that the DPL, filed as part of the TelCove Petition on December 6, 2004, was jointly prepared by SBC and TelCove. SBC submitted that the DPL set forth each party's preliminary statement of its position on each unresolved issue, as of the date of the TelCove Petition. SBC submitted that Section 252(b)(3) of the 1996 Act provides, "A non-petitioning party . . . may respond to the other party's petition and provide such additional information as it wishes . . . ." Therefore, its response to the TelCove Petition is optional, "and there is no mandatory content." (SBC Response at 1.) SBC asserted that, while it does not agree with TelCove's identification of the most important issues, as submitted in the TelCove Petition, it will address the parties' differences in SBC's testimony

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3 The Commission issued revised Certificate No. 90-9107-TP-TRF to TelCove on August 30, 2004. Certificate 90-9107 was previously held by Adelphia Business Solutions Operations, Inc. d/b/a TelCove (issued under Case No. 03-920-TP-ACN); Adelphia Business Solutions, Inc. (issued under Case No. 03-920-TP-ACN); and Hyperion Communications of Ohio, LLC (issued under 98-1458-TP-ACE).

4 The TelCove Petition states that the parties "agreed that the request for negotiation was received by SBC on June 29, 2004," which means the arbitration window ended December 6, 2004 (the 160th Day), thus making the TelCove Petition filing timely (TelCove Petition, at 6).

5 TelCove's current interconnection agreement was adopted by Hyperion Communications of Ohio, LLC (Hyperion), which was a predecessor under Certificate No. 90-9107 (*See* n. 2); Hyperion's interconnection agreement, under Case No. 99-1003-TP-NAG, was an adoption of the interconnection agreement between Ameritech Ohio and KMC Telecom, Inc., and was approved by the Commission on November 24, 1999.

and briefs, rather than in its response. SBC submitted that in no instance does the absence of a specific response to an allegation in the TelCove Petition signify an admission that the allegation is accurate.

On December 29, 2004, TelCove filed a motion to admit Noelle M. Kinsch and Brian T. FitzGerald to practice *pro hac vice* before the Commission in this proceeding.

On December 29, 2004, the arbitration panel, SBC and TelCove informally discussed scheduling issues by teleconference. Based on the anticipated time frame for the issuance of the Federal Communication Commission (FCC)'s new unbundled network element (UNE) rules and the parties' availability due to the multi-state arbitrations underway between the parties, the attorney examiner issued an entry on January 11, 2005, that established a case schedule including an evidentiary hearing to begin on April 18, 2005.

On January 18, 2005, TelCove docketed a letter stating that TelCove consented to extend the deadline required by Section 252(b)(4)(C) of the 1996 Act for a Commission determination in this arbitration proceeding.

By entry issued on March 14, 2005, the attorney examiner amended the case schedule, which included that the evidentiary hearing would begin on May 3, 2005. Also, by this entry, TelCove's December 29, 2004 motion for admission of Noelle M. Kinsch to practice *pro hac vice* before the Commission, in this proceeding, was granted.

On March 22, 2005, SBC filed direct testimony of Mark Neinast, Scott McPhee, Suzette Quate, David Michael Yoest, Corey Jones, Frederick C. Christensen, Jeannie Harris, and Deborah Fuentes Niziolek.

On March 22, 2005, TelCove filed direct testimony of Blase J. Gabreski and F. Wayne Lafferty. In conjunction with the direct testimony filed for Blase J. Gabreski, TelCove filed a motion for protective order and memorandum in support, as required by Rule 4901-1-24(D), Ohio Administrative Code (O.A.C.), seeking confidential treatment of specified portions of the filed testimony. No objections to the motion were filed by any party.

SBC, on April 7, 2005, filed a Motion for Leave to File *Instanter* Corrected Testimony of Mark Neinast, with a copy of the Corrected Testimony attached as Exhibit 1. No objections to the motion were filed by any party.

On April 27, 2005, SBC filed a motion to admit Theodore A. Livingston, Jr., Michael T. Sullivan, and Clark Stalker to practice *pro hac vice* before the Commission in this proceeding.

On April 28, 2005, the attorney examiner issued an entry ruling on all pending prehearing motions. First, TelCove's December 29, 2004 motion to admit Brian T. FitzGerald to practice *pro hac vice* before the Commission, in this proceeding, was granted. Second, SBC's April 27, 2005 motion to admit

Theodore A. Livingston, Jr., Michael T. Sullivan, and Clark Stalker to practice *pro hac vice* before the Commission, in this proceeding, was granted. Third, TelCove's March 22, 2005 motion for a protective order was granted, and the attorney examiner ordered that the identified information remain under seal for a period of 18 months from the date of the attorney examiner entry. Last, SBC's April 7, 2005 motion for leave to file *instanter* the corrected testimony of Mark Neinast was granted, and the attorney examiner ordered that the corrected testimony of Mark Neinast be filed *instanter*.

On Friday, April 29, 2005, the parties submitted a joint revised DPL to the arbitration panel for the hearing set to begin May 3, 2005. The revised DPL was not accompanied by a motion requesting permission to submit it to the arbitration panel.

On Monday, May 2, 2005, the arbitration panel, SBC, and TelCove informally discussed the revised DPL by teleconference. After discussing the options in light of the revised DPL filing, and the ongoing negotiations by the parties, the arbitration panel amended the case schedule to include: the filing of the final revised DPL on May 6, 2005; the filing of revised expert testimony on May 13, 2005; and the evidentiary hearing in this matter to begin on June 1, 2005. The arbitration panel advised the parties that the acceptance of a revised DPL and the resulting changes in the case schedule were limited to this proceeding only and did not set a precedent for future arbitration proceedings. The changes to the case schedule, as described above, were confirmed by attorney examiner entry issued May 12, 2005.

The final revised DPL was filed by the parties on May 6, 2005. On May 13, 2005, SBC filed the revised direct testimony of Scott McPhee, Mark Neinast, Suzette Quate, Michael D. Silver, Corey Jones, and Jeannie Harris. Also, on May 13, 2005, TelCove filed revised direct testimony of F. Wayne Lafferty.

The hearing began on June 1, 2005 and continued through June 2, 2005. In support of its position, TelCove presented the revised testimony of F. Wayne Lafferty (TelCove Ex. 1). The parties waived the presentation of testimony by Blase J. Gabreski at the hearing. His prefiled direct testimony was admitted as TelCove Exs. 2 and 2A. SBC presented the revised testimony of Scott McPhee (SBC Ex. 3), Michael D. Silver (SBC Ex. 4), Jeannie Harris (SBC Ex. 5), Mark Neinast (SBC Ex. 6), Rajinder Atwal (SBC Ex. 7), and Suzette Quate (SBC Ex. 8). The revised joint DPL filed on May 6, 2005, was admitted as Joint Ex. 1. The parties' proposed interconnection agreement (ICA), filed as Appendix C to the TelCove Petition, was admitted for the record as Panel Exhibit 1. Post-hearing briefs were submitted by TelCove and SBC on June 17, 2005, (TelCove Initial Br. and SBC Initial Br.) followed by reply briefs on June 24, 2005 (TelCove Reply Br. and SBC Reply Br.).

III. ISSUES FOR ARBITRATION

Prior to the hearing, the parties resolved Issues 3-4, 6(2), 7(2)-7(3), 8-12, 14, 17-18, 21-22, 24, 28-33, 35-36, 41, 47-51, 54-56, 60, 63, 66-68, 70(2), 72(1), 73(2)-73(3), 74, 77, 81, 83-85, and 87-89. After hearing, the parties resolved Issue 2.

In light of the FCC's newly released TRRO,[6] and the ongoing negotiations between the parties, the arbitration panel permitted TelCove and SBC to submit a revised DPL on May 6, 2005 and revised direct testimony on May 13, 2005, so that TelCove and SBC could more clearly identify the resolved issues and the remaining unresolved issues from the original DPL filed December 6, 2004. Yet, after a review of the revised DPL and the revised direct testimony of the parties' witnesses, we find that TelCove and SBC, due to ongoing negotiations between the parties, added several new issue(s)/sub-issue(s), which were not identified as disputed issues in the TelCove Petition filed on December 6, 2004. We note that Section 252(b)(4) of the 1996 Act limits a state's consideration in an arbitration proceeding filed pursuant to Section 252(b) to issues raised in the petition filed pursuant to Section 252(b)(1) and to any response, if any, filed pursuant to Section 252(b)(3) of the 1996 Act. Accordingly, any new issue(s) and/or sub-issue(s) that were not identified as disputed issues in the TelCove Petition filed on December 6, 2004 will not be considered in this Award.

INTERCARRIER COMPENSATION (ICC)

A. Scope, Definition and Routing of Section 251(b)(5) and Access Traffic

Issue 37: What is the proper definition and scope of Section 251(b)(5) Traffic?

ICA Ref. – Intercarrier Compensation Appendix § 5.1

TelCove Position

According to TelCove, the parties disagree on the types of traffic that should be encompassed by the definition of the term "Section 251(b)(5)" in the ICA. (TelCove Reply Br. at 29.) It is TelCove's position that SBC has proposed a definition of Section 251(b)(5) traffic that is too narrow, improperly relies on the geographic location of the end-user, and seeks to exclude Voice over Internet Protocol (VoIP) traffic that should be classified as local rather than toll traffic. TelCove notes that SBC relies on the physical location of the calling and called parties and the CPN[7] to determine whether traffic is Section 251(b)(5) traffic. (TelCove Initial Br. at 54.) TelCove's witness, Mr. Lafferty, testified that the use of internet protocol (IP) technology has introduced "a new paradigm which

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6 *See, In the Matter of Unbundled Access to Network Elements*, CC Docket Nos. 01-338, et al., FCC 04-290 (Feb. 4, 2005 Order on Remand) (Triennial Review Remand Order) (TRRO).

7 CPN is the Calling Party Number.

removes geography as a determining factor for the originating and terminating points for a call." (TelCove Ex. 1, at 33.) He also testified that IP technology is the ultimate number portability mechanism, as the end-user customer can be almost anywhere in the world and still be reached using the same telephone number. Further, Lafferty argues that the geographic location of the individual initiating the call, as well as the geographic location of the individual receiving the call, often cannot be determined when IP technology is utilized. *(Id.* 34-35.)

TelCove's proposed Section 251(b)(5) definition is as follows:

> 5.1 Section 251(b)(5) Traffic shall mean telecommunications traffic originated and terminated:
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> a. within the same ILEC[8] Local Exchange Area as defined by the ILEC Local (or "General") Exchange tariff on file with the applicable state commission or regulatory agency; or
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> b. within neighboring ILEC Local Exchange Areas that are within the same common mandatory local calling area. This includes but is not limited to, mandatory Extended Local Calling Service (ELCS), or other types of mandatory expanded local calling scopes.
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> Section 251(b)(5) traffic includes traffic originated transmitted or terminated using IP enabled technology or originated and transmitted using IP enabled technology within the same ILEC Local Exchange Area as defined by the ILEC Local (or "General") Exchange tariff on file with the applicable state commission or regulatory agency. For reciprocal compensation purposes, traffic originated and transmitted using IP enabled technology originates at the point of interconnection with the public switched network.

(TelCove Initial Br. at 56.)

TelCove claims that Section 251(b)(5) reciprocal compensation should apply to traffic which originates and terminates in the same local calling area as identified in the ILEC's (i.e., SBC's) tariffs or the same mandatory local calling area established by the Commission or other appropriate regulatory authority, regardless of the technology chosen by the originating, transmitting, or terminating parties to transmit the traffic. The choice by either party to use IP technology to originate, transmit, and/or terminate a call, TelCove argues, should have no bearing on the statutory requirement under Section 251(b)(5) of the 1996 Act to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic. *(Id.* at 55.) It is TelCove's position that its definition for Section 251(b)(5) traffic does not rely on the physical location of the end-user as a determining factor for the type of compensation. Instead, TelCove proposes that the actual POI[9] with the PSTN[10]

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8 ILEC is the Incumbent Local Exchange Carrier.

9 POI is the Point of Interconnection.

10 PSTN is the Public Switched Telephone Network.

should determine the jurisdiction of the traffic originated and transmitted using IP technology. (*Id.* at 56; TelCove Ex. 1, at 35, 40.) TelCove argues that it is the nature of the traffic and the trunk group over which it is sent that will determine the jurisdictional nature of the traffic. In other words, the determination of how to rate a call must be based on how the call was trunked. (Tr. I, 37.) This, according to TelCove, is superior to just assuming all IP-enabled calls are either local or toll where no CPN is present. (TelCove Ex. 1, at 38-39.) It is TelCove's position that the carrier that hands the call off or converts the call from IP to PSTN has to trunk the call properly using its judgment, based on the information available to the carrier. (*Id.* at 39-40.)

Finally, TelCove argues that its proposed definition of Section 251(b)(5) traffic is consistent with the FCC's *Vonage Order*[11] where the FCC determined that VoIP traffic could not be separated into a local or long distance component. TelCove states that the FCC has pending an IP-enabled services proceeding where it is comprehensively examining numerous types of IP-enabled services. TelCove argues that SBC's proposed definition of 251(b)(5) traffic would prejudge the outcome of the FCC's future determinations by potentially imposing access charges and dedicated access trunk requirements on all IP-enabled local traffic. (TelCove Initial Br. at 57-58.)

SBC Position

SBC states that the parties agree that the definition of "Section 251(b)(5) Traffic" must be included in the ICA and agree that reciprocal compensation is applicable to Section 251(b)(5) traffic. However, the parties disagree on the types of traffic that should be encompassed by the term "Section 251(b)(5) Traffic." (SBC Initial Br. at 40.)

SBC's proposed Section 251(b)(5) definition is as follows:

> 5.1 Section 251(b)(5) Traffic shall mean telecommunications traffic in which the originating End User of one Party and the terminating End User of the other Party are:
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> a. both physically located in the same ILEC Local Exchange Area as defined by the ILEC Local (or "General") Exchange Tariff on file with the applicable state commission or regulatory agency; or
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> b. both physically located within neighboring ILEC Local Exchange Areas that are within the same common mandatory local calling area. This includes but is not limited to, mandatory Extended Area Service (EAS), mandatory Extended Local Calling Service (ELCS), or other types of mandatory expanded local calling scopes.

11 *See, In the Matter of Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267 (November 12, 2004 Memorandum Opinion and Order) (*Vonage Order*).

(Joint Ex. 1, Part 1, at 25.)[12]

SBC proposes to use the term "Section 251(b)(5) Traffic" to describe the type of traffic subject to reciprocal compensation under Section 251(b)(5) of the 1996 Act. SBC asserts that it defines this term in accordance with the FCC's *ISP Remand Order*.[13] (SBC Initial Br. at 40.) Accordingly, SBC proposes that Section 251(b)(5) traffic originates from an end user and is destined to another end user physically located within the same ILEC mandatory local calling scope. SBC contends that the FCC, in its *ISP Remand Order*, reaffirmed that Section 251(b)(5) reciprocal compensation applies only to traffic that originates and terminates in the same local exchange. SBC asserts that Section 51.701(b) of the FCC rules[14] states that Section 251(b)(5) reciprocal compensation is inapplicable to "traffic that is interstate or intrastate exchange access, information access, or exchange services for such access." According to SBC, this means that all traffic "that travel[s] to points - both interstate and intrastate – beyond the local exchange" is not subject to reciprocal compensation. (*Id.* at 40-41; *ISP Remand Order*, ¶ 37.)

SBC notes that TelCove disputes that Section 251(b)(5) traffic is limited to traffic that originates and terminates between end users physically located within the same local or mandatory local calling area. (SBC Initial Br. at 41.) SBC witness McPhee testified that TelCove asserts that a call should be subject to reciprocal compensation under Section 251(b)(5) if the calling and called telephone numbers are assigned to the same local or mandatory local calling area, irrespective of the actual locations of the calling and called end users. (SBC Ex. 3, at 4.) SBC argues that TelCove's position on this issue appears to be merely a corollary of its position on one or both of two other issues: the proper routing and compensation for IP-enabled traffic (Issue 43), and the proper routing and compensation for FX traffic[15] (Issue 38). (SBC Initial Br. at 41.)

<u>Arbitration Award</u>

A closer look at the competing language for Section 5.1 of the Intercarrier Compensation Appendix reveals that the dispute in Issue 37 is not the types of traffic that should be encompassed by the term "Section 251(b)(5) Traffic." The heart of the dispute is how the jurisdictional nature of a call (regardless if it is IP-based or PSTN-based or a combination of both) would be determined for the purpose of intercarrier compensation, which controls whether or not reciprocal compensation would apply (Section 251(b)(5) Traffic) or switched access compensation would apply (non-Section 251(b)(5) traffic.) TelCove's first

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12 Joint Exhibit 1 refers to the last DPL filed by the parties in this docket on May 6, 2005.

13 *See, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-bound Traffic,* CC Docket Nos. 96-98, 99-68, FCC 01-131 (April 27, 2001 Order on Remand and Report and Order) (*ISP Remand Order*), *remanded but not vacated, WorldCom, Inc. v. FCC,* No. 01-1218 (D.C. Cir. 2002). The term "ISP" refers to an Internet Service Provider.

14 The rules promulgated by the FCC are contained in Title 47 of the Code of Federal Regulations (C.F.R.).

15 FX traffic is Foreign Exchange traffic.

concern with SBC's proposed definition of Section 251(b)(5) traffic is that it improperly relies on the geographic location of the end-user. We note that the Commission's Local Service Guidelines[16] provide that any end user call originating and terminating *within the boundaries* of the ILEC's local calling area shall be treated as a local call for differentiating local and toll call types for the purposes of traffic termination compensation. The Commission has clearly intended that the physical location of the calling and called parties is the deciding factor in the jurisdiction of the call for traffic compensation purposes. Therefore, TelCove's evaluation of whether the calling and called telephone numbers are assigned to the same local calling area, irrespective of the actual locations of the calling and called end users, is inconsistent with our Guidelines. Accordingly, we adopt SBC's proposed language for Section 5.1 (Intercarrier Compensation Appendix), which considers the physical location of the originating and terminating end users of a call, as being consistent with our Guidelines.

Next, we address TelCove's concern that SBC's proposed definition of Section 251(b)(5) traffic seeks to exclude VoIP traffic that should be classified as local rather than toll traffic. To address its concern, TelCove proposes that, for reciprocal compensation purposes, traffic originated and transmitted using IP-enabled technology originates at the point of interconnection with the public switched network. (TelCove Initial Br. at 56.) TelCove acknowledged that, according to its proposed language, TelCove would treat a call originated and transmitted using IP-enabled technology as having originated at the point where it hits or interconnects with the PSTN. (Tr. I, 30.) The record also reflects that it is TelCove's intent that this criterion should be used "if there was no way to determine where that call originated." (Tr. I, 31; Tr. II, 25.) TelCove witness Lafferty further explained that the intention of TelCove's proposed language is that, if the call can be identified, then the standard method of identifying calls will be used to determine the call jurisdiction. (Tr. II, 26.) However, Mr. Lafferty asserts that it is often impossible to determine where a call actually originated, when it is originated and transmitted using IP-enabled technology. (Tr. I, 31.)

We note the record reflects that technical advancements may solve the problem of identifying where a call transmitted over IP technology actually originated. (Tr. I, 61.) We note that the FCC, in its *Vonage Order*, decided that the characteristics of Digital Voice (Vonage's VoIP offering) preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of carrying out a dual federal/state regulatory scheme. (*Vonage Order*, ¶ 14.) Accordingly, the FCC ruled that Digital Voice service is interstate in type and, therefore, subject to the FCC's jurisdiction, rather than state jurisdiction of such services. However, the FCC in that Order made it clear that it did not yet determine the final rules for the variety of issues associated with IP-enabled services like intercarrier compensation. (*Id.*, ¶ 44.) Absent an FCC final resolution of this issue, and pending the outcome of the appeals from the *Vonage*

16 *See, In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Feb. 20, 1997 Entry on Rehearing, Appendix A, Section IV.C).

Order, we find that, for IP-PSTN calls, if the jurisdiction of the call can be determined using CPN or other call records, the applicable compensation regime should be applied (i.e., interstate or intrastate access rates for non-Section 251(b)(5) traffic, and reciprocal compensation for Section 251(b)(5) traffic). If the jurisdiction of the call cannot be determined then, in response to the FCC's finding that IP-based services are interstate services, the call shall be considered an interstate call and the interstate access rates shall apply for the purpose of intercarrier compensation. Accordingly, we reject TelCove's proposed language in Section 5.1 of the Intercarrier Compensation Appendix.

Issue 43(1): Should reciprocal compensation arrangements apply to Information Services traffic, including IP Enabled Service Traffic?

ICA Ref. – Intercarrier Compensation Appendix §§ 17 – 17.2

Issue 43(2): What is the proper routing, treatment and compensation for Switched Access Traffic including, without limitation, any PSTN-IP-PSTN Traffic and IP-PSTN Traffic?

ICA Ref. – Intercarrier Compensation Appendix §§ 17 – 17.2

Issue 46 (TelCove):

Issue 46(1): Should the Agreement contain terms allowing for the exchange of VoIP traffic?

Issue 46(2): Should VoIP traffic be classified by the geographic location of the Calling and Called Parties?

Issue 46(3): How should the parties compensate each other for the termination of VoIP traffic?

Issue 46 (SBC): What is the proper routing treatment and compensation for Switched Access Traffic including without limitation any PSTN to PSTN Traffic and VoIP to PSTN Traffic?

Both parties:
ICA Ref. – ITR (Interconnection Trunking Requirements) Appendix §§ 12.1 – 12.2

<u>TelCove Position</u>

It is TelCove's position that Issues 43 and 46 address the same basic problem: how to treat IP-enabled traffic in the ICA, in the absence of FCC ruling on the proper treatment of such traffic. (TelCove Reply Br. at 38-39.) TelCove repeats its position that the physical location of the originating and terminating end-users should not be used to determine the jurisdiction of a call. According to TelCove, the FCC has correctly determined that the geographic location is not measurable when IP-enabled or VoIP technology is used to originate and transport a call. Accordingly, TelCove asserts that SBC's position, to use the physical location of the originating and terminating end-users for IP-enabled traffic compensation, would be inconsistent with the FCC's determination and should be rejected by the Commission. (TelCove Initial Br. at 71.) TelCove does not dispute that access charges should apply to interexchange traffic and reciprocal compensation should apply to Section 251(b)(5) traffic. TelCove also does not dispute that, where a call originates and terminates on the PSTN and utilizes IP transport technology in between (PSTN-IP-PSTN), it is subject to access charges when it is interexchange. (Tr. I, 34.) However, TelCove disputes the assumption inherent in SBC witness Harris' testimony that IP-PSTN traffic is all interexchange traffic, arguing that some of that traffic will be local. Conversely, TelCove agrees with SBC that not all IP-enabled traffic is local. (TelCove Reply Br. at 39.) TelCove agrees that IP technology can be used to originate and transport (and in some cases even terminate) both local and interexchange traffic and it is often impossible to determine where it actually originated. (*Id.* at 31.) TelCove opines that, consistent with the treatment of PSTN traffic, the determination of the proper compensation mechanism for IP-enabled traffic should be based on the use of the PSTN. (*Id.* at 35.) Therefore, TelCove contends that it has proposed an appropriate modification of the definition of switched access traffic to properly exempt VoIP traffic originated in the same ILEC local exchange areas from switched access traffic. (TelCove Initial Br. at 77.)

As to routing/trunking arrangements, TelCove argues that SBC takes the position that all Switched Access Traffic (regardless of whether or not it is originated and terminated in the same local calling area) must be terminated over Feature Group access trunks (B or D), except certain types of intraLATA[17] toll and Optional EAS[18] traffic, and that all such traffic is subject to applicable interstate and intrastate switched access charges. TelCove explains that, for Section 12 of the ITR Appendix, TelCove has proposed that not all IP-enabled traffic be automatically treated as interexchange or switched access traffic. Using the call path, as SBC seeks to do, in order to determine the trunk requirements, would mistakenly require Feature Group trunks for local traffic and force the application of access charges in error. (TelCove Ex. 1, at 38.) TelCove explains that, rather than focus on the geographic end points of the call, TelCove's proposal would have the Commission focus on the call's point of entry into and use of the PSTN, which in turn determines the appropriate trunking (local or access). The local or access trunk selection will then control whether reciprocal compensation (local) or access (toll) compensation arrangements apply. (TelCove Reply Br. at 39.) TelCove claims that its approach is fully consistent with paragraph 61 of the FCC's *IP-Enabled Services NPRM*,[19] as quoted by SBC in its Initial Brief:

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17 The term "intraLATA" describes telecommunications between two points (e.g., the called and calling numbers) located within the same Local Access and Transport Area (LATA), e.g., a telephone call between Columbus and Lancaster.

18 The term "EAS" refers to Extended Area Service.

19 *See, In the Matter of IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28 (Mar. 10, 2004 Notice of Proposed Rulemaking) (*IP-Enabled Services NPRM*).

> As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.

(TelCove Reply Br. at 39-40; SBC Initial Br. at 65; *IP-Enabled Services NPRM*, ¶ 61.)

As to SBC's claim that TelCove "all but abandoned its position that federal law treats interexchange IP-PSTN traffic as local traffic subject to reciprocal compensation," TelCove argues that SBC is misguided. TelCove explains that its position, that calls should be rated when they hit the PSTN and that if the CPN is available it be utilized to determine the proper treatment, has not changed throughout this proceeding. It further explains that the carrier that is selecting the trunking has the best information regarding whether to utilize a local or toll trunk. Where the CPN is available it would serve as a major factor in determining upon which trunk the call should be placed. (TelCove Reply Br. at 40.)

As to SBC's claim that IP traffic is susceptible to CPN stripping, which results in phantom traffic, TelCove contends that both TelCove witness Lafferty and SBC witness Neinast testified that IP traffic can be stripped of its CPN. (Tr. I, 61-63; Tr. II, 207-208.) Mr. Lafferty further testified that the loss of CPN, or phantom traffic, is a growing problem in this industry. (Tr. II, 34.) Additionally, TelCove argues that SBC's reliance on the recent FCC *VoIP 911 Order*,[20] which required VoIP providers that carry IP-PSTN traffic to provide the CPN, actually proves TelCove's point. (TelCove Reply Br. at 40-41.)

Next, TelCove addresses SBC's claim that "TelCove's language for the definition of Switched Access Traffic is inconsistent and it is unreasonable to define a single term two different ways in two different sections – particularly where, as here, those definitions conflict." TelCove argues that not only is it reasonable to define the same term differently depending upon the context and use, it is often necessary. The two appendices at issue deal with dramatically different subjects. TelCove explains that SBC's confusion should be resolved by TelCove's acknowledgement that the language in Section 12.1 in the Trunking (ITR) Appendix and Section 17.1 in the Intercarrier Compensation Appendix should have said "for purposes of this <u>Appendix</u> only" instead of "for purposes of this <u>Agreement</u> only." (*Id.* at 41.)

In conclusion, TelCove recommends that until such time as the FCC adopts new rules governing intercarrier compensation for IP-PSTN traffic in its IP-Enabled Service NPRM and/or IC Further NPRM, the Commission should acknowledge the new reality that IP-Enabled services are not tied to geography.

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[20] *See, In the Matter of E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 05-196 (¶ 37), et al., FCC 05-116 (June 3, 2005 First Report and Order and Notice of Proposed Rulemaking) (*VoIP 911 Order*).

As a result, compensation associated with such traffic should be separated from geography, as proposed by TelCove's language. (*Id.*, at 41-42.)

SBC Position

SBC states that the dispute between the parties concerns the appropriate intercarrier compensation and routing for IP-enabled traffic including both PSTN-IP-PSTN and IP-PSTN traffic. SBC explains that PSTN-IP-PSTN traffic is traffic that begins and ends on the PSTN like traditional phone calls but is temporarily converted to the IP format for some portion of the transmission. IP-PSTN traffic, the type most at issue in this arbitration, is traffic that originates in the IP transmission format and is later converted to the time division multiplex (TDM) format to be terminated on the PSTN. It is SBC's position that, when PSTN-IP-PSTN or IP-PSTN traffic is interexchange traffic, it should be treated like all other interexchange traffic and, when it is local, it should be treated like all other local traffic. It is SBC's opinion that TelCove proposes that all IP-PSTN (and perhaps all PSTN-IP-PSTN traffic) be treated like local traffic, even if it is interexchange traffic, which is inconsistent with and prohibited by federal law. (SBC Initial Br. at 60-61.)

As to PSTN-IP-PSTN traffic, SBC contends that its proposed language in Section 12.1 (ITR Appendix) and Section 17.1 (Intercarrier Compensation Appendix) defines "Switched Access Traffic" to include interexchange traffic that "terminates over a party's circuit switch, including traffic from a service that originates over a circuit switch and uses Internet Protocol (IP) transport technology." SBC argues that its proposed language in Sections 12.1 & 17.1 is consistent with the FCC's decision in *IP Access Charge Order*,[21] where it held that carriers who carry interexchange PSTN-IP-PSTN traffic must pay applicable access charges. Therefore, SBC argues that, consistent with the *IP Access Charge Order*, the parties' agreement should explicitly reflect that interstate and intrastate access charges apply to interexchange PSTN-IP-PSTN traffic just like all other interstate and intrastate interexchange traffic. Also, SBC argues that similarly the agreement should require the use of access trunk groups for interexchange PSTN-IP-PSTN traffic, rather than local interconnection trunks, so that SBC can assess the appropriate interstate and intrastate access charges. (*Id.* at 61-63.)

Similarly, SBC argues that its proposed treatment of IP-PSTN is consistent with the current FCC intercarrier compensation rules that require the application of access charges to all interexchange traffic, with no exception for IP-PSTN traffic when the traffic is interexchange (i.e., originates and terminates in different local exchanges). SBC opines that, when IP-PSTN traffic is local (i.e., remains within the local exchange), it should be treated like all other local traffic (i.e., subject to reciprocal compensation). In support of its position, SBC cites Section 51.701(b)(1), of the FCC rules, which provides that reciprocal

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21 *See, In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97 (Apr. 21, 2004 Order) (*IP Access Charge Order*).

compensation under Section 251(b)(5) does not apply to "traffic that is interstate or intrastate exchange access, information access, or exchange services for such access." SBC maintains that Section 251(g) of the 1996 Act preserves the "access charge regimes applicable to this traffic." (*ISP Remand Order*, ¶ 37.) Also, in support of its position, SBC cites the FCC's policy statement in the *IP-Enabled Services NPRM*[22] stating that:

> As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.

(*IP-Enabled Services NPRM*, ¶ 61.) Accordingly, SBC argues that, if TelCove provides interexchange IP-PSTN service, TelCove should not be allowed to escape paying for the cost of the PSTN. (SBC Initial Br. at 64-65.)

Also, in support of its position, SBC cites the FCC's *Vonage Order* arguing that, although the FCC recognized the difficulty in identification of the physical location of the end user making IP-PSTN calls, the FCC still decided that IP-PSTN traffic is jurisdictionally interstate (for the purpose of prohibiting state tariffing and certification requirements on such providers). SBC asserts the FCC made it extremely clear that the FCC was not making any changes to its intercarrier compensation and access charges rule. Thus, SBC opines that, until the FCC establishes new rules, the parties should continue to follow the existing industry practice of using CPN to rate traffic. SBC goes on to say that while CPN may not be perfect, and on occasion may fail to accurately rate calls, this is not a grave issue. (*Id.* at 69-70.)

SBC argues that TelCove's proposed language, which states that all IP-PSTN traffic should be treated as "local" traffic for intercarrier compensation and routing purposes by looking only at the point the traffic interconnects with SBC's PSTN and ignoring the point where the IP-PSTN traffic actually originated, is inconsistent with federal law. SBC argues that under TelCove's proposal, an IP-PSTN call originated and terminated in a single local exchange in Columbus, and an IP-PSTN call placed in Europe and terminated in a Columbus local exchange, would be treated as "local" calls that "originated" at the point where both calls hit the PSTN in the Columbus local exchange, and, accordingly, subject to reciprocal compensation. SBC argues that there is no FCC rule that allows traffic to be rated by the point it "originates" on the PSTN, rather than the point it really originates (i.e., the location of the originating end user). (*Id.* at 65-66.) As to TelCove's position that its proposal follows the technology-neutral intercarrier compensation principle, SBC argues that TelCove's proposal, which results in treating all IP-PSTN traffic as local, and exempting all traffic using IP technology from access charges, flies in the face of this principle. It is SBC's opinion that its

22 *See* Note 19 above for full reference to the *IP-Enabled Services NPRM*.

proposal, where intercarrier compensation does not depend on the underlying technology used, is technology neutral. (*Id.* at 72.)

SBC asserts that TelCove witness Lafferty admitted that, if the call record (which includes CPN) for an IP-PSTN call is available, then that record should be used to determine the jurisdiction of the call and the appropriate intercarrier compensation for the call. SBC further asserts that its proposed language would appropriately rate the IP-PSTN traffic as interexchange or local according to the CPN. As to TelCove's argument that its proposal is appropriate because call records are lost for IP-PSTN calls, SBC contends that call records *are* transmitted with IP-PSTN, because otherwise calls could not be directed to the proper party. SBC notes that TelCove's witness testified that on an IP-PSTN call sometimes the CPN would survive (the call transmission) and sometimes it would not, yet TelCove provided no explanation or evidence regarding why the CPN would not be part of the call record. SBC argues that, to the contrary, its witness testified that, for IP-PSTN calls, the majority of the time the CPN is included in the call record. (*Id.* at 66-67.) SBC argues that TelCove has not produced any evidence that TelCove's proposal to treat all IP-PSTN as local calls is more accurate than the current compensation regime (based upon CPN) for IP-PSTN traffic. (*Id.* at 71.)

SBC argues that TelCove failed to demonstrate that its proposal is technically feasible. According to SBC, TelCove's proposal to rate IP-enabled traffic by its "point of entry" would require SBC to determine what kind of technology was used to originate and to transport the call and at what point the call first touched the PSTN. SBC argues that TelCove did not explain how SBC could possibly determine this information for each call, or whether it is feasible to make such new information available in the signaling stream for every call. (*Id.*)

Next, SBC asserts that TelCove's proposed "Switched Access Traffic" definition in Section 17.1 (in the Intercarrier Compensation Appendix) includes interexchange PSTN-IP-PSTN traffic and excludes certain "traffic originated and transmitted using IP-enabled technology." Yet, TelCove's "Switched Access Traffic" definition in Section 12.1 (in the ITR Appendix) inappropriately omits all reference to PSTN-IP-PSTN traffic and proposes to define the term to exclude certain VoIP traffic (an undefined term in the agreement). SBC contends that the two "Switched Access Traffic" definitions conflict and will only lead to further disputes between the parties in the future. (*Id.* at 67-68.)

As to TelCove's argument that the "point of dispute is SBC's arbitrary determination that all traffic originated and transported using IP technology is automatically interexchange traffic," SBC argues that TelCove is mischaracterizing SBC's proposed language. SBC asserts that its proposed language defines switched access traffic (i.e., interexchange traffic that is subject to routing and access charges pursuant to switched access tariffs) as all traffic that originates and terminates in different local exchanges, including PSTN-IP-PSTN and IP-PSTN traffic that originates and terminates in different local exchanges (Sections 12.1 & 17.1). Conversely, SBC's proposed language defines

Section 251(b)(5) traffic (i.e., traffic that is routed over local interconnection trunks and is subject to reciprocal compensation) as all traffic that originates and terminates in the same local exchange (Section 5.1). Accordingly, SBC argues, its proposed language applies access charges only to PSTN-IP-PSTN and IP-PSTN traffic that is interexchange in nature, and would not apply access charges to IP-enabled traffic that originates and terminates in the same local calling area (as determined by the CPN). (SBC Reply Br. at 30.)

SBC, also, responds to TelCove's argument that an IP-PSTN call "could easily take a path through multiple states before being terminated to the PSTN in the same local calling area," and that SBC would inappropriately "treat this type of call as interexchange." SBC argues that nothing in its proposed language makes the rating of a call hinge upon the call path. Rather, SBC's proposed language looks only to the points of origination and termination. (*Id.* at 32.)

Arbitration Award

The dispute we need to address here is how to treat traffic originated and/or transmitted using IP technology (both PSTN-IP-PSTN and IP-PSTN) for the purposes of routing and intercarrier compensation under the ICA. Although TelCove claims that the dispute is only regarding the treatment of IP-PSTN traffic, SBC questions whether there is an agreement between the parties on the treatment of PSTN-IP-PSTN traffic. (SBC Initial Br. at 61; TelCove Reply Br. at 39.) Our discussion will address both types of traffic. In resolving this issue, we are guided by this Commission's and the FCC's ultimate policy goals for intercarrier compensation, which are to have the routing (trunking) arrangement and compensation for traffic exchanged between carriers/service providers treated in a technology neutral manner. Until the FCC issues its decision in the intercarrier compensation proceeding, and pending the outcome of the appeals from the *Vonage Order*, carriers are required to follow the existing rules and apply different rates based on traffic jurisdiction. As to the technologically neutral intercarrier compensation and trunking guiding principle, it has been clearly articulated by the FCC, in paragraph 61 of its *IP-Enabled Services NPRM*, that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network, and that the cost of the PSTN should be borne equitably among those that use it in similar ways. We also find it necessary to use the current industry practices, to the extent possible, to resolve these issues until the FCC resolves these issues generically and sets the necessary industry requirements for interconnection and trunking arrangements.

Accordingly, we find that, as we discussed in resolving Issue 37, for all types of traffic (PSTN-PSTN, PSTN-IP-PSTN or IP-PSTN), the physical location of the calling and called party, to the extent it is known, is the deciding factor in the jurisdiction of the call for traffic routing and intercarrier compensation purposes. If the physical location of the calling and called party is not known, but the CPN of the called party is available, the CPN should be used for the jurisdictional identification of the call for traffic routing and intercarrier compensation purposes. Although we do not accept TelCove's proposal to use

CPN as the preferred method to determine traffic jurisdiction, we find that it is a reasonable alternative to determine traffic jurisdiction in the absence of the availability of the physical location of the calling and called party. If neither the physical location of the calling and called parties, nor the CPN of the calling party is available, then the PSTN-IP-PSTN or the IP-PSTN traffic should be considered interstate traffic for the purpose of traffic routing and intercarrier compensation. This is consistent with the FCC's decision in *IP Access Charge Order* that carriers cannot avoid payment of access charges for interexchange traffic. It is also consistent with the FCC's *Vonage Order* finding IP-PSTN traffic to be interstate traffic due to difficulty in the identification of the physical location of the end user making the IP-PSTN calls. Also, this process will achieve the competitive and technological neutrality under the current intercarrier compensation framework, until the ultimate goal of unified intercarrier compensation is reached. Accordingly, we adopt SBC's proposed contract language for Section 17.1 (Intercarrier Compensation Appendix) and Section 12.1 (ITR Appendix) as it is consistent with our decision.

We are not persuaded by TelCove's argument that using the point where the call hits the PSTN to rate a call for the purpose of intercarrier compensation is technology neutral, consistent with the federal law, or even technically feasible. The record indicates that even TelCove's witness admitted that, under TelCove's proposal, a call originated and terminated in the same local exchange and a call originated in Europe and terminated in that same local exchange (whether the call is a PSTN-IP-PSTN call or an IP-PSTN call) will be treated the same. (Tr. II, 38-39.) This is not a technology neutral solution, as those two calls will be treated differently if the calls were PSTN-PSTN calls. Also, this proposal is not consistent with existing federal law, as a call originated in Europe and terminated in that same Ohio local exchange should be rated as an interstate interLATA[23] call. Based on TelCove's proposal, that call would probably be treated as a local or intrastate intraLATA call, as the point where it hits the PSTN is probably located in the same exchange or the same LATA. We believe TelCove's proposal would also conflict with the FCC's decision in *IP Access Charge Order* that carriers cannot avoid payment of access charges for interexchange traffic simply by using IP technology.

Also, the record shows that the terminating carrier has no control over the routing of the call (i.e., which trunk group the call will be transmitted over to reach the terminating carrier), which determines the applicable compensation rates. To the contrary, the routing of the call destined to the terminating carrier is determined by either the originating carrier or the IXC that transports the call. (Tr. II, 31-32.) We note that TelCove, under its proposal, did not articulate any defined rule to govern how such carrier (the originating carrier or the IXC that transports the call, and can be the same carrier) should route such calls. TelCove's witness testified that "the terminating carrier relies on the trunk that was used by the carrier that transported the call to terminate it to the terminating carrier . . . the terminating carrier has to rely on the carrier that delivers the call to

23 The term "interLATA" describes telecommunications between a point located within one LATA and a point located outside the LATA.

it." (Tr. I, 50.) TelCove did not explain how the carrier handing off the call to the terminating carrier, absent the CPN as TelCove argues, will be able to determine the appropriate trunk group to route a call. Neither did TelCove explain how SBC would determine all information necessary to be able to bill the originating carriers for traffic terminated on its network under TelCove's proposal. Accordingly, we find that TelCove failed to demonstrate that its proposal is technically feasible. Accordingly, we reject TelCove's proposed contract language for Section 17.2 of the Intercarrier Compensation Appendix and Section 12.1 of the ITR Appendix.

B. *Specific Access Tariffs to be Used for Determining Rates*

Issue 1: **Should TelCove be able to charge an intraLATA Access rate higher than the incumbent?**

ICA Ref. - GTC (General Terms and Conditions) § 1.1.2

Issue 42: **Should TelCove be able to charge an intrastate/IntraLATA or interstate/IntraLATA Access rate higher than the incumbent?**

ICA Ref. – Intercarrier Compensation Appendix §§ 10 - 10.1; 14.1 - 14.2

<u>**TelCove Position**</u>

TelCove's and SBC's dispute involves the proper access rates that TelCove is authorized to charge SBC for the termination of intrastate, intraLATA toll calls. TelCove disputes SBC's proposed language in Section 1.2.2, stating that "access compensation is in accordance with the LEC's tariffed access rates." TelCove argues that SBC is attempting to dictate the access charges it pays for terminating its own intraLATA toll traffic to TelCove by proposing that TelCove apply the SBC access rates to this traffic. (TelCove Ex. 1, at 40.) TelCove argues that it has an Ohio access tariff that it applies to all carriers, not just SBC and that its access rates are regulated and scrutinized by the Commission. (TelCove Initial Br. at 16.) TelCove states that, consistent with prior Commission order, its rates must be capped at the incumbent rates that were in effect as of June 2000.[24] Those rates do not necessarily reflect SBC's current access rates. (*Id.* at 16-17; Tr. II, 133-34.)

As to SBC's reference to the FCC's efforts to restructure interstate access charges to support its position, TelCove argues that Mr. McPhee acknowledged that the FCC has not ruled on intrastate traffic compensation. (TelCove Initial Br. at 17; Tr. II, 124.) TelCove believes that each party should be permitted to charge the access rates from its own intrastate access tariff to the party terminating intrastate, intraLATA toll traffic. (*Id.*) Finally, TelCove argues that any changes to intrastate access charges should only be made in the context of a generic access

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24 *See, In the Matter of the Commission Ordered Investigation of the Existing Local Exchange Competition Guidelines*, Case No. 99-998-TP-COI, *et al.* (Feb. 13, 2003 Opinion and Order).

reform proceeding where all interested parties are provided the opportunity to participate. (*Id.* at 70.)

SBC Position

According to SBC, the dispute in Issues 1 and 42 is whether TelCove should be permitted to charge SBC an access rate for terminating intraLATA toll calls that exceeds the rate SBC charges TelCove for the same service. SBC's position is that it should not. (SBC Initial Br. at 1.) SBC argues that the FCC addressed reform of CLEC access charges in its *CLEC Access Reform Order*.[25] According to SBC, the FCC recognized that CLECs' interstate access rates are, in many cases, far in excess of the rates ILECs charge for the same service, which results in shifting an inappropriate share of the CLECs' costs to the IXCs. (SBC Initial Br. at 1; *CLEC Access Reform Order*, ¶ 22.) SBC refers to the FCC findings in the *CLEC Access Reform Order*, arguing that there is no legitimate basis for requiring SBC to pay TelCove's unstated, unsupported, and changeable-at-will rates. (SBC Initial Br. at 2.)

Additionally, SBC argues that, consistent with the *CLEC Access Reform Order*, this Commission has adopted a rule that caps CLEC intrastate access rates at ILEC rates, with limited exceptions that do not apply here. SBC cites to the Commission's Opinion and Order in Case No. 99-998,[26] adopting Rule 4901: 1-6-33(C), O.A.C., which provides:

> CLEC shall cap its rates, on a rate element basis, at the rates of the ILEC providing services in the CLEC's service area, for the termination and origination of intrastate switched access traffic, unless:
>
> 1. The CLEC chooses to establish its own forward-looking, cost-based rates for the termination and origination of intrastate switched access traffic.
>
> 2. The CLEC is a rural CLEC competing with a non-rural ILEC and its rates are capped at NECA access rates.
>
> 3. The CLEC is transitioning its rates to the benchmark rate in accordance with the FCC's order in CC Docket 96-92, released April 27, 2001.

(SBC Initial Br. at 2-3.) SBC contends that TelCove has not suggested that any of those exceptions applies here. (*Id.* at 2-3.) Accordingly, SBC argues that TelCove's proposal, that it be permitted to charge access rates higher than SBC's access rates without any showing that its rates are forward-looking, cost-based

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25 *See, In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, FCC 01-146, 16 FCC Rcd. 9923 (Apr. 27, 2001 Seventh Report and Order) (*CLEC Access Reform Order*).

26 *See* Case No. 99-998-TP-COI, Feb. 13, 2003 Opinion and Order, Appendix A, at 21.

rates, violates this Commission's rule, and should be rejected even if there were no such rule. (*Id.* at 4.)

Arbitration Award

The dispute in both Issues 1 and 42 is, basically, whether TelCove should be able to charge SBC for the termination of intrastate, intraLATA toll calls at TelCove's tariffed switched access rates or whether TelCove's rates should be capped at SBC switched access rates. We find it is necessary to clarify the Commission's current rule regarding how a CLEC's intrastate switched access rates are to be set in its respective tariff. In Case No. 00-127-TP-COI, the Commission found that a CLEC must cap its intrastate access rates at the June 30, 2000 ILEC rate level unless a CLEC can justify its own higher rates through a cost submission.[27] This is the rule that all facilities-based CLECs in the state of Ohio must follow in setting their intrastate switched access rates in their respective intrastate tariffs. While, Rule 4901: 1-6-33(C), O.A.C., as referenced by SBC, was adopted by the Commission in Case No. 99-998-TP-COI, it is still subject to the rehearing process and is not yet a final Commission rule.

We find that, although SBC characterized TelCove's switched access rates as unstated and unsupported, SBC failed to provide any evidence that any of TelCove's tariffed intrastate switched access rates are in violation of the Commission's current rules. (SBC Initial Br. at 2; Tr. II, 135.) Accordingly, we adopt TelCove's position that the contract language should allow each carrier to charge its Commission-approved intrastate switched access rates for compensation for the termination of intrastate, intraLATA toll traffic. Because the language in GTC Section 1.1.2 and in Section 10.1 Intercarrier Compensation Appendix refers to each carrier's intraLATA or intrastate access tariff, we find that any future change in the Commission rules regarding intrastate switched access policy would trigger a mandate for tariff updates to reflect such changes, and would automatically bring the ICA into compliance with the Commission's intrastate access policy.

C. Treatment of FX Service Traffic

Issue 38: What is the appropriate form of intercarrier compensation for FX and FX-like traffic including ISP-bound FX Traffic?

TelCove: ICA Ref. – Intercarrier Compensation Appendix §§ 1.3; 7.2.1; 7.2.11; 7.4 – 7.5

SBC: ICA Ref. – Intercarrier Compensation Appendix §§ 1.3; 7.2.1 - 7.2.2.1; 7.4 – 7.5

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27 *See, In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI (Mar. 15, 2001 Entry on Rehearing, at 6).

<u>TelCove Position</u>

In its Initial Brief, TelCove proposes that foreign exchange (FX) traffic be treated similarly to the way that other types of local traffic are treated, including the payment of appropriate compensation to the terminating carrier. TelCove disagrees with SBC's proposal that a bill-and-keep regime apply to all FX traffic, including ISP-FX traffic. It is TelCove's position that FX traffic is no different in many respects than other Section 251(b)(5) traffic and that the compensation mechanism should be based on the nature of the traffic at the point where dial tone is received. According to TelCove, the end-user customer places a local call, and the costs involved by the originating party to originate and the terminating party to terminate the call are no different than any other local call. TelCove argues that the physical location of the customer purchasing FX service is irrelevant for purposes of determining compensation and therefore compensation should be based on the dialing pattern of the customer originating the call. (TelCove Initial Br. at 58-59.)

TelCove contends that it has not proposed that "reciprocal compensation," within the statutory meaning of Section 251(b)(5), apply to FX traffic, since TelCove agrees that FX traffic is not statutory Section 251(b)(5) traffic. TelCove opines that FX traffic does not have to be the same as Section 251(b)(5) traffic for a mutual compensation arrangement to apply. It is TelCove's position that a more balanced solution is to use a compensation mechanism, based on the use of the PSTN, which will provide a lower rate for the originating party to pay. What TelCove has proposed is that a charge (roughly equivalent in amount to reciprocal compensation, based on the presumption that the network costs involved are likely to be similar) be imposed for FX traffic. TelCove adds that, regardless of the FX nature of the call, there is a cost to the terminating carrier for handling that call. As to SBC's proposed bill-and-keep regime, TelCove argues that such a regime ignores the fact that these costs are being borne by the terminating carrier and that SBC's proposal must therefore be rejected. (*Id.* at 60-61.)

In support of its proposal, TelCove argues that SBC witness McPhee conceded that there is no FCC requirement mandating that the Commission adopt SBC's proposed bill-and-keep regime for FX type traffic. TelCove also claims that Mr. McPhee acknowledged that the "Commission can order a compensation mechanism be applied to that non-251(b)(5) Traffic . . . ." (*Id.* at 58.) Further, TelCove argues that while FX traffic may not meet all of the requirements of Section 251(b)(5) traffic in the 1996 Act, it is not precluded from compensation as Section 251(b)(5) Traffic as defined in the ICA. (TelCove Reply Br. at 31.)

<u>SBC Position</u>

SBC contends that its proposed bill-and-keep regime for FX and FX-like services applies to ISP-bound traffic as well as to voice traffic. (SBC Initial Br. at 45.) It is SBC's position that FX traffic is not subject to reciprocal compensation under Section 251(b)(5), as TelCove has acknowledged. SBC states that TelCove argues that the Commission can somehow impose reciprocal compensation (i.e., intercarrier compensation at rates equal to Section 251(b)(5) rates) on traffic to which Section 251(b)(5) does not apply. It is SBC's opinion that the traffic either is or is not subject to Section 251(b)(5) reciprocal compensation. If it is not, SBC argues, state commissions have no authority to impose reciprocal compensation on it. SBC contends that TelCove cites no such authority, because there is none. Further, SBC argues that this Commission has held that the applicability of reciprocal compensation under Section 251(b)(5) is determined by the geography, and not by NPA-NXX[28] assignments that may make non-local calls appear local. In support of its argument, SBC cites the Commission's decisions in arbitration cases involving SBC and Allegiance Telecom,[29] and TDS Metrocom.[30] SBC also cites the Commission's decision in the Global NAPS and Verizon North arbitration case.[31] (*Id.* at 42-43.)

SBC disagrees with TelCove's position that, because a call to an FX customer "looks" local to the network, it should be treated as local by being subject to reciprocal compensation, even though the call actually passes from one local exchange area to another. SBC opines that a call is an intraLATA toll call because it travels from one local exchange area to another local exchange area in the same LATA, not because of the NPA-NXXs of the calling party and the called party. SBC further opines that traffic between parties located in different local exchanges is interexchange traffic, and is subject to intrastate and interstate access tariffs, not reciprocal compensation. SBC argues that, according to the FCC's *ISP Remand Order*, Section 251(b)(5) does not mandate reciprocal compensation for exchange access, information access, and exchange services for such access. (*ISP Remand Order*, ¶ 34; SBC Initial Br. at 43-44.)

SBC states that it is true that, from the point of view of an end user who places a call to someone who has FX service, the call appears to be local, which is the whole point of FX service. However, SBC opines, from the point of view of the called party, FX calls do not appear (to be) local. SBC argues that the called party knows that he or she is paying for a special service that enables other people to place non-local calls without having to pay the toll charges they would otherwise have to pay. (SBC Initial Br. at 46.)

As to TelCove's argument that, since TelCove incurs the same costs for terminating an FX call as it incurs when it terminates a local call, SBC contends that TelCove's argument proves nothing since the intercarrier compensation

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28 The term "NPA" refers to the Numbering Plan Area. The term "NXX" is the term used to identify a central office code.

29 *See, In the Matter of Allegiance Telecom of Ohio, Inc.'s Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Ameritech Ohio*, Case No. 01-724-TP-ARB (Oct. 4, 2001 Arbitration Award, at 8-9).

30 *See, In the Matter of Petition of TDS Metrocom, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Ameritech Ohio*, Case No. 02-1254-TP-ARB (Dec. 19, 2002 Arbitration Award, at 25).

31 *See, In the Matter of Petition of Global NAPS Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North, Inc.*, Case No. 02-876-TP-ARB (Sept. 5, 2002 Arbitration Award).

scheme does not uniformly match terminating compensation to the terminating carrier's costs. (*Id.* at 47.) SBC further contends that, although according to TelCove's logic the charges to terminate local traffic and intraLATA toll traffic should be similar, by law an intraLATA toll call is subject to access charges, not reciprocal compensation. (SBC Reply Br. at 23.) Next, SBC addresses TelCove's position that a carrier, on whose network an FX call originates, should pay the terminating carrier a charge "roughly equivalent in amount to reciprocal compensation based on the presumption that the network costs involved are likely to be similar." SBC argues that TelCove has not proposed any "rough equivalent" rate in its contract language, either in words or in numbers. SBC points out that TelCove's contract language does not say that FX traffic will be subject to a charge roughly equivalent to reciprocal compensation, but it says that FX traffic *is* Section 251(b)(5) traffic, which TelCove concedes it is not. (*Id.* at 22-23.)

SBC disagrees with TelCove's argument that, even if FX traffic is not actually subject to Section 251(b)(5), the parties should nonetheless pay each other reciprocal compensation for the transport and termination of FX traffic because it is "like" Section 251(b)(5) traffic. SBC argues that: (a) FX traffic is not "like" Section 251(b)(5) traffic in any way that matters, but it is "like" intraLATA toll traffic; and (b) FX traffic travels to points beyond the local exchange and, therefore, in accordance with the FCC's *ISP Remand Order*, it is interexchange traffic and it is not subject to reciprocal compensation. (*ISP Remand Order*, ¶ 37; SBC Initial Br. at 47-48.)

SBC criticized TelCove's suggestion that, if reciprocal compensation does not apply to FX traffic, SBC's bill-and-keep proposal should be rejected because access charges would apply. SBC asserts that in reality the terminating carrier would pay access charges to the originating carrier, because the terminating carrier is providing a value-added service (namely, FX service) to its customer and is being compensated by its customer for providing that service. Thus, SBC argues that, contrary to TelCove's contention that its reciprocal compensation proposal is a reasonable middle ground, the real middle ground is SBC's bill-and-keep arrangement. (SBC Initial Br. at 48.)

<u>Arbitration Award</u>

We note the record reflects that both parties agree that FX traffic (whether ISP traffic or non-ISP traffic) is not statutory Section 251(b)(5) traffic. (TelCove Initial Br. at 60; SBC Initial Br. at 44.) Based on the FCC's *ISP Remand Order*, we agree with the parties that FX traffic is not statutory Section 251(b)(5) traffic. Accordingly, we find that reciprocal compensation rates do not apply to FX traffic.

In reaching this conclusion, we conducted our analysis according to 47 C.F.R. § 51.701 of the FCC rules. According to Section 51.701, we need to determine whether FX traffic is "interstate or intrastate exchange access, information access, or exchange service for such access" (i.e., Section 251(g) type of traffic). If FX traffic is Section 251(g) type of traffic, then it is not subject to reciprocal compensation; if it is not Section 251(g) traffic, then it is subject to reciprocal compensation. At the outset, under paragraph 42 of the FCC's *ISP Remand Order*, ISP-bound traffic (regardless of being categorized as FX traffic or non-FX traffic) falls within "information access" category in Section 251(g) of the 1996 Act, which excludes it from Section 251(b)(5). Accordingly, ISP-bound traffic (including ISP-bound FX traffic) is not subject to reciprocal compensation.

Next, we address non-ISP-bound FX traffic. We first examine whether FX traffic (in this paragraph of the Award we mean non-ISP-bound FX traffic) is either "exchange access" or "exchange service for such access." Under 47 U.S.C. § 153(16), "exchange access" means the offering of access to the telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services. The FCC, in note 65 of its *ISP Remand Order*, found that although the term "exchange service" is not defined in the 1996 Act, it is used in the Modified Final Judgment (MFJ) as part of the definition of the term "exchange access," which the MFJ defines as "the provision of exchange services for the purpose of originating and terminating interexchange telecommunications."[32] Accordingly, if the FX traffic is interexchange telecommunications service traffic, it is exempted from Section 251(b)(5) reciprocal compensation. We find that subscribers to FX service pay a premium charge, to avoid paying toll charges associated with the telephone toll services that would otherwise apply, to call certain exchanges outside the local calling area. Such charges (such as SBC's tariffed FX service) are in addition to the basic local exchange service rate. (Tr. I, 52.) The other dimension of the FX service is that it allows other end users to call the FX service subscriber without incurring toll charges. However, whether a call appears local from the end user's perspective (i.e., end user does not incur toll charges) is not what controls the jurisdiction designation of the traffic for compensation purposes; rather, it is the ILEC's local calling area. Calls originated and terminated between exchanges not within the boundary of ILEC's local calling area are interexchange calls (i.e., interexchange telecommunications) and such traffic is interexchange traffic for the purpose of intercarrier compensation arrangements. Therefore, we find that FX service falls under the "exchange service for such access" category of Section 251(g) traffic, and is not Section 251(b)(5) traffic. Accordingly, FX traffic is not subject to reciprocal compensation.

We note that TelCove's proposed language in Section 7.2.1 of the Intercarrier Compensation Appendix reflects the position that FX traffic is Section 251(b)(5) traffic in the exchange where the dial tone is received and is subject to reciprocal compensation, which is inconsistent with our conclusion. Then, in its Initial Brief, TelCove stated that it has not proposed that "reciprocal compensation" within the statutory meaning of Section 251(b)(5) apply to FX traffic, since TelCove agrees that FX traffic is not statutory Section 251(b)(5) traffic. Accordingly, TelCove proposed that a compensation charge roughly equivalent in amount to reciprocal compensation, based on the presumption that the network costs involved are likely to be similar, be imposed for FX traffic. (TelCove Initial Br. at 60-61.) However, in shifting its position, TelCove did not

32 *See ISP Remand* Order, ¶ 37, n. 65. *See* Note 13 above for the complete cite to the *ISP Remand Order*.

provide the Commission with a specific recommendation as to the revised contract language or the compensation rate for FX traffic to be included in the ICA. We find SBC's proposed language to be consistent with our conclusion. As to the compensation charges for FX traffic, the only other proposal is SBC's, which is a bill-and-keep arrangement. Accordingly, we adopt SBC's proposal for a bill-and-keep arrangement. Therefore, we adopt SBC's proposed contract language relevant to the Intercarrier Compensation Appendix, Sections 1.3, 7.2.1, 7.2.1.1, and 7.4 -7.5 for the final ICA.

D. Unidentified Traffic

Issue 40: **Should SBC be billed as the default originator for calls where the Calling Party Number (CPN) is not provided from an end user?**

Telcove: ICA Ref. - Intercarrier Compensation Appendix § 15.3

Issue 45: **Should SBC be deemed the originating carrier for traffic that it passes where the Calling Party Number (CPN) has been stripped or that otherwise cannot be identified?**

ICA Ref. – ITR Appendix § 5.4.8

<u>**TelCove Position**</u>

It is TelCove's position that it is not disputing the requirement to enter into the proper interconnection or transport and termination agreements with entities originating traffic. Rather, TelCove and SBC's dispute relates to the responsibility to identify the originating party and compensate the terminating party when the originating party has not been adequately identified. It is TelCove's position that, to the extent one party delivers third-party traffic to the other party, the party delivering the traffic must either identify the party originating the traffic or take responsibility for paying the required compensation to the terminating party. TelCove argues that, while the party delivering the traffic to the terminating party should know the identity of the party which originated the traffic or which delivered the traffic to the party handing off the traffic (i.e., the intermediary transit carrier), the terminating carrier has no means of identifying the originating party. TelCove argues that its language simply requires SBC, when delivering traffic to TelCove, to include a billing record that identifies the originating party. TelCove asserts that SBC, as the last carrier to transport the traffic, is in the best position to identify the traffic and should be required to provide such information or compensate TelCove for the transport and termination of the traffic. (TelCove Initial Br. at 67-68.)

TelCove asserts that the Oklahoma Corporation Commission (OCC) required SBC to compensate independent LECs (Independents), at the Independents' appropriate intrastate access charges, for third-party traffic terminating to the Independents on Feature Group C (FGC) trunks from SBC.[33] According to TelCove, SBC is required to provide the Independents with adequate records to identify the third-party carriers that SBC identifies as financially responsible for such traffic. If the third-party carrier pays the Independent, a credit is given to SBC. However, if the third-party does not pay the Independent, SBC and the Independent can work together to block the third-party from using the Independent's network to terminate traffic. (*Id.*)

TelCove maintains that it will provide a record to SBC including the CPN, originating Carrier Identification Code (CIC), and/or other necessary information that will allow SBC to identify the originating carrier, when TelCove delivers third-party traffic to SBC. Additionally, if TelCove does not provide SBC adequate information for SBC to identify the originating carrier, TelCove will compensate SBC for the termination of the unidentified traffic.. TelCove asserts that, even though SBC witness McPhee admits that SBC sometimes receives and hands off to TelCove traffic from an originating party that does not include proper billing records or other identifying information, and that SBC is the only carrier in a position to identify the carrier that originated the traffic, SBC refuses to agree to TelCove's proposal. (Tr. II, 122-23; TelCove Initial Br. at 69.)

<u>SBC Position</u>

According to SBC, this issue concerns transit traffic, and consequently involves an originating carrier (a third party), a transiting carrier (SBC), and the terminating carrier (TelCove). In this scenario, the originating carrier pays SBC for transporting the call from the originating carrier's network to TelCove, and the originating carrier pays TelCove compensation for terminating the call. SBC maintains that, generally, the originating carrier transmits, as part of the Signaling System 7 ("SS7") message that accompanies the call, information that enables the terminating carrier to identify the originating carrier, so that it can charge the originating carrier reciprocal compensation. This information is received by the transiting carrier, which passes it along to the terminating carrier along with the call. According to SBC, the parties' dispute concerns some calls that are transmitted by the originating carrier without the information the terminating carrier needs to identify, and bill, the originating carrier. SBC disputes TelCove's proposed language that would allow TelCove to charge SBC the reciprocal compensation that should be charged, but that cannot be charged to the originating carrier. (SBC Initial Br. at 57.)

SBC asserts that the Public Service Commission of Wisconsin ("PSCW") arbitrated this issue and held that SBC Wisconsin, as the transiting carrier, should provide the terminating carrier with whatever calling party information SBC Wisconsin receives from the originating carrier. However, SBC claims that if the originating carrier does not transmit information sufficient to permit the terminating carrier to bill the originating carrier (for reciprocal compensation), SBC Wisconsin has no "obligation to [the terminating carrier] for terminating the

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33 *See, In the Matter of the Application of Atlas Telephone Company, et al. for Approval of Tariffs,* Oklahoma Cause No. PUD 980000263 (Sept. 4, 2001 Final Order).

traffic."[34] SBC maintains that it should, and will, pass to TelCove, as the terminating carrier, whatever calling party information the originating carrier passes to SBC. But SBC cannot lawfully be made liable for the originating carrier's reciprocal compensation obligation to TelCove if that information is insufficient to permit TelCove to bill the originating carrier for reciprocal compensation. (*Id.* at 58.)

SBC argues that TelCove's proposal is inconsistent with the 1996 Act, as Section 251(b)(5) of the 1996 Act imposes the reciprocal compensation obligation on the originating carrier, and contemplates that all local exchange carriers will establish reciprocal compensation arrangements for the transport and termination of telecommunications. SBC maintains that the reciprocal compensation duty is the originating carrier's duty, not SBC's, and the terminating carrier (TelCove, in this instance) should have appropriate arrangements in place with that originating carrier to ensure that it is able to collect the reciprocal compensation that is due. SBC argues that if TelCove does not establish such an arrangement with the originating carrier, TelCove cannot shift that carrier's obligation to SBC. (*Id.*)

As to TelCove's statement that its language simply requires SBC, when delivering traffic to TelCove, to include a billing record that identifies the originating party, SBC asserts that it is a mischaracterization of the dispute and that it is not what TelCove's proposed language says. SBC maintains that this issue is not about SBC's obligation to help TelCove identify the originating carrier. SBC maintains that it has made clear it will cooperate with TelCove to try to identify the originator(s) of calls sent without the CPN information. (SBC Initial Br. at 59; SBC Reply Br. at 27; SBC Ex. 3, at 19.) SBC maintains that the parties have already agreed, in the very provision that is at issue here (Section 15.3, Intercarrier Compensation Appendix), that "SBC-13STATE will pass all SS7 signaling information including, without limitation, CPN if it receives CPN from FGD[35] carriers." (SBC Reply Br. at 33-34; *See also* Joint Ex. 1, Part 1, at 43-44.) Thus, SBC argues, the disagreement is not whether SBC will help TelCove identify the originating carrier; SBC has already committed to do that. (SBC Reply Br. at 34.) Rather, SBC continues, the question is whether SBC can properly be deemed the originating carrier if the actual originating carrier cannot be identified. SBC asserts its belief that TelCove's proposed language is plainly unreasonable, and should be rejected. (SBC Initial Br at 57, 59, 73-74; SBC Reply Br. at 28, 34.)

Next, SBC argues that TelCove's assertion that the "party delivering the traffic to the terminating party should know the identity of the party which originated the traffic or which delivered the traffic to the party handing off the traffic" is off point. (SBC Reply Br. at 28.) SBC stresses that the subject of the parties' disagreement is the situation where TelCove, as the terminating carrier,

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34 *See, TDS Metrocom Petition for Arbitration of Interconnection Terms, Conditions, and Prices from Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin*, Case No. 05-MA-123 (Mar. 12, 2001 Arbitration Award, at 91-92).

35 The term "FGD" refers to Feature Group D.

does not know who to bill as the originating carrier notwithstanding SBC's efforts to cooperate – not where SBC refuses to share with TelCove information that SBC has. (*Id.*) As to TelCove's reference to the OCC order, SBC contends that the order does not support TelCove's position, because the order is the result of a negotiated resolution between SBC Oklahoma and the other parties to the proceeding, and not an OCC determination of the issue – it simply records the fact of negotiated agreement. (*Id.* at 29.)

<u>Arbitration Award</u>

The parties agree that SBC, acting as transiting carrier, sometimes receives and hands off to TelCove traffic that does not include proper billing records or other identifying information to allow TelCove to bill the originating carrier. (TelCove Initial Br. at 69; Tr. II, 122.) The issue here is whether SBC should be considered the default originator of that traffic. We find that SBC has committed to pass the SS7 information it receives from the originating carrier, and has stated that it would be willing to provide TelCove with information about the trunk group over which that traffic is carried. (SBC Reply Br. at 33-34; Tr. II, 122-23.) We also find that Section 251(b)(5) of the 1996 Act does not obligate SBC to compensate TelCove for traffic delivered by SBC as an intermediate carrier and originated by a third carrier's end users. It is the originating carrier's responsibility in this situation, pursuant to a transport and termination agreement under Section 251(b)(5) between the third carrier and TelCove, to compensate TelCove for terminating such traffic. Accordingly, we reject TelCove's proposed language and adopt SBC's language for Section 15.3 Intercarrier Compensation Appendix and Section 5.4.8 ITR Appendix for the final ICA. The final ICA language should also include a requirement that SBC (as SBC committed) pass through all the information SBC receives from the originating carrier to TelCove. We direct the parties to work together to identify the originating carrier of the unidentified traffic.

E. Points of Interconnection for Out-of-Exchange Traffic

Issue 52: Where should TelCove route out-of-exchange traffic when SBC is not the serving tandem?

ICA Ref. – Out of Exchange Traffic Appendix § 4.5

The parties indicated in their reply briefs that this issue has been resolved. (TelCove Reply Br. at 42; SBC Reply Br. at 35.)

<u>TRANSIT TRAFFIC ARRANGEMENTS</u>

Issue 39: Is transit traffic an appropriate type of traffic for inclusion in the Agreement?

TelCove: ICA Ref. – Intercarrier Compensation Appendix § 4.5

Issue 44: **Should Transit Services be included in a Section 251/252 interconnection agreement?**
TelCove: ICA Ref. – ITR Appendix § 4.2.1 – 4.3

Issue 53: **Should transit traffic be addressed in a 251/252 ICA?**
TelCove: ICA Ref. – Out of Exchange Traffic Appendix § 6.0 – 6.3

TelCove Position

TelCove points out that transit traffic is a form of indirect interconnection for local (Section 251(b)[5]) and intraLATA traffic that is originated by a TelCove end-user customer, transported over the SBC network and handed off to a third-party (which can be another LEC, including potentially a wireless carrier or independent rural LEC), by SBC for termination to that third-party's end-user customer. Transit traffic can also work in the reverse and terminate, to TelCove's end-user, customer traffic originated by a third-party's end-user customer. TelCove maintains that the parties disagree on whether transit service should be included in the ICA with TelCove saying "yes" and SBC saying "no." TelCove states that SBC seeks to handle transit service through a separate commercial agreement with rates set by SBC that would be initially similar to current rates, but that could be raised at any time to "market-based" prices. (TelCove Initial Br. at 61.)

TelCove states that Section 251(a)(1) of the 1996 Act requires all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Therefore, TelCove maintains that the provision of transit traffic is interconnection and governed, at a minimum, by Section 251(a)(1) of the 1996 Act and should be included in this ICA. TelCove disagrees with SBC's assertion that it need not negotiate or arbitrate its obligations under Section 251(a)(1). TelCove maintains that SBC has provided transit service since adoption of the 1996 Act, including as part of TelCove and SBC's prior ICA. (*Id.* at 62; Tr. II, 116.) TelCove contends that SBC's present belief that transit traffic is not a Section 251(b) or Section 251(c) service subject to negotiation and arbitration is a radical change in SBC's position. (*Id.* at 62, 65.)

TelCove maintains that transit service is extremely important to its ability to compete and argues that without transit service, TelCove and other CLECs would be impaired in the provisioning of competitive local exchange services. TelCove explains that, absent transit service, a TelCove end-user customer's call to a third-party carrier's customer would not be completed unless TelCove had a direct trunk arrangement with the third-party LEC or wireless carrier, which in many cases is not an economical alternative. TelCove alleges that an alternate, state-wide transit service is not available in SBC's service territory in Ohio. It argues that, although SBC witness McPhee makes reference to an alleged start-up third-party provider, "Neutral Tandem," he was unable to identify whether or not the carrier had ICAs with all other carriers. (*Id.* at 63-64.)

As to SBC's proposal to offer a commercial transit agreement, TelCove argues there are two underlying concerns that require transit service to be addressed in the ICA. First, the 1996 Act recognized the requirement that interconnection, both direct and indirect, for the transport and termination of traffic was critical to a competitive telecommunications marketplace. Therefore, in TelCove's opinion, ICAs that are approved and enforced by the Commission under the 1996 Act, FCC rules, and specific Ohio rules would ensure that rates, terms and conditions for transit service are just and reasonable. TelCove also argues that there are no statutorily mandated processes for negotiating and ultimately arbitrating a commercial agreement and there is no set time window for completion as there is for an ICA under Sections 251/252 of the 1996 Act. Accordingly, TelCove argues, competitive neutrality and a level playing field necessitate that the Commission retain oversight of the pricing for transit service. (*Id.* at 64-65.)

TelCove asserts that other arbitrations involving SBC have recently concluded that transit traffic should be included in an SBC/CLEC (interconnection) agreement. TelCove states that in the Level 3/SBC arbitration proceeding in Kansas[36] and in the Level 3/SBC arbitration proceeding in Indiana,[37] the arbitrator ruled that transit traffic should be included in the ICA. TelCove also references the Connecticut Department of Public Utility Control decision that SBC has an obligation to provide transit service.[38] Additionally, TelCove argues that the United States Court of Appeals for the District of Columbia Circuit recently found that the FCC has not definitively addressed whether or not transit traffic is a UNE, but has deferred consideration of that issue until it completes its rulemaking on intercarrier compensation. Thus, the transit issue remains open and the FCC has yet to act.[39] TelCove points out that SBC witness McPhee acknowledged that the bottom line on whether the 1996 Act requires transit service remains an open question. (*Id.* at 65-66.)

As to SBC's argument that it is not required to provide transit service under Section 251(a)(1) of the 1996 Act, TelCove disagrees and argues that nothing in Section 251(a) limits SBC's obligation to interconnect solely to traffic that originates or terminates on SBC's own network. As to SBC's position that, even if transit is required under 251(a)(1), it is not subject to interconnection negotiations or to arbitration by this Commission, TelCove opines that this

36 *See, In the Matter of Arbitration Between Level 3 Communications, LLC and SBC Communications, Inc.,* Docket No. 04-L3CT-1046-ARB, (Arbitrators' Order 10: Decision, Feb. 7, 2005).

37 *See, In the Matter of Level 3 Communications, LLC's 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 Indiana Bell Telephone Company D/B/A SBC Indiana,* 2004 Ind. PUC LEXIS 465, at *28, Indiana Utility Regulatory Commission Case No. 42663 INT-01 (Dec. 22, 2004).

38 *See, Petition of Cox Connecticut Telcom, L.L.C. for Investigation of the Southern New England Telephone Company's Transit Service Cost Study and Rates,* Docket No. 02-01-23 (Jan. 15, 2003 Decision).

39 *See United States Telecom. Ass'n v. Fed. Communications Comm'n,* 359 F.3d 554 (D. C. Mar. 2, 2004) ("*USTA II*").

argument is without merit for the following reasons: a) several other state commissions have found otherwise in recent SBC/CLEC arbitrations; b) SBC has provided transit service in hundreds of arbitrated ICAs since passage of the 1996 Act, including some filed with this Commission; and c) SBC has waived any argument that this Commission lacks jurisdiction to arbitrate transit service in this proceeding, as SBC witness McPhee testified that, if the Commission concludes that transiting provisions must be included in the parties' ICA, the Commission should adopt the provisions set forth in Exhibit SM-1 attached to SBC Ex. 3. (TelCove Reply Br. at 32-33.)

As to SBC's proposed transit service provisions set forth in Exhibit SM-1 attached to SBC Ex. 3, TelCove states that it does not take issue with the prices proposed or the text of SBC's transit traffic language, with a single exception. TelCove proposes Section 4.5 language that would require the party providing the transiting function to pass Signaling Data and the Operating Company Number (OCN). If the signaling data is not provided, the transiting party would be billed as the default originator. (TelCove Initial Br. at 63.)

<u>SBC Position</u>

SBC opposes TelCove's proposed language, in the ICA sections in dispute, because it is SBC's position that transit traffic is not governed by the 1996 Act. Therefore, SBC believes that language concerning transit traffic is not subject to arbitration under the 1996 Act and, accordingly, cannot be included in an ICA made under the 1996 Act, without the voluntary agreement of the parties. SBC explains that transit traffic is traffic that originates on the network of one carrier, is handed off to a second carrier, and is transported to a third carrier for termination on that third carrier's network. SBC states that the carrier in the middle is said to provide "transit service." The transit traffic at issue here is the traffic for which SBC would be performing the transiting function or transit service. (SBC Initial Br. at 49.)

SBC contends that not every disagreement between carriers that are negotiating an ICA is subject to arbitration under Section 252 of the 1996 Act. SBC argues that, pursuant to Section 251(c)(1) of the 1996 Act, the issues that are subject to arbitration are those that arise out of the parties' negotiations concerning the "terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection [251](b) and this subsection [(c)]." SBC argues that the only appropriate arbitrational issues are those issues having to do with the duties imposed by Sections 251(b) and (c) of the 1996 Act. In support of its position, SBC argues that its position is confirmed by Section 252(c), which provides that, in resolving the arbitration issues, the state commission must "ensure that such resolution . . . meet[s] the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251" and "establish any rates for interconnection, services, or network elements according to subsection [252](d)." (*Id.* at 50.)

As to TelCove's argument that Section 251(a)(1) requires transiting, SBC alleges that nothing in the 1996 Act requires incumbent local exchange carriers –

or anyone else – to provide transit service. SBC further alleges that transit service would not be subject to arbitration under Section 252 even if it were required by Section 251(a)(1). SBC states that Section 251(a)(1) provides that all telecommunications carriers (not just local exchange carriers or incumbent local exchange carriers) must "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." This, according to SBC, means that SBC must allow all requesting carriers either to interconnect directly with SBC's network, by physically connecting the two networks for the mutual exchange of traffic, or to interconnect indirectly with SBC's network, i.e., to connect with SBC's network through a third party, if any, that is willing to provide transit service. This also means that, according to SBC, for other telecommunications carriers, each of them must allow every requesting carrier to interconnect with its network either directly or indirectly, via the network of a third party, if any, that is willing to provide transit service. Accordingly, SBC opines that Section 251(a)(1) does not require SBC, or any other carrier, to provide service between two carriers that wish to interconnect their networks indirectly. SBC maintains that, if Congress had intended to impose such a duty on incumbent carriers like SBC, it would have said so in Section 251(c). Congress did not do so. Such a duty cannot be imputed to Section 251(a)(1) based on policy considerations. Accordingly, SBC concludes that the 1996 Act does not require ILECs to negotiate, and does not authorize state commissions to arbitrate, terms or conditions for transiting as part of an ICA made pursuant to the 1996 Act. (*Id.* at 50-52.)

SBC asserts that it will continue to offer transit service for carriers that wish to use SBC's network to reach third party carriers pursuant to terms contained in a separate commercial agreement that is outside the scope of a Section 251/252 arbitration. SBC argues that the fact that transit service is not subject to arbitration under the 1996 Act does not imply that the Commission is without authority to regulate the service, only that it cannot do so in a proceeding under the 1996 Act. (*Id.* 52-53.)

Next, SBC addresses TelCove's arguments that (1) SBC provides transiting under its existing ICA with TelCove, and there has been no change of law that should alter that, and (2) SBC currently provides transit arrangements to other LECs. SBC argues that its voluntary agreement to provide transiting service via ICAs in the past does not justify a Commission requirement that SBC do so in the future. As to TelCove's argument that SBC could charge monopoly prices for transit service if transit service is not required by the 1996 Act, SBC maintains that such argument ignores several important considerations. First, SBC proposes to provide transiting to TelCove under a separate agreement under prices that are plainly just and reasonable and that TelCove has agreed to accept. Second, SBC continues, the fact that rates, terms and conditions for transit service are not subject to arbitration under the 1996 Act does not mean that they are beyond the Commission's power to regulate. As to pricing of transit service, SBC argues that a determination that the 1996 Act requires transiting would not constrain prices in any readily identifiable way because, as the FCC has recognized, there is no current rule governing the pricing for transit service in any event, and it is unclear how 1996 Act-required transiting would be priced. (*Id.* at 53-54.)

SBC maintains that the Commission should decide that the terms and provisions governing transit service should not be included in the parties' ICA. In case the Commission determines otherwise, SBC proposed contract language to provide clarity and certainty as to each party's responsibilities. SBC's proposed contract language appears in Ex. SM-1, and is attached to SBC Ex. 3.

<u>Arbitration Award</u>

To decide whether terms and provisions governing transit service should be included in the parties' ICA or not, we need to address the question of whether the 1996 Act requires the provision of the transit service or not. As SBC explained, pursuant to Section 251(a), SBC must allow all requesting telecommunications carriers either to interconnect directly with SBC's network, by physically connecting the two networks **for the mutual exchange of traffic**, or to interconnect indirectly with SBC's network, i.e., to connect with SBC's network through a third party, if any, that is willing to provide transit service. The same requirement applies equally to all telecommunications carriers. This means that, for other telecommunications carriers, each carrier must allow every requesting telecommunications carrier to interconnect with its network either directly or indirectly, via the network of a third party, if any, that is willing to provide transit service. We find that SBC, in provisioning the transit function at issue, is directly interconnected with TelCove's network for the transmission and routing of telephone exchange service and exchange access. We find that Section 251(c)(2)(A) of the 1996 Act obligates SBC to provide, for the facilities and equipment of TelCove, interconnection with SBC's network for the **transmission and routing** of telephone exchange service and exchange access. Section 251(c)(2)(A) does not state **transmission and termination** of telephone exchange service and exchange access, which means it does not limit the interconnection under Section 251(c)(2)(A) to the **mutual exchange of traffic** originated and terminated between the two carriers. Under Section 251(c)(2)(A), SBC is required to interconnect with TelCove for transmission and routing of telephone exchange service and exchange access destined to TelCove's end-users as well as to a third party. Accordingly, we find that under Sections 251/252 of the 1996 Act the terms and provisions governing transit service should be included in the parties' final ICA.

We note that the parties agree to all of the provisions of SBC's proposed transit service agreement except TelCove's proposed Section 4.5 language that would require the party providing the transiting function to pass Signaling Data and OCN. If the signaling data is not provided, the transiting party would be billed as the default originator. Based on our conclusion on this matter (Issues 40 and 45) where we rejected similar TelCove proposed language, we adopt SBC's proposed language in Exhibit SM-1, attached to SBC Ex. 3, and titled "Transit Traffic Service Appendix," to be incorporated in the final ICA.

UNBUNDLED NETWORK ELEMENTS (UNEs)

A. General Issues

Issue 69(1): What is the appropriate transition and notification process for UNEs SBC is no longer obligated to provide?

Issue 69(2): What other provisions should apply to declassified UNEs? ICA Ref. – UNE Appendix §§ 2.2.4, 2.2.5, 2.3

Issue 69(3): Should the ICA include language concerning "reclassified" UNEs?

ICA Ref. - UNE §§ 2.1, 2.2.1, 2.2.2, 2.2.3, 2.2.4, 2.2.5, 2.3, 2.6.1 and 2.15.2

TelCove Position

TelCove states the parties agree that the ICA must contain provisions for notice and a transition period where SBC is no longer required to offer a particular network element as a UNE pursuant to Section 251 of the 1996 Act (i.e., a "Declassified UNE"). TelCove asserts that it does not object to the use of the term "Declassified," but it does dispute several of SBC's proposals concerning the "declassification" process. (TelCove Ex. 1, at 66-68; TelCove Initial Br. at 96.) TelCove asserts that its proposed language in Section 2.2.1 provides that a UNE is "declassified" when it is no longer required to be provided on an unbundled basis as a result of a change in the law or the FCC's application of the law. (TelCove Ex., 1. at 69; TelCove Initial Br. at 96.)

TelCove states that its proposed language in Section 2.2.1 expressly carves out facilities necessary for interconnection pursuant to Section 251(c)(2) of the 1996 Act. TelCove argues that the FCC has determined that the interconnection facilities that SBC must provide to TelCove for Section 251(c)(2) interconnection are neither entrance facilities nor dedicated transport UNEs and therefore are exempt from declassification. (TelCove Initial Br. at 96.) TelCove contends that it proposes this language to ensure that the ability to interconnect with SBC and the facilities required for that interconnection are not removed as a result of UNE declassification. It is TelCove's position that SBC's proposed language for declassification is vague, fails to exempt appropriately critical facilities utilized for interconnection from the declassification process, and should be rejected by the Commission. (TelCove Initial Br. at 96-97.) TelCove disputes SBC's statement, in its Initial Brief, that there is no need to include TelCove's proposed contract language as TelCove is fully protected even without this language. TelCove argues that SBC did not demonstrate that TelCove's preservation of Section 251(c)(2) interconnection facilities availability, by expressly excluding such facilities from the declassification process, is inappropriate. (TelCove Reply Br. at 52-53.)

As to disputed language in Sections 2.2.2 and 2.2.5 of the UNE Appendix, TelCove proposes language providing that, once a given network element has been declassified, the CLEC is not entitled to obtain, or continue to have, access to it at rates set under Section 252(d)(1), whether provided alone, or in combination with other UNEs or services (e.g., combined or commingled). TelCove opines that its language is simple, concise and clear. TelCove argues that SBC's proposed language is redundant and contains a "by way of example only" clause that unduly complicates the contract language while failing to serve any useful purpose. (*Id.* at 98.)

As to the disputed language in Sections 2.2.3 and 2.2.4, TelCove asserts that SBC's proposed language should be removed since its only purpose is to protect SBC should SBC fail to utilize properly and uniformly its own "Lawful" label for UNEs throughout the ICA. (TelCove Initial Br. at 99.)

With regard to Section 2.3, TelCove argues that SBC reserves its rights to claim that nothing contained in the ICA shall be deemed to constitute consent by SBC that any item is a UNE. TelCove added the following language to Section 2.3:

> Nothing contained herein or excluded from this Appendix shall be deemed to constitute consent by CLEC that any item not identified in this Appendix as an available UNE or network element is not a network element or Available UNE under Section 251(c)(3) of the 1996 Act, as determined by effective FCC rules and associated effective FCC and judicial orders, that SBC-13STATE is not required to provide to CLEC alone, or in combination with other network elements or UNEs, or commingled with other network elements, UNEs or other services or facilities.

TelCove states that SBC witness Silver testified that SBC is willing to accept TelCove's disputed language in Section 2.3. (SBC Ex. 4, at 13.) Accordingly, TelCove asks that Commission to adopt its proposed language. (TelCove Initial Br. at 99.)

Next, TelCove states that the language in Section 2.6.1 involves the appropriate transition period and whether or not the Commission has a role in setting that period. TelCove states that the parties reached agreement on a 30-day transition period for individual UNEs, unless a greater transition period is specified by the courts, or the FCC. (TelCove Ex. 1, at 70.) TelCove maintains that the dispute centers on whether this Commission should be included in the list of regulatory entities that can specify an extension of the transition period beyond 30 days. TelCove maintains that its proposed language would include the Commission in the list of regulatory entities that can specify an extension of the transition period beyond 30 days, while SBC's language would not. TelCove argues that the transition from a UNE to another form of service will often require important provisioning related changes. If a regulatory or judicial body specifies a longer transition, to protect end-user customers from service disruption, SBC should be required to make that longer transition period available to TelCove. (TelCove Initial Br. at 99-100.)

In Section 2.6.1(a), TelCove argues that its proposed language ensures that, where TelCove is required to convert from a newly Declassified UNE, it may obtain the necessary analogous special access services, including any volume and term discounts, and clarifies that no termination charges apply for transition from newly Declassified elements. TelCove contends that its witness, Mr. Lafferty, made it clear that TelCove would comply with the terms and conditions of the tariff and is only seeking those volume and term discounts that it would otherwise be entitled to under the tariff. (Tr. I, 97.) TelCove argues that absent its proposed language, SBC might attempt in the future to charge TelCove for converting from a Declassified UNE. (TelCove Initial Br. at 101.)

TelCove disputes SBC's claim that TelCove is asking SBC to forego legitimate charges as a cost of exercising its undisputed legal right. TelCove argues that its language prevents SBC from imposing charges that would place TelCove at a competitive disadvantage for exercising TelCove's undisputed legal right to the UNE in the first place. As to the dispute under Section 2.6.1(a) regarding the volume and term discounts, TelCove states that parties appear to have reached a meeting of the minds on this issue, but may not yet have reached agreement on language. (TelCove Reply Br. at 55.)

In Section 2.6.1(b), TelCove argues that it proposes the implementation of a 30-day transition when a UNE is re-classified and made available. TelCove opposes SBC's argument that the 30 days it gave TelCove to adjust provisioning after a declassification event is not adequate for reclassification of a UNE. TelCove maintains that if 30 days was sufficient for UNE declassification it should be sufficient for re-classification of UNEs. (TelCove Initial Br. at 102.) TelCove disagrees with SBC's argument that TelCove's proposed language concerning reclassification of UNEs is unnecessary since the FCC has never removed a network element from unbundling in one decision, and then required unbundling of that element in a later decision. TelCove argues that it is possible over the multi-year term of the ICA that radical changes in the FCC's approach to competition and UNEs may occur, and TelCove's proposed language allows for such possibility. (TelCove Reply Br. at 55-56.)

<u>SBC Position</u>

SBC states that, as a result of the FCC's TRRO, a new issue arose, which is how to deal with former UNEs that are no longer required to be unbundled, but that must be provided for a transitional period under the TRRO. SBC has proposed to address such former UNEs through a Temporary Rider to the ICA entitled "Remand Order Embedded Base Temporary Rider," which is attached to SBC Ex. 4 as Attachment MDS-2. SBC states that it proposes contract language to define when a former UNE has been declassified and what the default transition process should be once declassification occurs. (SBC Initial Br. at 96-97.)

As to the dispute in Section 2.2.1, SBC maintains that the following language proposed by TelCove at the end of Section 2.2.1 regarding interconnection is out of place and improper in the UNE Appendix:

> The Parties agree that the FCC in its Triennial Review Order determined that interconnection facilities that ILECs are required to provide for Section 251(c)(2) interconnection are not appropriately included in the definition of dedicated transport and this will not be subject to Declassification.

(SBC Initial Br. at 98.)

It is SBC's position that UNEs provided under Section 251(c)(3), and interconnection provided under Section 251(c)(2), are entirely two different things, and are dealt with in separate portions of the ICA. SBC maintains that, to the extent interconnection is required under Section 251(c)(2), TelCove will have a right to it no matter what the ICA says about UNEs. *(Id.)* Likewise, as Mr. Lafferty recognized, if TelCove is eligible to buy a special access service under SBC's wholesale tariff, it will be able to do that without need for this extra contract language. *(Id.;* Tr. I, 85-86.)

SBC asserts that its proposed Section 2.2.4 clarifies that even if a reference to a UNE in the contract is inadvertently not preceded by "Lawful" or "Section 251(c)(3)," the reference shall be deemed to include the "Lawful" or "Section 251(c)(3)" qualifier. As to its proposed language in Section 2.2.5, SBC asserts that it clarifies that SBC has no duty to provide combinations of UNEs with non-UNEs, or commingling arrangements where the UNE portion is a declassified UNE. SBC argues that Sections 2.2.4 and 2.2.5 provide valuable clarification and protect SBC from later claims that it did not use a proper qualifier in some isolated reference to a UNE and therefore agreed to provide declassified UNEs, or that it did not adequately protect itself regarding combinations and commingling. (SBC Initial Br. at 98-99.)

As to TelCove's proposed language in Section 2.3 of the ICA, SBC states that in order to resolve this issue, SBC can agree to accept TelCove's language. (SBC Ex. 4, at 13.)

SBC disputes TelCove's objection to SBC's proposed phrase "by way of example only" in Sections 2.2.2 and 2.2.5 of the UNE Appendix, which precedes several provisions, and argues that it illustrates certain contexts in which a network element may be declassified. SBC further argues that these illustrative sentences are examples only, and they are not intended to cover all of SBC's obligations that SBC contends are articulated in Section 2.2.1, which defines when a network element is considered declassified. (SBC Reply Br. at 51.)

Regarding Section 2.6.1, SBC states that the parties have agreed on a 30-day transition process, while noting that FCC-ordered transition processes would take precedence, unless the parties voluntarily negotiate some other transition process. (SBC Initial Br. at 100.) SBC contends that the FCC is the entity that decides whether network elements are to be unbundled, as Section 251(d)(2) of the 1996 Act assigns that task to the FCC, and it is, therefore, the FCC that decides what any transition period should be. (SBC Reply Br. at 51-52.)

As to the disputed language in Section 2.6.1(a), SBC maintains that TelCove does not dispute that, if it is still purchasing a declassified UNE at the end of the transition period, SBC would have the right to convert the former UNE, and its price, to an analogous wholesale service, and in some cases to special access. According to SBC, TelCove proposes that SBC, after converting a declassified UNE to an analogous tariffed service, must automatically give TelCove any term or volume discounts that TelCove may be entitled to under that tariff. SBC argues that it will not know what discounts TelCove might be entitled to until TelCove makes specific term and volume commitments that entitle it to the discounts. SBC maintains that if TelCove wants such term and volume discounts, it must first make the necessary commitments under the tariff or an individual contract. SBC states that this issue may be resolved as TelCove has now agreed that it must make such firm commitments to be eligible for term and volume discounts. (SBC Initial Br. at 100; Tr. I, 96-97.)

SBC states that TelCove agrees that if TelCove elects to convert the former UNE to a wholesale service, it must pay any applicable conversion charge, service order charge, or record change charge. (Tr. I, 89-90.) SBC disputes TelCove's position that TelCove should not have to pay any such charges when, at the end of the transition period, TelCove has not made any other arrangements and SBC elects to convert a declassified UNE(s) to a wholesale service. SBC argues that TelCove does not dispute that: (a) once a transition period ends SBC has no obligation to keep providing a former UNE, and (b) after a transition period ends SBC has the right to convert a former UNE to a wholesale service. (Tr. I, 94, 98-99.) SBC contends that TelCove would penalize SBC by denying it full cost recovery by asserting that, while SBC has no duty to keep providing a declassified UNE after a transition period, SBC could voluntarily keep providing the UNE. (Tr. I, 90-91.) SBC further argues that TelCove's position would also violate the filed tariff doctrine, as it would allow TelCove to avoid lawfully tariffed charges that have to be paid by all other purchasers of the wholesale service. (SBC Initial Br. at 101-02.)

As to Section 2.6.1(b), SBC opines that TelCove's proposed language regarding the "reclassified" UNEs is unnecessary. In support of its position, SBC maintains that the FCC has never removed a network element from an unbundling requirement in one decision, and then required unbundling of that element in a later decision. SBC argues that, to the contrary, as competition continues to grow, each FCC unbundling decision has required additional declassification of UNEs (rather than requiring additional unbundling of network elements). (*Id.* at 102-103.) As to TelCove's request that SBC should process reclassification UNEs orders within 30 days, SBC argues that declassification and reclassification are not comparable. SBC argues that implementing a declassification decision merely requires SBC to stop processing UNE orders and to start doing nothing, while implementing a reclassification decision would require SBC to develop procedures and systems for CLECs to order the revived UNEs and for SBC to provision and maintain those UNEs. (SBC Ex. 4, at 16.) Regarding TelCove's proposed 30 days for implementing the reclassification of a UNE, SBC argues that, while the parties agreed-upon language for the UNE declassification allows additional time above the 30-day period if the FCC orders a longer transition period, TelCove's proposed language does not allow for any extensions, even if the FCC orders a longer time than 30 days, for the UNE reclassification. (SBC Reply Br. at 54.)

Arbitration Award

The disputed language in Section 2.2.1 of the ICA concerns language pertaining to interconnection facilities. The UNE Appendix of the ICA addresses UNE provisions under the requirements of Section 251(c)(3) of the 1996 Act, and FCC rules implementing such requirements. Interconnection requirements are addressed in a separate Interconnection Trunking Requirement (ITR) Appendix. We note the record reflects that the term "interconnection facilities" is not defined in the ICA. (Tr. II, 62-66.) The record also reflects TelCove's recognition that, to the extent interconnection is required pursuant to Section 251(c)(2) of the 1996 Act, TelCove's rights and responsibilities to interconnect with SBC's network are not impacted by the FCC's decision to declassify UNEs in its TRRO decision. (Tr. I, 82-86; Tr. II, 65.) Accordingly, we find TelCove's proposed language regarding interconnection facilities in Section 2.2.1 of the UNE Appendix to be unnecessary and we reject it.

As to the disputed language in Sections 2.2.2 and 2.2.5 regarding SBC's proposed language starting with the phrase "by way of example only," we note the record reflects that SBC itself states that these illustrative sentences are examples only, and they are not intended to cover all of SBC's obligations articulated in Section 2.2.1, which defines when a network element is considered declassified. We agree with TelCove that the illustrative sentences are redundant and complicate the contract language. We find that Section 2.2.1 is sufficient for the purposes of the ICA. Accordingly, we adopt TelCove's position and reject SBC's proposed language, in Sections 2.2.2 and 2.2.5, that begins with the phrase "by way of example only."

Next, we address the dispute regarding SBC's proposed language in Sections 2.2.3, 2.2.4 and 2.2.5 to protect SBC should it fail to utilize properly and uniformly the terms "Lawful" or "Section 251(c)(3)" for UNEs throughout the ICA. We first note that the parties informed the arbitration panel of the resolution of their dispute (Issue 2) regarding the use of these two terms. Regardless of how this issue was resolved, we agree with SBC that, to avoid future disputes during the term of the ICA, it is reasonable to include SBC's proposed language for GTC Section 1.1.73. Accordingly, we adopt SBC's proposed language for UNE Appendix Sections 2.1, 2.2.1, 2.2.2, 2.2.3, 2.2.4, and 2.2.5, relevant to this issue, for the final ICA.

Regarding TelCove's proposed language in Section 2.3, the record reflects SBC's willingness to accept the language. (SBC Ex. 4, at 13.) Accordingly, we adopt TelCove's proposed language in Section 2.3 of the UNE Appendix for the final ICA.

The dispute in Section 2.6.1 involves the appropriate transition period for declassified UNEs during the term of the ICA, and whether or not the Commission has a role in setting that transition period. The record reflects the parties' agreement on a 30-day transition period for individual UNEs, unless a greater transition period is specified by the courts or the FCC. (TelCove Ex. 1, at 70; SBC Initial Br. at 100.) We note that the FCC, in its TRRO, defined a specific default transition process for the embedded customer base and allowed carriers to negotiate alternative arrangements. (TRRO, ¶¶ 145, 198.) However, the FCC, in its TRRO, did not establish a specific default transition process for declassified UNEs that occur after the initial TRRO transition. Instead, the FCC stated its expectation for the ILECs and requesting carriers to negotiate the transition mechanisms in accordance with the Section 252 process. (TRRO, ¶ 196, n. 519.) We find that, in response to the current negotiation process under Section 252 of the 1996 Act, SBC and TelCove agreed on a 30-day transition period for individual UNEs, and that any future dispute between parties regarding the transition process, including the transition period, shall be brought to the Commission for resolution in accordance with Section 252 of the 1996 Act. Accordingly, we find that TelCove's proposed language for Section 2.6.1, UNE Appendix, to be unnecessary and will not be adopted.

In Section 2.6.1(a) of the UNE Appendix, TelCove's proposed language provides that, when SBC at the end of the transition period converts a declassified UNE to an analogous tariffed service such as special access, SBC shall automatically give TelCove any term or volume discounts that TelCove may be entitled to under that tariff. We find TelCove's proposed language to be inconsistent with the general tariff's terms and conditions requiring the carrier to make specific term or volume commitments in order to be entitled to the associated term or volume discount. We note that TelCove made it clear that it would comply with the terms and conditions of the tariff. (Tr. I, 97.) We also note that TelCove acknowledged that it must make a firm commitment pursuant to the tariff terms and conditions in order to be eligible for term and volume discounts. (Tr. I, 96-97.) Accordingly, we reject TelCove's proposed language in Section 2.6.1(a) of the UNE Appendix.

The next dispute is regarding TelCove's position that it should not have to pay the applicable conversion charge, service order charge or record change charge when, at the end of the transition period, TelCove has not made any other arrangements and SBC elects to convert a declassified UNE(s) to a wholesale service. We disagree with TelCove's rationale that it should not have to pay such charges (i.e., applicable conversion charge, service order charge, or record change charge) arguing that, while SBC has no duty to keep providing a declassified UNE after a transition period, SBC could voluntarily keep providing the UNE. (Tr. I, 90-91.) This is inconsistent with TelCove's position as it already agreed to a transition period of 30 days after the declassification of a UNE. (TelCove Ex. 1, at 70.) We find that, since TelCove already agreed to transition its customer from the UNE arrangement to any alternative arrangement within

30 days, it is TelCove's responsibility to take the appropriate steps to effectuate that transition, such as submitting an Access Service Request (ASR), or a disconnect order to SBC within 30 days. If TelCove fails to take the appropriate steps to effectuate the agreed-upon transition, we find it reasonable for SBC to convert a declassified UNE to a wholesale service and apply the applicable conversion charge, service order charge, or record change charge. Accordingly, we reject TelCove's proposed language in Section 2.6.1(a) of the UNE Appendix.

As to the disputed language in Section 2.6.1(b) relative to TelCove's proposed language on the appropriate transition period for reclassified UNEs, we find that language to be unnecessary for the purposes of this ICA. If in the future it is determined by the FCC that a specific declassified UNE should be reclassified, in accordance with Section 251(c)(3) requirements, the FCC will make that determination through the appropriate ruling. Such a ruling would be considered a change of law and should be addressed accordingly. Therefore, we reject TelCove's proposed language in Section 2.6.1(b) of the UNE Appendix.

Issue 70(1): Should TelCove's proposed language for Section 2.8.7 be adopted?
ICA Ref. - UNE Appendix § 2.8.7

TelCove Position

TelCove contends that its proposed language in Section 2.8.7 allows it to utilize a UNE to provide interexchange services to its end-users only when TelCove is using the same UNE to provision local services. (TelCove Ex. 1, at 71; Tr. I, 108.) According to TelCove, its proposed language imposes this restriction by closely tracking the FCC's post-TRRO rules by indicating that TelCove's use of UNEs cannot be exclusively for wireless or toll. (TelCove Initial Br. at 105.) TelCove asserts that SBC implies that "local service" must somehow be referenced in order for UNEs to be properly utilized without citing any authority that actually supports its proposal. TelCove argues that the FCC has explicitly authorized the use of UNEs so long as they are not used exclusively for toll and wireless. TelCove maintains that its proposed language adds clarity and avoids future disputes about TelCove's use of UNEs to provide both local service and toll and wireless services to the same customer. (TelCove Reply Br. at 57-58.)

SBC Position

With respect to SBC's obligation to provide UNEs, SBC objects to TelCove's proposed Section 2.8.7 which states that SBC must provide UNEs: "In a manner that allows CLEC purchasing access to UNEs to use such UNEs to provide exchange access service and to provide non-exclusive interexchange service to end-users." (SBC Initial Br. at 104.) SBC maintains that this language is too vague, and could be used by TelCove, or others, to justify using UNEs to provide only interexchange service, without also providing local service to the same end-user. (SBC Ex. 4, at 18; SBC Initial Br. at 104.) SBC contends that since it has already committed in Section 2.8 to provide nondiscriminatory access to

UNEs as required by law, TelCove's proposed language in Section 2.8.7 is unnecessary and should be rejected. Thus, to the extent the law allows TelCove to use UNEs to provide interexchange service in conjunction with other services, it will be able to do so. (SBC Initial Br. at 104.)

<u>Arbitration Award</u>

The disputed language proposed by TelCove states: "In a manner that allows CLEC purchasing access to UNEs to use such UNEs to provide exchange access service and to provide non-exclusive interexchange services to end-users." (Joint Ex. 1, Part 2, at 10.) We note that Section 51.309(b) of the FCC rules states: "A requesting telecommunications carrier may not access an unbundled network element for the exclusive provision of mobile wireless services or interexchange services."[40] We find that TelCove's proposed language does not track the FCC rules. Accordingly, we reject TelCove's proposed language in Section 2.8.7. To achieve the goal that both TelCove and SBC claim their respective proposals reflect, which is to be consistent with the law, we order the parties to include a reference to Section 51.309 of the FCC rules addressing the use of UNEs in the agreed-to language for Section 2.8 of the UNE Appendix to the ICA.

B. Bona Fide Request Process (BFR)

Issue 78: Should the pricing principles of the Act govern the bona fide request quote?
ICA Ref. – UNE Appendix § 6.3.12

<u>TelCove Position</u>

It is TelCove's position that both state and federal pricing rules should be consulted as part of the pricing process for a BFR. TelCove proposes the following language (TelCove's language is in bold italic):

> 6.3.12 Unless CLEC agrees otherwise, all rates and costs quoted or invoiced herein shall be consistent with the pricing principles of the Act, ***applicable FCC rules or applicable Commission rules.***

TelCove maintains that the pricing principles of the 1996 Act only have meaning when they are interpreted by a review of the proceedings and rules of the FCC and the state commission pricing rules. (TelCove Initial Br. at 128.)

As to SBC's argument that one component of BFR costs - time and materials - is not governed by either the 1996 Act or any regulatory rules, TelCove maintains that the Commission rules allow either for rate of return regulation, incentive regulation, or other regulatory oversight factors into the calculation of SBC's appropriate time and material costs. In support of its

[40] *See* TRRO, Appendix B, at 145, for the latest 47 C.F.R. § 51.309 text. *See also* Note 6 above for the full TRRO cite.

position, TelCove argues that, while the Commission must apply the 1996 Act and the FCC's TELRIC[41] pricing rules in the UNE context, it is this Commission's rules that dictate how and when parties may seek to initiate a new UNE pricing docket, and also dictate procedurally how to conduct the TELRIC pricing proceeding. (TelCove Reply Br. at 71.)

SBC Position

SBC's proposed language on the pricing principles that govern a BFR quote refers only to the 1996 Act. SBC objects to TelCove's language that refers to the 1996 Act, and also to applicable FCC rules, or applicable Commission rules. It is SBC's position that the issue concerns two potential types of charges for a BFR quote. According to SBC, the first type of charge is associated with its cost of actually preparing the quote, which is straightforward time-and-materials costs, and is not governed by the 1996 Act or any regulatory rules. The other charge, SBC maintains, is the proposed price for the requested UNE that SBC provides in response to the BFR, which is merely a projected price for a UNE, and is governed by the 1996 Act and FCC rules, not by state rules. SBC explains that the state commission sets the proposed price for the requested UNE by applying the 1996 Act and FCC rules. Thus, SBC argues, TelCove's reference to state Commission rules is improper in the context of UNE pricing. (SBC Initial Br. at 120.)

Arbitration Award

We agree with TelCove that, although the Commission must apply the 1996 Act and the FCC's TELRIC pricing rules in the context of UNE pricing review, it is this Commission that dictates how and when parties may seek to initiate a new UNE pricing docket and also dictates procedurally how to conduct the TELRIC pricing proceeding. As to SBC's assertion that its cost of actually preparing the quote for an additional or new, undefined Lawful UNE is straightforward time-and-materials costs, and is not governed by the 1996 Act or any regulatory rules, we find such a statement to be inconsistent with the requirement of Section 252(d)(1) of the 1996 Act, Section 51.501 of the FCC rules, and this Commission's UNE pricing guidelines established in Case No. 95-845-TP-COI (Section V.B.). The price SBC is allowed to charge a CLEC to recover its cost of actually preparing the quote for an additional or new, undefined Lawful UNE is an integral part of the provision of access to Section 251(c)(3) UNE, and should be TELRIC-based as required by the 1996 Act, FCC rules and this Commission's pricing guidelines. The same requirement applies to a proposed price for the requested UNE that SBC provides in response to the BFR. Accordingly, we adopt TelCove's proposed language in Section 6.3.12 of the UNE Appendix to the final ICA.

[41] The term "TELRIC" refers to Total Element Long Run Incremental Cost.

C. EELs, Combinations and Commingling

Issue 71(1): What procedures should govern the combination of UNEs?

Issue 71(2): How quickly should changes in law regarding combinations be implemented?

Issue 71(3): Must SBC provide notice within ten days that it will reject an order for a combination?

ICA Ref. – UNE Appendix §§ 2.16.1.1, 2.16.2, 2.16.3.3, 2.16.3.3.1, 2.16.3.3.2 and 2.16.5.5

<u>TelCove Position</u>

TelCove seeks to affirmatively state SBC's obligation to provide combinations of UNEs pursuant to 47 C.F.R. § 51.315 of the FCC's regulations, through its proposed language in Section 2.16.1.1, of the UNE Appendix, to the ICA. TelCove's proposed language to accomplish this goal is as follows: "<u>SBC-13STATE</u> shall permit CLEC to combine a UNE with other UNEs available under Section 251 or a combination of UNEs available under Section 251 and other network elements possessed by CLEC." (TelCove Initial Br. at 107.) In its Reply Brief, TelCove points out that SBC has agreed to the adoption of TelCove's proposed language and the issue is resolved. (TelCove Reply Br. at 58.)

The dispute in Section 2.16.2 pertains to TelCove's insertion of the words "within ten (10) business days of the request," requiring SBC to notify TelCove, of the reason why SBC believes it cannot accomplish or is not obligated to allow a particular combination. TelCove opines that the time period it proposes is commercially reasonable, allows TelCove to communicate effectively with end-user customers regarding whether or not a particular service can be provisioned using a UNE combination or whether other options must be explored, and allows TelCove an opportunity to challenge SBC's determination in a timely fashion. TelCove argues that, absent a time frame in the ICA, TelCove would not be able to inform the customer whether a service depending upon a combination of UNEs would be available or not. TelCove further argues that including a reasonable time frame for SBC to respond as to why a particular combination has been rejected furthers the development of competition, benefits potential end-users, and is not overly burdensome on SBC. (TelCove Initial Br. at 108-109.) TelCove opines that SBC's reluctance to accept this notice period evidences its lack of concern regarding the negative impact on TelCove and its customers that the delayed rejection of a request for a UNE combination by SBC will have. As to SBC's criticism that TelCove's proposal lacks a specific remedy, TelCove argues that the ten-day period functions as a key performance benchmark or standard, and that a general remedy exists. Should SBC continually fail to meet the standard, TelCove would have available to it the dispute resolution provisions of the ICA. (TelCove Reply Br. at 59-60.)

In Section 2.16.3.3.2, TelCove proposes language that would prevent SBC from unilaterally ceasing to provide certain combinations without adequate notice or transition time necessary for TelCove to make alternative arrangements. TelCove's proposed language is as follows (TelCove's language is in bold italic):

> 2.16.3.3.2 ***If any regulatory, judicial, or legislative action determines that SBC-13STATE is relieved of any obligation to perform any combining functions or other actions under this Agreement,*** upon the effective date of any such regulatory, judicial, or legislative action setting forth, eliminating, or otherwise delineating or clarifying the extent of an incumbent LEC's combining obligations, ***and after ninety (90) days notice to CLEC,*** SBC-13STATE shall be relieved of any obligation to perform any combining functions or other actions under this Agreement, and CLEC shall thereafter be solely responsible for any such functions or other actions.

(TelCove Initial Br. at 110.) TelCove maintains that, given the need to procure alternative arrangements, the notice period proposed by TelCove will benefit end-users by allowing for a smooth transition. TelCove argues that it proposes a longer time period (90 days) because it may need to consider various alternative service arrangements and may need time to work out any dispute regarding whether or not a combination is in fact available. (*Id.*) TelCove acknowledges that its proposed 90-day notice for the UNE combinations is longer that the 30 days agreed to transition period for declassified UNEs. TelCove argues that the various combinations that involve transport, such as enhanced extended links (EELs),[42] may take much longer to re-provision and replace than simple stand-alone UNEs. (TelCove Reply Br. at 60.)

SBC Position

SBC states that, although it disputes TelCove's proposed language for Section 2.16.1.1 included in TelCove Ex. 1 (Lafferty revised direct testimony), TelCove's proposed language for Section 2.16.1.1 in the May 6, 2005 DPL only seeks the right to "combine a UNE with other UNEs available under Section 251 or a combination of UNEs available under Section 251 and other network elements possessed by CLEC." SBC agrees to the May 6, 2005 DPL language. (SBC Initial Br. at 105; SBC Reply Br. at 57; Joint Ex. 1, Part 2, at 11.)

SBC opposes the time limit established by TelCove's proposed language in Section 2.16.2 requiring that, when SBC denies a TelCove request for a UNE combination, it must provide TelCove with written notice of the denial within ten business days of receiving the request. SBC maintains that this proposed time limit is arbitrary and unnecessary as SBC attempts to determine at the outset whether it will accept or reject any CLEC order for a UNE combination, but given the potential complexity of such orders and determining whether they are technically feasible, SBC should not be locked into the ten business-day

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42 The term "EEL" or enhanced extended link refers to "a UNE combination consisting of an unbundled loop and dedicated transport and may sometimes include additional electronics (e.g., multiplexing equipment)." (TRO, ¶ 571.)

period. SBC also questions how TelCove's proposal would work as it lacks the specificity of consequences when SBC fails to meet the ten business-day deadline proposed by TelCove. SBC argues that if its failure to meet the ten business-day deadline would result in forcing it to accept the combination order, regardless of its lawfulness or technical feasibility, this would be another reason to deny TelCove's proposal, as SBC should not be required to provision unlawful orders simply because it misses an arbitrary deadline. (SBC Initial Br. at 106.)

SBC maintains that TelCove's proposal in Section 2.16.3.3.2 requiring SBC to provide a 90-day notice before it ceases to offer a UNE combination is inconsistent with the parties' agreement to a 30-day transition period for UNE declassification procedures, which SBC argues is the very same kind of situation. To maintain such consistency, SBC proposes to revise its Section 2.16.3.3.2 language to include a similar 30-day notice period and make that period be superseded by any specific FCC-ordered transition period. (Tr. II, 176; SBC Initial Br. at 106; SBC Reply Br at 58.) In response to TelCove's argument that a 90-day period is necessary here because of the need to procure alternative arrangements, SBC maintains that same need exists when a single UNE is declassified and that TelCove offers no specific reason why the transition period here should be longer. (SBC Initial Br. at 106-07.)

<u>Arbitration Award</u>

As to the dispute regarding TelCove's proposed language for Section 2.16.1.1, the record reflects the resolution of this issue. (SBC Reply Br. at 57.)

Next, we address TelCove's proposed ten business days as the deadline for SBC to provide written notice to TelCove when SBC denies a UNE combination request. We note that, although SBC claims that the ten business-day timeframe is not reasonable due to the potential complexity of such orders and the time needed to determine whether the UNE combination requests are technically feasible, SBC did not state what timeframe would be considered reasonable for performing such functions. We also note that SBC failed to explain why it is not reasonable to have a performance benchmark, even absent a defined remedy, for providing UNE combinations while SBC has established performance benchmarks for providing other UNEs and services under the ICA. We find TelCove's proposed timeframe to be reasonable to allow TelCove to respond to service requests from its end-users that would require the use of UNE combinations, within a reasonable timeframe. If there is any dispute regarding the lawfulness or technical feasibility of a specific UNE combination, parties can use the dispute resolution (ADR) process in this ICA. Accordingly, we adopt TelCove's proposed language adding, "within ten (10) business days of the request" in Section 2.16.2 of the UNE Appendix.

As to the dispute concerning Sections 2.16.3.3 and 2.16.3.3.1, the record reflects that SBC now accepts TelCove's proposed language in these sections and that the issues are resolved. (SBC Initial Br. at 107.)

In Section 2.16.3.3.2, the dispute is regarding the appropriate notification time TelCove needs if any regulatory, judicial, or legislative action determines that SBC is relieved of any obligation to perform any combining functions, **and not regarding the declassification of UNEs.** (Tr. II, 73-75.) TelCove's reasoning for its proposed 90-day notice requirement before SBC ceases to provide UNE combinations is that TelCove may need more time to consider various alternative service arrangements, and it will benefit end-users by allowing for a smooth transition. (TelCove Initial Br. at 110.) We find that, if SBC is not obligated to perform the combining functions, this will affect only future combination requests, not existing UNE combinations, and that SBC's proposed 30-day notification is sufficient to allow TelCove to consider other alternative arrangements. Accordingly, we adopt SBC's proposed 30-day notice for Section 2.16.3.3.2 of the UNE Appendix to the ICA.

Issue 73(1): What limits may apply to the scope of SBC's commingling obligation?

ICA Ref. – UNE Appendix §§ 2.18.1.3, 2.18.1.5, 2.18.3.1, 2.18.3.1.2, 2.18.4, 2.18.4.1 and 2.18.9

<u>TelCove Position</u>

The first area of dispute is in Sections 2.18.1.3, 2.18.3 to 2.18.3.1.1. It is TelCove's position that while the FCC, in paragraph 579 of the TRO,[43] identified the broad right of TelCove to commingle, SBC attempts to insert language that would place unjustified obligations on TelCove's right to commingle. SBC's proposed language for Section 2.18.1.3, is as follows:

> Commingling is not permitted, nor is SBC-13STATE required to perform the functions necessary to Commingle, where the Commingled Arrangement (i) is not technically feasible, including that network reliability and security would be impaired; or (ii) would impair SBC-13STATE's ability to retain responsibility for the management, control, and performance of its network; or (iii) would place SBC-13STATE at a disadvantage in operating its own network; or (iv) would undermine the ability of other Telecommunications Carriers to obtain access to Lawful UNEs or to Interconnect with SBC-13STATE's network.

(Joint Ex. 1, Part 2, at 22.)

TelCove maintains it is clear that the FCC's regulations impose an affirmative duty on SBC to allow commingling, as the FCC states in 47 C.F.R. §

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[43] *See, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking) (Triennial Review Order) (TRO).

51.309(e): "[e]xcept as provided in § 51.318, an incumbent LEC shall permit a requesting *telecommunications carrier to commingle* an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC. (Emphasis added.)" TelCove argues that SBC's proposed restrictions are not present in Section 51.318 of the FCC rules. TelCove contends that the FCC treats combinations and commingling differently, because they serve diverse purposes. In support of its position, TelCove cites paragraph 501 of the TRO, where the FCC's stated purpose in allowing commingling was to avoid putting CLECs at an unreasonable competitive disadvantage by forcing them either to operate two functionally equivalent networks, or to choose between using UNEs and using more expensive special access services to serve their customers. (TelCove Initial Br. at 114-116.)

As to SBC's argument that TelCove fails to explain why the same limitations that apply to combining UNEs should not also apply to commingling of UNEs and services, TelCove maintains that it is SBC's obligation to demonstrate why SBC's limitations, drawn from 47 C.F.R. § 51.315, entitled "Combinations of unbundled network elements," should apply to commingling. Also, TelCove responds to SBC's argument that limitations on combinations, as described by the Supreme Court,[44] arise from general concepts of non-discrimination and technical feasibility, both of which apply equally in the commingling area. TelCove maintains that the word "commingling" does not appear anywhere in the Court's decision, as commingling was not at issue and was not addressed by the Court. TelCove asserts that, absent modification by the courts, the FCC's commingling regulations stand and those regulations do not permit the numerous restrictions on commingling that SBC seeks. (*Id.*)

TelCove disputes SBC's proposed language in Sections 2.18.4 and 2.18.4.1, requiring that all commingling requests be accomplished via the BFR process. TelCove argues that SBC should have in place a quicker and more efficient electronic ordering system. If SBC lacks such a system, TelCove argues, it should not be able to impose on TelCove the high cost for manual processes. TelCove notes that the record shows that the existing eleven commingling arrangements must now be ordered via a new SBC electronic system, which is represented in TelCove's language for Section 2.18.4.1 and contradicts SBC's proposed language in Section 2.18.4. (TelCove Initial Br. at 117; Tr. II, 161.)

TelCove maintains that, since the parties have expressly reserved the entire Section 271 element question and agreed not to consider it in this ICA, SBC's proposed language in Section 2.18.9 should not be adopted. TelCove argues that SBC's proposed language in Section 2.18.9, by negative implication, excludes the possibility that Section 271 network elements may be commingled. (TelCove Initial Br. at 118.) It is TelCove's opinion that, to the extent SBC argues that its language was not intended to address Section 271 UNEs, but rather to

44 On cross-examination, SBC witness Silver clarified that his direct testimony reference to "the limitations on combinations, as described by the Supreme Court" refers to *Verizon Communications, Inc., et al., v. FCC*, 535 U.S. 467 (2002).

make it clear that non-UNEs may not be commingled, that requirement is set forth in great detail in other provisions of the ICA. Accordingly, TelCove opines that SBC's proposed language either improperly implicates Section 271 issues or is duplicative and should be rejected. (TelCove's Reply Br. at 65.)

SBC Position

SBC states that, in Sections 2.18.1.3, 2.18.3 to 2.18.3.1.1, it proposes language that would relieve it from a commingling duty if creating the arrangement would impair SBC's ability to retain responsibility for management, control, and performance of its network, or would place SBC at a disadvantage in operating its network. SBC maintains that these are the same limits that apply to SBC's duty to combine UNEs under the Supreme Court's *Verizon* decision.[45] SBC argues that, in *Verizon*, the court found that: (a) a combination is not technically feasible if it impedes an incumbent carriers' ability "to retain responsibility for the management, control, and performance of its own network" (quoting Local Competition Order, ¶ 203);[46] and (b) placing limits on combining duty is necessary because an overbroad rule "could potentially affect the reliability and security of the incumbent's network," (quoting Local Competition Order, ¶ 296).[47] SBC argues that these limits should also apply to commingling, as SBC merely seeks to avoid having to create commingled arrangements that harm itself, its customers, or other CLECs seeking access or interconnection. SBC contends that the requirement of technical feasibility runs throughout Section 251 and the FCC's implementing rules, and should be implemented in the commingling context just as it was in the combinations context. Additionally, SBC contends that Section 51.318 of the FCC rules further demonstrates the parallel nature and treatment of combining and commingling, as Section 51.318(b) makes the same eligibility criteria apply to both combinations and commingling arrangements. (SBC Initial Br. at 109-11.)

In Sections 2.18.4.1 and 2.18.4.2, SBC proposes that, if a request is for a type of commingling arrangement for which SBC has developed standard ordering processes (currently 11 standard arrangements), the CLEC can order it directly. However, if the CLEC orders a commingling arrangement that is not on the list of standard arrangements, it should proceed via the BFR process. SBC maintains that this proposed process is completely consistent with TelCove's proposed process in Section 2.18.4.1, except that TelCove's proposed Section 2.18.4.1 would allow electronic ordering of all of the standard commingling arrangements. SBC contends that, while it tries to use electronic ordering whenever possible, it is not always possible, including in the commingling area, where orders for UNEs and services may take different formats and use different processes. SBC asserts that it cannot currently guarantee that all standard commingling arrangements will be able to be ordered electronically. SBC further

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45 *Verizon Communications, Inc., et al., v. FCC*, 535 U.S. 467 (2002) (*Verizon*).

46 *Verizon*, 535 U.S. 467, 536. *See also, In the Matter of Implementation of the Local Competition Provisions in the 1996 Telecommunications Act of 1996*, CC Docket Nos. 96-98, et al., FCC 96-325 (Aug. 8, 1996 First Report and Order) (Local Competition Order).

47 *Verizon*, 535 U.S. 467, 535.

contends that, as a result of TelCove's proposed language, SBC would not be permitted to make any new commingling arrangement available until it could also make available electronic ordering for that arrangement. Accordingly, SBC proposes language that distinguishes in Sections 2.18.4.1 and 2.18.4.2 between commingling arrangements that can be ordered directly and those that require a BFR. SBC notes that its proposal is fully set forth in Sections 2.18.7.1 and 2.18.4.2, so Section 2.18.4, which stated all commingling orders must be placed by BFR, is now outdated. SBC withdraws that proposed language in order to avoid confusion. (SBC Initial Br. at 111; SBC Reply Br. at 62.)

In Section 2.18.9, SBC proposes language to make clear that its commingling duty shall not apply to or otherwise include, involve or encompass SBC-13STATE offerings that are not Lawful UNEs under 47 U.S.C. § 251(c)(3). According to SBC, TelCove opposes this language by alleging that it somehow relates to Section 271 obligations, which the parties have agreed not to address here. SBC maintains that its proposed language does not refer to or particularly concern any Section 271 obligation, or call on the Commission to make any determination concerning Section 271; rather, it merely clarifies that SBC's commingling obligations extend only to Section 251(c)(3) UNEs. (SBC Initial Br. at 112; SBC Reply Br. at 63.)

<u>Arbitration Award</u>

We note that Section 51.309(e) of the FCC rules does not include the limitations that SBC proposes in the disputed language in Section 2.18.1.3. However, we find that the technical feasibility requirement is an integral and critical requirement of Section 251(c)(3) of the 1996 Act, which specifically addresses the ILECs' unbundling obligations, and the associated FCC's implementing rules, including commingling. Therefore, we find that the technical feasibility requirement should be considered in the context of the commingling obligation. We find that the Supreme Court's concern articulated in the *Verizon* case regarding the incumbent LECs' ability to retain responsibility for the management, control, and performance of its own network, as well as the reliability and security of the incumbent's network, are critical factors that should be considered in requesting any carrier offering (including commingling). Accordingly, we find SBC's proposed first, second and fourth criteria for its commingling offering to be reasonable and should be adopted in Section 2.18.1.3 of the UNE Appendix. However, we find the third criterion proposed by SBC to be vague, and should not be included in Section 2.18.1.3 of the UNE Appendix of the ICA. We further find that our conclusion is consistent with the FCC's articulated purpose, in paragraph 581 of the TRO,[48] to allow commingling (i.e., to avoid putting CLECs at an unreasonable competitive disadvantage), as SBC itself would consider these exact factors in providing services to any customers.

The disputed language in Sections 2.18.3 and 2.18.3.1.1 concerns SBC's obligation to perform the functions necessary to commingle. (Joint Ex. 1, Part 2,

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48 *See* TRO, CC Docket Nos. 01-338, et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003). *See* Note 43 for full TRO cite.

at 24-25.) We note that SBC argues that its proposed language in Section 2.18.3 reflects the same limits that apply to SBC's duty to combine UNEs under the Supreme Court's *Verizon* decision. However, we find that the agreed-to language in Section 2.16.1 of the UNE Appendix, which addresses the UNE combinations pursuant to the Supreme Court's *Verizon* decision, does not reflect language similar to SBC's proposed language in Section 2.18.3 addressing commingling arrangements. We find that SBC failed to demonstrate that the specific limitations it proposes on its obligation to perform the functions necessary to commingle in Section 2.18.3 are lawful. Accordingly, we reject SBC's proposed language in Sections 2.18.3 and 2.18.3.1.1 of the UNE Appendix.

We find that, in processing commingling arrangements, including the standard commingling arrangements, the orders may include UNEs, UNE combinations and services that may take different formats and use different processes. Therefore, we find TelCove's proposal to require SBC to process orders for all standard commingling arrangements electronically to be unreasonable. We find that, since SBC withdrew its proposed language in Section 2.18.4 to handle all commingling arrangements via the BFR process, SBC's proposed language in Sections 2.18.4.1 and 2.18.4.2 of the UNE Appendix is reasonable, and shall be adopted in the final ICA.

Regarding SBC's proposed language in Section 2.18.9, we find this language to be reasonable and find that it does not address the Section 271 issues, which the parties agreed not to address at this ICA. We find that SBC's proposed language clarifies that SBC's commingling obligations extend only to Section 251(c)(3) UNEs, which TelCove did not dispute. Accordingly, we adopt SBC's proposed language in Section 2.18.9 of the UNE Appendix for the final ICA.

Issue 75: Should the ICA reflect the FCC's rule and orders pertaining to EELs and high-cap commingled arrangements, including the limitations and restrictions related to their availability and use and compliance audits?

Original Issue 75: In light of the *USTA II* decision, how should EELs be defined in the ICA and should they be provisioned?

ICA Ref. – UNE Appendix § 2.19 (Entire)

<u>TelCove Position</u>

TelCove disputes SBC's language regarding EELs and high-capacity[49] commingled arrangements because it deviates from the text of the FCC's applicable regulations. TelCove asserts that its intent in its proposed language is to "closely track the applicable federal regulations and guidance." (TelCove Initial Br. at 119.)

[49] The term "high-capacity" refers to as DS1 or DS3 digital channels, circuits, or loops.

SBC Position

It is SBC's position that, in paragraph 577 of the TRO, the FCC established *"eligibility criteria" that a CLEC must meet in order to obtain a high-capacity* EEL on an unbundled basis. SBC argues that, in paragraphs 590-91 and 601-610 of the TRO, and in Section 51.318 of the FCC rules, the FCC set the EEL eligibility criteria that are designed to ensure that a requesting carrier uses EELs only if it is providing significant amounts of local usage service to its retail customers, and adopted certification and auditing requirements to ensure that CLECs purchasing EELs satisfy the eligibility criteria. According to SBC, *USTA II* upheld the FCC's EEL eligibility criteria, and no party challenged the TRO provisions requiring certification of compliance with those eligibility criteria. (*USTA II*, 359 F.3d 554, 592-93; SBC Initial Br. at 112-113.) SBC argues that, while TelCove purports to adhere to the FCC's requirements, several of TelCove's proposals in Section 2.19, of the UNE Appendix to the ICA, would in fact nullify the FCC's rules. (SBC Reply Br. at 65.)

Arbitration Award

We note that the FCC rules (47 C.F.R. §§ 51.309, 51.315 and 51.319), pertaining to EELs and high-capacity commingled arrangements were established in the TRO released on August 21, 2003. We find, as SBC argues, that in *USTA II* the court upheld the FCC's EEL eligibility criteria, and no party challenged the TRO provisions requiring certification of compliance with those eligibility criteria. We also find that the FCC, in its TRRO, did not address or alter any of these rules.

We find that the sub-issues presented by the parties, under Issue 75 (in the May 6, 2005 joint DPL and May 13, 2005 revised testimonies), are new, and, therefore, beyond the scope of this arbitration. Accordingly, the new sub-issues for Issue 75 shall not be considered in this Arbitration Award (Section 252(b)(4)(A) of the 1996 Act).

As to the original issue submitted for arbitration: "In light of the *USTA II* decision, how should EELs be defined in the ICA and should they be provisioned?" we find that the parties should define EELs in the ICA consistent with the FCC's definition in Section 51.5 of the FCC rules. Also, the parties should establish terms and conditions for EELs provision consistent with criteria set in 47 C.F.R. § 51.318.

Issue 76: Should SBC have an obligation to provide UNEs, combinations of UNEs, and TelCove elements and Commingled Arrangements beyond the 1996 Act and current FCC rules?

ICA Ref. – UNE Appendix § 2.22

<u>TelCove Position</u>

TelCove and SBC disagree on the proper role of tariffs. TelCove opines that, through its proposed language in Section 2.22 of the UNE Appendix, SBC seeks to force TelCove to fully and irrevocably waive any right or ability to purchase any UNE directly from any SBC tariff, and to agree not to so purchase or attempt to so purchase from any such tariff. TelCove argues that SBC wants to reserve for itself the option of either rejecting any order submitted under SBC's tariff or converting it to a UNE under the ICA and expects TelCove to agree in advance to such open-ended waiver. TelCove argues that, although the parties have elected to defer Section 271 issues, SBC's language raises Section 271 concerns because, if TelCove agreed to the language and later Section 271 UNEs were tariffed, SBC would be able to argue that TelCove waived its right to obtain those network elements. (TelCove Initial Br. at 126.)

TelCove maintains that, while SBC does not have a UNE tariff on file today in Ohio, SBC itself is in sole control of the nature and timing of SBC's future tariff offerings. According to TelCove, SBC's tariff offering presents a service the company is making generally available to the public and, if TelCove elects not to use its contractual interconnection rights but elects instead to take publicly available pricing and terms, it should be allowed to do so. TelCove argues that it is not asking to be allowed to pick and choose portions of the tariff and combine them with portions of the ICA, but it seeks the right to purchase UNEs pursuant to the terms and conditions, including the price of any UNE tariff that SBC might file. TelCove contends that it should not be disadvantaged *vis-à-vis* other competitors who, lacking an ICA, would be eligible to purchase out of the tariff while TelCove would be prohibited from doing so, simply because it entered into the ICA. (Id. at 127-128.)

TelCove maintains that SBC's argument that TelCove's position is premature and speculative, since SBC does not have a UNE tariff in Ohio, is irrelevant, as the issue is TelCove's ability to avail itself of services offered under such a tariff should SBC act voluntarily to file it. TelCove maintains that, while SBC states that TelCove could seek to renegotiate the ICA should SBC voluntarily file a UNE tariff, SBC fails to cite to any provision of the ICA that would allow for such renegotiation. TelCove opines that SBC's proposed "renegotiation" remedy is neither practical nor real as SBC's voluntary filing of such tariff would neither be a clear breach of the contract nor would it trigger the ICA's change-of-law provisions. (TelCove Reply Br. at 69-70.)

<u>SBC Position</u>

SBC maintains that it proposes language in Section 2.22 which states that this ICA will contain the sole and exclusive terms and conditions by which *TelCove will obtain Lawful UNEs from SBC* and that TelCove would not be allowed to obtain UNEs from any SBC tariff. SBC contends that TelCove seeks to be able to pick and choose between its ICA and any UNE tariff. SBC argues that TelCove's proposal is premature and entirely speculative as SBC does not have a tariff for UNEs in Ohio, has no present intention of filing such a tariff, and cannot lawfully be required to file such a tariff.[50] SBC further maintains that its proposal is consistent with the structure and purpose of Section 252(a)(1) of the 1996 Act which makes approved ICAs the "binding" statement of the parties' rights and obligations with respect to the matters covered by the agreement, such as unbundling. SBC argues that CLECs cannot treat ICAs as mere advisory documents that they can ignore or escape whenever they see something better in a tariff. The FCC, SBC contends, rejected a similar CLEC proposal to be able to pick and choose more favorable provisions from ICAs.[51] (SBC Initial Br. at 118-119.)

SBC argues that if it files a UNE tariff, and if TelCove deems the terms better than those in the ICA, TelCove could seek to renegotiate the ICA then. SBC further argues that, if those better terms result from a change in law, the Agreement's change-of-law provisions would be available. However, SBC maintains, TelCove cannot make its ICA non-binding or give itself the right to discard the Agreement and the entire arbitration/negotiation process. (SBC Reply Br. at 73.)

Arbitration Award

SBC's proposed language in Section 2.22 is as follows:

> 2.22 The Parties intend that this Appendix Lawful UNEs contains the sole and exclusive terms and conditions by which CLEC will obtain Lawful UNEs from SBC-13STATE. Accordingly, except as may be specifically permitted by this Appendix Lawful UNEs, and then only to the extent permitted, CLEC and its affiliated entities hereby fully and irrevocably waive any right or ability any of them might have to purchase any unbundled network element (whether on a stand-alone basis, in combination with other UNEs (Lawful or otherwise), with a network element possessed by CLEC, or pursuant to Commingling or otherwise) directly from any SBC-13STATE tariff, and agree not to so purchase or attempt to so purchase from any such tariff. Without affecting the application or interpretation of any other provisions regarding waiver, estoppel, laches, or similar concepts in other situations, the failure of SBC-13STATE to enforce the foregoing (including if SBC-13STATE fails to reject or otherwise block orders for, or provides or continues to provide, unbundled network elements, Lawful or otherwise, under tariff) shall not act as a waiver of any part of this Section, and estoppel, laches, or other similar concepts shall not act to affect any rights or requirements hereunder. At its option, SBC-13STATE may either reject any such order submitted under tariff, or without the need for any further contact with or consent from CLEC, SBC-

[50] *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 443-45 (7th Cir. 2003); *Verizon North Inc. v. Strand*, 309 F.3d 935, 940-41 (6th Cir. 2002).

[51] *See, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 13494 (Jul. 13, 2004 Second Report and Order, ¶ 11).

> 13STATE may process any such order as being submitted under this Appendix UNE and, further, may convert any element provided under tariff, to this Appendix UNE, effective as of the later in time of the (i) Effective Date of this Agreement/Amendment, or (ii) the submission of the order by CLEC.

(Joint Ex. 1, Part 2, at 39-40.)

We find that Section 252 of the 1996 Act establishes negotiations and ICAs as the method of setting the business relationship between incumbent LECs and their competitors. An ICA is the result of a negotiation process involving give-and-take, where parties agree to a comprehensive binding set of rates, terms and conditions that, as a whole, meets both parties' needs and business plans. The tariff offering represents a completely different mode of business relationship between carriers, which does not require a binding commitment, unless specifically included as a condition in the tariff. A carrier can either negotiate rates, terms and conditions and enter into a binding agreement with the incumbent LEC for Section 251 offering or, in the absence of an ICA, purchase such offering from a Commission-approved tariff, if such a tariff exists. Accordingly, we reject TelCove's position that it can, if and when SBC has an approved tariff for Section 251(c)(3) UNEs, elect not to use its contractual interconnection rights but elect instead to take publicly available pricing and terms offered under SBC's tariff. We also find that SBC's proposed language pertaining to the waiver issues are not ripe for review at this time, and will only be addressed by the Commission if and when SBC files for UNE tariff approval. Therefore, we will not adopt SBC's proposed language. Accordingly, to accurately reflect our conclusion that approved ICAs present the binding statement of the parties' rights and obligations with respect to the matters covered by the agreement, the parties shall adopt the following language for the final ICA, which replaces SBC's proposed Section 2.22 of Appendix UNE:

> 2.22 The Parties intend that this Appendix Lawful UNEs contains the sole and exclusive terms and conditions by which CLEC will obtain Lawful UNEs (whether on a stand-alone basis, in combination arrangements as defined in this Appendix Lawful UNEs, or pursuant to Commingling arrangements as defined in this Appendix Lawful UNEs) from SBC-13STATE, except as may be specifically permitted by this Appendix Lawful UNEs.

As to TelCove's concerns regarding the implication of SBC's proposed language on any Section 271 element, we find that the issue here, within the UNE Appendix, is regarding SBC's offering of a Section 251(c)(3) UNE pursuant to a tariff, and is not addressing a Section 271 offering. Therefore, the Commission conclusion on this issue should not impact any Section 271 issue/offering.

D. Conversions

Issue 72: Should the (Interconnection) Agreement contain processes when TelCove does not meet the eligibility criteria for converting a wholesale service to UNEs?

ICA Ref. – UNE Appendix §§ 2.17.1, 2.17.5 and 2.17.6

<u>TelCove Position</u>

TelCove states that SBC proposes to add the following language to the end of Section 2.17.1: "[b]y way of example only, the statutory conditions would constitute one such eligibility criterion." TelCove maintains that such phrases are duplicative of existing text and create confusion and ambiguity. TelCove also argues that it is unclear what SBC meant by the use of the undefined term "statutory conditions." (TelCove Initial Br. at 111.)

The dispute in Section 2.17.5 concerns the transition period needed when TelCove ceases to meet the applicable eligibility criteria for a particular conversion of a wholesale service to the equivalent UNE or combination of UNEs. TelCove's proposed language mandates a reasonable transition period of 90 days before SBC *may* convert TelCove's circuits to another product. TelCove proposed the following language (TelCove's proposed language is in bold italic):

> 2.17.5 If CLEC does not meet the applicable eligibility criteria or, for any reason, stops meeting the eligibility criteria for a particular conversion of a wholesale service, or group of wholesale services, to the equivalent Lawful UNE, or combination of Lawful UNEs, CLEC shall not request such conversion. To the extent CLEC fails to meet (including ceases to meet) the eligibility criteria applicable to a Lawful UNE or combination of Lawful UNEs, or Commingled Arrangement (as defined herein), <u>SBC-13STATE</u> may convert the Lawful UNE or Lawful UNE combination, or Commingled Arrangement, to the equivalent wholesale service, or group of wholesale services, upon ***ninety (90) days*** written notice to CLEC.

TelCove maintains that SBC should be required to give reasonable notice to TelCove that is sufficient to provide TelCove with an opportunity for it to make alternative arrangements for its customers. TelCove argues that SBC's proposal would require a flash cut that would be extremely disruptive to TelCove's business, could result in a missed or delayed customer transition, and would circumvent the important change of law provisions in the ICA. (TelCove Initial Br. at 112.) As to SBC's claim that TelCove's 90-day notice requirement is inconsistent with the agreed 30-day period when a particular UNE is declassified, TelCove argues that various combinations that involve transport, such as EELs, may take much longer to re-provision than simple stand-alone UNEs and the 90-day transition adequately protects end-users served over these combinations. (TelCove Reply Br. at 62.)

Section 2.17.6 addresses the role of the FCC, this Commission, and state law in setting procedures and guidelines for ordering and conversions between various services. TelCove believes that the Commission has a role and proposes the following language (TelCove's proposed language is in bold italic; SBC's proposed language is in bold):

> 2.17.6 In requesting a conversion of an <u>SBC-13STATE</u> service, CLEC must follow the guidelines and ordering requirements provided by <u>SBC-13STATE</u> ***and in conformance with FCC, Commission and*** any **applicable** laws that are applicable to converting the particular <u>SBC-13STATE</u> service sought to be converted.

According to TelCove, its proposed language simply allows for the possibility that there may be Commission rules or state laws, either now or in the future, that must be followed, relative to ordering and conversions. TelCove points out that the parties have agreed to expressly reserve their respective rights regarding the role of the Commission in the availability and treatment of UNEs in the UNE Appendix Section 1.1. (TelCove Initial Br. at 113.)

<u>**SBC Position**</u>

SBC states that this issue involves the conversion of wholesale services to UNEs, typically the unbundled loop-unbundled dedicated transport combinations known as EELs. SBC further states that the FCC, in Section 51.318 of its rules, as well as in paragraphs 585-89 of the TRO, requires certain "eligibility criteria" to be met before a CLEC can obtain a high-capacity EEL. SBC proposes to include language at the end of Section 2.17.1 stating that: "[b]y way of example only, the statutory conditions would constitute one such eligibility criterion." SBC objects to TelCove's claims that this language is ambiguous, and argues that the term "statutory conditions" is defined in the agreed-to language of Section 2.15.1 of the UNE Appendix. SBC argues that these statutory conditions are eligibility requirements, and TelCove does not contend otherwise. SBC further argues that these statutory conditions are not the only eligibility requirements, as the FCC's rules contain additional mandatory criteria that are also reflected in the ICA. Thus, the phrase "by way of example only" is appropriate, because the illustration regarding statutory conditions is an example only, and not an exclusive list of eligibility criteria. Thus, SBC argues, the reference is not vague and TelCove has no legitimate objection to this explanatory language. (SBC Reply Br. at 59.)

In Section 2.17.5, SBC proposes that when an EEL TelCove is using stops meeting the FCC's eligibility criteria, SBC will stop providing the EEL at UNE prices and will convert it to an analogous wholesale service or services, after giving written notice to TelCove. SBC asserts that TelCove's proposal, which requires a 90-day grace period after the written notice, during which it would continue to lease the EELs as a UNE combination, at UNE prices, is unreasonable and unfair. SBC maintains that, if a TelCove EEL stops meeting the FCC's eligibility criteria, TelCove is no longer entitled to obtain the EEL at TELRIC-based rates under any circumstances. SBC argues that, since the FCC did not provide any extended grace period in those circumstances, requiring SBC to offer one is the same as mandating unbundling where the FCC has already said it is not required. SBC maintains that TelCove will in most cases know in advance that an EEL is about to stop meeting the eligibility criteria, and thus can start considering its transition plan in advance. (Tr. I, 151.) SBC further argues that, while TelCove has agreed to a default 30-day transition period for declassified UNEs, it did not offer any reason as to why the transition period here, in a similar situation, should be three times as long. (SBC Initial Br. at 108.)

Regarding TelCove's argument that SBC's proposed process is a "flash cut," SBC maintains that its proposal ensures: (a) continuous service for the end-user while also assuring that SBC is paid the proper price for the EEL once it is no longer subject to UNE pricing; and (b) TelCove would still serve its customer; albeit at a different wholesale cost. (SBC Reply Br. at 59-60.)

SBC asserts that TelCove's proposed language, in Section 2.17.6, seeks to refer to FCC and state rules as somehow modifying SBC's guidelines and ordering requirements for conversion requests, creates ambiguity, is likely to create disputes, and should, therefore, be rejected. (SBC Initial Br. at 108-09.)

<u>Arbitration Award</u>

We note that the agreed-to language in Section 2.17.1, as well as other paragraphs in Section 2.17 of the UNE Appendix of the ICA, refers to "the eligibility criteria that may be applicable" without a definition of such eligibility criteria in this section of the ICA. SBC argues that its proposed language refers to the term "statutory conditions," which is defined in the agreed-to language of Section 2.15.1 of the UNE Appendix, as one of eligibility requirements, and that the FCC's rules contain additional mandatory criteria. By reviewing the agreed-to language in Section 2.15.1 of the UNE Appendix, we find that this section refers only to Section 251(c)(3) of the 1996 Act in setting criteria for a CLEC to access UNEs, not for conversion of wholesale services to UNEs. Accordingly, we reject SBC's proposed language at the end of Section 2.17.1, as it leads to potential confusion. We find that, if the parties need to define the term "applicable eligibility criteria" in Section 2.17.1 of the UNE of the ICA, they should include a reference to Section 51.318 of the FCC rules (47 C.F.R. § 51.318).

Next, we address the dispute in Section 2.17.5, regarding the notification period necessary when an EEL TelCove is using stops meeting the FCC's eligibility criteria. The record reflects that SBC's proposal does not present a "flash cut" as TelCove claims. The record reflects that, when an EEL TelCove is using stops meeting the FCC's eligibility criteria, SBC will stop providing the EEL at UNE prices, with no disruption to the end-user service, and convert it to an analogous wholesale service or services **after giving written notice** to TelCove. (SBC Initial Br. at 108.) SBC's proposal fails to suggest how long the period should be from the time it gives a written notice to TelCove until the time it must convert the EEL combination to the analogous wholesale service. We find 30 days to be a reasonable notification period for the purposes of this section. This 30-day period should be sufficient to allow TelCove to determine the appropriate arrangement by which it plans to serve the end-user. During this 30-day period, TelCove will continue to use such EEL arrangement(s) at the TELRIC-based price, with no true-up requirement. Accordingly, we reject TelCove's proposed 90-day notification proposal and adopt a limited 30-day notice for Section 2.17.5 of the UNE Appendix.

Last, we address TelCove's proposed language in Section 2.17.6 regarding the role of the FCC, this Commission, and state law in setting procedures and guidelines for ordering and conversions between various services. Although it is true that there may be FCC rules, Commission rules, or state laws in the future, relative to ordering and conversions, the parties have already agreed that TelCove must follow the guidelines and ordering requirements provided by SBC and laws that are applicable to converting the particular SBC service sought to be converted. TelCove is well aware that, if in the future the applicable law changes, it must follow the change of law provisions. Accordingly, we reject TelCove's proposed language in Section 2.17.6 of the UNE Appendix as unnecessary.

E. High Capacity Loops

Issue 79: If TelCove submits DS1 and DS3 loop orders that exceed the FCC cap for those facilities, what procedures should apply?

ICA Ref. - UNE Appendix §§ 8.3.4.4.1 and 8.3.5.4.1

Original Issues:

Issue 79(1): Should the ICA contain only 2-wire and 4-wire analog and 2-wire digital interface loop in light of the recent *USTA II* decision?

Issue 79(2): Is TelCove allowed to order DS1, DS3 and dark fiber loops following the release of the *USTA II* decision?

ICA Ref. - UNE Appendix §§ 8.2; 8.3.3.4; 8.3.4; 8.3.5; 8.3.5.1; 8.3.5.2; 8.3.5.2.1; 8.4; 18.6; 18.6.7; 18.6.8; 18.10.3, and 18.10.4

<u>**TelCove Position**</u>

The parties dispute the impact of the *USTA II* decision, and the FCC's TRRO decision and rules, on the provision of DS1 and DS3 UNE loops. TelCove argues that high capacity loops such as DS1 and DS3 should be included in the ICA, and proposes language to reflect its position.

<u>**SBC Position**</u>

As to SBC's position on the impact of the *USTA II* decision, and the FCC's TRRO decision and rules, on the provision of DS1 and DS3 UNE loops, SBC argues that TelCove's proposed language refers to elements that were eliminated from unbundling requirement by the TRO and *USTA II* decision.

Arbitration Award

We find that Issue 79, as presented by the parties (in the May 6, 2005 joint DPL and May 13, 2005 revised testimonies), is new, and, therefore, beyond the scope of this arbitration. Accordingly, this Issue 79 shall not be considered in this Arbitration Award (Section 252(b)(4)(A) of the 1996 Act).

As to the original issue submitted for arbitration, we order the parties to incorporate terms and conditions articulated in Section 51.319(a)(4)-(6) of the FCC's rules, and the TRRO, regarding the ILEC's unbundling obligation of DS1, DS3, and dark fiber loops, into their final ICA.

F. Dedicated Transport

Issue 86: What notice requirement, if any, prior to conversion by SBC to another service, should apply if TelCove orders dedicated transport on a route where the FCC's cap has been met?

ICA Ref. – UNE Appendix §§ 13.3.5.1, 13.3.6.1, 3.2 and 3.2.1

Original Issue 86: In light of *USTA II*, should UNE dedicated transport be provided in this ICA?

ICA Ref. – UNE Appendix §§ 13(All); 3.2; 3.2.1; 18.7-18.7.2; 18.9-18.9.5; and 18.11-18.11.2

TelCove Position

TelCove maintains that Sections 3.2 and 3.2.1 describe the methods under which SBC agrees to provide TelCove with access to UNEs, and that the FCC has made it clear that dedicated transport is available as a UNE, subject to certain limitations. TelCove argues that Sections 3.2 and 3.2.1 must be modified to insert the appropriate reference to dedicated transport UNEs. TelCove contends that, as a vestige of *USTA II*, SBC's language is limited only to loop UNEs and excludes the use of dedicated transport UNEs and combinations involving dedicated transport UNEs, which makes it inconsistent with FCC rules. (TelCove Ex. 1, at 86.) Accordingly, TelCove argues that its proposed language, which includes dedicated transport UNEs, should be adopted.

SBC Position

SBC did not address TelCove's disputed language regarding Sections 3.2 and 3.2.1 in its testimony, initial post-hearing brief or reply brief. (SBC Ex. 4; SBC Initial Br. at 123-24; SBC Reply Br. at 76.)

<u>Arbitration Award</u>

We find that the sub-issues related to Sections 13.3.5.1 and 13.3.6.1, raised as part of Issue 86, as presented by the parties (in the May 6, 2005 joint DPL and May 13, 2005 revised testimonies), are new, and, therefore, beyond the scope of this arbitration. Accordingly, the new sub-issues for Issue 86, related to Sections 13.3.5.1 and 13.3.6.1 (of the UNE Appendix) shall not be considered in this Arbitration Award (Section 252(b)(4)(A) of the 1996 Act).

As to the original issue submitted for arbitration: "In light of *USTA II*, should UNE dedicated transport be provided in this ICA?" we adopt TelCove's proposed language in Sections 3.2 and 3.2.1 of the UNE Appendix for the final ICA, as it is consistent with the TRO and TRRO decisions.

G. Subloops

Issue 82: Should SBC's proposed Section 9.4.4 be adopted?
ICA Ref. - UNE Appendix § 9.4.4

<u>TelCove Position</u>

It is TelCove's position that SBC's proposed language in Section 9.4.4 of the UNE Appendix, which relates to subloops, precludes TelCove from being able to obtain future Lawful UNE subloops and improperly includes various waiver, estoppel and laches provisions. TelCove maintains that SBC's sweeping language: "[a]s *no other type of subloop constitutes a Lawful UNE subloop,* <u>SBC-13STATE</u> is not obligated under this Section 251/252 Agreement to provide any other type of subloop" should be rejected by the Commission. TelCove argues that the operation of various other ICA provisions that identify whether a UNE has been declassified or made re-available will determine what subloops SBC must make available to TelCove. TelCove contends it is possible that, during the term of the ICA, SBC will be required to offer new UNEs, including yet unidentified subloops, or UNEs that were declassified but are made re-available. TelCove argues that SBC's proposed language appears to preclude TelCove from being able to obtain access to those UNEs. TelCove explains that its position is to avoid having SBC's proposed language be used to override some future decision regarding what is available as a subloop. (TelCove Initial Br. at 132.) TelCove maintains that the issue is not whether or not unbundled feeder subloops are available today. The issue, TelCove maintains, is whether SBC's proposed language prevents TelCove from gaining access to future subloops. (TelCove Reply Br. at 74.)

<u>SBC Position</u>

It is SBC's position that its proposed Section 9.4.4 clarifies that, under current law, no subloops other than 2-wire and 4-wire analog voice-grade and 2-

wire and 4-wire digital subloops conditioned for DSL[52] service are required to be unbundled. SBC argues that TelCove does not dispute that these are the only subloops that must be unbundled under current law. (Tr. I, 119.) SBC argues that, while TelCove states that its only concern with Section 9.4.4 is that it somehow might preclude TelCove from obtaining any new types of subloops that are required to be unbundled in the future, TelCove also admits that Section 9.4.4 wouldn't preclude that specific situation. (Tr. I, 119-20.) SBC maintains that it does not intend Section 9.4.4 to override any change-of-law provision. Rather, the only purpose is to define the law as it currently stands, which TelCove agrees the proposed language does. (SBC Initial Br. at 123.)

Arbitration Award

We note that, although SBC claims that its proposed Section 9.4.4 language clarifies that, under current law, no subloops other than 2-wire and 4-wire analog voice-grade and 2-wire and 4-wire digital subloops conditioned for DSL service are required to be unbundled, the proposed language well exceeds such clarification. We find that, pursuant to the ICA, TelCove is required either to submit a BFR or to invoke the change-of-law provision before it can obtain unbundled subloops other than the ones listed in the UNE Appendix. Accordingly, we find that SBC's proposed language for Section 9.4.4, of the UNE Appendix, is unnecessary and should not be adopted in the ICA.

ESCROW AND DEPOSIT REQUIREMENTS

General Terms and Conditions (GTC)

A. Escrow

Issue 19(1): Is the creation of an escrow mechanism appropriate?
ICA Ref. – GTC §§ 8.6 – 8.8.1

Issue 19(2): If an escrow mechanism is to be created, what terms and conditions should govern?

Issue 20: Should there be a requirement that disputed amounts be paid into escrow?
ICA Ref. – GTC §§ 9.3.3; 9.3.4

Issue 13: Upon termination or expiration of the agreement should undisputed amounts be paid promptly with disputed amounts resolved in accordance with dispute resolution procedures or should disputed amounts be required to be paid into an escrow account?
ICA Ref. – GTC § 5.5.2

52 The term "DSL" refers to Digital Subscriber Line service provided to end-user customers using fiber technology.

Issue 23(2): Must a CLEC pay the disputed amount into an escrow account before the invoices will be considered disputed?
ICA Ref. – GTC § 10.4.1

__TelCove Position__

TelCove contends that there is no need for any escrow provisions in the ICA. (TelCove Ex. 1, at 92, 94.) TelCove points out SBC's failure to identify the economic value of its losses in Ohio as a result of various CLECs defaulting on their bills to SBC. (TelCove Initial Br. at 38; TelCove Reply Br. at 20.) TelCove also notes its own positive history with regard to bill payment as grounds for there being no escrow requirements in the ICA. (TelCove Ex. 1, at 95; TelCove Initial Br. at 38-39; TelCove Reply Br. at 20.) In addition, TelCove points out that it will be unable to have access to its funds for other purposes if they are escrowed. (TelCove Ex. 1, at 93, 97; Tr. I, at 193-94; TelCove Initial Br. at 39; TelCove Reply Br. at 21-22.) In summary, TelCove believes that these provisions are unduly burdensome, especially in light of the availability of other dispute resolution provisions. (TelCove Ex. 1, at 96; TelCove Initial Br. at 38-40.) (*See also,* TelCove Exs. 2 and 2A.)

In the event that the Commission determines that an escrow requirement is appropriate, TelCove would modify SBC's proposed language in two respects. First, TelCove would add a minimum threshold of $10,000 per dispute for the escrow requirement. (TelCove Ex. 1, at 95-96, 98; TelCove Reply Br. at 22.) At the hearing, Mr. Lafferty clarified that TelCove's intent is that the $10,000 limit be applied on a "per-service, per-product, or a per-billing account number basis." (Tr. I, 196.) The second modification proposed by TelCove is to shift responsibility for payment of the administrative costs associated with an escrow account, to the party "requesting" that such an escrow account be established. (TelCove Ex. 1, at 95; TelCove Initial Br. at 41-42; TelCove Reply Br. at 22-23.)

TelCove also responds to SBC's proposed modifications to the escrow requirement triggers. It argues that those modifications are unrealistic in light of the billing errors often made by SBC. In addition, TelCove notes that this language would grant SBC unilateral authority to determine when TelCove's credit history is sufficiently positive to avoid escrow. (TelCove Initial Br. at 40-41.)

Finally, TelCove asserts that SBC's language is unclear as to whether a separate escrow account would be required for each disputed bill. (TelCove Initial Br. at 42.) If that were the case, then the cost of complying with the escrow requirements would be substantially increased.

__SBC Position__

SBC contends that failures by CLECs to pay SBC's bills have resulted in serious financial losses to SBC. Therefore, SBC argues, it needs to have the right to require that TelCove place sufficient funds in escrow to cover the disputed portions of bills. (SBC Ex. 8, at 19-20; SBC Initial Br. at 24-25; SBC Reply Br. at

12.) SBC notes that similar provisions have been allowed in other ICAs considered by this Commission. (SBC Initial Br. at 25-26.)

SBC points out that it has offered to include language that would create an exception from the escrow requirements in the event that certain conditions are met. This language is designed to exempt a company with a good credit history from the escrow provisions. (SBC Initial Br. at 26-27.)

SBC also counters TelCove's proposed modifications to the escrow terms. With regard to the suggested threshold of $10,000 per dispute, SBC submits that the language is too vague to be applied. (SBC Ex. 8, at 27; SBC Initial Br. at 28; SBC Reply Br. at 14.) SBC does recognize the clarification offered at the hearing, but states that the billing level that could be reached without any escrow ($60,000 per month, according to SBC) is too high to be acceptable. (SBC Initial Br. at 28-29, n. 19.) With regard to TelCove's other proposed modification, relating to which party would bear the costs of the escrow, SBC reasons that TelCove's language is nonsensical since no party would be "requesting" the escrow. (SBC Ex. 8, at 26; SBC Initial Br. at 27; SBC Reply Br. at 14.) Further, SBC argues that, if it is found to have the right to demand an escrow, it should not be charged for availing itself of that protection. (SBC Initial Br. at 27-28.)

<u>Arbitration Award</u>

The Commission agrees with SBC that it is reasonable to include in the ICA a requirement that each party should escrow funds sufficient to cover the payment of bills that it disputes. While not necessarily controlling, it is also noteworthy that, as cited by SBC, this Commission has approved escrow requirements in other such agreements.[53] However, the Commission will require certain modifications and clarifications to the language proposed by SBC.

The first area of modification is the coverage of the exceptions to the escrow requirement. The Commission has reviewed SBC's proposed triggers for the escrow requirement. (SBC Initial Br. at 27.) While the Commission agrees that it is meritorious not to trigger these requirements where a party has a good payment history, the proposed language evidences the difficulty in crafting language that would define such a situation. The language suggested by SBC would, as noted by TelCove, allow the billing party to determine whether the disputing party has 12 months of good credit history and whether it has a proven history of late payments. Such a provision allows the billing party excessive latitude in determining the applicability of the escrow provisions. On the other hand, the triggers suggested by TelCove provide only very limited protection to SBC. Therefore, the Commission will require that the language proposed by SBC be modified to set forth two escrow triggers. The escrow trigger provided in

[53] *See e.g., Petition of MCImetro Access Transmission Services, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio,* Case No. 01-1319-TP-ARB; and *Allegiance Telecom of Ohio, Inc.'s Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Ameritech Ohio,* Case No. 01-724-TP-ARB.

GTC Section 7.2.4, relating generally to the CLEC's insolvency or bankruptcy (Issue 16), is satisfactory as proposed. The escrow requirement should also be triggered in the event that the CLEC has not had at least 12 consecutive months without either (1) two consecutive months of late fulfillment of payment obligations or (2) three non-consecutive months of late fulfillment of payment obligations. For purposes of these provisions, "late fulfillment of payment obligations" should mean that the CLEC has failed to pay or dispute a bill by the termination of the 10-day cure period set forth in GTC Section 9.2 of the ICA or, if any part of the bill is disputed, has failed to fulfill all dispute notification provisions under GTC Section 9.3 of the ICA, and properly escrow funds, if escrow provisions are then applicable.

The ICA language proposed by SBC, for GTC Sections 9.3.3 and 9.3.4, should also be modified to be clear that only one escrow account will be required for each party to the ICA. (The parties could also agree to establish a joint escrow account to be used by either party.) Once a qualifying escrow account has been established, disputing additional items will not require either party to set up additional accounts.

The Commission agrees with TelCove that a disputing party should not be required to escrow funds to cover small disputes. SBC appears not to disagree with this premise. (Tr. II, 267; SBC Initial Br. at 28; SBC Reply Br. at 14.) The only question is how to define a "small dispute." As noted above, TelCove witness Lafferty stated that TelCove's intent was that the proposed $10,000 limit would apply "on a per-service, per-product, or a per-billing account number basis." The Commission finds that even this clarification is unclear. Since a single billing account is likely to cover numerous products and services, Mr. Lafferty's explanation could allow the threshold to be calculated in at least two different ways. Even if it were calculated based on the more restrictive, one threshold per account method, the Commission finds that the total amount under dispute without escrowed funds could mount dramatically. As TelCove apparently has six BANs[54] in Ohio, and at least one other account, such a threshold would allow the creation of at least $70,000 per month, or at least $840,000 per year, in non-escrowed disputes. (SBC Ex. 8, at 8; Tr. II, 266.) The Commission finds that this level is unreasonably high. Therefore, the language in GTC Sections 9.3.3 and 9.3.4 of the ICA should be modified to provide that disputes relating to a single month's bill, for a single account, which aggregate no more than $5,000, may be commenced without a party being required to place funds in escrow to cover the amount of the dispute. In addition, if an item that is under dispute appears on a subsequent bill, the value of that item shall not be considered with regard to the amount being disputed on such subsequent bill.

The parties also disagree in, GTC Section 8.6.2.2, with regard to which party should bear the costs of the escrow, with SBC believing that the disputing party should pay for the dispute and TelCove believing that the party "requesting the escrow" should pay for the escrow. (SBC Initial Br. at 28;

54 The term "BAN" refers to Billing Account Number.

TelCove Initial Br. at 41.)[55] The Commission does not find that either proposal is reasonable. The Commission expects that the escrow account requirements will result in both non-usage-based costs and usage-based costs. The GTC Section 8.6.2.2 ICA language should be modified to provide that each party will be responsible for the non-usage-based costs of establishing and maintaining its own escrow account or, if the parties agree to maintain one escrow account jointly, each party will be responsible for one-half of the non-usage-based costs of establishing and maintaining the joint escrow account. Escrow costs that relate to a particular dispute will initially be paid by the disputing party but will ultimately be charged to that party which is found to be in error with regard to that dispute. Thus, if a bill that is being disputed is found to have been incorrect, then the billing party will reimburse the disputing party for the cost of escrowing the funds to cover that dispute. If, on the other hand, a bill that is being disputed is found to have been correct, then the billing party would not reimburse the disputing party for that cost.

Issue 34: Should TelCove be required to escrow disputed amounts prior to the assignment of a collocation arrangement to another carrier?

ICA Ref. - Physical Collocation Appendix § 20.2.2;
Virtual Collocation Appendix § 18.1.2.2

<u>**TelCove Position**</u>

According to TelCove, SBC's proposed language would require TelCove to pay all disputed amounts into escrow prior to the assignment of collocation space to another carrier. TelCove does not agree with SBC's proposal because it believes that SBC has other remedies available to it, including the dispute resolution and breach of contract provisions that currently exist in the ICA. Those other remedies would allow SBC to receive payment from TelCove without delaying TelCove's ability to assign its collocation space to another party. As with all other escrow issues in this arbitration, TelCove witness Lafferty testified that SBC should not be able to impose an escrow requirement designed solely to prevent SBC from having uncollectible accounts, at the expense of tying up TelCove's free cash flow. (TelCove Ex. 1, at 101-02; TelCove Initial Br. at 52-53.)

<u>**SBC Position**</u>

SBC witness Silver explained that SBC permits a CLEC, such as TelCove, to assign its collocation arrangement to another CLEC as an accommodation to those CLECs that would like to have their space reassigned. (SBC Exhibit 4, at 5.) Mr. Silver pointed out that this arrangement benefits the CLEC by allowing it to exit a collocation space easily, while the acquiring CLEC does not have to

55 While, as noted by SBC, this language is somewhat confusing, the Commission reads it to mean that the billing party would bear the costs. Clearly, the party disputing a bill would not be the one which is "requesting" an escrow.

reinstall equipment or pay to build out the space. Mr. Silver further explained that, if TelCove were able to assign its collocation arrangement and future obligations to another CLEC without paying disputed amounts into an escrow account, SBC would lose any leverage it has against TelCove with regard to that space. (*Id.*) Finally, SBC notes, in its brief, that TelCove witness Lafferty agreed, on cross-examination, that there are no state or federal requirements that obligate SBC to allow one CLEC to assign space to another CLEC. (SBC Initial Br. at 39.)

<u>Arbitration Award</u>

The Commission agrees with SBC that there is no state or federal requirement that mandates SBC to allow TelCove to assign its existing collocation space to other CLECs. SBC, as a voluntary offering, has made this policy available as an option to carriers such as TelCove who wish to be able to assign their existing space to another CLEC. This policy permits TelCove to have greater flexibility in terms of exiting collocation space than it would have absent SBC's offering. As a voluntary offering, the Commission is sympathetic to SBC's argument that it should not be burdened with the responsibility of pursuing a CLEC for recovery of disputed collocation payments once it has assigned its collocation space to another CLEC. While other contractual remedies may be available to SBC, as pointed out by TelCove, the ultimate remedy in a collocation dispute, to repossess that space from a defaulting CLEC, would no longer exist if the defaulting CLEC had previously exited the space. Thus, the Commission believes that SBC's proposed contract language for Issue 34 should be adopted by the parties.

The Commission recognizes that the resolution of this issue differs slightly from the Commission's decision in this Award for the escrow language that is the subject of other issues in this arbitration. The Commission, however, believes that this dispute is clearly distinguishable from the other escrow issues because of the voluntary and optional nature of this offering. TelCove can avoid the escrow provision by simply not availing itself of SBC's offering. In contrast, other escrow requirements are clearly not avoidable by TelCove. Therefore, with regard to this issue only, an escrow will be required to the extent that a billing dispute relates in any way to equipment located in the collocation space being assigned. Such escrow will be required regardless of the creditworthiness of the CLEC and with no minimum amount in dispute.

B. Deposit (Adequate Assurance of Payment)

Issue 16(1): Should SBC be allowed to require Adequate Assurance of Payment?

ICA Ref. – GTC §§ 7.0 – 7.10

Issue 16(2): If SBC is allowed to require Adequate Assurance of Payment, what form and amount is appropriate?

Issue 6(3): Can SBC require the CLEC to tender additional assurances of payment?

ICA Ref. – GTC § 4.9.3.1

Issue 7(4): Can SBC condition the assignment on the requirement that the (acquiring) CLEC tender additional assurances of payment?

ICA Ref. – GTC, § 4.9.4.1

<u>TelCove Position</u>

TelCove asserts that deposits, or, as they are called in the ICA, assurances of payment, are unnecessary and inappropriate. (TelCove Ex. 1, at 99; TelCove Initial Br. at 35.) TelCove witness Lafferty testified that deposits, along with escrow requirements, impose economic harm on competitive providers such as TelCove, as they tie up free cash flow. (TelCove Ex. 1, at 100; TelCove Reply Br. at 15, 17.) TelCove states that no similar requirements exist in the ICAs that it has with other ILECs. (TelCove Reply Br. at 15.) While SBC claims that it is financially harmed by defaults by other CLECs, TelCove notes that SBC has not proved the level of such harm in the state of Ohio. (TelCove Reply Br. at 16.) Thus, TelCove argues, there should be no deposit requirement, especially in light of the other remedies available to SBC under the ICA. (TelCove Initial Br. at 36.)

TelCove also addresses both the triggering events for requiring deposits and the amount of those deposits, in case the Commission decides to require that deposit provisions be included in the ICA. With regard to SBC's proposed triggers, TelCove contends that allowing avoidance of deposit requirements based on the establishment of satisfactory credit allows SBC too much discretion. (TelCove Initial Br. at 35; TelCove Reply Br. at 18-19.) TelCove maintains that 12 months of timely payments, both disputed and undisputed, is unrealistic and too long, in light of SBC's history of billing errors. (TelCove Initial Br. at 35.) Finally, TelCove disagrees with using the failure to make timely payment of a single undisputed bill as a trigger for deposits. Rather, TelCove proposes requiring a deposit only if TelCove has not had 12 consecutive months without two consecutive failures to make timely payment of undisputed bills, allowing for appropriate time to cure. (Tr. II, 20-21; TelCove Ex. 1, at 100; TelCove Initial Br. at 37.) With regard to the amount of the deposit, TelCove submits that one month's anticipated billing is sufficient. (TelCove Ex. 1, at 101; TelCove Initial Br. at 37.)

<u>SBC Position</u>

SBC claims that it is reasonable to require a deposit from CLECs because, under ICAs, they receive products and services from SBC well in advance of payment, while SBC has no right to refuse to serve them. (SBC Initial Br. at 14-15; SBC Reply Br. at 9-10.) Therefore, just as in other cases where businesses purchase goods or services on credit, SBC wishes to have the right to require deposits unless the CLEC in question is a sound credit risk at the time SBC issues the credit. (SBC Initial Br. at 15; SBC Reply Br. at 10.) According to SBC, the existence of other remedies under the ICA does not obviate the need for a deposit since, by the time SBC could perfect its claims under those provisions, a CLEC might then be unable to pay. SBC notes that, if TelCove's payment history is positive, then TelCove may not have to provide a deposit. Thus, its payment history is not relevant to the inclusion of this language in the ICA. (SBC Initial Br. at 17.)

With regard to SBC's proposed triggers for the deposit requirements, SBC contends that a year's worth of timely payments is a reasonable way to establish a good credit history. (SBC Initial Br. at 18.) The second disputed trigger, according to SBC, is the failure by the CLEC to pay, on a timely basis, a single, undisputed portion of a bill. SBC notes that, while it might not require a deposit following one late payment, SBC needs to have that option in case "a CLEC that in other ways gives SBC Ohio reason for insecurity." (SBC Initial Br. at 18.)

SBC contends that its proposal for a deposit equal to three months' anticipated charges is reasonable in light of other provisions of the ICA. SBC specifically points to the fact that a CLEC could incur 90 days' worth of unpaid bills before SBC could discontinue providing services to the CLEC. (SBC Initial Br. at 19.) Therefore, it reasons that the anticipated charge for three months is a reasonable deposit.

Arbitration Award

The Commission agrees with SBC that it is appropriate to require a CLEC to provide a deposit, under certain circumstances. Such a requirement has previously been approved by this Commission.[56] However, the Commission will require changes to SBC's proposed language in two areas.

First, the triggers in GTC Section 7.2 that would allow SBC to request a deposit shall be amended to be identical to the triggers discussed above with respect to the requirement for escrowing funds to cover disputed bills. If a CLEC is sufficiently creditworthy to avoid the escrow requirement, then that CLEC should also avoid the deposit requirement.

Second, the amount to be deposited should not exceed two times the anticipated monthly charges under the ICA. The deposit calculation should also include an allowance for anticipated billing disputes resolved in favor of TelCove. While this level of deposit may not completely insulate SBC from any risk of nonpayment, it is a reasonable compromise that will allow TelCove to continue to have the ability to compete in the marketplace.

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56 *See, In the Matter of the Petition of MCImetro Access Transmission Services, LLC Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio*, Case No. 01-1319-TP-ARB.

STRUCTURE ACCESS POLICIES AND CHARGES

A. Penalties

Issue 61(1): Should a penalty be assigned for unauthorized entry into SBC's conduit system?

ICA Ref. – Structure Access (SA) Appendix § 22.1

Issue 61(2): If so, should the penalty amount be $500 or $250?

Issue 64(1): Can SBC charge a penalty for unauthorized pole attachments and conduit occupancy?

ICA Ref. – SA Appendix § 27.6

Issue 64(2a): If so, should the penalty for unauthorized pole attachment be $500 or $25 per pole?

Issue 64(2b): If so, should the penalty for unauthorized conduit occupancy be $25 per foot or a flat penalty of $250?

Issue 64(3): If allowed, should such penalties apply prospectively only?

TelCove Position

TelCove believes that Ohio state law does not permit the assessment of a penalty in contracts. (TelCove Reply Br. at 47.) However, TelCove asserts, to the extent the Commission finds it has the authority to adopt penalty language in the ICA, such language should ensure that penalties apply on a prospective basis only and are reasonable. (*Id.*) TelCove argues that SBC inappropriately proposes to impose on TelCove an open-ended liability covering both future and historical time periods. (TelCove Initial Br. at 88.) According to TelCove, it is not aware of any existing violations, and it notes that neither TelCove nor SBC has conducted an audit to determine whether any violations exist. (*Id.*) Therefore, neither company knows the level of potential retroactive exposure to TelCove. (*Id.*) TelCove points out that, since SBC did not address this issue in its initial brief, TelCove assumes that SBC has conceded that retroactive application of penalties would be burdensome and inappropriate, and, therefore, should not be allowed. (TelCove Reply Br. at 48.) TelCove does, however, recognize SBC's legitimate interest in ensuring that all entries into SBC's conduit systems are authorized. (TelCove Initial Br. at 88.) TelCove explains that it is willing to seek the required occupancy permits immediately, in the event that SBC discovers any unauthorized entry from prior periods. (*Id.* at 89.)

With respect to Issue 61, TelCove objects to SBC's proposed $500 penalty for each unauthorized entry to SBC's conduit system. (TelCove Initial Br. at 89.) TelCove explains that this penalty, particularly when coupled with SBC's proposed penalty of $50.00 for each foot of unauthorized conduit use (Issue 64), is clearly excessive and potentially duplicative. (*Id.*) TelCove argues that the Commission must consider the total implications of a large per-conduit penalty amount or a per-foot penalty amount. (*Id.*) TelCove believes that, since facilities in conduits can cover large distances, the potential implications of SBC's proposed $50.00-per-foot penalty for unauthorized facilities in conduits could be a catastrophic financial burden to TelCove. (*Id.*) TelCove has, instead, proposed a penalty of $250 for each unauthorized conduit system entry on a prospective basis. (*Id.*)

Concerning Issue 64, TelCove believes that it should be liable for a reasonable penalty for unauthorized attachments or conduit occupancy on a prospective basis only, concurrent with the term of the ICA. (TelCove Initial Br. at 92.) TelCove argues that SBC's proposed $500 penalty per unauthorized pole attachment and $50 penalty per unauthorized conduit foot is unreasonable and constitutes a barrier to using SBC's conduits and poles. (TelCove Initial Br. at 93.) TelCove claims that, not only are the amount of these penalties set too high, but the penalties are potentially duplicative with respect to conduit occupancy, as they are based on both the occurrence of a violation and the length, in feet of unauthorized conduit access. (*Id.*)

TelCove has proposed that the Commission set the penalty at $25.00 per-pole for unauthorized attachment and $250.00 per-conduit system for unauthorized facilities placed in the conduit system. (*Id.*) In addition, TelCove states that no penalty for unauthorized access has been assessed under Section 22.1, SA Appendix, of the ICA. (*Id.*) TelCove argues that SBC witness Atwal inexplicably attempts to interpret TelCove's proposed language as somehow indicating a change in TelCove's position regarding retroactive application where none exists. (*Id.*) According to TelCove, its proposed language does not expressly prohibit retroactive application. (Id.) However, TelCove believes that it need not do so. (*Id.*) TelCove asserts, as SBC witness Atwal conceded, the ICA is being created to establish and govern the relationship of the parties on a prospective basis only. (*Id.*) Further, TelCove's position has consistently been that if any penalties are determined to be appropriate, they should be applied on a forward-looking basis only. (*Id.*)

<u>SBC Position</u>

SBC argues that TelCove's position is unclear. (SBC Reply Br. at 44.) SBC claims the parties agree that penalties provide an appropriate incentive against unauthorized access to SBC's conduit. (SBC Initial Br. at 88.) SBC points out that TelCove may have done an about-face by asserting that the ICA, as a matter of law, cannot contain penalty language. (SBC Reply Br. at 44.) SBC argues that TelCove repeatedly agreed that it should be subject to reasonable penalties for unauthorized entry into SBC's conduit. (SBC Initial Br. at 88-89.) SBC believes the only question legitimately before this Commission is the dispute presented by Issue 61(2) as to what penalty amount is reasonable. (SBC Initial Br. at 89.) SBC notes that, in TelCove's Initial Brief, TelCove objects to the purported retroactive application of SBC's proposed penalty. (SBC Reply Br. at 44.) SBC submits that the Commission need not address this point. SBC asserts that it does not propose to penalize TelCove for an unauthorized entry that occurred before the effective date of the parties' new ICA. (*Id.*)

As to Issue 61, SBC has proposed a penalty of $500 per unauthorized conduit entry; TelCove has proposed $250. (SBC Initial Br. at 89.) SBC points out that TelCove argues that SBC's proposed penalty for unauthorized conduit access (Issue 61) is duplicative of SBC's proposed penalty for "unauthorized conduit attachments" (Issue 64 - unauthorized conduit occupancy) and proposes that the fine for unauthorized conduit (access) be waived if an unauthorized entry penalty was imposed. (SBC Initial Br. at 93.) SBC believes the Commission should adopt SBC's proposal that, in the case where TelCove has made an unauthorized entry and "installed unauthorized [facilities in SBC's] conduit," TelCove pay the higher of the two penalties, but not both. (*Id.*) According to SBC, this way the amount of the penalty depends on the gravity of the offense. (*Id.* at 93-94.) SBC argues that the Commission should adopt SBC's proposal because it is in line with the penalty amounts for structure access violations in other states, and it appropriately recognizes the serious risk to SBC's and other carriers' networks if conduit access is not monitored. (*Id.* at 93.)

SBC argues that for TelCove to attach to SBC's structure without a permit is unfair both to SBC, because attachments and occupancies without a permit deprive SBC of its property and associated fees, and to other CLECs and attaching parties, because it deprives them of space when they may have appropriately applied for a permit, but the space was unlawfully taken by TelCove. (SBC Initial Br. at 92.) SBC submits that the parties agree there should be a penalty for unauthorized pole attachments and conduit occupancy, and believes there is no dispute as to Issue 64(1). (*Id.*)

With respect to Issue 64(2), SBC proposes that TelCove pay $500 for each unauthorized pole attachment and $50 for each foot of cable installed in SBC's conduit system without proper authorization. (SBC Initial Br. at 93.) SBC points out that TelCove has proposed $250 per unauthorized pole attachment and $250 for cable installed in a conduit (without regard to length). SBC claims that its proposed amounts are reasonable in light of the deterrent effect both parties agree they are trying to achieve. SBC also argues that its proposal is consistent with its ICAs in other states. In addition, SBC's proposed penalty "for unauthorized conduit [access] appropriately bases the penalty on the number of feet of conduit [used without authorization], while TelCove's does not." SBC believes that basing the penalty on a per-foot calculation recognizes that conduit lengths vary considerably and that a larger penalty is more appropriate for more significant violations. (*Id.*) SBC asserts the Commission should adopt SBC's proposal that, "in the case where TelCove has made an unauthorized entry and installed unauthorized [facilities in SBC's] conduit, TelCove pay the higher of the two penalties, but not both." (*Id.* at 93.) SBC claims this way the amount of the penalty depends on the gravity of the offense. (*Id.* at 93-94.)

SBC notes that, at the hearing, TelCove indicated that it would explain the absence of TelCove's proposed language addressing whether penalties would apply retroactively. (SBC Reply Br. at 47.) SBC points out that, in its brief, TelCove suggests that no language is required, presumably because the penalty provision for unauthorized attachment can be read to implicitly exclude retroactive application. SBC believes that TelCove is wrong. SBC argues that, if

TelCove has an unauthorized attachment in place today, and it remains in place after the ICA that the parties are now arbitrating goes into effect, that attachment is in violation of Section 27.6 of the Structure Appendix as of the effective date of the agreement. *(Id.)*

Arbitration Award

The Commission notes that the record adequately supports that neither party opposes the unauthorized entry or attachment penalties. Therefore, consistent with previous Commission approval in Case No. 97-1658-TP-ATA,[57] the Commission agrees and finds that it is reasonable, as implied by both parties on the record, that in the event when unauthorized entry or attachment happens to an SBC structure a penalty will apply. After coming to the conclusion that a penalty will apply, the only question that remains before this Commission is the dispute regarding what penalty amount is reasonable. After considering all the arguments raised and the costs and expenses attributable to unauthorized entry and attachment to an SBC structure, the Commission finds that, consistent with its policy in Case No. 97-1658-TP-ATA, and to deter unauthorized entry and attachment, TelCove should pay SBC in the amount of $500 for each unauthorized pole attachment, as well as $500 per unauthorized conduit entry or $50 per foot for unauthorized conduit occupancy. With regard to TelCove's concerns about duplicative charges for unauthorized conduit entry and installation, the Commission finds that it is appropriate that, in the case where TelCove has made an unauthorized entry and installed unauthorized facilities in SBC's conduit, TelCove should pay the higher of the two penalties, but not both. Also, with respect to Issue 64(3), the record reflects that both parties agree that this agreement is being arbitrated to determine the relationship of the parties on a prospective basis and not a retrospective basis. (Tr. II, 230.) Thus, the Commission agrees that penalties will apply on a prospective basis, as of the effective date of this agreement. Accordingly, we adopt SBC's proposed language for SA Appendix Sections 22.1 and 27.6, as discussed above.

Issue 65: If penalties are paid for unauthorized attachment or occupancy, should TelCove remain responsible for potential liability for trespass and other illegal or wrongful conduct?

ICA Ref. – Structure Access (SA) Appendix § 27.8

TelCove Position

TelCove contends that SBC, through the language it proposes in SA Appendix, Section 27.8, seeks to "double dip," because it is seeking specific damages for specific acts of unauthorized attachment or occupancy, in addition

[57] *See, In the Matter of the Application of SBC Ohio (formerly Ameritech Ohio) to Propose Changes to its Pole Attachment and Occupancy Accommodation Tariff, as well as to Introduce the Structure Access Guidelines as an Addendum to the Tariff,* Case No. 97-1658-TP-ATA (May 8, 2003).

to the penalties already paid for such unauthorized attachment or occupancy. (TelCove Ex. 1, at 108-09; TelCove Initial Br. at 94.) TelCove asserts that, if TelCove is already willing to pay compensation to other attaching entities and to pay "reasonable penalties to SBC for unauthorized pole attachments and conduit entry," then any additional liability to SBC is unnecessary, as part of this ICA, to deter unauthorized attachments or to compensate SBC for any harm that may have resulted from TelCove's inadvertent use of these SBC facilities. TelCove opines that it would be an acceptable alternative, to TelCove, for SBC to retain the right to pursue trespass and other civil liabilities in SA Appendix, Section 27.8, as long as the penalty provisions in SA Appendix, Sections 22.1 (Issue 61) and 27.6 (Issue 64) were eliminated. (TelCove Ex. 1, 108-09; TelCove Initial Br. at 94.) TelCove supports the above alternative by asserting that "state law does not permit the assessment of a penalty in contracts." (TelCove Reply Br. at 51.)

<u>SBC Position</u>

SBC contends that TelCove seeks to "immunize itself" from compensating SBC for damage TelCove causes by its unauthorized attachments to or occupancy of SBC's structure, so long as TelCove pays a penalty to SBC. (SBC Initial Br. at 95.) SBC opines that TelCove's position, of paying penalties *or* damages, does not distinguish between SBC's two concerns, and is "mixing apples with oranges." SBC asserts that TelCove witness Lafferty acknowledged that TelCove should "make SBC whole for any damages that it causes to SBC's property." (*Id.*; Tr. I, 182.) SBC contends that its language is necessary to ensure this (payment for damages) occurs. (SBC Initial Br. at 95.)

<u>Arbitration Award</u>

After considering all of the arguments raised, the Commission agrees with TelCove that the additional liability language is unnecessary for SA Appendix, Section 27.8, but not for the reasons TelCove asserted. The Commission addressed what it believes are the appropriate penalties for unauthorized access under Issues 61 and 64, above. Here, the Commission recognizes that damage to SBC's equipment could occur under either unauthorized access, or authorized access. The Commission finds that SBC's concern regarding payment for damage to its equipment is already addressed by the agreed-to language in SA Appendix, Section 9.3, titled "Damage to Facilities," and in GTC, Section 14.6, which also addresses damage to SBC facilities. Accordingly, the Commission finds that SBC's proposed contract language for SA Appendix, Section 27.8 should not be adopted in this agreement.

B. Costs and Requirements for Inspections by SBC

Issue 58: Which party should bear the costs associated with having an SBC employee present when TelCove performs work within the SBC conduit system?

ICA Ref. – Structure Access (SA) Appendix § 16.3.2

__TelCove Position__

According to TelCove, SBC has proposed that an SBC employee be present at TelCove's expense whenever TelCove or its representatives perform work in SBC's conduit system. (TelCove Initial Br. at 86.) TelCove points out that both parties agree that SBC may, at its election, have an employee present any time TelCove performs work within the conduit system. (TelCove Reply Br. at 45.) However, while TelCove has no objection to allowing SBC to oversee its own property at any time, TelCove does not believe it should bear the financial burden of SBC voluntarily choosing to monitor TelCove's personnel. (TelCove Initial Br. at 86.) TelCove witness Lafferty testified that, as a certified telecommunications provider in the state with a long history, TelCove prides itself on having well-trained, qualified technicians. TelCove argues that SBC has presented no evidence to dispute this fact. TelCove claims it has even agreed to go as far as to permit SBC to review its training programs for its technicians and representatives to ensure that the personnel are qualified for work in conduit system and that TelCove's standards are comparable with SBC's standards. Furthermore, TelCove notes that, absent any showing that it is necessary for SBC to have an employee present when TelCove is working in the conduit system, it is simply inappropriate to impose upon TelCove the cost of an SBC employee's presence. (*Id.*)

__SBC Position__

SBC states that the parties agree SBC can have a representative present while TelCove (or its contractor) performs work in SBC's conduit system. (SBC Initial Br. at 83.) SBC asserts that the dispute is about who should bear the costs to have SBC's representative present while TelCove (or its contractor) is in SBC's conduit system. SBC believes that TelCove recognizes there are incremental costs associated with SBC having a person present to review TelCove work. (*Id.*) According to SBC, although it must grant access to its structure, SBC continues to be responsible for the maintenance of its entire network, including its structure. (SBC Initial Br. at 84.) Further, the conduit system that SBC maintains is, of course, not limited to SBC's structure and facilities alone; it includes facilities owned by CLECs, utility companies, cable companies and others. SBC argues that when a party enters the conduit system, that party jeopardizes the facilities of SBC and all these other entities if it does not adhere to safety and maintenance procedures. Therefore, because of the critical security, service reliability, and network integrity concerns associated with conduit access, SBC needs to have a representative present to verify that all work is performed correctly by TelCove and that no damage is done to any other entity's facilities. SBC claims this is the same process that SBC follows when contractors perform work for SBC itself. (*Id.* at 84.)

__Arbitration Award__

The Commission agrees that an SBC representative has the right to be present when TelCove or its representatives perform work in SBC's conduit system. In order to resolve the issue of who would pay for the cost to have an

SBC representative present when TelCove performs the work in SBC's conduit, we refer to the Commission's previous approval in Case No. 97-1658-TP-ATA.[58] The Commission finds that the costs of inspections made during construction shall be paid by the attaching party. The Commission agrees with SBC that TelCove shall bear the costs associated with having SBC's representative present during construction. Accordingly, SBC's proposed language for Section 16.3.2, SA Appendix, should be adopted for the final ICA.

Issue 59: What SBC charges should apply for access to maps, records and additional information?

ICA Ref. – Structure Access § 17.1

<u>TelCove Position</u>

TelCove first asserts that "SBC should not be allowed to charge TelCove for access to necessary maps, records, and additional information, required to plan TelCove's access to necessary structure." TelCove also asserts that SBC should charge "only to the extent such charges are cost-based and approved by the Commission." (TelCove Initial Br. at 87.) TelCove contends that often SBC is the only source of the information contained in such maps, records, or other documents. (*Id.*) TelCove maintains that it is willing to compensate SBC for legitimate, reasonable, measurable incremental cost associated with providing access to various maps, records, and documents, as suggested by the FCC in its Order on Reconsideration in Docket 96-98.[59] (TelCove Reply Br. at 46.) However, such expenses must be actually incurred and should be based on SBC's use of an efficient electronic system for management of SBC's maps, records, and outside plant information. (*Id.*) TelCove argues that, despite repeated requests for SBC to quantify the costs SBC claims it will incur, SBC has still failed to do so. (*Id.* at 47.)

<u>SBC Position</u>

SBC argues that, as initially framed, Issue 59 addressed whether TelCove would reimburse SBC for the costs SBC incurs, if any, to provide TelCove access to SBC's maps, records and additional information related to structure. (SBC Initial Br. at 85.) SBC claims that the original DPL and testimony focused, therefore, on two questions: whether SBC incurs costs to provide access and, if so, whether TelCove should compensate SBC for those costs. SBC contends that, in its new contract language set forth in the final May 6, 2005 DPL, TelCove concedes that SBC incurs costs to provide access to its structure maps, records and other information, and agrees to compensate SBC for those costs. (*Id.* at 85-86.) SBC asserts that TelCove has now changed its position and proposes that

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58 *See* Note 57 for full case reference.

59 *See, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, et al., FCC 99-266 (Oct. 26, 1999 Order on Reconsideration).

the cost recovery for access to maps, records and other information be "at cost based rates approved by the Commission." (*Id.* at 86.) SBC notes that while that language may sound innocuous, it is too vague for the Commission to adopt. SBC believes that to the extent TelCove is proposing that the Commission, in some unidentified proceeding, adopt standardized rates for access to maps and records, the Commission should reject that proposal. Further, SBC claims there are a host of factors that affect the amount of work SBC must undertake (and the costs it therefore incurs) to provide access to its maps and records and, therefore, cost-recovery should be based on the costs SBC actually incurs, on a time and material basis. (*Id.* at 86.)

Arbitration Award

The Commission agrees that SBC should provide TelCove with access to and copies of maps, records and additional information. Consistent with the Commission's previous approval in Case No. 97-1658-TP-ATA, the Commission finds that maps, records and additional information are also referred to as "information access." We note that information access requires the attaching party to pay all charges associated with the request for information. Therefore, the Commission finds that TelCove should reimburse SBC for the costs SBC incurs to provide TelCove access to maps, records and additional information related to structure access. Because the costs will be different based on the amount of work SBC undertakes, we are not specifying a rate for information access in this Arbitration Award. However, if the parties cannot come to a decision on a reasonable rate, the parties should bring the dispute to the Commission for resolution. Accordingly, TelCove's proposed language for Section 17.1, SA Appendix, should not be adopted in this agreement.

Issue 62(1): Should Attaching Party pay for SBC to conduct a post construction inspection?

ICA Ref. – Structure Access (SA) Appendix § 26.1

Issue 62(2): If so, which party's language governing whether the charge should apply where an Attaching Party paid for an SBC representative to be present during installation should be adopted?

TelCove Position

TelCove claims it does not object to allowing SBC to conduct a post-construction inspection; however, TelCove does not believe such an inspection is necessary. (TelCove Initial Br. at 90.) TelCove believes if SBC opts to conduct such an inspection, SBC should bear the cost of doing so. (*Id.*) TelCove argues that, as a certified telecommunications provider with a long history in the state, TelCove prides itself on having well-trained, qualified technicians and SBC has presented no evidence to dispute this fact. (*Id.*) According to TelCove, its interest in protecting the integrity of the network is as strong as SBC's, as neither company can afford to lose customers based on low quality service. (*Id.*) TelCove has also offered to permit SBC to review its training programs to ensure that TelCove's technicians are trained to follow standards comparable to SBC's. (*Id.* at 90-91.) TelCove believes that the issue is whether a charge should apply for SBC to conduct a post-construction inspection if TelCove has already paid for an SBC representative to be present during installation. (*Id.* at 91.) TelCove's position is that the Commission should not allow SBC to "double dip." (*Id.*) TelCove maintains that charging TelCove for costs associated with oversight of its work and also a post-construction inspection fee is duplicative and unnecessarily drains TelCove's competitive resources. (*Id.*) TelCove contends that, given SBC's complete failure to demonstrate the necessity of conducting post-construction inspections, there is no justification for imposing upon TelCove the cost of any such inspection SBC elects to conduct. (TelCove Reply Br. at 49.)

<u>SBC Position</u>

SBC claims the parties agree that SBC will be permitted to conduct an inspection after construction work is done for TelCove on SBC's structure. (SBC Initial Br. at 90.) SBC argues that it is SBC's practice to inspect the work of all contractors performing work on SBC's structure, including work done on SBC's behalf. (*Id.* at 91.) SBC points out the parties disagree, however, about who should pay for an inspection after construction work done for TelCove. SBC explains that TelCove, as the cost causer, should bear the cost of such post-construction inspections. SBC asserts that, when SBC is on site during the entirety of the work that is being performed by TelCove's contractors, and SBC is able to inspect all of the work as it is performed then SBC will not charge for a post-construction inspection, as its proposed language indicates. According to SBC, if the SBC representative is not present for the entire time or, due to the nature of the job (e.g., laying fiber in multiple locations), is not able to properly inspect all of the work while it is being performed, then a post-construction inspection will be necessary. (*Id.*)

<u>Arbitration Award</u>

The Commission agrees with the parties that SBC should be permitted to conduct an inspection after construction work is done by TelCove on SBC's structure. The question that remains for the Commission to resolve is which party is responsible for paying for the inspection after the construction work is completed. Consistent with the Commission's approval in Case No. 97-1658-TP-ATA, the Commission finds that SBC has the right to make post-construction and periodic inspections of TelCove's facilities attached to or in SBC's structure, and that the cost of the post construction inspection should be paid by TelCove. Further, with regard to TelCove's concerns about "double dipping," we agree that, if SBC is on site during the entirety of the work as it is performed, SBC shall not charge for a separate post-construction inspection. We find that SBC's proposed language for Section 26.1, SA Appendix, includes the statement that "[s]hould an SBC representative be on site during the entirety of TelCove's installation and is able to review all work performed, then SBC will not charge TelCove for a separate post-construction inspection." (Joint Ex. 1, Part 1, at 53.)

Accordingly, the Commission finds that SBC's proposed language for Section 26.1, SA Appendix, should be adopted in the final ICA.

C. Forced Removal of Facilities

Issue 57 (TelCove):

Issue 57(1): Can SBC force the removal of CLEC facilities if CLEC continues to pay for the facilities but has temporarily ceased to make active use of the poles, ducts, conduits and rights of way?

Issue 57(2): If removal, despite the exercise of due diligence by the CLEC, takes longer than 60 days and the CLEC is willing to continue paying its pole attachment fees, should SBC have the right to insist on 60 days for removal?

Issue 57 (SBC):

Issue 57(1): Is SBC obligated to allow CLEC to continue to maintain *occupancy permits for structures when* CLEC has ceased to provide telecommunications service in the state or has ceased to make active use of the structure?

Issue 57(2): If TelCove is terminating an occupancy permit, should TelCove manage its termination request such that it will have removed its facilities within 60 days from its notice to SBC to terminate its occupancy permit?

Both parties: ICA Ref. – Structure Access (SA) Appendix §§ 12.1; 28.3

<u>TelCove Position</u>

TelCove submits the parties agree that there are certain circumstances under which SBC should have the ability to remove TelCove's facilities from SBC's structures and terminate the occupancy permits. (TelCove Initial Br. at 82.) However, TelCove argues that SBC seeks, pursuant to Section 12.1, unilateral authority to force TelCove to remove its facilities, which may currently be in use, from SBC's structures and terminate the occupancy arrangement even if TelCove is continuing to pay SBC for access to the facilities. (*Id.*) TelCove believes SBC's position is that non-use, even for a temporary period of time, is adequate grounds for termination. (*Id.*) According to TelCove, so long as TelCove is properly authorized and current in its payments, SBC suffers no harm and should not be granted unilateral authority to remove TelCove's facilities, unless SBC or another carrier has a demonstrated need for the space in its structures and TelCove is not using the facilities to serve customers. (TelCove Initial Br. at 83.)

TelCove explains that it clearly has no incentive to continue to pay SBC for facilities for which it has no near-term use. (*Id.*) However, TelCove notes that there are many circumstances in which TelCove might temporarily cease to use certain facilities it is leasing from SBC, or even cease, temporarily, to do business in the state at all. (*Id.*) For example, should a large TelCove customer change providers, such facilities might become temporarily idle. (*Id.*) In such instance, TelCove might be in the process of establishing new customer accounts in the same area, using the same facilities or other facilities within the same structure. (*Id.*) In these cases, as TelCove witness Lafferty testified, it would make no sense for SBC to be allowed to terminate the structure access arrangement. (*Id.*)

As to Issue 57(2), TelCove claims that, in general, the parties agree that 60 days' notice should provide adequate time for TelCove to remove its facilities from an SBC structure. (TelCove Initial Br. at 84.) However, TelCove asserts that specific end-user customer needs might warrant an extension to avoid service disruptions or other customer impact. (*Id.*) TelCove argues that it merely seeks a safety valve to ensure that there is a process for extending this window. (*Id.*) TelCove notes that while the extension need not be automatic, it should allow TelCove additional time as long as TelCove is working actively to remove its facilities. (*Id.*) In addition, TelCove would continue to pay SBC throughout such an extension, until it had removed all facilities. (*Id.*)

<u>SBC Position</u>

SBC submits that the parties have agreed to language in Section 12.1 of the SA Appendix that requires TelCove to remove its facilities from SBC's structure if TelCove ceases to have authority to provide telecommunications services in Ohio. (SBC Initial Br. at 79.) According to SBC, the parties disagree about whether TelCove will be required to remove its facilities if (a) it ceases to provide telecommunications services in the state (even though it retains authority to do so); or (b) it ceases to make active use of SBC's structure. (*Id.*)

With respect to the first scenario – where TelCove is no longer providing telecommunication services in the state – TelCove has not even attempted to justify why it should be allowed to continue to attach its facilities to SBC's structure. As SBC witness Atwal explained, and TelCove acknowledged, structure is a finite resource. (*Id.*) SBC argues that often new poles must be installed or new conduit must be dug in order to expand capacity for new attachers, and there are significant costs associated with that work. (SBC Initial Br. at 79.) SBC also notes that there is no legal justification for permitting TelCove to continue to attach its facilities to SBC's structure when TelCove is no longer providing telecommunications services. SBC maintains that if TelCove is not providing service anywhere in the state, it cannot be said to be a "provider" of telecommunications services, even if it is still certificated. (*Id.* at 80.)

SBC claims the second scenario – where TelCove is no longer actively using its facilities that are attached to SBC's structure – is an even easier dispute to resolve. SBC points out that TelCove has already agreed in Section 28.2 of the SA Appendix to remove, at SBC's request, any facilities that are no longer in active use. SBC notes that the language SBC proposes for Section 12.1 simply mirrors that language. According to SBC, TelCove's language attempts to condition the obligation to remove inactive facilities upon SBC demonstrating that SBC or another carrier has a specific need for the structure TelCove is occupying. Further, SBC points out at no point has TelCove explained why Section 12.1 should be different than Section 28.2. (*Id.* at 80.)

SBC proposes to give TelCove 60 days from the date that the occupancy permit is terminated to remove its facilities from SBC's structure. SBC points out that TelCove has agreed to 60 days, but wants the option to obtain an extension of up to 60 days. SBC believes that TelCove's proposed language is unnecessary and vague. (*Id.* at 81.) SBC notes that TelCove suggests that its language is a necessary "safety valve." (SBC Reply Br. at 39.) SBC disagrees, and asserts that 60 days is an adequate time period, particularly in light of the fact that TelCove typically has control over when it terminates its occupancy permits. (*Id.*)

<u>Arbitration Award</u>

In regard to Issue 57(1), which addresses SA Appendix Section 12.1 regarding termination of agreement or occupancy permits, we find that, consistent with previous Commission approval in Case No. 97-1658-TP-ATA, if TelCove ceases to use its attachment to provide telecommunication services for any period of one year, TelCove's occupancy permit shall terminate. Further, the Commission notes that SBC witness Atwal testified that SBC would not have any way of knowing when TelCove facilities are idle. (Tr. II, 233.) The Commission agrees with TelCove's proposed language that TelCove will still be responsible for paying SBC for the use of its facilities during this period of time. Therefore, the Commission directs the parties to adopt TelCove's proposed language for Section 12.1, SA Appendix, in this matter. Finally, with respect to Issue 57(2), and consistent with previous Commission approval in Case No. 97-1658-TP-ATA, the Commission finds that TelCove should remove its facilities within 60 days from the date the occupancy permit is terminated. Accordingly, SBC's proposed language for Section 28.3, SA Appendix, should be adopted in the final ICA.

<u>NAME CHANGE AND CHANGE OF CONTROL</u>

Issue 5(1): Is it appropriate to charge for record order charges, or other fees for each CLEC CABS BAN where the CLEC name is changing if there is no OCN/ACNA change?

ICA Ref. – GTC § 4.9.2.1

<u>TelCove Position</u>

TelCove contends that it is not appropriate for SBC to bill TelCove for record order charges or other significant fees for each CLEC Carrier Access Billing System (CABS) Billing Account Number (BAN) where the CLEC name is changing but there is no change to the Operating Company Number (OCN) or Access Carrier Name Abbreviation (ACNA). (TelCove Initial Br. at 20.) The OCN is a four-digit number used to identify local telecommunications providers. (TelCove Ex. 1, at 117.) The ACNA is a three-letter code that exchange carriers use to identify themselves when interfacing with other exchange carriers. (*Id.*) The parties agree that it is appropriate for TelCove to compensate SBC for record order charges associated with name changes where the name change actually requires TelCove to change its OCN or ACNA. (TelCove Initial Br. at 21.) In such instances, TelCove believes the charge should be reasonable and only cost-based so as not to hinder TelCove from making the business decisions most appropriate to its operations. (*Id.*)

The parties are also in agreement that, in those instances where a name change requires a change in the OCN or ACNA, TelCove should be required to submit an Operator Service Questionnaire (OSQ) to SBC in order to update its Operator Services and Directory Assistance records. (SBC Ex. 8, at 5.) TelCove states that there should be no charge for submission of the OSQ itself, but only cost-based charges to implement the change. (TelCove Initial Br. at 21.)

The parties are in disagreement about whether a record order charge should apply when there is a name change that does not necessitate a change to the OCN or ACNA. TelCove's position is that a simple name change - one that does not involve an assignment or a transfer of control - does not require a change to the CLEC's OCN or ACNA, and, therefore, should not require TelCove to incur record order charges. (TelCove Ex. 1, at 117.) TelCove asserts that these charges interfere with TelCove's business by limiting the economic assignment or transfer of the ICA or the mere changing of the company's name in the normal course of business, and are therefore anticompetitive. (TelCove Initial Br. at 22.) Because the so-called costs associated with record changes appear to be exorbitant, TelCove has held the line in its refusal to consider paying such "costs" particularly where a name change does not involve an OCN or ACNA change. (TelCove Ex. 1, at 118; TelCove Reply Br. at 8.)

TelCove maintains that, throughout this proceeding, its position has been consistent and reasonable while SBC has made efforts to cloud the issue of record order charges. (*Id.*) TelCove affirms that they agree to pay reasonable, cost-based record order charges for name changes involving OCN or ACNA changes, but for name changes where the OCN or ACNA are unchanged as a result of a name change, the costs and other implications to SBC will be minimal, if not de minimis. (TelCove Ex. 1, at 118.) SBC concedes that the costs for a name change that does not implicate a change in OCN or ACNA are minimal, and insists that it will only charge TelCove a minimal amount. (SBC Initial Br. at 7; TelCove Reply Br. at 8.) TelCove opines that significant record order charges are not "minimal" and therefore they should not be required to pay these charges. (TelCove Reply Br. at 7- 8.)

SBC Position

SBC states that the OCN and ACNA appear on each end user account or circuit, and are used throughout the industry to ensure accurate provisioning and billing. (SBC Initial Br. at 6.) SBC uses these codes in its directory databases, network databases and billing systems to identify, inventory, and appropriately bill and provision the services requested on each service order. SBC expresses that, if a CLEC changes its OCN and/or ACNA, every SBC database and downstream system that identifies the CLEC by its OCN and/or ACNA must be updated. (*Id.*)

According to SBC, to implement a change in TelCove's name or OCN/ACNA, SBC must, at TelCove's direction, update the accounts of each TelCove CABS BAN and each TelCove end user account in the SBC databases to reflect the correct name or OCN/ACNA. (*Id.* at 6-7.) SBC proposes that, if TelCove changes its name, TelCove should submit (1) an order to change the CLEC CABS BAN, and (2) an order for each end user record not billed out of CABS, along with an OSQ. (*Id.* at 7.)

SBC asserts that it is only reasonable for TelCove to compensate SBC for the costs it incurs when it performs that work because any transaction that entails such a change is a result of TelCove's business decision. Therefore, TelCove, and not SBC, should be accountable for any costs that result for that decision. SBC claims that TelCove agrees to pay reasonable, cost-based record order charges for name changes that include a change to an OCN or ACNA, but declares that it should not have to compensate SBC for any costs it incurs if TelCove changes its name but not its OCN or ACNA. According to SBC, TelCove believes that, if the OCN and/or ACNA are unchanged, the costs or other implications for SBC should be minimal. (*Id.* at 7.) SBC claims that TelCove has offered no explanation why it should not compensate SBC when TelCove is the party that causes the costs. (SBC Reply Br. at 4.)

SBC states that, the magnitudes of the costs does not justify imposing them on SBC. (SBC Initial Br. at 7.) SBC opines that they incur costs when a CLEC changes its name and TelCove must compensate SBC for those costs, even if they are small. (SBC Reply Br. at 4.) As determined by SBC, TelCove has six BANs in Ohio, and their name is associated with each one. (SBC Initial Br. at 8.) When TelCove changes its name, each BAN must be changed to reflect the new name. SBC asserts that a record order is the appropriate way to accomplish this task. Likewise, SBC's resale account system has a Consolidated Billing Account (CBA) which is associated with the CLEC name and requires a record order to modify the name on the account. (*Id.*)

In addition, SBC claims that TelCove's position fails because this Commission approved an order charge in Case No. 96-922-TP-UNC,[60] and that charge is included in SBC's pricing schedule. (SBC Reply Br. at 4.) SBC encourages the Commission to reject TelCove's position that SBC should not be permitted to pass along to TelCove the costs SBC incurs as a result of a TelCove name change, whether or not TelCove also changes its OCN or ACNA. (SBC Initial Br. at 8.)

60 *See, In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*, et al., Case No. 96-922-TP-UNC (Mar. 13, 2003 Opinion and Order, and June 10, 2003 Entry on Rehearing).

<u>Arbitration Award</u>

Regarding Issue 5(1), the Commission adopts SBC's language for GTC Section 4.9.2.1. When a CLEC makes a business decision to change its name, costs are incurred by the ILEC to accommodate such a change and the CLEC is responsible for compensating the ILEC for those costs. SBC witness Quate testified that, when a CLEC chooses to change its name but not the OCN or ACNA, SBC must update each BAN with the new name to reflect the CLEC that will be responsible for the account going forward. (SBC Ex. 8, at 8.) SBC uses a record order to update the database systems with the new name. (*Id.*) In accordance with SBC's testimony, we find that the record order is the appropriate tool to update each BAN. Additionally, the Commission finds that the record order charge is the proper non-recurring charge to be used when a carrier changes its name but not the OCN or ACNA. We note that we previously allowed a record order charge for SBC in Case No. 96-752-TP-ARB.[61] Accordingly, the Commission adopts SBC's proposed language for GTC Section 4.9.2.1, regarding this issue, for the final ICA.

Further, SBC asserted that the Commission approved a non-recurring order charge for record orders issued by SBC, in Case No. 96-922-TP-UNC. (SBC Initial Br. at 8.) We find that the order charge in Case No. 96-922-TP-UNC referred to a service order charge to be assessed to CLECs when electronically ordering new UNE loops from SBC, and not a record order charge as discussed above. Therefore, this case, as cited by SBC, is not applicable to this particular issue.

Issue 5(2): Is it appropriate for SBC to act within 5 days on a company name change request?
ICA Ref. – GTC § 4.9.3.2

<u>TelCove Position</u>

TelCove's language would require SBC to act within five business days on a company name change request. (TelCove Initial Br. at 22.) TelCove witness Lafferty testified that five business days is a commercially reasonable timeframe. (TelCove Ex. 1, at 118.) TelCove declares that SBC's proposed language is completely silent with respect to an implementation timeframe, and it appears that SBC seeks to leave the timeframe within which it must act on a company name change totally open and subject to SBC's sole discretion. (*Id.*) TelCove continues that nowhere on this record has SBC provided any alternate time frame. (TelCove Reply Br. at 8.) TelCove states that it is in the best interest of everyone to update the OCN and ACNA records as quickly as possible and,

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61 *See, In the Matter of the Application of AT&T Communications of Ohio, Inc.'s Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Ohio Bell Telephone Company dba Ameritech Ohio,* Case No. 96-752-TP-ARB (Jan. 16, 1997 Opinion and Order, Mar. 13, 1997 Entry on Rehearing, and May 8, 1997 Entry on Rehearing).

since SBC is so adamant against TelCove's proposed five-day period, SBC should at least provide this Commission with a viable alternative. (*Id.*)

SBC Position

SBC states that five days is too short a time period for changing TelCove's name for each end user record and circuit ID number. (SBC Initial Br. at 9.) SBC declares that TelCove does not explain why its proposal is commercially reasonable. SBC asserts that the time needed depends on the size and complexity of the assignment. (*Id.*) SBC claims that TelCove's contention that SBC proposes no timeframe is incorrect, because SBC is stating that it will complete the work within the notice period provided in the General Terms and Conditions, Section 4.9.3.1 (Issue 6[1]), which is 90 days. (SBC Reply Br. at 4.)

Arbitration Award

Regarding Issue 5(2), the Commission adopts SBC's language. Five days to act on a name change request is unreasonable, and TelCove has not made a valid argument regarding how or why five days is commercially reasonable. According to SBC witness Quate's testimony, SBC needs time to review the assignment and meet with TelCove to determine the necessary tasks to complete the assignment. (SBC Ex. 8, at 9.) In addition, SBC states that the time needed depends on the size and complexity of the assignment. (*Id.*) SBC has not specifically stated a timeframe in its proposed language but has alluded, in conjunction with Issue 6(1), that 90 days is an appropriate period of time. (SBC Ex. 8, at 9, 10.) We find that 90 days is too long, and unreasonable to process a name change request, because most of the tasks to complete the name changes only are electronic updating of the billing systems. SBC witness Quate testified that it could be accomplished more quickly depending on the size (of the request). (Tr. II, 287, 289.) We find that a mid-point of 45 days would be more appropriate in this instance. Because the Commission is adopting SBC's language for this issue, we also determine that 45 days should be inserted as the timeframe for GTC Section 4.9.3.2 in the final ICA.

Issue 6(1): Should the period of advance written notice TelCove provides to SBC before a TelCove assignment that entails a change to TelCove's Company Code be "90 days" or "up to 90 days"?

ICA Ref. – GTC § 4.9.3.1

TelCove Position

Neither party disagrees that TelCove shall provide SBC with advance written notice of any assignment or transfer of the ICA pursuant to a CLEC OCN/ACNA change, and that consent for such assignment or transfer shall not be unreasonably withheld. (TelCove Initial Br. at 24.) The parties, however, disagree on the amount of advance notice required. TelCove opposes SBC's 90 days' advance written notice of an assignment or transfer of the ICA. TelCove has committed to provide SBC with as much notice as possible to ensure a smooth transition. (*Id.*; TelCove Reply Br. at 9.) TelCove argues that its proposal would allow TelCove to provide SBC with 90 days' notice where feasible, and also would give TelCove the flexibility to provide less notice when business considerations require it. (TelCove Initial Br. at 24.) TelCove asserts that SBC's witness conceded that, in certain circumstances, SBC would not require 90 days' notice and that transactions might exist that require less time. (*Id.*)

TelCove opines that SBC appears concerned that TelCove might use its proposed language inappropriately and only provide SBC with one or two days' notice "because 'up to ninety days' includes two." (TelCove Reply Br. at 9.) TelCove's position is that this concern is unwarranted because TelCove has a strong interest in providing SBC with as much notice as possible to ensure that any assignment or transfer it proposes is consented to and proceeds as smoothly as possible. (*Id.*) Because of the fact-specific nature of any assignment or transfer of control, TelCove believes it is unreasonable to commit to a specific and rigid three-month timeframe that must govern in every instance. In order to belay SBC's unfounded fear, TelCove is willing to provide SBC with protection against inappropriately short notice. (*Id.* at 10.) TelCove is willing to making an adjustment to its proposed language to allow for "up to ninety days notice ***but no less than thirty days notice***."

SBC Position

SBC contends that TelCove should give SBC 90 days' advance notice of the closing of a transaction, when TelCove is engaging in a transaction that entails the transfer or acquisition of assets provisioned under the ICA. (SBC Initial Br. at 10.) According to SBC, this notice is needed in order to resolve outstanding accounts, to determine if a deposit is warranted, to amend the ICA to reflect the new name and/or OCN ACNA change, and to modify the affected records. This 90-day advance written notice, SBC argues, will allow sufficient time for the parties to meet, determine what steps need to be taken, and accomplish the tasks necessary to facilitate a smooth transition. (*Id.*) SBC states that TelCove's "up to ninety days" is inadequate because it includes two days or less, and TelCove could give SBC an obviously inadequate two days' advance notice. (SBC Initial Br. at 10-11; SBC Reply Br. at 5.) SBC agrees that TelCove's proposal would allow it to provide SBC with 90 days' notice where feasible, but the problem is that TelCove's proposal would not require TelCove to provide SBC with 90 days' notice where feasible. (SBC Reply Br. at 5.)

With regard to the circumstances under which TelCove supposedly would not be able to give 90 days' notice, SBC argues that it is unclear what those circumstances are. (SBC Reply Br. at 5.) As to TelCove's initial assertion that those hypothetical circumstances are where the other party to the transaction might not want the transaction to become public 90 days before it is closed, SBC asserts that SBC witness Quate discredited such circumstances. (*Id.*) SBC further asserts that, even in such circumstances, TelCove could give SBC 90 days' notice that a transaction is in the works, even if that means doing so before the transaction documents are signed. (*Id.*)

Arbitration Award

Regarding Issue 6(1), the Commission rejects both parties' language involving advance written notice of an assignment that requires a change to the company code. TelCove's proposed language of "up to ninety days" places no requirement to give a reasonable period of notice. Adding the words "but no less than thirty days notice" only requires TelCove to give 30 days, which is too short of a period of notice to be reasonable. (TelCove Reply Br. at 10.) SBC's proposed language of 90 days' advance written notice is too long to be commercially reasonable and would hinder the carriers' ability to transfer or assign their interests. The Commission is adopting a (mid-point) time period of 60 calendar days' notice. TelCove has proposed that 60 days is appropriate for the mass migration issue. It seems reasonable that 60 days would be a moderate period of notice for this issue, as noted by the parallel Kansas arbitration proceeding in Docket No. 05-ABIT-507-ARB.[62] Accordingly, the Commission finds that a 60-day period of advance written notice should be adopted into GTC Section 4.9.4.1 the ICA, for assignments which result in a change to the company code.

Issue 7(1): Should the period of advance notice that TelCove provides SBC before a mass migration be sixty days or ninety days? How should a mass migration be defined?

ICA Ref. – GTC § 4.9.4.1

TelCove Position

TelCove and SBC agree that a mass migration, which involves the movement of a large group of customers from one carrier to another, requires more advance notice to SBC than the transfer of fewer customers. (TelCove Initial Br. at 26.) The issue is "one of scope" in determining how many customers or service orders at one time constitute a mass migration. (*Id.*) For TelCove, mass migrations must be defined to allow routine customer movement that is indicative of a competitive business without the delay and cost associated with

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62 *See, In the Matter of Arbitration between TELCOVE INVESTMENT, LLC and SOUTHWESTERN BELL TELEPHONE COMPANY D/B/A/ SBC KANSAS Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms, and Conditions of Interconnection*, issued under Kansas Docket No. 05-ABIT-507-ARB, Order 8, Arbitrators' Award, (June 8, 2005), and filed in this docket as Exhibit 1, to SBC's Reply Brief filed on June 24, 2005. SBC notes that the parties in the Kansas proceeding filed their objections to the June 8, 2005 Award and suggests, therefore, that this Commission not attach any weight to the Kansas Award (*id.* at 1, n. 1). SBC further notes that it has not cited to the Kansas Award, but does not "exclude the possibility that the Panel might find some of the Kansas Arbitrators' analysis of interest, however, and is therefore filing a copy of the Kansas Award as Exhibit 1 to this brief." (*Id.*)

extraordinary mass migration procedures. (*Id.*) It is TelCove's opinion that SBC's initial proposed language could have resulted in a mass migration label as a result of the movement of a single customer. (*Id.*) TelCove identified this problem and SBC responded with its present mass migration proposal, which defines a mass migration as an increase in average daily order volume of 125% over 3 days and requires 90 calendar days' advanced written notice. (*Id.*) TelCove opines that this is too restrictive, unjustified, and restricts a customer's ability to select the carrier of its choice without fear of a long transition process. (*Id.*) TelCove objects to this language because the transfer of a single large customer with many lines could potentially trigger the mass migration notice requirements. (*Id.* at 28.) In an effort to resolve the issue, TelCove proposed to define mass migration as an increase in average daily order volume of 150% over 3 days and agreed to provide SBC 60 calendar days' advance written notice of any mass migration. (TelCove Reply Br. at 10.) TelCove increased the trigger from 125% to 150% because the loss of a few large customers (given TelCove's relatively small number of customers) might trip SBC's lower trigger of 125%, even though there would be no actual mass migration event. (*Id.*)

While SBC may require time to ensure that adequate resources are in place to process a mass migration event, it is TelCove's position that 60 days provides more than satisfactory notice for such purposes. (TelCove Reply Br. at 11.) According to TelCove, SBC does not understand the importance of this issue, as customers should be free to migrate as quickly as possible. (TelCove Initial Br. at 27.)

<u>SBC Position</u>

On this issue, SBC proposes that a mass migration be defined as one in which "anticipated daily volumes associated with the migration of a base of CLEC's customers will exceed 125% of the acquiring CLEC's normal daily volumes for more than three consecutive days," and requests 90 days' advance notice for mass migration. (SBC Initial Br. at 12.) According to SBC, TelCove cannot decide whether its objection to SBC's 125% figure could be triggered by the "transfer of a single large customer" or by the "loss of a few large customers." (SBC Reply Br. at 6.) SBC asserts that the movement of one customer could not possibly constitute 125% of the average daily volume of any carrier's customer migrations over three consecutive days. (SBC Initial Br. at 12-13.) As determined by SBC, the confusion is not mitigated by TelCove's observation that what really counts is the number of service orders or lines, because TelCove has done nothing to tie either SBC's 125% or TelCove's 150% to any number or range of service orders or lines, or to show why an increase of one magnitude should be regarded as mass migration, while an increase of a lesser magnitude should not. (SBC Reply Br. at 6.) SBC states that TelCove's argument boils down to the general and self-evident proposition that the higher the percentage, the lower the probability of a false mass migration alarm. SBC claims that this is not a basis for a decision, because the proposition is just as self-evident that the higher the percentage, then the higher the probability that the alarm will not ring for a genuine mass migration event. SBC attests that a false alarm is not problematic because the parties can decide not to implement the special procedures that are used in mass migration. (*Id.*) However, if the alarm fails to ring for a genuine mass migration, it will be too late to implement those procedures once it becomes apparent that a mass migration is underway. (*Id.* at 6-7.)

With respect to the length of the notice period, SBC believes that 90 days is a more appropriate lead time than 60 days. (SBC Initial Br. at 12.) TelCove has given no basis for their proposal of 60 days. (*Id.*) SBC claims that TelCove's argument is a qualitative proposition that the shorter the notice period, the "more consumer-friendly" it is. (SBC Reply Br. at 7.) SBC agrees that this may be true, but it does not mean that shorter is better, because it ignores the point that the notice period has to be long enough to get the job done properly, and that is the more important consideration. (*Id.*)

Arbitration Award

Regarding Issue 7(1), the Commission adopts TelCove's language. The Commission agrees with TelCove that the 150% proposal is more reasonable because SBC's proposal of 125% may trigger an unnecessary mass migration event with the loss of a few large customers. The loss of one large customer would equate to a large number of lines which would likely cause mass migration procedures to be triggered. As SBC stated in the hearing, the SBC migration system considers the number of lines associated with a customer. Therefore, the Commission adopts TelCove's 150% proposal for the ICA. (Tr. II, 253.) With regard to the period of advance notice for conducting a mass migration, the Commission adopts TelCove's language of 60 days' notice as a more reasonable timeframe. Ninety days is not a commercially reasonable timeframe for advance notice and would require the customer to be waiting for a prolonged period of time to move to its new carrier. The Commission has set the advance notice of a mass migration at 60 days for the ICA. Accordingly, TelCove's proposed language GTC Section 4.9.4.1 should be adopted for the final ICA.

NETWORK ENGINEERING (Identified as UNE Issue on DPL)

Issue 80: Is it appropriate to allow TelCove to install its own HVPE at its customer's premises in lieu of SBC installing an HVPE on SBC's network?

ICA Ref. – UNE Appendix § 8.2.1

TelCove Position

The parties are in agreement that High Voltage Protection Equipment (HVPE) is necessary when a cable enters into a high voltage location. (TelCove Reply Br. at 73.) TelCove claims that it should be allowed to provide its own HVPE device on its customers' side of the demarcation point, if the HVPE meets industry standards. (TelCove Initial Br. at 130.) According to TelCove, HVPE is often placed at the end-user customer's premise. If the end-user is a high voltage location, such as an electrical power substation or wireless service office, HVPE will be placed at that location to protect the telecommunications network. (*Id.*)

TelCove asserts that SBC grossly distorts TelCove's position and language when SBC claims that TelCove's language would grant TelCove the "unfettered discretion to elect to install an HVPE on SBC Ohio's networks, in lieu of SBC Ohio doing so." (TelCove Reply Br. at 73.) TelCove does not seek to place any HVPE on SBC's side of the demarcation point or anywhere on SBC's network. TelCove adds, where HVPE on the customer side is not adequate or if the HVPE must be on SBC's side of the demarcation for valid engineering purposes, TelCove is not opposed to SBC installing the HVPE. (*Id.*) What TelCove seeks is the ability to place HVPE on TelCove's customer's premise where appropriate for a specific factual situation. (*Id.*) In all other situations, TelCove should not be artificially limited to an HVPE provided by SBC, at a greatly marked-up price, on the SBC side of the demarcation point. (TelCove Initial Br. at 131.) TelCove asserts that TelCove's proposal would allow it to install industry standard compliant HVPE on the customer's premises at a spot closest to the high voltage source in a manner that is economically efficient. (TelCove Reply Br. at 74.) This would provide a cost savings to the end-user, while still providing full protection to the customer's, TelCove's, and SBC's networks. (*Id.*)

TelCove also states that SBC witness Silver asserts with no basis that, if TelCove places its own HVPE, TelCove would leave SBC's cable exposed to the potential electrical hazard. (TelCove Initial Br. at 130.) TelCove submits that SBC's witness acknowledges that he lacks sufficient background and expertise to determine whether or not placing HVPE closer to the source of voltage, as TelCove proposes, would make the HVPE more effective in protecting both TelCove's, and SBC's networks. (*Id.*)

SBC Position

SBC states that the issue is whether TelCove may elect to install HVPE at TelCove's customer's premise in lieu of SBC installing one on SBC's own network. (SBC Reply Br. at 74.) SBC disagrees and believes that TelCove should be permitted to install an HVPE at TelCove's customer's premise if it wants to, but that TelCove may not prohibit SBC from also installing HVPE on SBC's network. (*Id.* at 74-75.) SBC declares that, if SBC determines it is appropriate to install HVPE on its network in order to protect SBC and other carrier equipment, SBC should have the right to do so. (*Id.* at 75.) SBC submits that while TelCove's proposed language intends to foreclose SBC from installing HVPE on SBC's side of the network, even if TelCove installs its own HVPE, TelCove's witness testified at the hearing that TelCove does not intend this result. (SBC Initial Br. at 122; Tr. I, 184-85.) SBC opines that, even without TelCove's admission concerning the unintended result of TelCove's proposed language, SBC would prevail on this issue because SBC is ultimately responsible for its network, and SBC should be permitted to install the HVPE if it determines one is necessary. (SBC Initial Br. at 122.)

SBC clarifies that the HVPE addressed in its language is part of SBC's network prior to the point of demarcation between SBC's facilities and those of the collocated CLEC. SBC claims it is not proposing to install an HVPE on TelCove's network or on the customer-side of the network interface device (NID) serving a TelCove customer. SBC contends that its proposed language does not have any effect on TelCove's ability to install an HVPE on its network or at its customer premises. (*Id.*)

SBC opines that TelCove is incorrect when TelCove suggests that SBC has no basis for its assertion that placing an HVPE at the customer's premise may leave SBC's network exposed. (SBC Reply Br. at 75.) SBC states that TelCove assumes the only equipment that might impact the SBC network is located at TelCove's customer's premise, when SBC maintains equipment on its network that it uses to provide service to TelCove and its customers. SBC attests it is that equipment that SBC wants to be sure, through installation of an HVPE on the SBC's network, does not damage SBC's network. (*Id.*)

<u>**Arbitration Award**</u>

Regarding Issue 80, the Commission adopts TelCove's language. TelCove is not proposing to install an HVPE on SBC's side of the demarcation point or anywhere on SBC's network, and TelCove is not prohibiting SBC from installing an HVPE on SBC's side of the demarcation point for engineering purposes. (TelCove Initial Br. at 73-74.) TelCove is simply asking to install an HVPE on its own customer's side of the demarcation point. According to SBC's Kansas General Exchange Tariff, Section 16.15.7(A), SBC allows the end user to install HVPE and, in the past, allowed the very same thing in Ohio. (TelCove Ex. 1, at 123.) Accordingly, it would be reasonable to allow TelCove to install HVPE on the customer's side of the demarcation point since it is TelCove's customer. The Commission finds that TelCove's proposed language for UNE Appendix Section 8.2.1 should be adopted in the final ICA.

<u>AUDITS</u>

Issue 26: Should the threshold for a second audit within a twelve-month period be a ten percent variance or a five percent variance in the initial audit?

ICA Ref. – GTC § 11.1

<u>**TelCove Position**</u>

TelCove asserts that, because audits are financially burdensome and resource intensive, it is appropriate to limit follow-up audits, within a 12-month period, to situations involving at least a 10% variance. (TelCove Ex. 1, at 125-26; TelCove Initial Br. at 48.) TelCove witness Lafferty testified that:

> Audits often involve the collections of extensive data through document requests and interviews with the audited party's employees. The employees working on an audit have full time responsibilities elsewhere in both the audited and auditing [companies]. Audits can consume significant human and financial resources and take months to complete. During the audit, other business often gets neglected.

(TelCove Ex. 1, at 126; TelCove Initial Br. at 48.) TelCove contends that a 10% variance would better reflect normal variations and is a more realistic indicator of the accuracy of the audited party's records. (*Id.*; TelCove Br. at 48.) TelCove argues that, for smaller companies like TelCove who do not deal with the same volumes as SBC, a single, one-time error might cause a five percent variance. (*Id.*; TelCove Br. at 48.) TelCove agrees that additional audits should be permitted within a year "if the audited party's records are so faulty that their ongoing reliability is reasonably questioned." However, TelCove asserts that a 10% variance trigger could help limit the burden and disruption of additional audits. (*Id.*, at 126-27.) TelCove also contends that SBC has provided no evidence to support its proposal of a 5% variance for a follow-up audit. (TelCove Reply Br. at 26.)

<u>SBC Position</u>

SBC asserts that, if an audit discloses "an uncorrected net variance or invoicing error in the Audited Party's favor, the Auditing Party should be permitted to conduct an additional, follow-up audit." (SBC Ex. 8, at 46; SBC Initial Br. at 32.) Therefore, SBC's proposed language provides for a follow-up audit if the initial audit "discloses an error with an aggregate value of at least five percent of the amounts payable by the Audited Party for the audit timeframe." (*Id.*; SBC Initial Br. at 32.) SBC agrees that small errors do not warrant the time and expense of a follow-up audit, which, SBC asserts, is the reason for the 5% minimum variance threshold. (*Id*; SBC Initial Br. at 33.) SBC submits that, for example, in a situation where one party bills the other party for $1,000,000, an error of $50,000 (5%) would warrant an additional audit. (*Id.*; SBC Initial Br. at 33.) SBC contends that TelCove argued for no follow-up audits, under any circumstances. (SBC Initial Br. at 33.) Now that TelCove has changed its position and accepted SBC's language, but with a substitution of "10%" for "5%," SBC argues that this change left SBC without the opportunity "to demonstrate authoritatively that 5% is regarded as statistically significant, and thus is sufficient to warrant a follow-up." Further, SBC argues that TelCove has not made a compelling case for its ten percent variance proposal. SBC contends that TelCove has made no complaints that SBC has been overzealous in its auditing of TelCove in the past. (*Id.*) SBC further contends that it would have no reason in the future to incur unnecessary expenses by conducting a follow-up audit if it should happen that the 5% threshold is exceeded under circumstances that suggest TelCove does not have systemic billing problems. (*Id.* at 33-34.)

<u>Arbitration Award</u>

TelCove and SBC agree that each may audit the other party's books, records, data, and other documents, to evaluate the accuracy of the audited party's billing and invoicing, and to verify that the audited party has complied with the ICA provisions that affect the accuracy of the billing. Both SBC and TelCove recognize the need to try to limit audits to once per year (contract year), due to the potential for disruption of normal business activities. Both parties agree that small billing errors do not warrant the time and expense of a follow-up audit. The remaining issue, with regard to GTC Section 11.1, is whether the trigger to require a follow-up audit should be set at a 5% variance threshold (SBC) or at a 10% variance threshold (TelCove). Based on a review of the arguments made by the parties, we find that SBC's proposed 5% variance is too low a threshold because a single error can produce this size of variance for a small company such as TelCove. Also, due to the burdensome nature of audits, we find that TelCove's proposed 10% variance is more reasonable as a trigger for follow-up audits within a 12-month contract year, and should be adopted for GTC Section 11.1, in the ICA.

Issue 27: If the Audited Party requires the Auditing Party to hire a third party auditor to conduct the audit, which party should bear the cost?

ICA Ref. – GTC §§ 11.1.2; 11.1.5; 11.1.6

<u>TelCove Position</u>

TelCove states that the issues regarding GTC Section 11.1.2 are whether an audit conducted in accordance with the ICA should be conducted by a third-party auditor and, if so, who should pay for the audit. (TelCove Initial Br. at 49.) TelCove's position is that an outside party would be more objective than either of the parties to the audit. (TelCove Ex. 1, 127; TelCove Br. at 50.) TelCove witness Lafferty testified that, "[i]f SBC decides that an audit is required, it already has concern with some aspect of TelCove's operations. Therefore, if SBC's employees were allowed to conduct the audit, the auditor would be starting the process with the end result in mind." (*Id.*; TelCove Initial Br. at 50.) TelCove disagrees with SBC's assertion that third-party auditors are not sufficiently familiar with USOCs (Universal Service Order Codes) and telecommunications records to conduct such audits. (*Id.*; Telcove Initial Br. at 50.)

Concerning the question of who should pay for the audit, TelCove asserts that the auditing party should pay for the audit because, "[i]f the audited party is paying for the audit, the auditing party will have less incentive to avoid frivolous audits." (*Id.*; TelCove Initial Br. at 50.) Last, TelCove asserts that, as discussed above, audits are a disruption to the course of business and, by making the auditing party bear the cost, the auditing party would "be required to balance the costs of the audit with the expected recovery from the audit before initiating the [audit] process." (*Id.*, at 128; TelCove Initial Br. at 50-51.) TelCove contends that it is willing to make its audit proposals mutual. As witness Lafferty testified, "[i]f TelCove initiates an audit under the ICA, TelCove would utilize a third-party auditor and pay the full expense of the audit." (TelCove Ex. 1, at 128.)

With regard to GTC Section 11.1.5, TelCove states that the issue centers on when the audited party should compensate the auditing party if an audit confirms any undercharges. TelCove's position is that payment of the undercharge should be accomplished by SBC (the auditing party) charging TelCove (the audited party), in the next billing cycle, for the amount that was undercharged. (Tr. II, 97-98.) TelCove witness Lafferty explained the reasons why TelCove has suggested the next billing cycle as the appropriate method for dealing with undercharges:

> [F]irst of all, the next billing cycle is probably never more than 30 days away so it is a relatively short period of time. The bills contain [a] significant amount of details so that both parties know what was being billed for and what services are being paid. It allows the records and the accounting systems, at least from TelCove's standpoint, and I think SBC also, to be properly updated so we don't find the same thing in a future audit.

(Tr. II, 98.) TelCove contends that, despite SBC's objection for using this method for dealing with undercharges, SBC has proposed a "virtually identical method for handling discovered overcharges." (SBC Initial Br. at 51.)

The last issue concerns GTC Section 11.1.6. TelCove's position is that, if an audit uncovers variances of 10% or more on a net basis, and that variance is subsequently verified by the parties, then the audited party would be required to pay 25% of the costs of the outside third-party auditor. (TelCove Ex. 1, at 128; TelCove Initial Br. at 51.) For the reasons discussed above under Issue 26, TelCove asserts that 10% is a more commercially reasonable trigger than SBC's proposed 5% trigger, particularly when SBC is dealing with a much smaller competitor like TelCove. (TelCove Ex. 1, 128-29; TelCove Initial Br. at 51-52.)

<u>SBC Position</u>

With respect to the issues under GTC Section 11.1.2, SBC proposed language that would permit the audited party to request that an independent auditor perform the audit, rather than the auditing party's employees; however, if the audited party makes that request, then the audited party would be required to pay one-quarter of the independent auditor's fee. (SBC Ex. 8, at 34; SBC Initial Br. at 34.) SBC asserts that the reasons for its proposed language are because it is not inappropriate for the auditing party to use its own employees to conduct audits, and it is more economical to do that than to use an independent auditor. (SBC Ex. 8, at 50; SBC Initial Br. at 34.) Therefore, SBC believes that TelCove should pay for the incremental cost when TelCove requests that an independent auditor, rather than SBC employees, perform an audit of TelCove's records. (SBC Initial Br. at 35.)

SBC witness Quate testified that an audit has two purposes, as stated in GTC Section 11.1. The first purpose is to evaluate the accuracy of the audited party's billing and invoicing for the services that it renders. (SBC Ex. 8, at 51; SBC Initial Br. at 36.) The second purpose is to verify the audited party's compliance with the ICA provisions that affect the accuracy of the audited party's billing and invoicing for the services it renders. (*Id.*; SBC Initial Br. at 36.)

SBC asserts that there are two types of audit findings that may result in the audited party owing the auditing party money. First, the audit may disclose that the audited party (TelCove) overbilled the auditing party (SBC), in which case the audited party in effect owes the audited party a partial refund. Second, the audit may disclose that the auditing party (SBC) underbilled the audited party (TelCove) because of inaccurate information the audited party provided to the auditing party concerning calls that originated on the audited party's network. (*Id.*; SBC Initial Br. at 36.)

As to the timing of payment of undercharges under GTC Section 11.1.5, SBC witness Quate testified that the parties agree in GTC Section 11.1 that, if the audit discloses either sort of error describe above, the error should be rectified promptly. (*Id.*; SBC Initial Br. at 37.) SBC's proposed language for undercharges provides that the "[a]udited [p]arty shall . . . (ii) for any undercharges caused by the actions of the [a]udited [p]arty, immediately compensate [a]uditing [p]arty for such undercharge." (*Id.*, at 51-52; SBC Initial Br. at 37.) SBC contends that for SBC to use the method proposed by TelCove (to add the underbilled amount to the next bill SBC sends to TelCove) puts an unnecessary burden on SBC, as the auditing party. (*Id.*, at 52-53; SBC Initial Br. at 37-38.) Instead, the rule should be that an error made by the audited party should be corrected by the audited party. (*Id.*; SBC Initial Br. at 37.) Therefore, in the case of an undercharge, SBC asserts that the appropriate remedy for an audit finding of undercharges is for the audited party (TelCove) to correct its error by the immediate payment of that undercharged amount. (*Id.*, at 53; SBC Initial Br. at 37-38.)

With regard to GTC Section 11.1.6, while the proposed ICA language shows a conflict, SBC did not provide any witness testimony concerning this section, and did not discuss this section in either of its briefs. We note that SBC's proposed language for GTC Section 11.1.6 has not changed since the initial joint DPL and proposed ICA (Appendix C) were filed with the TelCove Petition on December 6, 2004. SBC's proposed language is as follows (bold font represents SBC proposed language and opposed by TelCove):

> 11.1.6 **Except as may be otherwise provided in this Agreement,** audits shall be performed at the Auditing Party's expense, **subject to reimbursement by Audited Party of one-quarter (¼) of any independent auditor's fees and expenses in the event that an audit finds, and the Parties subsequently verify, a net adjustment in the charges paid to or payable by Auditing Party hereunder by an amount that is, on an annualized basis, greater than five percent (5%) of the aggregate charges for the audited services during the period covered by the audit.**

(Panel Ex. 1, GTC at 42.)

Arbitration Award

First, with regard to GTC Section 11.1.2, we find that SBC's language should be adopted. Based on a review of the arguments made by the parties, we find it reasonable that, if the audited party requests that an independent auditor be engaged, the audited party should pay one-quarter of the independent auditor's fees and expenses. Accordingly, we adopt SBC's proposed language for GTC Section 11.1.2, of the final ICA.

Next, the issue concerning GTC Section 11.1.5 is the timing of the payment of undercharges. SBC witness Quate testified that, in the situation where the audited party (TelCove) overbilled the auditing party (SBC), the audited party will correct the error by making a "refund of any overpayment" by the auditing party "in the form of a credit on the invoice for the first billing cycle" after the parties have agreed upon the accuracy of the results. (SBC Ex. 8, at 51-52; SBC Initial Br. at 37.) Rather than use the same billing process to correct the undercharge, SBC proposes that TelCove make immediate payment to SBC. (*Id.*, at 53; SBC Initial Br. at 37-38.) After a review of the arguments presented by the parties, we find that TelCove's proposal will allow for a better record of the transactions between the parties and, hopefully, will reduce future billing disputes between the parties. Accordingly, we adopt TelCove's proposed language for GTC Section 11.1.5, of the final ICA.

Last, with respect to GTC Section 11.1.6, we find that the payment of any independent auditor's fees, under this section, would be in addition to the payment of fees under GTC Section 11.1.2. Further, we find that, consistent with Issue 26 above, 10% is a more commercially reasonable threshold than SBC's proposed 5% trigger for payment of expenses under this section. Accordingly, we adopt TelCove's proposed language for GTC Section 11.1.6, of the final ICA.

MISCELLANEOUS (OTHER) GENERAL TERMS AND CONDITIONS

Issue 15: Can SBC limit to ten months the maximum amount of time that the agreement will continue past its Term while negotiation on a successor agreement occurs?

ICA Ref. – GTC § 5.7

TelCove Position

TelCove argues that artificially limiting the length of time that the ICA will remain in effect during negotiation of a successor agreement would negatively impact the negotiation and arbitration process and would give SBC unfair leverage in the development of such an agreement. (TelCove Initial Br. at 33.) TelCove assures the Commission that its intent is not to prolong the ICA indefinitely but, rather, to allow the ICA to continue through the negotiation and arbitration process. (TelCove Ex. 1, at 130; TelCove Initial Br. at 33.) According to TelCove, SBC would have little incentive to waive the deadline if the current ICA would *simply terminate after 10 months, leaving all the risk on TelCove that* no ICA would be in place. (TelCove Initial Br. at 34.) TelCove describes SBC's proposal as a "Hobson's choice," in which TelCove would have to choose between an undesirable successor agreement and a terminated ICA. (TelCove Reply Br. at 13-14.)

SBC Position

SBC's position is that, since arbitrations must be concluded within 9 months after a request for negotiation, a 10-month window is appropriate. SBC notes that this time period could be extended by agreement, just as the 9-month arbitration deadline can be extended. (SBC Initial Br. at 21-22.) SBC argues that TelCove's concerns about bad faith negotiation are without merit. (SBC Reply Br. at 10.)

Arbitration Award

While the Commission agrees with SBC that the ICA should not continue in effect without any termination date whatsoever, it also recognizes that a 10-month deadline gives SBC substantial negotiating power over TelCove. That deadline was developed by SBC as 30 days beyond the nine-month deadline for completion of arbitrations. (SBC Ex. 8, at 44; SBC Initial Br. at 22.) As both parties recognize that the arbitration period is sometimes extended by the parties, the Commission finds that the termination of the ICA should be more directly tied to the arbitration period. (SBC Ex. 8, at 45; SBC Initial Br. at 22; TelCove Initial Br. at 33-34.) Therefore, rather than a specific 10-month deadline, GTC Section 5.7 of the ICA should provide that the ICA would terminate at the earlier of either (1) the effective date of the successor or (2) the later of either 10 months after SBC's receipt of TelCove's negotiation request or 30 days after the arbitration award is issued.

Issue 23(1): Should TelCove be allowed 29 days or up to 90 days to provide the information it must provide concerning a bill it disputes in order to avoid waiving its right to dispute the bill?

ICA Ref. – GTC § 10.4.1

TelCove Position

TelCove states its belief that, in the event TelCove commences a billing dispute, SBC's proposed language for GTC, Section 10.4.1 requires TelCove to provide all supporting evidence within the 29 days following the bill due date or waive its ability to dispute the invoice. TelCove asserts that its proposal provides TelCove with additional time to supply the supporting evidence in two ways. First, TelCove submits that it will attempt and succeed in most instances in providing all supporting evidence within 30 days after the bill due date.

TelCove submits that this is only 1 day longer than SBC's proposed time period, and contends that this has the advantage of coinciding with the end of the subsequent billing period, as SBC uses a 30-day calendar billing period. (TelCove Initial Br. at 44.) Second, TelCove further asserts it is a "commercial reality" that billing disputes are often so sizable or complex that it would be unreasonable to require TelCove to submit all supporting evidence within the 29-day period (following the bill due date). Based on this "commercial reality" TelCove's language does not trigger an automatic waiver of a billing dispute unless TelCove fails to provide the required information within 90 calendar days. TelCove submits that a 90-day calendar period (following the bill due date) should provide TelCove with reasonably sufficient time to further research more complicated disputes. (*Id.* at 45.)

TelCove, in its Reply Brief, submits that it would be open to a resolution where SBC's language is modified to expressly match SBC's assertion on brief that TelCove need only provide written notice of dispute based on information on the "bill itself" within 29 days of the Bill Due Date. (TelCove Reply Br. at 24.)

<u>SBC Position</u>

SBC witness Quate testified that the parties have agreed to the following information for proper written notice of a billing dispute: (1) the date of the bill in question, (2) CBA/ESBA[63]/ASBS or BAN number of the bill in question, (3) telephone number, circuit ID number or trunk number in question, (4) any USOC information related to the item questioned, (5) amount billed, (6) amount in question, and, (7) the reason that CLEC disputes the billed account. (SBC Ex. 8, at 29.) Ms. Quate further testified that the "Bill Due Date is 30 days after the bill date," and, since SBC's proposed language provides for written notice 29 days after the bill due date, SBC actually "allows TelCove 59 days after it receives a bill to dispute the bill by providing the information listed above." (*Id.* at 30.)

SBC, in its brief, contends that TelCove has misread SBC's proposed language for GTC Section 10.4.1, as the disputed language has nothing to do with when "evidence" must be provided to SBC; rather, all it requires are the seven items identified by witness Quate above. SBC submits that the first five items are on the bill itself. SBC asserts that the "evidence" reference in Section 10.4.1 refers to documentation that "the Non-Paying Party has placed the disputed amount in escrow, not evidence that bears on the resolution of the dispute." (SBC Initial Br. at 31.)

<u>Arbitration Award</u>

The Commission agrees with SBC that 29 days, after the Bill Due Date, for a total of 59 days, is reasonable time for TelCove to provide SBC with the initial written notice of a billing dispute that includes the seven items discussed above. The Commission notes, however, should the dispute involve complex billing, the

63 The term "ESBA" refers to Enhanced Summary Billing Account. *See* Appendix for other terms.

parties are to cooperate in providing additional time to supplement the documentation, provided with the initial written notice, in order to resolve the dispute. Accordingly, SBC's proposed language for issue, in GTC Section 10.4.1, should be adopted for the final ICA.

Issue 25: Is it appropriate to include mutuality with (Section) 10.4.1 by including language providing for SBC's waiver after 90 days if it fails to properly dispute?
ICA Ref. – GTC § 10.4.4

TelCove Position

As discussed above with regard to Issue 23(1), GTC Section 10.4.1 outlines the requirements TelCove must meet when providing notice to SBC of a billing dispute. TelCove witness Lafferty testified that TelCove's proposed GTC Section 10.4.4 provides that SBC must meet the same requirements concerning TelCove billing to SBC. Mr. Lafferty testified that "[b]oth TelCove (Section 10.4.1) and SBC (Section 10.4.4) should be required to provide the same documentation and [to] follow the same process and time line for documenting disputes . . . concerning items already billed." (TelCove Ex. 1, at 132-133.)

SBC Position

SBC provided no testimony concerning this issue and did not address this issue in its briefs.

Arbitration Award

The Commission concludes that this issue is not contested, based on the lack of testimony by SBC on this issue. Yet, the Commission agrees with TelCove that it is reasonable for the parties to provide the same documentation to each other concerning billing disputes and to follow the same process and time line for documenting disputes concerning items already billed. However, the Commission will require certain modifications and clarifications to TelCove's proposed language. TelCove shall modify its proposed language in GTC Section 10.4.4 to be consistent with the Commission's decision regarding GTC Section 10.4.1, as discussed above, for the final ICA.

IV. CONCLUSION

Based on the foregoing, TelCove and SBC should incorporate the directives set forth in the Arbitration Award within their final ICA. In accordance with Mediation/Arbitration Guideline X.J., TelCove and SBC shall file, within 14 days of this Arbitration Award their entire ICA for the Commission's review. If the parties are unable to agree upon an entire agreement within this time frame, each shall file for the Commission's review its version of the language that it believes should be incorporated in the ICA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On June 29, 2004, TelCove initiated negotiations with SBC for the terms and conditions of an interconnection agreement.

(2) On December 6, 2004, TelCove filed a petition to arbitrate the terms and conditions of interconnection with SBC pursuant to Section 252 of the 1996 Act. The TelCove Petition included a proposed ICA identified as Appendix C, and a joint DPL with proposed interconnection language submitted by TelCove and SBC for each issue.

(3) On December 29, 2004, the arbitration panel, SBC and TelCove informally discussed scheduling issues by teleconference. Based on the anticipated time frame for the issuance of the FCC's new UNE rules, and the parties' availability due to the multi-state arbitrations underway between the parties, the parties agreed to file expert testimony on March 14, 2005, and for the hearing to begin on April 18, 2005.

(4) On December 29, 2004, SBC filed a response to the TelCove Petition.

(5) On January 11, 2005, the attorney examiner issued an entry confirming the case schedule discussed on December 29, 2004.

(6) On January 18, 2005, TelCove Operations, Inc. docketed a letter stating TelCove consented to extend the deadline required by Section 252(b)(4)(C) of the 1996 Act for a Commission determination in this arbitration proceeding.

(7) By entry issued on March 14, 2005, the attorney examiner, at the request of the parties, amended the case schedule, which included that expert testimony would be filed on March 22, 2005, and the evidentiary hearing would begin on May 3, 2005.

(8) On March 22, 2005, the parties concurrently filed direct expert testimony.

(9) In conjunction with the direct testimony filed for Blase J. Gabreski, on March 22, 2005, TelCove filed a motion for protective order and memorandum in support, under Rule 4901-1-24(D), O.A.C., seeking confidential treatment of specified portions of the filed testimony.

(10) SBC, on April 7, 2005, filed a Motion for Leave to File *Instanter* Corrected Testimony for Mark Neinast, with a copy of the Corrected Testimony attached as Exhibit 1.

(11) On April 28, 2005, the attorney examiner issued an entry ruling on all pending prehearing motions.

(12) On April 29, 2005, the parties submitted a revised DPL to the arbitration panel for the hearing set to begin May 3, 2005. The revised DPL included revised proposed interconnection language submitted by TelCove and SBC. The revised DPL was not accompanied by a motion requesting permission to submit it to the arbitration panel.

(13) On May 2, 2005, the arbitration panel, SBC, and TelCove informally discussed the revised DPL by teleconference. After discussing the options in light of the revised DPL filing, and the ongoing negotiations by the parties, the arbitration panel amended the case schedule to include: the filing of the final revised DPL on May 6, 2005; the filing of revised expert testimony on May 13, 2005; and the evidentiary hearing in this matter to begin on June 1, 2005. The arbitration panel advised the parties that the acceptance of a revised DPL and the resulting changes in the case schedule were limited to this proceeding only and did not set a precedent for future arbitration proceedings. On May 12, 2005, the attorney examiner issued an entry confirming the case schedule discussed on May 2, 2005.

(14) On May 6, 2005, the parties submitted a final revised DPL to the arbitration panel, in accordance with the May 2, 2005 teleconference.

(15) On May 13, 2005, the parties concurrently filed revised direct expert testimony.

(16) The arbitration hearing was held on June 1 and 2, 2005. In lieu of oral arguments, the parties filed initial briefs on June 17, 2005, and reply briefs on June 24, 2005.

(17) The Commission has continuing regulatory oversight over this agreement, at all times, in accordance with Title 49 of the Revised Code and the *1996 Act*.

It is, therefore,

ORDERED, That the parties incorporate the directives set forth in this Arbitration Award within their final interconnection agreement. It is, further,

ORDERED, That, within 14 days of this Arbitration Award, SBC and TelCove shall docket their entire interconnection agreement for review by the Commission, in accordance with Mediation/Arbitration Guideline X.J. If the parties are unable to agree upon an entire interconnection agreement within this time frame, each party shall file for Commission review its version of the language that should be used in a Commission-approved interconnection agreement. It is, further,

ORDERED, That, within ten days of the filing of the interconnection agreement amendment, any party or other interested persons may file written comments supporting or opposing the proposed interconnection agreement amendment and that any party or other interested persons may file responses to comments within five days thereafter. It is, further,

ORDERED, That nothing in this Arbitration Award shall be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That this Arbitration Award does not constitute state action for the purpose of antitrust laws. It is not our intent to insulate any party to a contract from the provisions of any state or federal law that prohibits restraint of trade. It is, further,

ORDERED, That this docket shall remain open until further order of the Commission. It is, further,

ORDERED, That a copy of this Arbitration Award be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

JKS/JWK/NS/LS/MG/CW/ct

Entered in the Journal

JAN 25 2006

Reneé J. Jenkins
Secretary

ABBREVIATIONS & ACRONYMS

1996 Act	The Telecommunications Act of 1996, which is codified at 47 U.S.C. § 151, *et seq.*
ACNA	Access Carrier Name Abbreviation or Access Customer Name Abbreviation (alphabetic)
ASBS	No definition available in case documents.
ASR	Access Service Request
BAN	Billing Account Number
BFR	Bona Fide Request process
CABS	Carrier Access Billing System
CBA	Consolidated Billing Account
CIC	Carrier Identification Code
CLEC	Competitive Local Exchange Carrier
CPN	Calling Party Number
DPL	Decision or Disputed Points List
DS1	Digital Signal, level 1
DS3	Digital Signal, level 3
DSL	Digital Subscriber Line service
EAS	Extended Area Service
EELs	Enhanced Extended Link(s)
ELCS	Extended Local Calling Service
ESBA	Enhanced Summary Billing Account
ESP	Enhanced service provider
FCC	Federal Communications Commission
FGC	Feature Group C trunk
FGD	Feature Group D trunk

FX	foreign exchange (traffic)
GTC	General terms and conditions (of the interconnection agreement)
HVPE	High Voltage Protection Equipment
ICA	Interconnection Agreement
ICC	Intercarrier compensation (appendix to the interconnection agreement)
ILEC	Incumbent Local Exchange Carrier
IP	internet protocol
ISP	Internet Service Provider
ITR	Intercarrier trunking requirements (appendix to the interconnection agreement)
IXC	Interexchange Carrier
LATA	Local Access and Transport Area
LEC	Local Exchange Carrier
MFJ	Modified Final Judgment
NID	Network interface device
NPA	Numbering Plan Area
NPRM	Notice of Proposed Rulemaking (issued by the FCC)
NXX	The term used to identify a central office code (N=2-9, X=0-9)
OAC	Ohio Administrative Code
OCN	Operating Company Number
OCC	Oklahoma Corporation Commission
OSQ	Operator Service Questionnaire
POI	Point of Interconnection or Point of Interface
PSCW	Public Service Commission of Wisconsin
PSTN	Public Switched Telephone Network

Section 271	Section 271 of the 1996 Act
SS7	Signaling System 7
TDM	Time Division Multiplex
TELRIC	Total Element Long Run Incremental Cost
TRO	Triennial Review Order: *See, In the Matter of the Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking) (Triennial Review Order) (TRO).
TRRO	Triennial Review Remand Order: *See, In the Matter of Unbundled Access to Network Elements*, CC Docket Nos. 01-338, et al., FCC 04-290 (Feb. 4, 2005 Order on Remand) (Triennial Review Remand Order) (TRRO).
UNE	Unbundled Network Elements
USOC	Universal Service Order Code
VoIP	Voice over Internet Protocol