**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

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| In the Matter of the Petition for Arbitration | ) | |
| of Unresolved Issues in a Section 251(b)(5) | ) | Case No. TO-2006-0147 |
| Agreement with T-Mobile USA, Inc. | ) | Consolidated |

# RESPONDENTS' COMMENTS ON THE PRELIMINARY ARBITRATION REPORT

**FEBRUARY 24, 2006**

****Denotes Information Deemed to be Proprietary by Petitioners****



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Respondents, Cingular Wireless LLC ("Cingular") and T-Mobile USA, Inc. ("T-Mobile"), submit these comments in response to the Preliminary Arbitration Report ("Report") issued on February 16, 2006.

## I. JOINT ISSUES INVOLVING BOTH CINGULAR AND T-MOBILE

The transport network configuration that the Report has approved, for the purpose of determining a transport rate for each Petitioner, is not the "lowest cost network configuration" as FCC rules require. Thus, the Report, in its current form, would allow some Petitioners to claim rates exceeding the 3.5-cent rate originally proposed – because the Report would permit Petitioners' cost studies to be based upon interoffice cable and transmission equipment that do not exist and which Petitioners would never deploy to terminate wireless traffic. In other words, the Report, in its current form, would require Respondents to subsidize other users of Petitioners' transport networks. FCC rules prohibit such a result.

Respondents respectfully submit that, with regard to the Joint Issues identified below, the Report does not comply with applicable federal standards and therefore should be corrected.

**Issue No. 3 – What are Petitioners' forward-looking costs to purchase and install new switches?** The Report adopts Respondents' position that Petitioners' forward-looking switch costs should be based on publicly available FCC switch cost data (on a current cost basis) from the FCC's 10th Report and Order. However, the Report's description of the changes to Petitioners' cost studies is incomplete. While the Report accurately recommends a variable

switch investment of $76.56 per line, it neglects to mention that Petitioners should also utilize fixed switch investments of $428,296 and $161,800 per switch for standalone/host and remote switches, respectively. In addition, the Report does not address Respondents' position that for standalone/host switches with fewer than 700 lines, affected Petitioners should obtain a bona fide vendor quote, because a $428,296 fixed investment is too large for very small switches. With these additions, the Report would be accurate and complete.

Petitioners have stated their intent to use the fixed switched investments contained in the 10th Report and Order. See Petitioners' Clarification Response, p. 4 (Feb. 21, 2006)(hereafter, "Petitioners' Response"). To comply with the Report, these fixed switch investments must be expressed on a current cost basis, by reducing them 12% for switch price reductions occurring since the 10th Report and Order. In addition, Petitioners did not indicate that they would obtain vendor quotes for non-remote switches with fewer than 700 lines, and their silence on the subject suggests they have no plans of doing this. The final order should therefore require Petitioners with these small switches to obtain this data; otherwise, their termination rates will be artificially inflated.[1]

**Issue No. 7 – What Are Petitioners' appropriate, forward-looking interoffice cable lengths?** The Report "adopts T-Mobile's position" (p. 8). T-Mobile's (and Cingular's) position has been that Petitioners' forward-looking interoffice cable lengths equal their cable lengths in the current interoffice networks, including the cable distance to existing meet points with transit carriers. The evidence is undisputed that Respondents' position is the "lowest cost network configuration."

However, after adopting Respondents' position, the Report goes on to state that "this decision is conditioned on cables going to the nearest switch; not necessarily the nearest SBC

[1] Respondents agree with Petitioners' Response (p. 3) that Issue 3 is moot to the extent that the Report adopts Petitioners' position on Issue 4 regarding the usage-sensitive portion of end office switching.

switch, but the nearest large LEC tandem switch" (p. 8). Petitioners have indicated that, in re-running their cost studies, they will assume that their remotes will be connected directly to their host switch, and that their host and standalone switches will be connected with their own facilities to "the nearest large ILEC wire center." See Petitioners' Response, pp. 5-6. In other words, Petitioners are assuming that at some unspecified time in the future, they will be required to build new facilities from their existing meet points to the nearest large ILEC wire center.

Such an assumption is not supported by the record. The *only* record evidence regarding Petitioners' assertion that they may someday be required to extend their facilities beyond their current meet points is contained in witness Schoonmaker's rebuttal testimony, in which he claims to have had a conversation with the president of Ellington Telephone, who supposedly said that SBC has resisted building *new* facilities to Ellington's current meet point (Schoonmaker Rebuttal, p. 25, l. 1-9). But this one anecdote does not constitute substantial evidence supporting a requirement that Petitioners' interoffice cable lengths should include the distance from the current meet point to the nearest large LEC tandem, given that:

- Such testimony is hearsay, and should not be used to prove the truth of the assertion contained within it.
- Petitioners had the option of having the Ellington Telephone president submit direct testimony. Had Petitioners chosen this option, Respondents would have had the opportunity to depose and/or cross-examine this person and learn the real facts.
- Moreover, such limited hearsay testimony does not support the Petitioners' assumption in any event:
  - There is no evidence at all that SBC intends to abandon its existing facilities to its meet point with Ellington;
  - There is no evidence at all that SBC's existing facilities are inadequate to meet Ellington's future requirements for the exchange of telecommunications traffic with the Public Switched Telecommunications Network ("PSTN");
  - The hearsay evidence at most supports a claim that SBC *may* require Ellington, and Ellington alone, to build new facilities if Ellington requires additional capacity (and again, there is no evidence of this); and

- There is no record evidence at all that SBC would take the same position with regard to the other Petitioners.

In addition, the Report fails entirely to mention Respondents' contract amendment proposal that fully addresses Petitioners' concerns *without* requiring Respondents to pay for "costs" that Petitioners will likely never incur.[2]

The Report does not comply with federal law to the extent that its rulings are not based on substantial evidence, or fail to consider all the evidence, including Respondents' agreement to renegotiate rates if Petitioners are ever forced to build facilities beyond the current meet points. Respondents therefore respectfully request that the final order adopt Respondents' position in full on Issue 7.

**Issue No. 8 – What are the appropriate cable sizes?** The Report adopts Petitioners' position: "The HAI Input of 24 fiber cable to connect offices should be used. The HAI model assumes a hypothetical, forward-looking network, and it would not be cost effective or forward-looking to place smaller cables" (p. 8). The Report explains the decision as follows:

> It is reasonable to assume that in a forward-looking network, traffic will increase. In light of this assumption, it is reasonable to assume that larger cable will be needed. If the forward-looking cable sizes are underestimated, then it will cost more to correct (id.).

Respondents respectfully suggest that this decision is incorrect. First, there is no record evidence that Petitioners' PSTN traffic "will increase" – and with the development of competitive alternatives such as wireless, such a conclusion is counter-intuitive. It is a clear violation of the substantial evidence standard to base an assumption upon no record evidence. Second, even if there were such evidence, there is clearly no evidence that *every* Petitioner, for *each* of its cable routes between *each* of its switches, would be served most efficiently with only

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[2] See Wireless Brief at 80 (Petitioners "could propose that their interconnection agreements with T-Mobile and Cingular contain contingency provisions that transport rates will be renegotiated if SBC abandons its existing 'meet point facilities' in a way that requires Petitioners to build new facilities from the current meet point to the nearest SBC switch. T-Mobile and Cingular would agree to such a proposal.").

one cable size – and specifically, a 24-fiber cable (and never a 12-fiber cable, never an eight-fiber cable or any other size).

FCC Rule 51.505(b)(1) specifies that network elements be efficiently designed, which requires a reasoned analysis of total demand for fibers and the most efficient cable size to serve total demand over the long term. To implement this means estimating the demand for fibers of cable for a Petitioner's cable routes or a typical mix of cable routes. Then, the next larger cable size is identified, and costs for this cable are determined. This is what Mr. Conwell did in correcting Cass County Telephone's interoffice cable costs. The Petitioners did not do this, and the Report suggests that the Commission does not intend to require them to meet their burden of demonstrating that their forward-looking network is efficiently designed. The Commission, however, does not possess the delegated authority to waive the requirements of FCC Rule 51.505(b)(1).

In addition, the Report ignores altogether evidence clearly showing that basing transport costs on 24-fiber cable only is *not* the most efficient network configuration and therefore is not TELRIC-compliant. Specifically,

- Petitioners today are more than serving total demand for interoffice fibers with cable sizes less than 24 fibers. For example, Cass County has no cable routes today with more than **__** fibers in service, and only **_____** fibers in service (Conwell Direct, Schedule WCC-13). Cass County is not an aberration.

- Cass County and others are likely to satisfy future demand for fiber cable in many cable routes with eight and 12-fiber cable. For example, the interoffice link between Cass County's Peculiar switch and the meet point with **_____ _____** cable with four fibers in service. Other Cass County cable routes have only **___** fibers in service (id., p. 66, l. 12 – p. 67, l. 7.). Any assumption that such cable routes will need 24 fibers to satisfy future demand must be based upon substantial evidence. No such evidence is contained anywhere in the record. The Report, however, suggests that Cass County install 24-fiber cable in every interoffice route, whether the route needs 24-fiber cable or not.

- Eight and 12-fiber cable cost 12 to 16 percent less than 24-fiber cable, resulting in significant cost savings when such cable are adequate to meet demand (id., p. 66, l. 1-

4). Yet, the Report would have Respondents pay transport rates to recover the cost of more expensive cable – in short, pay for capacity that will never be used.

- Peace Valley currently has only **_____** cable in its transport system, composed of **_____** (id., p. 63, l.22 – p. 64, l. 13). Nothing in the record supports the assumption that Peace Valley will need a 24-fiber cable to satisfy future demand. Yet, the Report would have Respondents pay transport rates to recover the cost of a 24-fiber cable for Peace Valley – once again, pay for capacity that will never be used.

To avoid being arbitrary and capricious, an agency must "articulate a rational connection between the facts found and the choice made." Motor Vehicles Ass'n v. State Farm, 463 U.S. 29, 43 (1983). On Issue 8, the Report, in its present form, does not meet this standard. The assumption that someday all 27 Petitioners will all need 24-fiber cable for each of their interoffice cable routes is totally unsupported in the record.

Given that Petitioners have failed to determine efficient cable sizes as FCC rules require, Respondents have recommended that the mix of eight, 12 and 24 fiber cables for Cass County be used, resulting in approximately 12 fibers per cable. This mix was based on efficient design of Cass County's interoffice cable routes as required by FCC Rule 51.505(b). The Commission should either adopt this recommendation or require Petitioners to re-run their cost studies by estimating total fiber demand in their cable routes and sizing interoffice cables efficiently. Otherwise, the Report is arbitrary and capricious (because it is based on no record evidence), fails to comply with FCC Rule 51.505(b) (by failing to analyze total demand for fibers and the most efficient cable size to serve total demand over the long term), impermissibly excuses Petitioners from meeting their burden of proof with regard to such an analysis, ignores copious evidence that contradicts the assumption that all Petitioners will need 24 fiber cable to meet future demand on all interoffice cable routes, and thus artificially inflates transport rates.

**Issue No. 9 – What is the appropriate amount of sharing of Petitioners' interoffice cabling in order to reflect sharing with services other than transport and termination?** The

Report adopts Petitioners' position: "The HAI model assigns the entire cost of interoffice fiber cable to transport, with a portion of the cost assigned to structures" (p. 9). In support of this ruling, the Report states:

> Although Respondents point out faults in the Petitioners' position, using Cass County as an example, they have not offered their methodology for their position (id).

Respondents respectfully suggest that this ruling makes fundamental legal and factual errors. The issue is simply this: if the fibers in a Petitioner's interoffice cable are shared among several users, FCC Rule 51.511 requires that the cost of the cable be apportioned among *all* such users. Under federal law, Respondents cannot be required to pay for the cost of the portion of interoffice cable used by other entities. Yet the Report would require just such a prohibited result.

There is no dispute that Petitioners use their cable for purposes other than the transport of PSTN traffic. For example, the record evidence shows that Cass County Cable Route **_____

_____

_____

_____** (see Conwell Direct, p. 69, l. 6-12).

Respondents' witness Conwell has shown that an efficiently sized interoffice cable for Cass County Telephone would average 12 fibers. Of these 12 fibers, on average, half would be used for the interoffice transport system (including a pro-rata share of spare capacity), and the other half for other purposes – loop concentrators, leased fibers, *etc.* Thus, half of the cost of a 12-fiber cable (or the cost of six fibers of the cable capacity) would be attributable to the transport system and the remainder of the cost would not be associated with interoffice transport

at all. This is the basis of Respondent's recommendation to assume the costs of six fibers of cable for the interoffice transport system.

Yet, in contravention of FCC Rules 51.505(b) and 51.511, the Report would assign 100 percent of Petitioners' interoffice cable costs to transport systems. In other words, the Report, in its current form, would require Respondents to pay for capacity that Petitioners use for loops (which may not be recovered in transport and termination rates), for non-telecommunication activities (such as video or Internet), or for capacity Petitioners lease to affiliates or other third parties. FCC rules prohibit such subsidies.

The Report appears to confuse the concept of sharing the cost of fibers in a cable with the concept of sharing the costs of fibers attributed to the transport system. Petitioners' cost studies do, in fact, share the costs of fibers attributed to the transport system among the common, dedicated and direct trunks "riding" the transport system. That issue is not in dispute. The issue in dispute is that Petitioners' cost studies, and the Report, do not require that the costs of *fibers in the cable* be shared among the different users of those total fibers.

Consistent with FCC rules, Respondents recommend a two-step process: first, the total cost of cables be allocated among all users of the cables' fibers, resulting in 6/12ths (six of twelve fibers) of cable costs being assigned to the transport system; second, the cost of the transport system ($6/12^{th}$ of the total cost) be allocated to common, dedicated and direct trunks in the transport system.

Both Petitioners' cost studies and the Report ignore the first step. The Report, in its current form, requires that the entire cost of the cable (i.e., the cost of *every fiber in the cable*) be assigned to the transport system, even though the uncontroverted evidence in this matter demonstrates that Petitioners' transport systems do not use 100% of the fibers in the interoffice cables. For example, the evidence is undisputed that **___** of Cass County's interoffice

cables contain fibers devoted to uses other than **_____**.[3] By requiring transport and termination rates to pay for 100% of the cost of fibers in Cass County's and the other Petitioners' interoffice transport systems, the Report violates FCC requirements that the costs of interoffice cables be shared among the different users of the cables.

Importantly, the Report does not (and, indeed, cannot consistent with record evidence) find that Petitioners' cost studies allocate all the cost of interoffice cable to all users of the cable. And, the Report does not (and, indeed, cannot consistent with the record evidence) find that Respondents' criticism of Petitioners' proposal is invalid. Instead, the Report apparently finds Respondents' position incomplete because Respondents supposedly did not "offer a methodology for their position."

This rationale impermissibly shifts the burden of proof. The implication is that Respondents' have lost Issue 9 because of a failure to "offer their methodology." Under FCC rules, Respondents are not required to offer a methodology. That burden falls on Petitioners alone.[4]

In fact, Respondents did provide a "methodology" – the very methodology that FCC rules mandate. This methodology is set out in detail on pages 75-79 of the Direct Testimony of Mr. Conwell and shown graphically in Schedule WCC-16. Respondents' specific recommendation on this issue is contained in summary form on page 118 of their Post-Hearing Brief. For the Report to overlook (or ignore) this testimony and recommendation is reversible error.

If, for example, a Petitioner has 12 cables in its interoffice network and uses six of them for transport of PSTN traffic, it has one of two choices: consider the costs of (1) only the six

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[3] Conwell Direct, p. 71, l. 13-14.

[4] The Report appears to confuse the situation by the fact that Respondents were precluded from providing a detailed analysis for all the Petitioners (as they did with Cass County) because many of the Petitioners did not provide in response to data requests the information Respondents needed to make such detailed computations. Obviously, Respondents cannot be faulted because of Petitioners' refusal to respond completely to legitimate data requests. Once again, the burden is not upon Respondents to provide proper data and proper costs studies for Petitioners. That burden lies with Petitioners.

cables that are actually used for PSTN traffic, or (2) all 12 cables, but then spread (or allocate) those costs among all the users of the 12 cables. What an incumbent LEC cannot do lawfully is what Petitioners are asking the Commission to do, and what the Report in fact proposes – namely, have users of six cables (in this example) pay for the costs of 12 cables.

Petitioners have the burden of demonstrating that their cost studies are calculated on a "per unit" cost using "the total number of units of the element" (here, the interoffice cable network). 47 C.F.R. § 51.511(a). This means that the cost of the cable must be apportioned among *all* the fibers in the cable and *all* the users of those fibers – as opposed to what was described above in the second step, in which costs of fibers assigned to the transport system are assigned among common, dedicated and direct trunks. Petitioners have not met this burden. Whether Respondents' methodology is incomplete or unexplained is irrelevant because under federal law, Respondents do not have the burden of proof. That burden is rather upon Petitioners. Because Petitioners have failed to meet that burden, Petitioners' position cannot be adopted – as a matter of law.

The Commission must make two decisions if it wants to render a decision consistent with FCC rules. First, it must determine the proper size of interoffice cables in fibers per cable. Secondly, it must determine what proportion of the cost of the interoffice cables is to be assigned to the interoffice transport system - based on the number of fibers attributed to the interoffice transport system versus other users.

Petitioners have not presented in the record the facts that the Commission would need to properly decide this issue. In short, Petitioners have utterly failed to meet their burden of proof on Issue 9. In contrast, Respondents have submitted a counterproposal that complies fully with FCC rules. Respondents therefore respectfully request that the final order in this cause adopt Respondents' proposal in full.

**Issue No. 10 – What is the appropriate sizing of Petitioners' forward-looking, interoffice transmission equipment?** The Report "adopts Petitioners' position of the HAI default of OC48 because Petitioners' position is forward-looking" (p.10). Respondents respectfully suggest that this ruling is inconsistent with FCC rules.

The issue is not which party's position is forward-looking – because they both are. The issue rather is whether Petitioners' have met their burden of demonstrating that their proposed use of OC-48 transmission equipment in *all* portions of *all* of their networks is the "most efficient" and "lowest cost" configuration, as FCC Rule 51.505(b)(1) requires.

Simply because a network element (the transport system, in this case) reflects forward-looking technology does not relieve an ILEC of the requirement to efficiently size the network element based on its company-specific expected demand. OC-48 is just one of several sizes of SONET transport systems, the forward-looking technology for interoffice transport. Other sizes include OC-3, OC-12 and OC-192 systems, with the capacities for 2,016, 8,064 and 129,024 voice circuits (DS0 equivalents), respectively. By adopting Petitioners' position on this issue, the Report suggests that all Petitioners and all their network nodes (central offices), with significantly different demands for voice circuits, are most efficiently served using *only* OC48 systems with 32,256 voice circuits of capacity. Such an assumption must be supported by evidence in the record, but the Report cites nothing from the record in support. The reason is simple: *Petitioners have submitted no evidence at all in support of this assumption*.

OC-48 equipment has the capacity to handle up to 32,326 voice (DS0 equivalent) circuits (see Tr. Vol. 3, p. 242, l. 1-7). Petitioners' have conceded that use of such equipment would result in vast unused capacity in their networks:

- Witness Schoonmaker admitted that Cass County's use of OC-48 equipment at its **_____** switch would mean that Cass County would use only **___** percent

of available capacity – that is, not use **___** percent of the capacity (Tr. Vol. 3, p. 242, l. 14-24).

- Mr. Conwell's analysis of Cass County's interoffice transmission equipment costs (Exhibit WCC-18, row labeled "Total IO trunks") showed that Cass County's response to T-Mobile's data requests indicated a needed capacity of **____** voice circuits for Cass County's **_____** network nodes (central offices). This demonstrates that an OC-48 system with 32,256 voice circuits of capacity is far too large, and that an OC-3 with 2,016 circuit capacity is sufficient. Given that Cass County is one of the larger Petitioners (in terms of lines in service), it is reasonable to conclude that OC-3 systems also are adequate for smaller companies.

- Peace Valley's transport network has only **_____** circuits, the equivalent of **__** voice circuits (see Tr. Vol. 3, p. 241, l. 23-25). Thus, Petitioners' proposal – which the Report approved – presumes that Peace Valley would purchase transmission equipment with **___** percent-unused capacity.

  - Even if Peace Valley's DS0 circuits were to increase by a factor of 10 (and there is not a scrap of evidence to suggest this would occur), Peace Valley would still not use **__** percent of the capacity provided by OC-48 transmission equipment.

Petitioners have acknowledged that Respondents' OC-3 proposal would give them excess capacity. For example, witness Schoonmaker admitted on cross-examination that Respondents' proposal would build in **__** percent excess capacity for Cass County (see Tr. Vol. 3 p. 242, l. 25 – p. 243, l. 10). Respondents have submitted evidence for 20 of the Petitioners showing that an OC-3 system (with 2,016 voice grade circuits) will supply more than adequate excess capacity for any future growth of all 20 Petitioners (see Conwell Direct, p. 83, 1.21- p. 84, 1.5; Schedule WCC-1). Notably, Petitioners have not even suggested, much less submitted evidence, that this excess capacity would be inadequate to meet their future needs.

FCC Rule 51.505(b) requires that the TELRIC of common transport, specifically the interoffice transport system in this case, reflect an efficient network configuration. FCC Rule 51.511, in defining forward-looking economic costs per unit, intends for the cost of a network element (efficiently configured) to be divided by total demand over a reasonable planning period. Taken together these Rules require Petitioners' cost studies to do the following:

1. Determine the total demand for interoffice transport from voice traffic, private lines, special access circuits and other circuits transported *via* the interoffice transport system. This demand would be expressed as the number of DS1s (24 voice circuits) or DS3s (28 DS1 circuits) required; and
2. Determine the next size OCx transport system that will serve this demand over the reasonable period. If total demand is expected not to exceed three DS3s, an OC-3 system is appropriate. If total demand is expected to exceed three DS3s, but not 12 DS3s, an OC-12 system is justified. And, so on.

Petitioners did not do this. And, the Report fails to require this of the Petitioners.

If Petitioners' forward-looking network is presumed to include transmission equipment too large for future growth, then Respondents will be paying for equipment that will never be used to terminate Respondents' traffic. Such a result would violate FCC Rule 51.511, which requires forward-looking costs to be based upon "reasonable projections" of future usage. The Report, by adopting the proposal that all Petitioners' forward-looking networks should contain OC-48 transmission equipment, violates this requirement. Respondents, therefore, request that the final order adopt their proposal on Issue 10, which would provide forward-looking transmission equipment for 20 Petitioners, with substantial amounts of excess capacity to handle any "reasonable projection" of future growth.

Respondents have also raised a second point with regard to this issue – whether, in the determination of Petitioners' forward-looking transmission equipment, the need for signal regenerators should be assumed. Respondents have presented evidence that signal regenerators are not needed in Petitioners' interoffice networks, because the distances between switches for all Petitioners is less than the 40-mile threshold for placement of a regenerator (Conwell Direct, p. 83, l. 13-14). Petitioners presented no evidence to rebut Respondent's evidence.

The Report does not discuss Respondents' challenge or otherwise rule upon it. This is an error that should be corrected. In adopting Respondents' proposal, the final order should also

adopt the assumption that signal regenerators are not needed in Petitioners' forward-looking transmission equipment.

**Issue No. 11 – What are the appropriate forward-looking common transport costs for each Petitioner?** The Report notes that seven of the Petitioners have not produced the data Respondents (or the Commission) need to independently calculate a transport rate that would comply with FCC requirements. The Report states that the decision on Issue 11 "[w]ill be based on results of rerunning cost studies with recommendations" (p. 10). The Report further states, "As to the 7 that have not produced data, See, Issue 2" (id). In Issue 2, the Report states only that resolution of the issue "is dependent upon the results of the revised cost studies the parties are directed to run" (p. 5). Respondents respectfully submit that the Report has not addressed the problem associated with these seven Petitioners.

The Commission is required by federal law to reject the position of these seven Petitioners, because they have submitted no evidence at all in support of their transport rates and have thus failed to meet their burden of providing that their proposed transport rates do "not exceed [their] forward-looking cost of providing" transport. 47 C.F.R. § 51.505(e). A "rerun" of these seven carriers' cost studies will not correct this fundamental defect.

The necessary information is available, but Petitioners have refused to produce it. No decision can be rendered until this data is produced. Respondents submit that the Commission should order these seven Petitioners to use a bill-and-keep arrangement with Respondents until the seven produce the cost data outlined at the hearing (see Tr. Vol. 4, p. 373, l. 5-24). As Respondents have explained, "only such a remedy will give these seven Petitioners sufficient incentive to produce the data Respondents require to develop corrected rates" (Wireless Brief, p. 38).

**Issue No. 13 – What is the appropriate value of Petitioners' forward-looking signaling link costs?** The Report adopts Petitioners' position, which is based on the HAI default assumption that every switch of every Petitioner (both hosts and remotes) in a forward-looking network would be connected to an SS7 network, because Petitioners' proposal "is forward looking" (p.12). Respondents respectfully suggest that the decision is based upon an assumption supported by no record evidence.

The uncontroverted evidence is that Petitioners do not today connect their **_____ _____**. In fact, remote switches cannot be connected to an SS7 network – that is why they are called "remotes;" only "host" and standalone switches can be connected to an SS7 network and thus have signaling links (see Wireless Brief, p. 111). Thus, for the Commission to adopt Petitioners' assumption (SS7 links will be connected to every remote switch in a forward-looking network), Petitioners would have had to submit evidence that (a) it is technically feasible to connect SS7 links to remote switches, and if so (b) there will someday be a need to justify such remote switch connections (as opposed to using the host switch SS7 links as is done today). Petitioners have submitted no evidence on either point.

As with other issues discussed above, such lack of evidence is not trivial. If the Commission requires Respondents to pay for SS7 signaling links that are not, and will not be, needed, then Respondents will be required to pay for facilities that will never be used. Thus, the burden is on Petitioners to demonstrate that the assumption in question (SS7 links to all remote switches) is based upon "reasonable projections" of future growth. 47 C.F.R. § 51.511. It is not enough that an assumption be forward-looking; it must also be reasonable (and supported by credible evidence). That is what is missing here. When a cost study assumption is not supported by reasonable projections in the record, FCC rules prohibit a state commission from accepting the assumption. This is true whether Respondents submit any proposal at all.

The Report implies, though not stating directly, that Respondents should lose Issue 13 because their proposal is not forward-looking. The Report further appears to imply that Resondents' proposal is not forward-looking because Respondents do not propose to increase the number of signaling links in Petitioners' networks. The term "forward-looking," however, is not synonymous with "expansion." The FCC has stated: "Forward-looking cost methodologies, like TELRIC, are intended to consider the costs that a carrier would incur in the future." First Report and Order, 11 FCC Rcd at 15848 ¶ 683. Thus, if a LEC's traffic volumes are not increasing, a forward-looking cost study would not assume that its transport network will require greater capacity.

Respondents' proposal (that the cost of current SS7 signaling links be used to calculate transport and termination rates) is based upon the fact – uncontroverted in the record – that Petitioners will never connect their remote switches to an SS7 network, because remote switches cannot be so connected. Given this fact, Respondents' proposal is not only "forward-looking," it is also clearly the "least cost network configuration" as FCC Rule 51.505(b)(1) requires. To assume signaling links that will never be established is, simply put, prohibited by FCC rules.

The error caused by the Report's unexplained decision is significant. For example, Cass County Telephone has **_____**.[5] Because remote switches are not capable of being connected directly to an SS7 network, Cass County, in its actual network, has only **_____**. Yet, the Report would base a rate for Cass County upon the assumption that the company would install **_____**.

The Commission's arbitration decision must be based on substantial evidence. Here, the Report is based on no evidence at all, and the Report further does not address contrary evidence

[5] Conwell Direct, Schedule WCC-9.

that Petitioners made no attempt to rebut. Accordingly, Respondents respectfully request that the final order in this cause adopt Respondents' proposal.

**Issue No. 17 – What is the appropriate intraMTA traffic balance ratio/percentage?**

The Report adopts Cingular's position, but with respect to the T-Mobile arbitration, adopts Petitioners' position. The Report explains this latter decision as follows:

> [B]oth T-Mobile and the Petitioners want to use averages. However, Petitioners' average is based on actual traffic studies. T-Mobile's is based on actual, reduced traffic (p. 14).

T-Mobile asks the Arbitrator to reconsider this decision. First, 15 of the Petitioners introduced no evidence at all regarding the intraMTA traffic they exchange with T-Mobile.[6] While T-Mobile has been willing to use averages, this agreement was conditional:

> In this proceeding, T-Mobile is willing to apply an average traffic ratio to all Petitioners, ***provided that the average is supported by evidence for each Petitioner*** (Wireless Brief, p. 151; emphasis added).

Because 15 of the Petitioners have submitted no evidence at all in support of their ratios, the Arbitrator has no choice but to reject their position for their failure to meet their burden of proof.

In contrast, T-Mobile conducted actual traffic studies designed to measure intraMTA traffic exchanged with all the Petitioners – including the 15 that submitted no evidence whatsoever. To the extent that either parties' position is deemed "reduced" (and it is not self evident what that means), it be must Petitioners' position that relies on incomplete data. Some of the land-to-mobile call records were incomplete, but that industry-wide problem does not convert a study of actual traffic into, or otherwise result in, a "reduced" traffic study as the Report summarily concludes.

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[6] These 15 Petitioners include: Cass, Craw-Kan, Farber, Grandby, Grand River, Iamo, KLM, Lathrop, Le-Ru, Million, New Florence, Oregon Farmers, Peace Valley, Rock Port, and Steelville. While BPS measured traffic, it measured both intraMTA *and interMTA traffic* without separating the traffic, which invalidates the results of its study (see Tr. Vol. 3, p. 247, l. 24 – p. 248, l).

Based on the record evidence and governing federal law requirements, T-Mobile submits that the Arbitrator must rule in T-Mobile's favor on Issue 17 – at least with respect to the 15 Petitioners that did not submit any evidence (or in BPS' case, did not submit useful evidence).

## II. CINGULAR ONLY ISSUES

**Issue 20 – Should Petitioners be required to provide local dialing for calls to a Cingular NPA/NXX rate centered in Petitioners' EAS calling scopes?**

**Issue 21 – Should Petitioners be required to accept and recognize as local all calls from/to Cingular subscribers who have been assigned numbers that are locally rated in Petitioners' switches, if Cingular does not have direct interconnection to those switches?**

**Issue 22 – Should the Cingular contract contain provisions for both direct and indirect interconnection?**

For these three Cingular-only issues, the Report states that "the Commission will not rule" because "the parties offer no proposed language to the interconnection agreement" (pp. 15, 16 and 17). This is incorrect. The record in this case does contain Cingular's proposed language for each of the above three issues. Attached as Exhibit 1 to Cingular's Response to the Petition for Arbitration (which was filed in the record on October 31, 2005) is the proposed Interconnection Agreement containing Cingular's proposed language for each of the three issues.

For Issue 20, Cingular's position is discussed on page 17 of Cingular's Response, which discussion states that Cingular's proposal is contained in the **bold language** in section 3.2 of Exhibit 1 to the Response. Cingular's proposed language in Exhibit 1 reads as follows:

> **The exchange of the Parties' traffic on ILEC's EAS ("Extended Area Service") routes shall be considered Local traffic.**

For Issue 21, Cingular's position is discussed on pages 17-18 of its Response, which discussion states that Cingular's proposal is contained in the **bold language** in section 20.2 of Exhibit 1 to the Response. Cingular's proposed language in Exhibit 1 reads as follows:

**Cingular may establish local numbers in an ILEC switch without obtaining a direct connection to that switch. Accordingly, Cingular may obtain and ILEC will recognize as local all numbers assigned to ILEC's rate center, including those numbers which may have a designated LERG routing point outside the ILEC rate center but within the same LATA as the rate center. This section applies whether ILEC and Cingular are directly or indirectly connected. If indirectly connected, ILEC will deliver all calls to such local numbers to the transiting carrier and not to an interexchange carrier.**

For issue 22, Cingular's position is discussed on page 9 of Cingular's Response, which discussion states that its proposal is contained in the **bold language** in sections 3.3, 3.4, 3.5, 3.6 and 3.7 of Exhibit 1 to the Response. In this same issue, Cingular objected to portions of Petitioners' proposed language in section 21.1, and this was also indicated in the discussion on page 9 of the Response. The objected-to language in that section is doubled-underlined. Cingular's proposed language for this issue is too lengthy to quote here, but the proposed language is clearly contained in the record of this cause.

Even if Cingular's proposed language were not in the record, the Commission would still be required under the Act to rule on these issues. Section 252(b)(4)(C) of the Act specifies that a State commission "shall resolve each issue set forth in the petition and the response, if any." This statutory requirement does not allow the Commission to defer ruling on an issue – even if the parties fail to present evidence or argument – provided the issue is raised in the Petition or the Response. As discussed above, all three issues were raised in Cingular's Response.

Cingular therefore respectfully requests that the final order in this cause include rulings on Issues 20, 21 and 22 consistent with Cingular's stated positions and proposed contractual language as included in Cingular's Response to the Arbitration Petition, Cingular's testimony and Respondents' Post-Hearing Brief filed herein.

Issue 23 – Should Petitioners be entitled to claim the Rural Exemption? The Report rules against Cingular on this issue, holding:

> In order for this [the Rural Exemption] to have been an issue, Cingular would have had to petition the Commission to terminate the rural exemption Petitioners now have. Cingular has not done so and the Commission has not issued an order terminating the rural exemption of Petitioners (p. 18).

Under the Act there are *two different types of rural exemptions*. Under Section 251(f)(1), a rural carrier is exempt from the Section 251(c) obligations (such as collocation and the provision of network elements) unless and until the Commission terminates the exemption pursuant to a specific request. This is the rural exemption that the Report discusses. Cingular does not seek a decision with regard to the Section 251(f)(1) exemption.

Under Section 251(f)(2), on the other hand, a rural carrier must actively seek an exemption from certain of the Section 251(b) requirements. This is the exemption that Cingular seeks a ruling on. Petitioners are not entitled to an exemption of 251(b) obligations such as "dialing parity" unless they file an application with the Commission, and unless the Commission thereafter specifically rules that the specific Section 251(b) obligation – dialing parity in this example – would constitute an "undue economic burden." It is Cingular's position that a rural LEC filing a Petition for Arbitration under the Act thereby waives the right to seek an exemption of the Section 251(b) obligations pursuant to the exemption allowed under Section 251(f)(2) (see Wireless Brief, pp. 163-65).

The Report ignores the distinction between the obligations that are exempted by Section 251(f)(1) and those exempted by Section 251(f)(2). Cingular, for reasons more fully discussed in its Post Hearing Brief, therefore respectfully requests that the final order rule that Petitioners may not claim an exemption of the Section 251(b) requirements pursuant to the exemption of Section 251(f)(2) when having filed a Petition for Arbitration under Section 252 of the Act.

## CONCLUSION

WHEREFORE, Respondents ask for relief as requested herein.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that a true and final copy of the foregoing was served via electronic transmission on this 24th day of February, 2006, to the following counsel of record:

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