BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Petition of	)	
Alma Telephone Company	)	
for Arbitration of Unresolved	)	**Case No. IO-2005-0468, et al.**
Issues Pertaining to a Section 251(b)(5)	)	**(consolidated)**
Agreement with T-Mobile USA, Inc.	)	

POST-HEARING BRIEF OF RESPONDENT T-MOBILE USA, INC.

Comes now Respondent T-Mobile USA, Inc. ("T-Mobile), by its undersigned counsel, and pursuant to 4 CSR 240-36.040(18), files its post-hearing brief in this consolidated proceeding. In support of the positions asserted in its Final Offers, T-Mobile states the following:

I. INTRODUCTION

A. PROCEDURAL HISTORY.

This proceeding arises out of arbitration petitions filed by Alma Telephone Company, Northeast Missouri Rural Telephone Company, Mid-Missouri Telephone Company, and Chariton Valley Telephone Corporation ("LECs" or "Petitioners") on June 7, 2005, designated as Case Nos. IO-2005-468, 469, 470 and 471, respectively. By Orders dated June 8, 2005, the Commission consolidated the four Cases in Case No. IO-2005-0468. T-Mobile filed its response to the consolidated petitions on July 5, 2005.

The Petitioners and T-Mobile initiated interconnection negotiations on January 13, 2005. These negotiations were unsuccessful, largely because the Petitioners were unwilling to compromise any of their opening positions in the negotiations and because they refused to acknowledge their basic legal obligations under the federal Communications Act and implementing rules adopted by the Federal Communications Commission ("FCC").

An initial arbitration meeting was held on June 29, 2005, and on the next day, the Arbitrator issued an order setting a procedural schedule.

On July 11, 2005, T-Mobile and the Petitioners filed motions in limine. On August 3, 2005, the Arbitrator granted T-Mobile's motion (finding that issues relating to the exchange of traffic, and any compensation due as a result of that traffic exchange, prior to January 13, 2005, were not to be tried in this Docket, and excluding evidence concerning those issues), and denied the Petitioners' motion (which had sought to exclude evidence concerning intraMTA traffic the Petitioners send to interexchange carriers). The August 3 order substantially narrowed the issues and evidence required in this arbitration.

T-Mobile and the Petitioners each filed statements of unresolved issues and pre-hearing legal memoranda on July 15, 2005, written direct testimony on July 21, 2005, and rebuttal testimony on July 28, 2005. The parties jointly filed an issues matrix and Final Offer proposals on August 5, 2005, and on that date, the Petitioners filed a separate position statement. T-Mobile's position statements on the issues were contained in the issues matrix. In the spirit of compromise, T-Mobile presented Final Offers that moved substantially from its opening positions, and chose not to pursue several issues it had previously identified. An evidentiary hearing was held on August 11, 2005, to consider the disputed issues.

The initial pleadings had identified sixteen open issues for resolution. The Arbitrator eliminated five issues (Nos. 1-5 in the arbitration petitions) in his August 3 Order on the motions in limine. The Petitioners have formally abandoned Issues 1-5, the parties have reached agreement on Issues 6d (interMTA/intraMTA split for Alma Telephone) and 13 (effective date of the TTA), and T-Mobile has abandoned Issue 11 (use of cell sites for traffic studies), and consolidated Issues 14 and 15 into Issue 8.

B. THE ARBITRATION ISSUES THAT HAVE BEEN RESOLVED.

Of the sixteen unresolved issues initially identified by the parties, several of these issues have been resolved. T-Mobile below identifies the arbitration issues that are no longer in dispute and as a result, no longer require action by the Arbitrator.[1]

1. Issues 1-5: Compensation Prior to the January 13, 2005 Request for Negotiations

The Arbitrator, in his August 3, 2005 Order concerning the motions in limine, excluded from this proceeding "all consideration of traffic volumes and compensation for traffic prior to January 13, 2005, the date on which Petitioners requested negotiations." Order at 2. Two days later, the Petitioners stated they "will accept the Arbitrator's direction" and "will relent on issues 1-5."[2] Accordingly, Section 5.5 of the Petitioners' proposed Traffic Termination Agreement ("TTA") should be excluded from the final TTA because it references a settlement agreement that does not exist and that will not be addressed in this arbitration proceeding.

The Petitioners now agree with T-Mobile that the "TTA, as approved," should be effective "back to January 13, 2005."[3] It would be inappropriate for the Arbitrator to "instruct or permit Petitioners to request inclusion" of pre-January 13, 2005 traffic in their pending complaint case.[4] The Arbitrator has no jurisdiction over the complaint docket (Docket No. TC-2002-57) to which the Petitioners refer. The Petitioners must seek Commission approval to expand the scope of that proceeding.

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1 The Arbitrator must resolve "open issues." *See* 47 U.S.C. § 252(c). The issues that T-Mobile lists in this subsection have been resolved and are no longer "open."

2 Petitioners' List of Issues, Position Statements, Decision Point List and Final Offers, at 5 (Aug. 5, 2005)("Pet. Final Offer Mem.").

3 *See id.*

4 *See id.*

2. Issue 6d: InterMTA Factor – Alma Only

T-Mobile agrees with the Petitioners' statement that "Alma has proposed a 0.0% interMTA factor, and that T-Mobile has agreed to that proposal. There is no need for interstate/intrastate proportions of interMTA access traffic necessary for the Alma TTA. Traffic factors are not an issue between Alma and T-Mobile."[5] The parties noted their agreement on this issue at the hearing. Tr. 43, ll. 7-10.

3. Issue 9: Petitioners' Reciprocal Compensation Obligations for IntraMTA Calls to Wireless Customers with Ported Telephone Numbers

Although the TTA originally proposed by the Petitioners would have exempted them from paying reciprocal compensation to T-Mobile for intraMTA calls to T-Mobile customers with ported numbers, the Petitioners have never explained why they think that such calls are exempt from their statutory duty to pay reciprocal compensation. For example, T-Mobile pointed out in response to the arbitration petitions that there is "no exception in FCC rules for calls to wireless customers that utilize a ported telephone number,"[6] and federal appellate courts have held that the FCC's intraMTA rule "is clear, unambiguous, and on its face admits of no exceptions."[7] The Petitioners ignored this T-Mobile point in their reply, again failing to justify their position.

The Petitioners have now, finally, abandoned their position on ported numbers, stating they "agree with T-Mobile" that the objectionable language included in Section 1.1 of the proposed TTA should "not be included in the TTAs" resulting from this arbitration:

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5 Pet. Final Offer Mem. at 6.

6 T-Mobile Consolidated Response at 6 ¶ 25 (July 5, 2005).

7 *Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d 1256, 1264 (10th Cir. 2005).

> Petitioners agree to drop their request that language excluding calls made to a ported number [sic].[8]

T-Mobile notes that while Petitioners state in passing that they have been "granted suspensions from and/or modifications to intermodal Local Number Portability requirements,"[9] they do not seek to have this tangential fact recognized in the TTAs resulting from this arbitration. T-Mobile agrees with this approach-- namely, that the Petitioners' obligations with respect to intermodal LNP requirements are irrelevant to the TTA. Routing and compensation for calls to ported numbers are the same as calls to non-ported numbers.

4. Issue 13: Effective Date of Arbitration Award

T-Mobile and the Petitioners agree that "the effective date of the agreement should be the date the negotiations began, January 13, 2005":

> Petitioners do not believe this is an issue in light of their offer to drop the inclusion of past compensation claims in this Arbitration.[10]

The parties confirmed their agreement on this issue by noting their stipulation at the hearing. Tr. 42 l. 22 - 43 l. 4.

5. Issues 14 and 15: Petitioners' Obligation to Compensate T-Mobile When Networks Are Indirectly Interconnected and for Transport Costs Incurred In Terminating Land-to-Mobile Traffic

T-Mobile added Issues 14 and 15 in its pleadings, but, as the case moved toward hearing, concluded that both of these issues were subsumed by Issue 8, which raises the general issue of compensation to T-Mobile for completion of intraMTA land-to-mobile calls. Rather than burden

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8 Pet. Final Offer Mem. at 24.

9 *Id.*

10 Pet. Final Offer Mem. at 27.

the Arbitrator with duplicative issues, T-Mobile chose to drop Issues 14 and 15 as separate issues.

C. ARBITRATION ISSUES THAT REMAIN UNRESOLVED

The following six issues remain unresolved between the Parties.

1. Issues 6a-6c, and 6e: InterMTA Percentage and Interstate/Intrastate Traffic Split– Chariton, Mid-Missouri and Northeast

The parties continue to disagree over the intraMTA – interMTA split of T-Mobile mobile-to-land traffic terminating to three of the Petitioners -- Chariton, Mid-Missouri, and Northeast -- to be included in the going-forward interconnection agreement. The Petitioners' final offers were identical to their opening positions: Chariton, 26% interMTA and 74% intraMTA, Northeast, 22.5% interMTA and 77.5% intraMTA, and Mid-Missouri, 16% interMTA and 84% intraMTA. In contrast, T-Mobile's final offer presented a compromise from its opening position, offering 13% interMTA and 87% intraMTA for traffic terminated to Chariton, 11.25% interMTA and 88.75% intraMTA for traffic terminated to Northeast, and 8% interMTA and 92% intraMTA for traffic terminated to Mid-Missouri.

With regard to the interstate/intrastate split of traffic, the Petitioners have again refused to move from their original position of a uniform 80% intrastate and 20% interstate allocation. T-Mobile showed movement in its final offer of a 50% intrastate and 50% interstate traffic split.

2. Issue 7: IntraMTA Rate

The parties vigorously contest the issue of an appropriate rate for intraMTA traffic. Petitioners' opening position and final offer are identical, at $0.035 per minute. T-Mobile's final offer presents a compromise of $0.015 per minute as compared to its opening position of $0.068 per minute for a permanent rate (in addition to the original offer, which Petitioners did not accept, of the default interim rate established by the FCC subject to true up upon approval of the

permanent rate). Although T-Mobile's cost witness documented that when the FCC's TELRIC rules are applied, the Petitioners are entitled to no more than $0.0068 per minute,[11] T-Mobile, in the spirit of compromise, is willing to pay the Petitioners $0.015 per minute for mobile-to-land intraMTA traffic.

3. Issue 8: Reciprocal Compensation Obligation for IntraMTA Land-to-Mobile Traffic that the Rural LEC Hands Off to an IXC for Delivery to T-Mobile

The Petitioners continue to ask this Commission to create an exemption from the reciprocal compensation rules for intraMTA calls originated on their networks that their customers make to T-Mobile subscribers, based on the fact that they route this traffic to an IXC to deliver in turn to T-Mobile for termination. T-Mobile maintains its position that federal law permits no such exception to the reciprocal compensation obligation for all intraMTA traffic.

4. Issue 10: Billing for IntraMTA Traffic

The Petitioners have studiously ignored the alternate, industry-standard approaches that T-Mobile has proposed to address billing under the TTA that results from this arbitration. T-Mobile's opening position described both bill-and-keep and net billing, both of which are commonly used in negotiated and arbitrated interconnection agreements between CMRS providers and ILECs. Continuing in the Final Offer framework of compromise, T-Mobile's last position follows the net billing approach that utilizes intraMTA traffic factors of 65% mobile-to-land and 35% land-to-mobile to capture the reciprocal compensation obligations of each party. The Petitioners have not contested or otherwise addressed T-Mobile's proposals concerning Issue 10. There is, therefore, no basis for the Arbitrator to rule against T-Mobile on Issue 10.

[11] Conwell Rebuttal, Ex. 15, p. 2 l. 14.

5. Issue 12: Including an Explicit Statement of the Parties' Reciprocal Compensation Obligation

Related to Issue 8, to eliminate doubt and later disagreement among the parties, T-Mobile seeks an explicit statement in the arbitrated TTA that the compensation obligation for intraMTA traffic is reciprocal and symmetrical. Consistent with their position on Issue 8, the Petitioners seek to exclude any statement of their obligation to compensate T-Mobile for completing land-to-mobile intraMTA traffic.

6. Issues 16: The Petitioners' Discrimination Against T-Mobile by Requiring Their Customers to Dial 1+ to Reach All T-Mobile Customers, Including Those with Telephone Numbers Rated in the LEC's Rate Center

The Petitioners have made apparent that they will not recognize local telephone numbers that T-Mobile may obtain in compliance with FCC rules, and that they will instead treat these calls as toll and require their customers to dial extra digits to complete these local land-to-mobile calls. This discriminatory position conflicts with the Petitioner's local dialing parity obligations set forth in the Act and FCC rules. Petitioners conceded that this discriminatory position would impose a substantial competitive disadvantage on T-Mobile and other wireless carriers.

II. LEGAL STANDARDS TO BE APPLIED IN THIS ARBITRATION PROCEEDING

Below are the relevant legal standards that T-Mobile submits should be applied to this proceeding.

A. THE COMMISSION IS REQUIRED TO FOLLOW FEDERAL LAW – EVEN IF FEDERAL LAW DIFFERS FROM PRIOR COMMISSION PRECEDENT

As a general matter, current federal law provides the framework for resolving disputes arising during arbitration of interconnection agreements. Congress, in the Telecommunications

Act of 1996, fundamentally changed – and narrowed – the scope of State authority over the interconnection of telecommunications networks. As the U.S. Supreme Court has stated:

> ...the question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed in the 1996 Act, it unquestionably has. * * * Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control.[12]

Congress has authorized State commissions to arbitrate interconnection disputes, but it also made clear that State commissions must follow federal law in resolving these disputes. Section 252(c) of the Act provides:

> In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission *shall* –
>
> (a) *ensure* that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251 of this title;
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> (b) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
>
> (c) provide a schedule for implementation of the terms and conditions by the parties to the agreement.[13]

The Missouri Commission, in arbitrating and resolving the open issues, has only that authority which the Congress has expressly delegated to it.[14] The obligation to apply federal law in

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[12] *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366, 378 n.6, 381 n.8 (1999). *See also Iowa Network Services* v. *Qwest,* 363 F.3d 683, 686 (8th Cir. 2004)("The 1996 Act also thrust the federal government into the local exchange telephone market regulatory arena, which had previously been the exclusive domain of the states."); *id.* at 690 ("There can be no doubt that in the 1996 Act Congress greatly expanded the federal government's involvement in the telecommunications industry, even into areas such as local exchange service that previously had been left to state regulation."); *AT&T* v. *Southwestern Bell,* 86 F. Supp. 2d 932, 946 (W.D. Mo. 1999)(Federal court rejects Missouri Commission's 11th Amendment immunity defense).

[13] 47 U.S.C. § 252(c)(emphasis added).

[14] As a federal district court in Missouri has held, "[a]bsent Congressional authority, the PSC would have no right to participate in the unique dispute resolution process devised by Congress, in which the

rendering an arbitration decision applies even if State law precedent differs from federal law. The Eighth Circuit has stated in this regard: "We must defer to the FCC's view . . . . The new regime for regulating compensation in this industry is federal in nature, and while Congress has chosen to retain a significant role for the state commissions, *the scope of that role is measured by federal, not state law.*"[15] The federal courts have jurisdiction over any appeal of arbitration decisions by state commissions.[16]

Throughout this proceeding the Petitioners have cited to, and relied upon, prior decisions of this Commission. T-Mobile respectfully submits that to the extent these decisions conflict with federal law, the Commission is required in this arbitration proceeding to apply federal law.[17]

PSC is authorized to arbitrate disputes between private telecommunication companies." *AT&T* v. *Southwestern Bell,* 86 F. Supp. 2d at 946.

[15] *Southwestern Bell* v. *FCC,* 225 F.3d 942, 946-47 (8th Cir. 2000)(emphasis added; internal citations omitted). *See also Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d at 1263 ("These FCC determinations have since been codified as regulations *binding on* the industry and *state commissions.*")(emphasis added).

[16] *See* 47 U.S.C. § 252(e)(6)("In any case in which a state commission makes a determination under this section, any party aggrieved by such determination may bring an action in the appropriate Federal district court."). *See also Iowa Network Services* v. *Qwest,* 363 F.3d at 692 ("Once the agreement is either approved or rejected by the [state commission], any aggrieved party is directed by Congress to bring an action in federal court to challenge the [state commission's] determination that the agreement is, or is not, in compliance with §§ 251 and 252."); *id.* at 693-94 ("Congress gave the authority to interpret § 251(b)(5) to the federal courts."). Indeed, Congress has provided that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4).

[17] For example, in *Rural Iowa Independent Telephone Ass'n* v. *Iowa Utilities Board,* No. 4:02-cv-40348, slip op., at 32 n.36 (S.D. Iowa, Aug. 11, 2005)(copy attached), the U.S. District Court for the Southern District of Iowa chose not to follow decisions of the Missouri Commission and prior Iowa decisions upon which Iowa rural ILECs had relied.

B. MATTERS THAT ARE NOT RELEVANT TO THIS ARBITRATION

There are several matters that the Petitioners have raised that have no relevance to the Arbitrator's decision.

1. Negotiated agreements that the parties may have with other carriers. The Petitioners in their pleadings and during the hearing repeatedly mentioned that their positions on certain issues are consistent with terms contained in agreements that one of the parties has voluntarily negotiated with *other* carriers, or with terms in voluntarily negotiated agreements to which none of the companies in this case is party.[18] In fact, negotiated agreements involving other carriers are legally irrelevant in this arbitration proceeding, and certainly do not constitute evidence upon which the Arbitrator may rely to resolve the disputed issues.

Agreements that are negotiated voluntarily (without arbitration) can – and do – include provisions "without regard to the standards sets forth in subsections (b) and (c) of section 251 of this title."[19] After all, the very essence of negotiated agreements is compromise, whereby each party makes a concession in one area to receive a benefit in another area (or a party makes concessions because the cost of arbitration or other business concerns may exceed the benefits of arbitration).

In addition, the legal standard for State commission approval of an interconnection agreement differs for negotiated and arbitrated agreements. With regard to negotiated agreements, it does not matter whether every term in the agreement complies with federal law in every respect; a State commission may reject a negotiated agreement only if it is contrary to the public

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[18] *See, e.g.,* Pet. Final Offer Memo. at 14-15 (Petitioners refer to "approximately 70 agreements" between rural ILECs and CMRS carriers, "*none* of which including an obligation for the LEC to compensate T-Mobile for landline to wireless IXC traffic.")(emphasis in original).

[19] 47 U.S.C. § 252(a)(1).

interest or discriminates against a carrier not a party to the agreement.[20] In stark contrast, a State commission may only approve arbitrated agreements that "meet the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section."[21]

The Petitioners (as is their right) have chosen to arbitrate the reciprocal compensation issues rather than to engage in the meaningful compromise that would have been necessary for the parties to have developed an agreement voluntarily. As a result of this choice, this Commission is now required to "ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251 of this title."[22] The Petitioners certainly cannot complain that this Commission must apply federal law to the open issues when it was they who chose the arbitration alternative in the first place.

2. Section 251(i). The Petitioners complain they are "disadvantage[d]" and placed between "the proverbial rock and hard place" because Section 251(i) will require them to offer to other wireless carriers the terms of the agreement that is ultimately adopted in this proceeding.[23] The Petitioners are correct that the obligations of Section 252(i) apply to incumbent LECs only, and not to competitive carriers like T-Mobile. This was a deliberate policy decision made by Congress to "prevent discrimination" by incumbent LECs that hold inherent market power over new entrants.[24] As the FCC has observed, competitive carriers have "little to offer the incum-

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20 *See* 47 U.S.C. § 252(e)(2)(A).

21 47 U.S.C. § 252(e)(2)(B). *See also id.* at § 252(c)(1).

22 *Id.*

23 *See* Pet. Final Offer Mem. at 1-2.

24 *See All-or-Nothing Rule Order*, 19 FCC Rcd 13494, 13510 ¶ 28 (2004). *See also First Local Competition Order,* 11 FCC Rcd 15499, 16139 ¶ 1315 (1996)("[T]he primary purpose of section 252(i) [is] preventing discrimination."); *id.* at 16141 ¶ 1321 ("[T]he importance of section 252(i) [is] in preventing discrimination.").

bent," with the result that incumbents have "scant, if any, economic incentive to reach agreement."[25] The FCC has additionally recognized that an incumbent LEC "has superior bargaining power"[26] and "has the incentive to discriminate against its competitors."[27] In contrast, competitive wireless carriers possess no market power.[28]

The Petitioners' obligations under Section 252(i) are legally irrelevant to the task before the Arbitrator – namely, to "ensure that [the decision] meet[s] the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251 of this title."[29] Importantly, the Arbitrator would have this task even if Section 252(i) did not exist.

Several points bear brief mention concerning the Petitioners' Section 252(i) obligation. First, the FCC recently limited the scope of an incumbent LEC's obligation under the statute by replacing its former "pick-and-choose" rule with the more restrictive "all-or-nothing" rule.[30] Second, the Arbitrator should be advised that several Missouri LECs have recently petitioned the FCC to extend its "all-or-nothing" rule to wireless carriers, so a rural LEC can opt into contracts wireless carriers have entered into with other LECs, and that petition is now pending.[31] Finally,

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25 *First Local Competition Order,* 11 FCC Rcd at 15560 ¶ 141.

26 *Id.*

27 *Id.* at 15612 ¶ 218.

28 The size of the respective parties often has little relevance in negotiations. For example, even a national wireless carrier like T-Mobile cannot compete meaningfully with the services provided by a small incumbent LEC if the incumbent refuses to pay reciprocal compensation for land-to-mobile traffic while demanding that the wireless carrier pay it compensation for mobile-to-land traffic or if the incumbent refuses to honor locally-rated telephone numbers that a wireless carrier obtains pursuant to FCC rules.

29 47 U.S.C. § 332(c)(1).

30 Under the new "all-or-nothing" rule, a carrier seeking to avail itself of terms in an interconnection agreement must "adopt the agreement in its entirety, taking all rates, terms, and conditions from the adopted agreement." *All-or-Nothing Rule Order*, 19 FCC Rcd 13494 at ¶ 1 (2004).

31 *See* Missouri Small Telephone Company Group, Petition for Reconsideration, CC Docket No. 01-92 (March 25, 2005)("MSTCG Petition"). *See also* Public Notice, *Petitions for Reconsideration of Ac-*

the "proverbial rock and hard place" about which the Petitioners complain is again due to their decision to arbitrate the issues rather than engage in meaningful negotiations with T-Mobile.

C. THE PETITIONERS BEAR THE BURDEN OF PROOF ON ALL ISSUES

The Petitioners, as incumbent LECs, bear the burden on proof on all issues. As the Minnesota Public Utilities Commission has observed:

> The Federal Act attempts to introduce competition into the monopoly markets of incumbent providers. It does this by imposing a number of specific duties on incumbent LECs, all aimed at giving new entrants reasonable and nondiscriminatory access to the networks of incumbents. The Act, in effect, puts the onus on incumbent LECs to open their markets to competitors. It follows then that the burden of proof in proceedings to implement the Act should fall on the incumbent, in this case, GTE.[32]

As discussed in the following section, the Commission's rules must also be considered in resolving the disputed issues. Under 4 CSR 240-36.040(19), the Arbitrator must select one party's position over the other party's position ("baseball arbitration"), "unless the result would be clearly unreasonable or contrary to the public interest..." Under long-standing Missouri law, a decision of the Commission must be both lawful and reasonable, i.e., it must be within the Commission's statutory powers and supported by substantial and competent evidence on the record as a whole. *State ex rel. Utility Consumers Council v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. Banc 1979). This arbitration is governed by federal law, thus, to be lawful, the decision must be consistent with governing federal law. The Commission is an agency with limited powers (*Id.* at 49), and as interconnection arbitrations are creatures of federal law, the Commission must look to federal law to determine the scope of its power. The Petitioners must

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tion in Rulemaking Proceeding, Report No. 2713 (May 25, 2005), *published in* 70 Fed. Reg. 34766 (June 15, 2005); Corrected Report No. 2713 (June 3, 2005).

[32] *AT&T Communications/GTE Minnesota Arbitration Order*, Docket No. P442,407/M-96-939, 1996 Minn. PUC LEXIS 151 at *10 (Dec. 12, 1996)(emphasis added).

prove that their proposals are consistent with federal law. Further, for the Arbitrator to adopt their position on an issue, the Petitioners have the burden of proving by competent and substantial evidence that their proposal is more reasonable than T-Mobile's.

D. PSC RULES AND RECENT CASES

This proceeding is governed for procedural purposes by the Commission's rule applicable to arbitration of interconnection disputes. 4 CSR 240-36.040. Although the rule outlines in detail the procedure to be followed in this case, it does not address the substantive issues of dispute resolution, other than to state that the Arbitrator is to choose between the parties' Final Offers. 4 CSR 240-36.040(19). The Arbitrator's Report is presented to the Commission for final resolution of the disputed issues. 4 CSR 240-36.040(24).

The Commission has recently considered several arbitration cases involving interconnection agreements between incumbent LECs and competitive telecommunications carriers, but apparently has to date not considered an arbitration case involving an incumbent LEC and a wireless carrier. Although witness Schoonmaker indicated that arbitrations between incumbent LECs and wireless carriers have been commenced, he could cite no case which had proceeded to hearing and decision by the arbitrator and Commission. Thus, the Arbitrator in this case is writing on a clean slate with respect to the issues raised by the parties.

III. DISCUSSION OF THE DISPUTED ISSUES

T-Mobile below discusses each of the "open issues" that the Arbitrator must address and why its proposals should be adopted.

A. ISSUE 6: PROSPECTIVE INTERMTA/INTERSTATE FACTORS FOR THREE OF THE PETITIONERS (ALL BUT ALMA)

Each of the three Petitioners with which T-Mobile did not reach agreement concerning the prospective interMTA/intraMTA and interstate/intrastate traffic allocation made a proposal based on a "traffic study" using vintage data. This proffer of outdated information does not satisfy the Petitioners' burden of proof on this issue. None of the data upon which these proposals are based is less than two years old, none involved more than three months' traffic figures, and none were based on the FCC's definition of a local call. Further, none of the Petitioners explained the methodology of these "studies," leaving the Arbitrator to speculate as to their validity and depriving T-Mobile of the opportunity to meaningfully examine the studies and point out any shortcomings. For example, it is likely that Petitioners relied on the rate center assigned to the customer to determine the location of an originating caller, which clearly does not take into account the fact that a mobile caller may very well not be placing the call from a location in the rate center. In short, the traffic studies which form the basis of the Petitioners' proposals on traffic allocation are just as unreliable as the cost studies relied on by Mr. Schoonmaker to support the Petitioners' intraMTA rate proposal.[33]

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[33] Mrs. Schoonmaker provides no evidence on the traffic jurisdiction issues. Tr. 139 l.17-21. The companies' individual witnesses are the only sources of evidence to support their proposed traffic allocation figures. Tr. 55, l.25 - 56; l. 5; 82, ll. 20-24; 106, ll. 21-25.

1. Interstate/Intrastate Traffic Allocation

With respect to the interstate/intrastate traffic allocation, the Petitioners rely on vintage data to support their proposal of such an imbalance in this traffic allocation, which is not surprising considering their strong motive to over-report in the intrastate jurisdiction, due to the wide disparity between interstate and intrastate access charges. The Petitioners have a significant incentive to propose a large intrastate figure, as their intrastate access charges are many times greater than their interstate access charges.[34]

On the other hand, T-Mobile's proposal relies on traffic data which is more current. Based on the traffic data reported by the Petitioners in their annual reports to the Commission, for the year ending December 31, 2004, T-Mobile's interstate/intrastate proposal of 50% for each jurisdiction is far more reasonable than the Petitioners' 80% intrastate/20% interstate proposal, which is largely based on "evidence" that many other wireless carriers have agreed to that split in negotiated agreements. Mr. Simon of Chariton Valley stated that his company proposed a 80% intrastate/20% interstate traffic jurisdiction split for interMTA traffic because other wireless carriers have agreed to those numbers in voluntary negotiations. Tr. 111 l. 22-24. Moreover, the historical data they suggest lends support to their uniform proposal fails to reflect current, aggregate traffic allocation patterns. According to its 2002 annual report, fully 49.2% of Northeast's 23,509,230 minutes of terminating access in 2004 were interstate. Ex. 2, Schedule 11. For Chariton Valley, interstate terminating access accounted for 41.8% of its total of 29,367,839 minutes in 2004. Ex. 6, Schedule 11. There is no evidence to suggest that T-Mobile's traffic allocations would vary from these overall traffic patterns for Chariton Valley and Northeast. Unfortunately,

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[34] Northeast: 14.9 cents intrastate, 1.87 cents interstate; Mid-Missouri: 12.49 cents intrastate, 1.7 cents interstate; Chariton Valley, 7.9 cents intrastate; 1.4 cents interstate. Tr. 54 l. 10-20; 84 l.10-18; 107 l. 11-18.

for some inexplicable reason, Mid-Missouri refused to make this data public, claiming that it is "competitive data." Tr. 88 l. 24 - 89 l. 3; Ex. 4, Schedule 11. T-Mobile has been deprived of the ability to formulate a legitimate basis for its proposal with respect to Mid-Missouri, but its proposal should not be rejected because Mid-Missouri has shrouded it current traffic data in secrecy.

2. InterMTA/IntraMTA Traffic Allocation

The Petitioners' proposed allocation of intrastate traffic between interMTA and intraMTA jurisdictions is similarly tainted with the incentive to "pump up" the interMTA percentage, yielding greater revenues from access charges (the Petitioners' intraMTA rate proposal is significantly less than their intrastate access charges, so they have the incentive to increase their interMTA traffic). The T-Mobile interMTA/intraMTA proposals for the three Petitioners recognize that reality, while still allowing for a substantial amount of interMTA traffic.

The Petitioners acknowledge that they are using "historical" data and "applying that to a going-forward basis." Tr. 50 l. 8-9; Tr. 112 l. 13-20. Mr. Godfrey characterized the traffic study as "looking at the data as it came to us from outside the MTA" to determine "how many of those came across state boundaries." Tr. 50 l. 13-16. Two of the companies, Northeast and Chariton Valley, rely on ancient traffic data, and even that data is of very short duration. Mr. Godfrey stated that Northeast has not conducted a traffic study based on data more recent than 2001 for T-Mobile traffic, despite having decided to file for arbitration and admitting that he did not know whether T-Mobile was marketing service in Northeast's service area 4 years ago, in 2001, when the data was gathered. Tr. 64 l. 13-16. Chariton Valley's data is also four years old, having been gathered in November and December, 2001, Ex. 5, p. 4 l. 17-20, and Mr. Simon admitted that Chariton Valley has not conducted more recent studies of T-Mobile traffic. Tr. 113 l. 2-5.

Ms. Denise Day of Mid-Missouri testified that T-Mobile provides service in the Mid-Missouri service territory but acknowledged that she did not know when T-Mobile started doing so. Tr. 91 l. 20-24. Mid-Missouri recorded the traffic data for its study on T-Mobile traffic more than two years ago, in 2003, and has not conducted a study on more recent data. Tr. 92 l. 17-20. None of the studies are recent enough to provide a view into T-Mobile's current service areas and its customers' calling patterns.

The old data on which the Petitioners rely may bear some relevance in determining compensation due for the time periods in which the data were recorded (2001-2003), but certainly cannot be relied on for determining traffic allocation on a going-forward basis. And it is interesting to note that these studies only involved mobile-to-land traffic. None of the Petitioners presented evidence on the amount of land-to-mobile traffic going to T-Mobile. Mr. Simon testified that Chariton Valley has never measured that traffic. Tr. 113 l. 6-8. Nor has Mid-Missouri conducted such a study. Tr. 91 l. 21-24. The Petitioners appear to have no interest in knowing how many calls their customers place to T-Mobile numbers.

The Petitioners also appear to have ignored the FCC's own rules about what constitutes a local (intraMTA) or long distance (interMTA) call between wireline and wireless carriers. The section of the FCC's rules on reciprocal compensation for exchange of local traffic defines "telecommunications traffic" subject to reciprocal compensation as a call "exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area..."[35] A federal court recently confirmed that traffic between a LEC and wireless carrier within the same MTA is local: "traffic between an LEC and CMRS network that originates and terminates in the MTA is *local...*" *3 Rivers Telephone* v. *U.S. WEST*, CV-99-80-

[35] 47 C.F.R. §51.701(b)(2).

GF-CSO, 2003 U.S. Dist. LEXIS 24871 *67 (D. Mont., Aug. 22, 2003)(emphasis added)(copy attached). The attachments to the Petitioners' prefiled testimony indicate that the "studies" were based solely on the NPA-NXX's of the wireless numbers from which the traffic was originated, without regard to the geographic location of the wireless customer when originating the traffic. The studies fly in the face of the controlling FCC rules, and should therefore be discounted as providing support for the Petitioners' traffic allocation proposals. By showing zero movement between their opening and final offers, the Petitioners exhibit a disregard of the federal requirements. The Petitioners have failed to meet their burden of proof.

The unreliability -- or age -- of the Petitioners' traffic studies is also demonstrated by Northeast's claim that its study showed that 100% of the traffic it receives from T-Mobile is interMTA. Mr. Godfrey testified that most of Northeast's exchanges are in the St. Louis MTA.[36] In fact, it appears that a part of one exchange, Luray, lies in the Des Moines MTA, and a small part of the Winigan exchange lies in the Kansas City MTA, while Northeast's remaining eleven exchanges (and, for that matter, most of the Luray and Winigan exchanges) are in the St. Louis MTA. T-Mobile provides service in the St. Louis metropolitan area today, but, according to Mr. Godfrey, the Arbitrator should rely on a four-year old traffic study which shows that not a single T-Mobile call originated in the St. Louis MTA. This demonstrates that the Northeast study is either totally unreliable due to bad methodology, or that the data is so old that it cannot be used to help in the allocation of traffic between the interMTA and intraMTA jurisdictions.

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[36] At the hearing T-Mobile utilized a Missouri map showing the MTA boundaries. The Commission's website contains a similar map, overlaid with the boundaries of the telephone exchanges. http://www.psc.state.mo.us/teleco/maps/MTA_LATA_Exchanges.pdf. T-Mobile requests that the Arbitrator and the Commission take official notice of the MTA and exchange map on the website.

Further, the Petitioners' witnesses acknowledged that their proposals were based on what their companies had negotiated with other carriers and NOT on their old traffic studies. Tr. 70 l. 24 - 71 l. 24 (Mr. Godfrey: "we'll just use the same factors we've used with some other carriers. We'll use 22.5 percent."). Mr. Godfrey characterized the traffic jurisdiction proposal: "this was basically a negotiated number, an arrived-at number as something acceptable to our company, to PSC Staff . . . And we just agreed to it." Tr. 77 l. 7-10. The Petitioners' witnesses could point to no arbitrations or other evidence to support those numbers. *See, e.g.*, Tr. 112 l. 3-12.

Instead of conducting current studies to correspond with the going-forward nature of this arbitration, the Petitioners hope to glide past their burden of proof by introducing evidence that at some point in their history they conducted a traffic study based on criteria other than those dictated by the FCC that showed higher interMTA traffic ratios. Then they hope the fact that other carriers have agreed to these percentages in purely negotiated agreements will convert their old, flawed data into competent and substantial evidence to support an Arbitrator's finding in their favor. The Arbitrator should reject that reasoning.

In the absence of current data using reliable measurements, the parties are left to propose what they consider to be reasonable. Chariton Valley, Mid-Missouri and Northeast propose percentages simply because they are the numbers other wireless carriers have agreed to in voluntary negotiations. None of those numbers is based upon traffic data challenged in a going-forward arbitration proceeding. The Chariton Valley and Northeast traffic studies are based on particularly old data. The Petitioners' proposals are not supported by competent and substantial evidence on the record. On the other hand, to allow the Arbitrator to decide between good faith proposals, T-Mobile did not make a Final Offer of 0% InterMTA traffic on Issue 6 based on the Petitioners' failure to meet their burden of proof with valid and relevant data. Instead, T-Mobile

compromised on this issue to make reasonable offers on the interMTA/intraMTA split for each Petitioner, and a 50%/50% interstate/intrastate allocation (which is fully supported by the split between intrastate and interstate terminating minutes in the Petitioners' 2004 annual reports, the most recent information available). The Petitioners' proposals regarding both sets of allocations are based on old numbers and/or negotiated numbers between other parties, neither of which can provide support for the Arbitrator's decision. The Arbitrator should select T-Mobile's proposals on Issue 6.

B. ISSUE 7: PROSPECTIVE INTRAMTA RATE

To complete calls which cross network boundaries (i.e., that originate on the Petitioners' wireline networks and terminate on the T-Mobile wireless network, or *vice versa*), the terminating company incurs certain costs for which the originating company should provide compensation. The amount which should be paid in compensation (and the Petitioners' obligation to pay T-Mobile to complete such calls) has been a major source of dispute among the parties. Both sides agree that the rate must be cost-based, and both sides presented substantial economic evidence in support of their positions. The evidence which T-Mobile presented demonstrates that the compensation figure advanced by the Petitioners is far in excess of their costs as defined by FCC rules, and that T-Mobile's proposal is far closer to the Petitioners' costs. The Arbitrator should adopt T-Mobile's proposal.

As an initial point, the Arbitrator should summarily strike the Petitioners' cost study because of their failure to comply with the Communications Act and the Commission's arbitration rules. Section 252(b)(2) of the Act specifies that a party submitting an arbitration petition "*shall, at the same time as it submits the petition*, provide the State commission <u>all</u> *relevant documentation* concerning (i) the unresolved issues; [and] (ii) the position of each of the parties with respect

to those issues."[37] Similarly, Commission rule 4 CSR 240-36.040(3)(E) provides that an arbitration position "must contain . . . [a]ll relevant documentation that supports the petitioner's position on each unresolved issue." One of the central issues in this proceeding is the rate based on forward-looking economic costs the Petitioners may charge for call termination, and a forward-looking economic cost study clearly is "relevant" to this issue. The Petitioners' failure to serve a copy of their cost study with their arbitration petitions is alone grounds to strike their cost study and to adopt the T-Mobile offer on compensation. Indeed, the Commission has created the precedent for rejecting the Petitioners' position due to their failure to comply with the requirements of Section 252(b)(2).[38]

The Petitioners' failure to comply with Section 252(b)(2) and 4 CSR 240-36.040(3)(E) resulted in substantial prejudice to T-Mobile, as it was denied the opportunity to comprehensively prepare and present its case. Not until prefiled testimony was filed did the Petitioners present the basis for their intraMTA rate proposal (but not complete documentation of the underlying cost analysis), and the brief time between direct and rebuttal testimony rendered impossible the preparation of a comprehensive response to the Petitioners' cost evidence. If the Commission expects parties to comply with the federal Act and the Commission's rules, the Petitioners' cost study summary should be stricken, their rate proposal should be rejected, and T-Mobile's proposal adopted.

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[37] 47 U.S.C. § 252(b)(2)(A)(emphasis added).

[38] *See, e.g., Petition of Sage Telecom for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection with Southwestern Bell,* Case No. TO-2002-307, 2002 Mo. PSC LEXIS 101 (Jan. 17, 2002)(Commission dismisses arbitration petition because the petitioner has "not complied with the requirements of Section 252(b)(2) because the petitioners failed to file *any* of the relevant documents with its petition.")(emphasis in original). This case was decided before the Commission's arbitration rules were adopted (the rules became effective in August, 2004), but the same result would obtain if the Arbitrator applied only the Commission's rule requiring presentation of supporting evidence with the petition.

The Commission would be justified in adopting bill-and-keep for the exchange of all intraMTA traffic, as the Petitioners have failed to prove their TELRIC costs. Nevertheless, as a gesture of good faith, T-Mobile first offered to establish an interim rate until such time that the Petitioners would provide relevant cost data. In the further spirit of good faith and compromise, T-Mobile proposed in its Final Offer of a reciprocal and symmetrical rate of $0.015 per minute for the exchange of intraMTA traffic with the Petitioners -- even though its cost witness demonstrated that under FCC's forward-looking cost rules, the Petitioners would be entitled to receive no more than $0.0068 per minute.

Even if the Arbitrator is inclined to allow the Petitioners to pursue their claim in spite of their failure to comply with the Communications Act and Commission rules, *they* have the burden of proving that their proposed call termination rate complies fully with the FCC's rules. The evidence demonstrates they have failed to meet that burden, requiring the Arbitrator to select T-Mobile's 1.5 cents proposal.

Governing FCC rules make clear that the Petitioners must prove that their proposed intraMTA rate has been calculated in compliance with FCC rules. FCC Rule 51.505(e) provides:

> *Cost study requirements.* An incumbent LEC must prove to the state commission that the rates . . . do not exceed the forward-looking economic cost per unit . . . using a cost study that complies with the methodology set forth in this section and § 51.511.[39]

As the Commission has recognized, "[t]his [FCC] regulation means that SWBT, as the incumbent LEC, has both the burden of production and the burden of persuasion on the issue of whether its proposed rates comply with the forward-looking TELRIOC methodology prescribed

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[39] 47 C.F.R. § 51.505(e). *See also First Local Competition Order,* 11 FCC Rcd at 15852 ¶ 695 ("[I]n the arbitration process, incumbent LECs shall have the burden to prove the specific nature and magnitude of these forward-looking common costs.").

by the FCC. The regulation further requires that SWBT meet its burden through the use of a cost study."[40]

The Petitioners' cost witness, Robert Schoonmaker, conceded on cross-examination that the rate for intraMTA call termination resulting from this arbitration may not exceed the Petitioners' forward-looking transport and termination costs. Tr. 157 l. 4-7. However, as the following discussion demonstrates, the Petitioners here have failed to "prove . . . that the rates [they propose] do not exceed the forward-looking economic cost per unit . . . using a cost study that complies with" FCC rules. As a consequence, the Arbitrator must reject their proposed rate and adopt T-Mobile's proposed rate.

Mr. Schoonmaker admitted in his prefiled testimony that the study he performed, relying on the Hatfield model, had numerous shortcomings and failed to yield reliable results. Indeed, the extent of his concerns proves that the Petitioners' evidence is unreliable and cannot be used to support the proposed rate of 3.5 cents per minute. To use his own words, "I have concerns about the validity of the HAI Model I am presenting." Ex. 8, p. 7 l. 19-20. He went on to specify four major concerns about his use of the HAI Model to calculate the costs applicable to the interMTA rate: (1) lack of time to consider the Model's default inputs, (2) use of general inputs, rather than company-specific data, yielded results far different from real world costs, (3) inappropriate application of the Model to small telephone companies, such as the Petitioners, and (4) unreliable results for small geographic areas. Ex. 8, p. 7 l. 21- p. 9 l. 2.

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[40] *Determination of Prices, Terms, and Conditions of Certain Unbundled Network Elements,* Case No. TO-2001-438, 2002 Mo. PSC LEXIS 1066, *239 (Aug. 2, 2002). *See also Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 309 F. Supp. 2d 1299, 1310 (W.D. Ok. 2004)("[T]he burden of proof is on the RTCs [Rural Telephone Companies] to show that a proposed rate meets the required standards, a contention which the RTCs do not dispute in their reply brief.").

In fact, in his direct testimony, Mr. Schoonmaker admitted that only days before he prepared his testimony he ran the Model again, changing many inputs, and obtaining much different results, including much lower costs. T-Mobile witness Conwell summarized those changes in his testimony, which Schoonmaker conceded to be accurate. Tr. 163 l. 17- 164 l. 10. According to Mr. Conwell, the modifications which Mr. Schoonmaker applied at the last minute resulted in transport and termination cost reductions for the Petitioners of some 57%. As quoted in Mr. Conwell's testimony, the scope of the change in cost inputs was expressed in an email from the Petitioners' counsel on July 12, 2005, barely one week before direct testimony was due: "[Mr. Schoonmaker] will be modifying the cost studies with respect to rate of return, central office switching expense as a percentage of COE investment, and the percentage of intraLATA traffic going through access tandems." Ex. 13, p. 12 l. 16-21; Ex. WCC-1. The mere fact that such radical changes had to made at the last minute undermines the reliability of the Petitioners' cost evidence.

FCC rules specify that an incumbent LEC cost study use the "most efficient telecommunications technology currently available."[41] But the evidence demonstrates that the Model and reality are far apart. Mr. Conwell expresses significant concern about whether the Petitioners utilize "efficient, forward-looking architecture" in their networks, and how their networks actually compare to the hypothetical networks used in the HAI Model. Ex. 13, p. 8 l. 19 - p. 10 l. 2. As Mr. Conwell puts it, "there is evidence to strongly suggest the HAI model is not representative of the ILECs' current or forward-looking networks and costs; yet, few changes to the default input were made to account for this." Ex. 13, p. 10 l. 3-5. In fact, the Petitioners own data responses show that the Hatfield Model uses unrealistic inputs on the crucial element of network

[41] 47 C.F.R. § 51.505(b)(1). *See also*, Ex. 13, p. 9 l. 2-6.

architecture. For example, the Hatfield Model assumes that 22 miles of interoffice facilities are needed to connect Alma to the nearest RBOC, while in reality only 3.64 miles of facilities are needed, a substantially lower cost. Tr. 168 l. 11 - 170 l. 10; Ex. 11, answers to questions 10(a) and 13(b). With respect to network design, the Model's assumptions and the real networks are radically different. The Model assumes that all four of the Petitioners utilize an OC-3 system. Tr. 171 l. 8-12; Ex. 11, answer to question 13(a). In reality, Alma uses a DS-3 system, and Chariton Valley, Mid-Missouri, and Northeast all use an OC-12 system. Tr. 171 l. 13 - 172 l. 25; Ex. 11, answers to questions 10(b), 11(b), 12(a), and 13(b). In response to T-Mobile's second data requests, each of the Petitioners asserted that its current network is indeed an efficient, forward-looking network. *Ipso facto*, if the HAI model does not comport with the Petitioners' networks, it cannot be representative of efficient, forward-looking network. This is an essential requirement of the FCC rules.

Second, FCC rules and orders are clear that with respect to local switching, the Petitioners may only recover a pro rata portion of the switch costs that involve traffic sensitive costs (as opposed to non-traffic sensitive costs). Although current versions of the HAI model utilize a zero percent (0%) factor, Mr. Schoonmaker used a 70 % factor. Mr. Conwell summarizes the appropriate end office switching costs in Ex. WCC-3 to his direct testimony (Ex. 13). Expressed in Mr. Schoonmaker's estimates at 70%, Mr. Conwell indicates that the figure should actually be less than 10%. Ex. 13, p. 18 l. 15-20. He testifies that the model which Mr. Schoonmaker used is an old version of the Hatfield Model which assumed that 70% of the cost of switching was usage-sensitive -- based on mid-1990's pricing. That pricing has changed radically in recent years, and in fact the Hatfield Model has been revised to reflect those changes, but the version used by the Petitioners did not reflect those changes. The factor used by the Petition-

ers greatly overstates switching costs. By substituting an appropriate factor (less than 10%), Mr. Conwell determined that the average end office switching cost per minute dropped from 1.04 cents to .07 cents. Ex. 13, p. 21 l. 1 - 23 l. 6.

Mr. Conwell presented this evidence in his direct testimony. In his rebuttal testimony, Mr. Schoonmaker attempts to respond, and does so by stating that Mr. Conwell has failed to consider the price differences encountered by RBOCs and small LECs in purchasing switching equipment. (Ex. 9, p. 17 l. 10-17). But he testifies only in conclusory fashion, and produces no empirical evidence to support his assertion that such price differences exist. He provides no price lists, marketing materials, or letters from switch manufacturers to support his claim.

The Petitioners will no doubt criticize Mr. Conwell for not conducting his own cost study. Counsel for the Petitioners attempted to show that Mr. Conwell did not have his own model for use in calculating their costs. Tr. 217 l. 16-25. However, counsel failed to understand that Mr. Conwell used the Petitioners' own cost study, making corrections to comply with the FCC rules and using publicly available information. It was not necessary for Mr. Conwell to produce a separate cost model. Given the short time T-Mobile had to review, analyze, and refute Mr. Schoonmaker's cost study (which was rerun in its entirety barely a week before direct testimony was filed), the Arbitrator cannot expect T-Mobile's cost witness to do more than Mr. Conwell did. He reviewed the Petitioners' cost evidence for large and/or obvious errors, and he corrected the cost studies as necessary to comply with the FCC rules and to reasonably estimate the Petitioners' costs. It would be manifestly unfair for the Petitioners to be allowed to take advantage of their failure to produce evidence in support of their rate proposal in a timely fashion, in derogation of their obligation under the federal Act and Commission rules. But that is precisely what they are asking the Arbitrator to countenance. T-Mobile's proposal of 1.5 cents per minute

presents a reasonable compromise, is supported by the evidence, and is an appropriate figure for the Arbitrator choose in resolving Issue 7.

C. ISSUE 8: THE PETITIONERS' RECIPROCAL COMPENSATION OBLIGATIONS REGARDING INTRAMTA CALLS THAT THE PETITIONERS DELIVER TO AN IXC

As local exchange carriers, the Petitioners have the federal statutory "duty to establish *reciprocal* compensation arrangements for the transport and termination of telecommunications."[42] FCC implementing rules, affirmed on appeal,[43] define the scope of this duty. Specifically, FCC Rule 51.701 provides in relevant part:

> (a) The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.
>
> (b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:
>
> * * *
>
> (2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in Sec. 24.202(a) of this chapter.[44]

Although federal appellate courts have held that the "mandate expressed in these provisions is clear, unambiguous, and on its face admits of no exceptions,"[45] the Petitioners nonetheless ask the Arbitrator to create a new exception. Specifically, the claim that they should be excused from paying reciprocal compensation for intraMTA traffic they deliver to interexchange carriers

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[42] 47 U.S.C. § 251(b)(5)(emphasis added). The obligation of CMRS carriers to pay reciprocal compensation is instead based on FCC rules. *See* 47 U.S.C. § 20.11(b)(2)("A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.").

[43] *See Iowa Utilities Board* v. *FCC,* 120 F.3d 753, 800 n.21 (8th Cir. 1997). Incumbent LECs chose not to challenge the Eighth Circuit's affirmance of the FCC's LEC-CMRS interconnection rules in their appeal to the Supreme Court. *See AT&T* v. *Iowa Utilities Board,* 525 U.S. 366.

[44] 47 C.F.R. § 51.701(a), (b)(2).

[45] *Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d at 1264.

("IXCs"). But the Commission may not rewrite or ignore FCC rules, which the Commission is obligated to follow in this arbitration proceeding.

The Arbitrator addressed this disputed issue in the August 3, 2005 Limine Order:

> 47 USC 251(b)(5) imposes upon local exchange carriers the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. For purposes of applying reciprocal compensation, 47 CFR 51.701(b)(2) defines telecommunications traffic in relevant part as that "exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area. *The MTA's geographic boundary, and nothing else, determines whether reciprocal compensation applies.*

August 3 Order, at (emphasis added). Every federal court that has considered the issue has reached the same conclusion as the Arbitrator.

- Both the federal district court and the Tenth Circuit affirmed the Oklahoma Commission's decision that the intraMTA rule applies to <u>all</u> intraMTA traffic, including traffic rural LECs send to IXCs. *See Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d at 1264 ("Nothing in the text of these provisions provides support for the RTC's contention that reciprocal compensation requirements do not apply when traffic is transported on an IXC network."), *aff'g Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 309 F. Supp. 2d at 1309-10 ("The court concludes that the Oklahoma Corporation Commission did not err when it ruled that reciprocal compensation obligations apply to all calls originated by an RTC and terminated by a wireless provider within the same major trading area, *without regard to whether those calls are delivered via an intermediate carrier.*")(emphasis added).

- The U.S. District Court in Nebraska vacated an arbitration decision issued by the Nebraska Public Service Commission to the extent it exempted intraMTA traffic delivered to IXCs, holding that "[u]nder this rule [51.701(b)], reciprocal compensation obligations apply to *all* calls

originated by Great Plains [a rural LEC] and terminated by Western Wireless [a wireless carrier] within the same MTA, *regardless of whether the calls are delivered via an intermediates carrier* such as Qwest. Thus, as a matter of federal law, the Commission erred in ruling that Great Plains owed no reciprocal compensation to Western Wireless for calls originated by Great Plains and terminated by Western Wireless within the same MTA, *whether or not the call was delivered via an intermediate carrier.*" *WWC License* v. *Anne C. Boyle, et al.*, No. 4:03CV3393, Slip op. at 5-6 (D. Neb., Jan. 20, 2005)(emphasis added)(copy attached to Pruitt Direct, Ex. 16, Schedule F).

- Just this month an Iowa federal court affirmed a decision of the Iowa Utilities Board holding that bill-and-keep should be applied to all intraMTA traffic, including traffic delivered to an intermediate carrier. *See Rural Iowa Independent Telephone Ass'n* v. *Iowa Utilities Board*, No. 4:02-cv-40348.[46]

- Finally, a federal court in Montana has held that "traffic between an LEC and CMRS network that originates and terminates in the MTA is local and, therefore, subject to reciprocal compensation rather than access charges. *The FCC order makes no distinction between such traffic and traffic that flows between a CMRS carrier and LEC in the same MTA that also happens to transit another carrier's facilities prior to termination.*" *3 Rivers Telephone* v. *U.S. WEST*, 2003 U.S. Dist. LEXIS 24871 *67 (emphasis added).

There are numerous additional reasons why the Petitioner's IXC exemption argument lacks merit. For example, the reciprocal compensation rule applicable to traffic exchanged between two LECs expressly exempts traffic sent to an IXC. FCC Rule 51.701(b)(1) provides:

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[46] Notably, this federal court chose not to follow the reasoning in the Missouri Commission decisions upon which the Iowa rural ILECs had relied. *See id.* at 32 n.36.

(b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:

(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, *except for telecommunications traffic that is interstate or intrastate exchange access*, information access, or exchange services for such access (see FCC 01-131, paragraphs 34, 36, 39, 42-43).[47]

Notably, there is no corresponding exemption for LEC exchange access/IXC traffic in the LEC-CMRS intraMTA rule contained in FCC Rule 51.701(b)(2).[48]

In addition, FCC Rule 51.701 when adopted in 1996 contained the word "local" within the Rule.[49] However, in 2001, the FCC deleted from the Rule all references to the word "local" because the word "created unnecessary ambiguities."[50] As amended, FCC Rule 51.701(b) currently provides (with changes from the 1996 Rule noted):

~~Local~~ Telecommunications traffic. For purposes of this subpart, ~~local~~ telecommunications traffic means:

(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, ~~that originates or terminates within a local service area established by a state commission~~ except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see FCC 01-131, paragraphs 34, 36, 39, 42-43); or

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47 47 C.F.R. § 51.701(b)(1)

48 *See Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d at 1265 ("Significantly, the [FCC] did not carry forward that same exception into regulation 51.701(b)(2), the operative definition in this case. We agree with the district court's conclusion that the FCC was undoubtedly aware of issues arising when access calls are exchange, yet it chose not to extend a similar exception to LEC-CMRS traffic."); *id.* at 1266 ("We will not ignore the clear distinction drawn by the agency.").

49 *See Local Competition Order,* 11 FCC Rcd 15499, 16228 (1996); 47 C.F.R. § 51.701 (1997).

50 *Implementation of the Local Competition Provisions of the Act,* 16 FCC Rcd 9151, 9173 ¶ 46 (2001). *See also Virginia Arbitration Order,* 17 FCC Rcd 27039, 27190 ¶ 315 (2002)("Verizon is correct: the Commission did find that use of the phase 'local traffic' created unnecessary ambiguities. Instead, the Commission has used the term 'section 251(b)(5) traffic' to refer to traffic subject to reciprocal compensation. . . . Accordingly, we direct the parties to substitute the term 'section 251(b)(5) traffic' where the term 'Local Traffic" appears in section 4.2.").

> (2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in Sec. 24.202(a) of this chapter.[51]

Similarly, as amended, FCC Rule 51.701(a) currently provides (with changes from the 1996 Rule again noted):

> The provisions of this subpart apply to reciprocal compensation for transport and termination of ~~local~~ telecommunications traffic between LECs and other telecommunications carriers.[52]

The deletion of the word "local" further confirms that a LEC's statutory reciprocal compensation obligation is not limited to traffic that an incumbent carrier believes is "local." The Petitioners have repeatedly misquoted these FCC rules, ignoring their current content – and have continued to misquote these rules even after the error was pointed out to them.[53] And, the Petitioners continue to use the word local in their arguments (obviously in the hope that the Commission will overlook this misstatement in deciding the Petitioners' "IXC exception" argument).[54]

The Petitioners' IXC exemption argument is also incompatible with the FCC's own definition of reciprocal compensation. FCC Rule 51.701(e) provides:

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[51] 47 C.F.R. § 51.701(b) (2004).

[52] 47 C.F.R. § 51.701(a) (2004).

[53] *See* Schoonmaker Direct at 39, Lines 14-16 (quoting the old Rule 51.701(a) that included the word "local"). Ex. 8, p. 39, l. 14-16. Although T-Mobile pointed out this error in prefiled rebuttal filed on July 28, 2005 (*see* Pruitt Rebuttal at 13-14) (Ex. 17, p. 14, l. 1-3), the Petitioners chose to continue to misquote current FCC rules. *See* Pet. Final Offer Mem. at 17 (quoting the old Rule 51.701(a) that included the word "local"). The Petitioners have misled the Commission in a second way. During the hearing, Mr. Schoonmaker testified that the FCC's 2001 order deleting the word "local" has been "subsequently remanded by the appeals court as being unlawful." Tr. 193 l. 22-23. The 2001 order was remanded, but not because it was unlawful, because the court did not vacate the FCC's order. More importantly, Mr. Schoonmaker neglected to advise the Commission that the FCC's deletion of the word "local" had nothing to do with the issues in the appeal. *See Worldcom* v. *FCC,* 288 F.3d 429 (D.C. Cir. 2002).

[54] *See, e.g.,* Pet. Final Offer Mem. at 16 ("The FCC ruled that reciprocal compensation is intended for situations were [*sic*] two carriers, the LEC and CMRS provider, collaborate to complete a local call."); *id.* at 17 ("Traffic between an IXC and a CMRS provider is not local telecommunications traffic under the FCC's rules.").

> For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that *originates on the network facilities of the other carrier.*[55]

Similarly, FCC Rule 20.11(b) provides:

> Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.
>
> (1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that *originates on facilities of the local exchange carrier*;
>
> (2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that *originates on the facilities of the commercial mobile radio service provider.*
>
> (3) Local exchange carriers and commercial mobile radio service providers shall also comply with applicable provisions of part 51 of this chapter.[56]

The unequivocal statement that reciprocal compensation applies to traffic that "originates on facilities of the local exchange carrier" makes clear that the use of an intermediary carrier such as an IXC is not relevant in determining the originating carrier's reciprocal compensation obligations.

The FCC also made clear in its order adopting Rule 51.701 that a LEC's reciprocal compensation obligations apply to all intraMTA traffic:

> Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.[57]

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55 47 C.F.R. § 51.701(e)(emphasis added).

56 47 C.F.R. § 20.11(b)(emphasis added).

57 *Local Competition Order,* 11 FCC Rcd 15499, 16014 ¶ 1036 (1996).

In making this statement, the FCC explicitly recognized that carriers could (and would) interconnect indirectly using "facilities provided by alternative carriers,"[58] which necessarily includes sending calls to intermediary carriers such as IXCs.

The Petitioners completely ignore the foregoing and make no attempt to demonstrate that the federal courts have wrongly decided the issue. Instead, they advance different arguments in support of their IXC exception position. None of these arguments has merit:[59]

- The Petitioners say they rely on "Section 251(g) of the 1996 Act [which] preserves the access regime for IXC traffic unless and until explicitly superseded by FCC prescribed regulations."[60] The FCC in fact explicitly superseded prior access arrangements as applied to LEC-CMRS intraMTA traffic in its 1996 *Local Competition Order* implementing the 1996 Act and by adopting Rule 51.701.

- The Petitioners assert that paragraph 1036 of the *Local Competition Ord*er "sets forth the access regime was designed for situations where three carriers, with the IXC in the middle, collaborate to complete a call. The FCC contrasted the access regime with that intended for the reciprocal compensation regime. The FCC rules that reciprocal compensation is intended for situations were [*sic*] two carriers, the LEC and the CMRS provider, collaborate to complete a local call."[61] In fact, the FCC made no such distinction in paragraph 1036, and rather held that that reciprocal compensation applies to all traffic that "originates and terminates in the same MTA":

  > On the other hand, in light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under section 251(b)(5). Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA). Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-

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58 *Id.* at 16015 ¶ 1039.

59 T-Mobile does not respond to all of the Petitioners' argument on this subject. For example, some of their arguments are unintelligible (*e.g.,* Rule 51.701 "only applies for the purpose of *developing* reciprocal compensation arrangements . . . . . The rule does not answer the question of whether IXC traffic is subject to reciprocal compensation."). Pet. Final Offer Me. at 15 (emphasis in original).

60 Pet. Final Offer Mem. at 15.

61 Pet. Final Offer Mem. at 15-16.

> authorized wireless license territory (i.e., MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. *Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.*[62]

And, as noted above, the FCC made clear in paragraph 1039 that its reciprocal compensation rules apply even when carriers use "facilities provided by alternative carriers" in connecting with each other.[63]

- Petitioners rely on paragraph 1043 of the *Local Competition Order* for the proposition that reciprocal compensation does not apply if the call is "carried by an IXC."[64] But as the Tenth Circuit has held, the "sweep of this paragraph is limited to a narrow range of interstate interexchange traffic and is silent on the issue of reciprocal compensation owed CMRS providers. As such, we find it neither persuasive nor controlling."[65]

- The Petitioners quote from two sentences from the FCC*'s TSR Wireless Order*[66] But as the Tenth Circuit has recognized, this quotation "simply does not address the LEC's duty to compensate the CMRS provider for call termination. . . . It certainly does not relieve the originating carrier of its obligation to compensate the terminating carrier under the reciprocal compensation regime."[67]

- The Petitioners assert their position is supported by "common sense" because "IXC traffic does not belong to Petitioners."[68] But for purposes of reciprocal compensation between LECs and CMRS carriers, the question is not whether traffic "belongs" to one carrier or another; rather, the question is does the intraMTA traffic "originate on the facilities of the local exchange carrier."[69]

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62 *Local Competition Order*, 11 FCC Rcd 15499, 15014 ¶ 1036 (1996)(emphasis added).

63 *Id.* at 16015 ¶ 1039.

64 Pet. Final Offer Mem. at 16.

65 *Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d at 1266-67.

66 Pet. Final Offer Mem. at 17-18.

67 *Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d at 1267.

68 Pet. Final Offer Mem. at 18.

69 *See* 47 C.F.R. §§ 20.11(b), 51.701(e).

- The Petitioners assert that they are "not certified to provide interexchange service."[70] However, the Petitioners are not being required to provide interexchange services. As the FCC recognized in the *TSR Order* upon which the Petitioners themselves rely, the Petitioners are free to rate as toll to their customers intraMTA calls which those customers make to T-Mobile customers who do not have locally-rated telephone numbers.[71]

- The Petitioners state that they are "required by federal and state rules to deliver IXC traffic to the IXC chosen by the end user."[72] This is accurate, but these "PIC rules" come into play because the Petitioners have chosen to offer their customers such tiny local calling areas – a matter over which T-Mobile has no control. More importantly, however, as discussed above, both FCC rules and all relevant federal court decisions held that incumbent LECs cannot avoid their statutory reciprocal compensation obligation by sending traffic to IXCs. Besides, if Northeast, for example, receives $0.149/per minute in access charges from IXCs on a given land-to-mobile intraMTA call,[73] Northeast certainly can afford to pay T-Mobile $0.015/per minute for call termination.

- The Petitioners quote one sentence from the FCC's *CMRS Access Charge Order* for the position that CMRS carriers are "not prohibited" from charging IXCs access charges.[74] But as they further acknowledge (*albeit* in a footnote only), the FCC also ruled that IXCs "only had to pay pursuant to contract"[75] – namely, IXCs must pay access charges to wireless carriers only if they voluntarily decide to pay such charges. Not surprisingly, T-Mobile has found that IXCs are not willing pay voluntarily for something (call termination) they receive today for free, and the record evidence is undisputed that T-Mobile in Missouri (or elsewhere) does not receive terminating access charges from any IXC.[76]

- The Petitioners also make a passing reference to the FCC's recent *T-Mobile Wireless Termination Tariff Order*.[77] The relevance of this FCC order to this

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70 Pet. Final Offer Mem. at 18.

71 *See TSR Wireless* v. *U S WEST*, 15 FCC Rcd 11166, 11185 ¶ 34 (2000)("For example, to the extent the Yuma-Flagstaff T-1 is situated entirely within an MTA, does not cross a LATA boundary, and is used solely to carry U S West-originated traffic, U S West must deliver the traffic to TSR's network without charge [pursuant to the reciprocal compensation rules]. However, nothing prevents U S West from charging its end users for toll calls completed over the Yuma-Flagstaff T-1.").

72 Pet. Final Offer Mem. at 18.

73 Tr. 19, l. 15.

74 Pet. Final Offer Mem. at 19.

75 *Id.* at 19 n.5.

76 *See* Pruitt Rebuttal at 4-5 and 7; Ex. 17, p. 4, l. 19 - 5, l.7; p. 7, ll. 5-6.

77 Pet. Final Offer Mem. at 20-21.

> arbitration proceeding is not apparent because, in that decision, the FCC stated that it "intended for compensation arrangements to be negotiated agreements," it reaffirmed that "negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act," and it amended its rules by "prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff."[78]

The Petitioners finally rely on decisions by this Commission that apparently hold that rural LECs can exempt themselves from their federal reciprocal compensation obligation simply by sending their intraMTA land-to-mobile traffic to an IXC, stating that these decisions "make sense."[79] But even assuming the decisions "make sense" to the Petitioners, the fact remains that in this arbitration proceeding, which is a creature of, and governed by, federal law, the Commission must follow federal law, "including the regulations prescribed by the" FCC.[80] And, considering that appeals of this Commission's arbitration decision will be entertained in federal court, not state court, it bears noting that every federal court to consider the issue has agreed that the FCC's intraMTA rule means what it says on its face. Specifically, under federal law, a LEC's obligation to provide reciprocal compensation applies to every call that "originates and terminates within the same Major Trading Area."[81] As the Arbitrator has correctly recognized, "[t]he MTA's geographic boundary, and nothing else, determines whether reciprocal compensation applies."[82] Similarly, there is no exception to the reciprocal compensation obligation based on the type of interconnection -- direct or indirect -- between the originating and terminating carrier.

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78 *T-Mobile Wireless Termination Tariff Order,* 20 FCC Rcd 4855, 4861 ¶ 9, 4863 ¶ 14 (2005).

79 *See* Pet. Final Offer Mem. at 19-22.

80 47 U.S.C. § 252(c)(1).

81 47 C.F.R. § 51.701(b)(2).

82 Limine Order at 2.

E. ISSUE 10: NET BILLING

In Issue 10, T-Mobile asks the Arbitrator to consider a simple and elegant solution to traffic tracking and billing issues which could make administration of the TTA much easier for the Petitioners and T-Mobile. T-Mobile has proposed language for Section 5.1.3 of the TTA which would require the parties to compute the amount of compensation flowing in each direction and make only one payment, rather than multiple payments, of the net amount owed. The Petitioners have no competing proposal, as they assert that there should be no compensation from wireline to wireless carriers.

The keystone of net billing is that compensation must be reciprocal, that is, the Petitioners will pay T-Mobile for terminating land-to-mobile traffic, and T-Mobile will pay the Petitioners for terminating mobile-to-land traffic. The parties would determine the net amount of the compensation, and one payment would be made. Recognizing that mobile-to-land traffic might regularly exceed land-to-mobile traffic, T-Mobile would pay the net amount to the LEC each month. As Mr. Pruitt testified, net billing is "an industry standard mechanism for capturing the balance of traffic ... while reducing the administrative burden of cross-billing." Ex. 16, p. 24 l. 16-18. The mechanism is simple, as explained by Mr. Pruitt:

> As indicated in Section 5.1.3 of T-Mobile's proposed Traffic Termination Agreement, the LEC would determine how much T-Mobile owes it from terminating traffic sent by T-Mobile, subtract the amount its owes T-Mobile for terminating LEC-originated traffic to T-Mobile customers, and delivering [sic] a payment to T-Mobile for their difference. This would require a single payment every month, rather than a possibility of multiple payments between the parties.

Ex. 16, p. 24 l. 20 - p. 25 l. 3. At the hearing, Mr. Pruitt testified that T-Mobile's proposal to use a 65% measure for the T-Mobile share of traffic generated between it and the LEC is "a standard that's commonly used throughout the industry." Tr. 256 l. 23-24. The amount paid would depend on the volume of traffic and the rate paid for intraMTA termination (Issue 7).

Net billing is a concept which is difficult to question, once the issue of mutual, reciprocal compensation has been resolved and the assumption is made that land-to-mobile traffic is not roughly balanced with mobile-to-land traffic. To reduce the number of bills crossing between the parties, and to foster cooperation in the determination of compensation owed, net billing is the best solution to what could be most difficult part of administering the TTA.

The Petitioners have not presented any proposal that would capture reciprocal compensation owed to T-Mobile for intraMTA land-to-mobile calls, nor have they countered the reasonable balance of traffic compromise T-Mobile proposed in its Final Offer of 65% mobile-originated and 35% land-originated. The only portion of T-Mobile's proposed billing language the Petitioners have specifically addressed is the definition of certain billing records (the CTUSR, or Cellular Transiting Usage Summary Report) SBC provides to T-Mobile, upon which the volume of mobile-to-land traffic may be based for billing purposes.[83] The Petitioners ask that the CTUSR definition be stricken from the TTA because SBC does not currently provide them with these records. The Petitioners misread the proposed language, which allows for flexibility. T-Mobile's proposed net billing language allows the parties to use traffic volume information "identified by CTUSR records plus records of intraMTA calls handed off to IXCs *or other mutually acceptable calculation.*"[84] This language allows the parties to identify and agree upon the appropriate sources for determining the volume of mobile-to-land, intraMTA calls delivered to each Petitioner for termination.

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83 *See* Pet. Final Offer Mem. at 24-25.

84 *See* T-Mobile Consolidated Response to Petitions for Arbitration, Exhibit, p. 7 (emphasis added).

F. ISSUE 12: SCOPE OF THE PETITIONERS' RECIPROCAL COMPENSATION DUTY

The Petitioners summarily dismiss the T-Mobile proposal concerning reciprocal and symmetrical compensation by saying it "amounts to nothing more than an abstract statement of law," although they oppose inclusion of the language that T-Mobile has proposed.[85] T-Mobile must respectfully disagree. During this proceeding, the Petitioners have stated that T-Mobile is entitled to reciprocal compensation only (a) if the parties directly connect their networks (e.g., establish a physical link between their networks rather than utilize the current arrangement of indirect interconnection through SBC via which the Petitioners and T-Mobile are each directly connected to SBC)[86] – even though traffic volumes may not justify the cost of a dedicated facility (or trunk group), (b) if T-Mobile pays for the entire cost of the direct connection, and (c) even then, only to the extent that the land-to-mobile calls are within the LEC's local calling scope.[87] And, the Petitioners have been very clear that they will refuse to pay the costs of transporting their own customers' calls to T-Mobile's network even if a direct interconnection is utilized, and they take this position even though it conflicts with FCC rules.

The Petitioners acknowledge that the only direct connection in place between any Petitioner and a wireless carrier is between Chariton Valley and its subsidiary Chariton Valley Wire-

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85 *See* Pet. Final Offer Mem. at 26-27.

86 "The term interconnection is used by regulators and carriers to refer to the physical linking and use of networks owned by different carriers, to permit customers of one carrier to call customers of another carrier, and interconnection may be direct or indirect. 'Interconnection is direct when the carrier's facilities or equipment is attached to another carrier's facilities or equipment,' and 'indirect when the attachment occurs through the facilities or equipment of an additional carrier.'" *See Rural Iowa Independent Telephone Ass'n* v. *Iowa Utilities Board*, No. 4:02-cv-40348, at 5, fn. 11 (quoting Order on Reconsideration, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 96-98, 15 FCC Rcd. 17806, ¶ 85, n.198 (2000)).

87 *See, e.g.*, Tr. 94 l. 7 - 96 l. 12; 140 l. 25 - 141 l. 4; Petitioners' Motion in Limine, at 2 (June 11, 2005); Pet. Final Offer Mem. at 19-20 ("[L]andline to mobile traffic is properly a local reciprocal compensation call only if the ILEC and CMRS provider [are] locally interconnected. . . . T-Mobile and Petitioners are not locally interconnected.").

less. Tr. 116 l. 10-22; 119 l. 4-7. Mr. Simon admitted Chariton Valley Wireless enjoys a competitive advantage over other wireless carriers because Chariton Valley's landline customers may call a Chariton Valley Wireless customer on a local basis (without having to dial 1+ and pay toll charges), even when the Chariton Valley Wireless customer is outside the local calling area of Chariton Valley. Tr. 118 l. 24 - 120 l. 16.

Much of the discussion above with respect to Issue 8 is applicable to Issue 12. The Petitioners owe compensation to T-Mobile to terminate their traffic. Resolution of Issue 12 by the Arbitrator is critically important. It is time, finally, that the Petitioners recognize their federal statutory obligation that reciprocal compensation means "reciprocal compensation" – whereby "*each* carrier [recovers its] costs associated with the transport and termination on each carrier's network facilities of [intraMTA] calls that originate on the network facilities of the *other* carrier."[88]

1. The Petitioners' reciprocal compensation obligation applies to all intraMTA traffic, whether T-Mobile interconnects with them directly or indirectly via an intermediary carrier. Section 251(b)(5) imposes on the Petitioners the duty to establish "*reciprocal* compensation arrangements for the . . . termination of telecommunications."[89] FCC rules define "termination" as "the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises."[90] In other words, the Petitioners must compensate T-Mobile for mobile switching costs incurred in terminating intraMTA traffic originating on the Petitioners' networks and the costs T-Mobile incurs in delivering this traffic to its customer being called. Ordinarily, however, wireless carriers charge a re-

88 47 U.S.C. § 252(d)(2)(A)(i)(emphasis added).

89 47 U.S.C. § 251(b)(5)(emphasis added).

90 47 C.F.R. § 51.701(d).

ciprocal compensation rate that is equal to the rate the incumbent carrier charges it for call termination.[91]

As discussed above, these rules apply to all intraMTA traffic exchanged between a LEC and a wireless carrier. There is nothing in the FCC rules that limits an incumbent LEC's reciprocal compensation obligation to the situation where a wireless carrier connects directly to the incumbent's network – and, thereby, exempts the incumbent from its obligation when the wireless carrier instead interconnects indirectly. In this regard, the Tenth Circuit has already rejected the Petitioners' argument, holding that an "RTC's obligation to establish reciprocal compensation arrangements with the CMRS provider in the instance case is not impacted by the presence or absence of a direct connection."[92]

In fact, the type of interconnection that carriers utilize has nothing to do with the compensation the carriers must pay each other over the interconnection facilities. A carrier's interconnection obligations are set forth in Section 251(a)(1) of the Act; a LEC's reciprocal compensation obligation for the transport and termination of traffic is contained in a different provision of the statute – specifically, Section 251(b)(5). Similarly, FCC rules define "interconnection" as "the linking of two networks for the mutual exchange of traffic. *This term does not include the transport and termination of traffic.*"[93]

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[91] 47 C.F.R. § 51.711(a)("Rates for transport and termination of telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c) of this section.").

[92] *Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d at 1268.

[93] *See* 47 C.F.R. § 51.5 (definition of "interconnection")(emphasis added). According to the FCC, "interconnection is direct when the carrier's facilities or equipment is attached to another carrier's facilities or equipment," and "indirect when the attachment occurs through the facilities or equipment of an additional carrier." *Wireline Services Offering Advanced Telecommunications Capability,* 15 FCC Rcd 17806, 17805 n.198 (2000).

Indeed, the Petitioners' position would lead to absurd results. As courts have recognized, only incumbent LECs are required to offer direct interconnection upon request.[94] Rural LECs are exempt from this obligation because of their rural exemption.[95] Thus, a wireless carrier could ask a rural LEC for direct interconnection and the rural LEC could refuse the request and in the process – at least according to the Petitioners' argument – exempt itself from having to pay any reciprocal compensation to the wireless carrier. And, if the Petitioners were correct in their position, T-Mobile would owe no compensation to the Petitioners – including during the complaint period – because during this entire time T-Mobile interconnected indirectly with the Petitioners. If the Petitioners involved in Case No. TC-2002-57 truly believed in the validity of their argument, they would have dismissed their complaint case against T-Mobile long ago.

2. The Petitioners' position on transport costs for intraMTA land-to-mobile traffic conflicts with FCC rules. Historically, wireless carriers and rural LECs have found it most efficient to interconnect indirectly with each other. This is demonstrated by the facts of this case, where the Petitioners' witnesses admitted of only one direct interconnect with a wireless carrier, and that was the direct interconnection between Chariton Valley and its wholly-owned subsidiary, Chariton Valley Wireless.[96] In this regard, one of the Petitioners' own trade associations has told the FCC that "[s]ince all carriers in a service area or market must at some point connect to the area tandem, there is efficiency in utilizing the tandems to route calls to other carriers instead of

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94 *See Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d at 1268 ("[T]he affirmative duty established in § 251(c) runs solely to the ILEC, and is only triggered on request for a direct interconnection.").

95 *See* 47 U.S.C. § 251(f)(1)(A).

96 Tr. 116, ll. 5-22.

building a direct connection to each carrier": "As a practical matter, the most feasible and cost-effective option for most rural ILECs is to use the RBOC's tandem for transiting functions."[97]

Nevertheless, as competition intensifies and as traffic volumes continue to increase (including during the term of the TTA), there may be circumstances where it is more efficient for both a rural LEC and a wireless carrier to interconnect directly. However, the Petitioners have made very clear that they will pay nothing for the cost of the direct interconnection facility, including when the facility is used for land-to-mobile traffic that originates on one of their networks.[98] This position, which the Petitioners have never attempted to justify in their legal memoranda, is flatly inconsistent with the Act and FCC implementing rules.

Section 251(b)(5) imposes on the Petitioners the duty to establish "*reciprocal* compensation arrangements for the transport . . . of telecommunications."[99] FCC rules define "transport" as the transmission of traffic "from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC."[100] If a rural LEC and wireless carrier were to interconnect directly, the interconnection point ordinarily would be located at the edge of the rural LEC's network. Under a rural LEC's reciprocal compensation obligation, which applies to both "transport and termination," the rural LEC would be responsible for that portion of the facility to the extent it is used for land-to-mobile traffic – just as the wireless carrier would be respon-

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97 National Telecommunications Cooperative Association, *Bill and Keep: Is It Right for Rural America?,* at 41 (copy attached).

98 Tr. 94, ll. 22-25; 133, ll. 1-5.

99 47 U.S.C. § 251(b)(5)(emphasis added).

100 47 C.F.R. § 51.701(c).

sible for that portion of the facility to the extent it is used for mobile-to-land traffic. As the FCC General Counsel explained recently to a federal appellate court:

> Under current intercarrier compensation rules, then, when a wireless customer calls a rural LEC customer, the wireless carrier is responsible for transporting the call and paying the cost of this traffic. And, conversely, when a rural LEC customer calls a wireless customer, the rural LEC is responsible for transporting the call and paying the cost of this transport.[101]

The FCC has made clear that the cost of a direct interconnection facility is to be shared between the two carriers:

> If the providing carrier provides two-way trunks between its network and the interconnecting carrier's network, then the interconnecting carrier should not have to pay the providing carrier a rate that recovers the full cost of those trunks. These two-way trunks are used by the providing carrier to send terminating traffic to the interconnecting carrier, as well as by the interconnecting carrier to send terminating traffic to the providing carrier. Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier.[102]

The Tenth Circuit has ruled that the "RTCs' argument that CMRS providers must bear the expense of transporting RTC-originating traffic on the SWB network must fail."[103] The Petitioners' own trade association has stated that "the carrier that originates the call will pay for the transiting function."[104] If rural LECs must bear the cost of transport for land-to-mobile calls with

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101 Brief for Federal Communications Commission, *United States Telecom Ass'n, et al.* v. *FCC,* Nos. 03-1414, 1443, at 35 (D.C. Cir., filed July 9, 2004)(copy attached).

102 *Local Competition Order,* 11 FCC Rcd 15499, 16028 ¶ 1062 (1996). *See also id.* at 16027 ¶ 1062 ("The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility."); 47 C.F.R. § 51.709(b)("The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnection carrier to send traffic that will terminate on the providing carrier's network.").

103 *Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d at 1267 n.11.

104 National Telecommunications Cooperative Association, *Bill and Keep: Is It Right for Rural America?,* at 40.

indirect interconnection, it necessarily follows that they must bear the cost of transport for land-to-mobile calls when direct interconnection is utilized.

The FCC has declared that "the incumbent and the new entrant are co-carriers and each gains value from the interconnection agreement. Under these circumstances, it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement."[105] After all, Congress has determined that the costs of transport shall be shared via a "reciprocal compensation arrangement."[106] Yet, the Petitioners' stated position – which, it bears emphasis, they have never attempted to justify in law or policy – would not result in symmetrical compensation arrangements for the transport of telecommunications, because according to them, they should pay nothing in transport while wireless carriers would bear the costs of all transport – for both mobile-to-land calls *and* land-to-mobile traffic.

H. ISSUE 16: THE PETITIONERS' LOCAL DIALING PARITY OBLIGATIONS

For purposes of reciprocal compensation, as the Arbitrator has recognized, "[t]he MTA's geographic boundary, and nothing else, determines whether reciprocal compensation applies."[107] But from the perspective of the retail services that the Petitioners offer to their own customers, the Petitioners may rate calls subject to reciprocal compensation between the carriers either as local or toll to their own customers.[108] Whether the Petitioners' treat their customers' calls as

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105 *Local Competition Order,* 11 FCC Rcd 15499, 15781 ¶ 553 (1996).

106 47 U.S.C. § 251(b)(5).

107 Limine Order at 2.

108 *See, e.g., TSR Wireless* v. *U S WEST,* 15 FCC Rcd 11166, 11185 ¶ 34 (2000)("For example, to the extent the Yuma-Flagstaff T-1 is situated entirely within an MTA, does not cross a LATA boundary, and is used solely to carry U S West-originated traffic, U S West must deliver the traffic to TSR's network without charge [pursuant to the reciprocal compensation rules]. However, nothing prevents U S West from charging its end users for toll calls completed over the Yuma-Flagstaff T-1.").

local or toll depends on the rate center association of the number being called. As explained during the hearing:

- If the wireless customer being called has a number rated to the Jefferson City exchange, a rural LEC will bill its customer a toll call even though the wireless customer at the time may be located only a few feet from the rural LEC customer caller;[109] and

- If the wireless customer being called has a number rated to the rural LEC's rate center, a rural LEC will treat the call as local even though the wireless customer at the time may be located in New York City or Los Angeles.[110]

Wireless carriers, as they expand their network coverage into more rural areas, are beginning to obtain local telephone numbers – that is, numbers rated to a rural LEC's exchange. They obtain these numbers for an obvious reason: few friends, family and neighbors will call them on their wireless phone if they must dial extra digits and incur a toll charge.[111] Indeed, wireless services will never compete with the local exchange services offered by incumbent LECs if the incumbent treats calls to wireless customers as toll. As one federal court has found:

> If Western Wireless' customers lack the ability to receive local calls from many of the independent telephone companies' landline subscribers within the Western Wireless' major trading area, then Western Wireless is placed at a competitive disadvantage.[112]

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[109] Tr. 73, l. 4 - 75, l. 7.

[110] Tr. 117, l. 22 - 118, l. 1; 142, l. 20 - 143, l. 11.

[111] As the FCC observed earlier this month, "most purchasers of mobile telephony service prefer a local telephone number. . . . By local number, we mean one for which a user does not incur a toll-charge from a given location. Although, a non-local telephone number does not affect the cost of wireless service of the wireless subscriber, because most carriers offer long distance service at no additional charge, having a non-local number does affect the cost of landline users calling that subscriber." *Sprint/Nextel Merger Order,* FCC Docket No. 05-63, FCC 05-148, at ¶ 55 and n.145 (Aug. 8, 2005). The FCC has noted that wireless carriers obtain "as many NXX codes as are required to permit wireless customers to be called by wireline customers on a local basis." *Numbering Resource Optimization,* 14 FCC Rcd 10332, 10370 ¶ 112 (1999).

[112] *Atlas Telephone* v. *Oklahoma Corporation Comm'n*, 309 F. Supp. 2d at 1317.

The Petitioners' witness asserted that their companies operate in a competitive market,[113] and that a wireless carrier with locally rated telephone numbers has a competitive advantage over wireless carriers without locally rated numbers.[114]

Section 251(b)(3) of the Act imposes on Petitioners the "duty to provide dialing parity to competing providers of telephone exchange service."[115] The FCC's local dialing parity rule provides:

> A LEC *shall* permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider.[116]

T-Mobile does not dispute that for retail rating purposes (vs. reciprocal compensation purposes), the Petitioners typically rate as toll those calls to wireless customers with non-locally-rated telephone numbers – even if the wireless customer happens to be located in the rural LEC exchange at the time of the call (the first example listed above). But if T-Mobile, or any other wireless carrier, obtains a locally-rated telephone number from the North American Number Plan Administrator, in compliance with FCC rules,[117] the Petitioners must, under the FCC's local dialing parity rule, honor these numbers and treat calls to these local numbers as local.

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113 Tr. 89, ll. 3-4; 91, ll. 2-3.

114 Tr. 120, ll. 13-16.

115 47 U.S.C. § 251(b)(3). The FCC has expressly ruled that a LEC's obligation to provide dialing parity extends to CMRS providers. *See Second Local Competition Order,* 11 FCC Rcd 19392, 19429 ¶ 68 (1996)("We reject USTA's argument that the section 251(b)(3) dialing parity requirements do not include an obligation to provide dialing parity to CMRS providers. To the extent that a CMRS provider offers telephone exchange service, such a provider is entitled to receive the benefits of local dialing parity.").

116 47 C.F.R. § 51.207 (emphasis added).

117 The FCC has exclusive jurisdiction over numbering. *See* 47 U.S.C. § 251(e)(1). Under FCC rules, a wireless carrier can obtain numbers rated to any LEC rate center where it "is or will be capable of providing service within sixty (60) days." 47 C.F.R. § 52.15(g)(2). There is nothing in FCC rules requiring a wireless carrier to have a direct interconnection as a condition to obtaining locally-rated numbers.

In seeming derogation of their obligation to provide dialing parity to all locally-rated numbers, the Petitioners have taken the position, without any explanation or legal justification,[118] that they can exempt themselves from their local dialing parity obligation either by refusing to amend their state tariffs to recognize a wireless carrier's local numbers or by requiring the carrier to interconnect directly as a condition to providing dialing parity.[119]

It bears emphasis that the Petitioners' compliance with the FCC's local dialing parity rule would impose no burden on the Petitioners. As another federal court has held in rejecting the assertion the Petitioners make here:

> Great Plains is asked only to treat locally rated Western Wireless calls in the same manner that it treats its own locally rated calls. The Court adopts the reasoning of the *Atlas II* court and finds that local dialing parity and tandem routed local calling are consistent with the 1996 Telecommunications Act's general purposes without placing an undue burden on Great Plains.[120]

T-Mobile asks that the Arbitrator find that the Petitioners' dialing patterns for wireless calls are inconsistent with the nondiscriminatory treatment they should extend to all providers with which they exchange traffic.

IV. CONCLUSION

In this case the parties have asked the Commission for the first time to arbitrate an interconnection agreement between Missouri wireline carriers and a wireless carrier. This case presents a number of issues which to date have only been resolved through negotiation between LECs and wireless carriers, but the resolution reached in those negotiated agreements has no effect here. The rulings of the Arbitrator must be based on the evidence presented in prefiled tes-

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118 For example, the Petitioners ignored this issue in their Final Offer Memorandum.

119 *See, e.g,,* Tr. 66, ll. 18-21; Schoonmaker Rebuttal at 29 (Ex. 9, p. 29, ll. 13-22).

120 *WWC License* v. *Anne C. Boyle, et al.*, No. 4:03CV3393, Slip op. at 10.

timony and at the hearing, and the decision-making process is governed by federal law, not state law. T-Mobile urges the Arbitrator to find that compensation for the termination of traffic exchange with the Petitioners must flow in both directions, and that the cost-based amount of the compensation should be set at 1.5 cents per minute.

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 August, 2005, to the following counsel of record:

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