BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition for Arbitration of Unresolved Issues in a Section 251(b)(5) Agreement with T-Mobile USA, Inc.	)))	Case No. TO-2006-0147
In the Matter of the Petition for Arbitration of Unresolved Issues in a Section 251(b)(5) Agreement with Cingular Wireless.	)))	Case No. TO-2006-0151

Petitioners' Comments on the Arbitrator's Preliminary Report

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I. INTRODUCTION

Petitioners request that the Arbitrator and Arbitration Panel reconsider the preliminary positions in the Preliminary Arbitration Report in light of the record, the Petitioner's Brief, and the following points. As directed by the Arbitrator, the Petitioners are providing additional revised cost studies.[1]

II. COMMENTS

A. CORRECTIONS AND MODIFICATIONS

Petitioners have identified a few procedural areas of the Preliminary Arbitration Report that require correction and/or modifications.

1. The Fidelity companies are no longer parties.

On January 5, 2006, Fidelity Telephone Company filed its notice of voluntary dismissal pursuant to Commission Rule 4 CSR 240-2.116. Therefore, Fidelity Telephone Company is no longer a party to this arbitration proceeding, and it should not be listed as a Petitioner. Also, Fidelity Communications Services I, Inc.; and Fidelity Communications Services II, Inc. were dismissed because they are competitive local exchange carriers (CLECs). Thus, the Final Arbitration Report should clarify that none of the Fidelity companies are parties to this arbitration case.

[1] Petitioner's failure to address any particular aspect of the Preliminary Arbitration Report should not be construed to mean that Petitioners agree with the preliminary decision. Similarly, the Petitioners' action to provide additional cost study evidence and analysis as directed by the Arbitrator does not mean that the Petitioners do not maintain their position on all issues.

2. The CLECs have been dismissed.

On January 17, 2006, the Missouri Public Service Commission (Commission) issued its Order recognizing that CLECs Green Hills Telecommunications Services and Mark Twain Communications Company were dismissed as parties. The Commission further held that "The Commission will not dismiss the claims of Mark Twain or Green Hills". The Preliminary Arbitration Report recognizes in Issue 24 that the CLECs have been dismissed as parties, so the Final Report should clarify at the outset that the CLECs are no longer parties to this arbitration.

3. The Effective Date is April 29, 2005.

The effective date of the Agreement as specified in Issue 35 should be April 29, 2005 instead of 2006. (*See* Issues Matrix.)

4. Melissa Manda

The Preliminary Arbitration Report has a typographical error in that it identifies one of the counsel for Petitioners as Melissa Anderson. This should be corrected to identify counsel for Petitioners as Melissa Manda.

B. COMMENTS ON SPECIFIC ISSUE NUMBERS

Issue 1. Must Petitioners individually establish a separate transport and termination rate based upon their own separate costs?

While the Arbitrator agreed with Petitioners that each Petitioner need not establish a separate transport and termination rate, the Arbitrator also found that the Petitioners are required to establish separate costs and that the rates are then to be based on such costs.

As directed by the Arbitratior, Petitioners have performed revised cost studies for transport and termination. The revised studies demonstrate that the forward-looking costs for a number of the Petitioners are higher than the proposed uniform rate of $0.035 per minute. Accordingly, if the Commission is unwilling to establish a uniform rate for all Petitioners that is no higher than the average of all their forward-looking costs as shown by their initial cost studies in this case, then the Petitioners should be allowed to set rates at their indicated forward-looking costs, even if those costs are higher than the $0.035 per minute originally proposed.

Issue 3. What is the Petitioners' forward-looking cost to purchase and install new switches?

The Preliminary Arbitration Report adopts the T-Mobile/Cingular position, but T-Mobile/Cingular's switch costs are based on Federal Communications Commission (FCC) data that is not applicable to Petitioners. (Conwell, Direct, p. 46, Lines 6-7). Mr. Conwell's further reduction in the FCC switch costs of 12% is also unfounded.[2]

Mr. Conwell's source for his switch cost estimates is the FCC's "*Tenth Report and Order.*"[3] (Conwell, Direct, p. 42, Lines 1-26) However, this FCC *Order*, by its own terms, is not applicable to the Petitioners. The FCC *Order* recognizes the separate requirements of calculating costs for smaller, rural telephone companies and larger providers. The *Tenth Report and Order* only addresses the switch costs of large companies, not small, rural telephone companies such as the Petitioners.

[2] If the Arbitrator's final Report accepts the same decision for Issue 4 as the Preliminary Arbitration Report, this determination is moot since the determination of Issue 4 supersedes the overall investment amounts discussed in regard to Issue 3.
[3] Docket Nos. 96-45 and 97-160, 14 FCC Rcd 20156 (1999).

Specifically, the FCC identifies its *Order* as a "Forward Looking Mechanism for High Cost Support for **Non-Rural LECs**".[4] And the *Order* states as follows:

> In this Report and Order, we complete the selection of a model to estimate forward-looking cost by selecting input values for the synthesis model we previously adopted. These input values include such things as the cost of switches, cables, and other network components necessary to provide supported services, in addition to various capital cost parameters. The forward-looking cost of providing supported services estimated by the model will be used as part of the Commission's methodology to determine high-cost support for **non-rural carriers** beginning January 1, 2000.[5]

The FCC upheld a modified, embedded cost mechanism for rural carriers. In a later *Rural Task Force Order* in 2001, the FCC rejected the use of the *Tenth Report and Order* for rural telecommunications carriers. The FCC acknowledged that it did not have sufficient information to develop a forward-looking model that appropriately could be used to estimate costs in areas served by rural carriers. Thus, the FCC retained a modified, embedded cost mechanism for these carriers. The FCC reasoned:

> [C]ompared to large non-rural carriers, 'rural carriers generally serve fewer subscribers, serve more sparsely populated areas, and generally do not benefit as much from economies of scale and scope. For many rural carriers, universal service support provides a large share of the carriers' revenues, and thus, any sudden change in the support mechanisms may disproportionately affect rural carriers' operations.'[6]

Accordingly, Mr. Conwell's initial starting point for determining Petitioners' switch investment is totally inappropriate. The FCC's own decision limits its applicability to

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[4] *Tenth Report and Order*, 64 FR 67372, Dec. 1, 1999 (emphasis added).
[5] *Id.* at ¶2 (emphasis added).
[6] *In the Matter of the Federal-State Board on Universal Service, Multi-Association Group (MAG) Plan*, CC Docket No. 96-45; CC Docket No. 00-256, *Fourteenth Report and Order, Rural Task Force Order*, 66 FR 30080, rel. May 23, 2001, ¶16.

non-rural (i.e. large) ILECs. Moreover, the FCC has clearly indicated that actual or embedded costs of rural carriers are a more reliable source. Petitioners' proposed forward-looking switch costs are 28% less than their actual switch investments as of 2003. Given the fact that Petitioners have purchased or replaced their switches since 1996, it is not unreasonable to assume that these actual costs, discounted by 28%, are representative of what the Petitioners would have to pay today for new digital switches.

Mr. Conwell then takes these FCC switch costs (which are attributable to non-rural LECs) and reduces them by 12%. The 12% "deflater" used by Mr. Conwell is not competent evidence because it is based on hearsay, *i.e.* the testimony of a witness in Tennessee concerning the C.A. Turner Price Index. (Conwell, Transcript, p. 319, line 25-p. 320, line 1) In fact, Mr. Conwell testified that he does not know the specific methodology of the Turner Price Index. *Id.* at p. 321, line 22. He does not know if it is based upon vendor quotes or actual prices paid. *Id.* at line 25. The record is devoid of the C.A. Turner Price Index information, leaving Respondents' claim for further reductions unsubstantiated. The Commission is left with no opportunity to evaluate its applicability or reasonableness.

The switch costs calculated by Respondents for Cass County Telephone Company demonstrate the shortcomings of Respondents' analysis. Mr. Conwell's assumed switch investment for Cass County is only 30% of its actual switch investment. Cass County began business in 1996 (and installed all of its switches since then), so its actual investment in switching is less than eight years old. It is unreasonable to assume that Cass County's switches could be replaced at only 30% of their actual costs.

Clearly, a forward-looking switch cost that is only 30% of the actual investment is unreasonable, yet that is the position adopted by the Preliminary Arbitration Report.

In fact, FCC Orders addressing switch costs for rural telecommunications carriers recognize increasing rather than decreasing numbers. As recently as January 12, 2006, the FCC upheld an **increase** in the local switching support formula for average schedule companies.[7] In its Order, the FCC noted that each year, the FCC must review and approve or modify any proposed modifications to the formulas used to calculate high-cost loop support and local switching support for average schedule companies. The local switching support formula is used to determine the amount of support for switching costs that will be provided to average schedule companies from the FCC's universal service high-cost support mechanism. *Id*. (*citing* 47 C.F.R. Section 54.301(f)) While this formula is more focused on the distribution of universal service high-cost support and caution must be exercised to use it otherwise, the formula demonstrates **increased** local switching costs are being incurred by smaller companies.

The Petitioners' position of identifying the cost of switches based upon recent actual, embedded switch investments as of 2003 and reducing them by approximately 28% is the most reasonable estimation of their forward-looking switch costs.

[7] *Federal-State Joint Board on Universal Service, 2006 Modification of Average Schedule Universal Service Formulas*, CC Docket No. 96-45, 2006 FCC LEXIS 116, January 12, 2006.

Issue 4. What is the appropriate value for the usage-sensitive portion of Petitioners' forward-looking end office switching costs?

The Arbitrator's Preliminary Report accepts the position of T-Mobile/Cingular which allocates all costs of switching, except $18.33 per line, to non-traffic sensitive costs. This contrasts with the Petitioners' position which adopts the HAI input value and assigns 70% of switch costs as traffic sensitive, which is also supported by the FCC's *MAG Order*. The Preliminary Report criticizes the *MAG Order's* 70% value as "overly broad", but the Respondents' proposal is equally broad and suffers from the added defect of being unsupported by any record evidence.

Respondents' position is based on their belief that there has been: (1) a change in switch technology; and (2) a change in vendor pricing for the switches purchased by the Petitioners. However, the Respondents' position is unsupported by any record evidence of such changes in either switch technology or vendor pricing for small companies such as Petitioners.

The digital switch technology in use by Petitioners is also the forward-looking technology. The forward-looking technology for switching includes digital central office switches, both host and remote, generally equipped with currently required functions and features. The switching equipment actually in use by the small Missouri companies includes digital central office switches, both host and remote, which are equipped with these same functions and features. (Schoonmaker, Direct, p.23) Previous FCC decisions support the HAI Model's 70% allocation of switching costs as user sensitive.

For example, in the FCC's "MAG Order"[8], the FCC codified this 70% requirement in Section 69.306 of its rules. This FCC position identifying the 30%-70% by rule has not changed. (Schoonmaker, Rebuttal, p.18)

Respondents have accepted the fact that digital switching technology is the forward looking technology for Petitioners, but Respondents have failed to offer any evidence that the digital switches being purchased today by Petitioners are any different than those purchased five to ten years ago. More significantly, Respondents have failed to show that the functions being performed by today's switches have changed such that these functions should now be classified as non-traffic sensitive. In addition, the Respondents have failed to demonstrate a change in vendor pricing that justifies their position. In fact, the only evidence of vendor pricing is a letter from a large manufacturer of switches, Nortel, indicating that switch pricing and technology for small ILECs has not changed and a large portion of the switch remains traffic sensitive.

The state commission orders and FCC decisions cited by Respondents do not apply to the Petitioners as small rural carriers in Missouri. FCC orders single out the unique business needs of smaller rural carriers versus the large companies. *See Fourteenth Report and Order, Rural Task Force Order*, 66 FR 30080, May 23, 2001. In addition, the FCC, Minnesota, and Illinois cases Respondent cites involve large LECs/RBOCs such as Verizon, Qwest, and Ameritech (now SBC/AT&T). While these larger companies may have the ability to purchase switches on a flat price, per line basis, this is not the case for small companies.

[8] *In the Matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, FCC 01-304, Nov. 8, 2001.

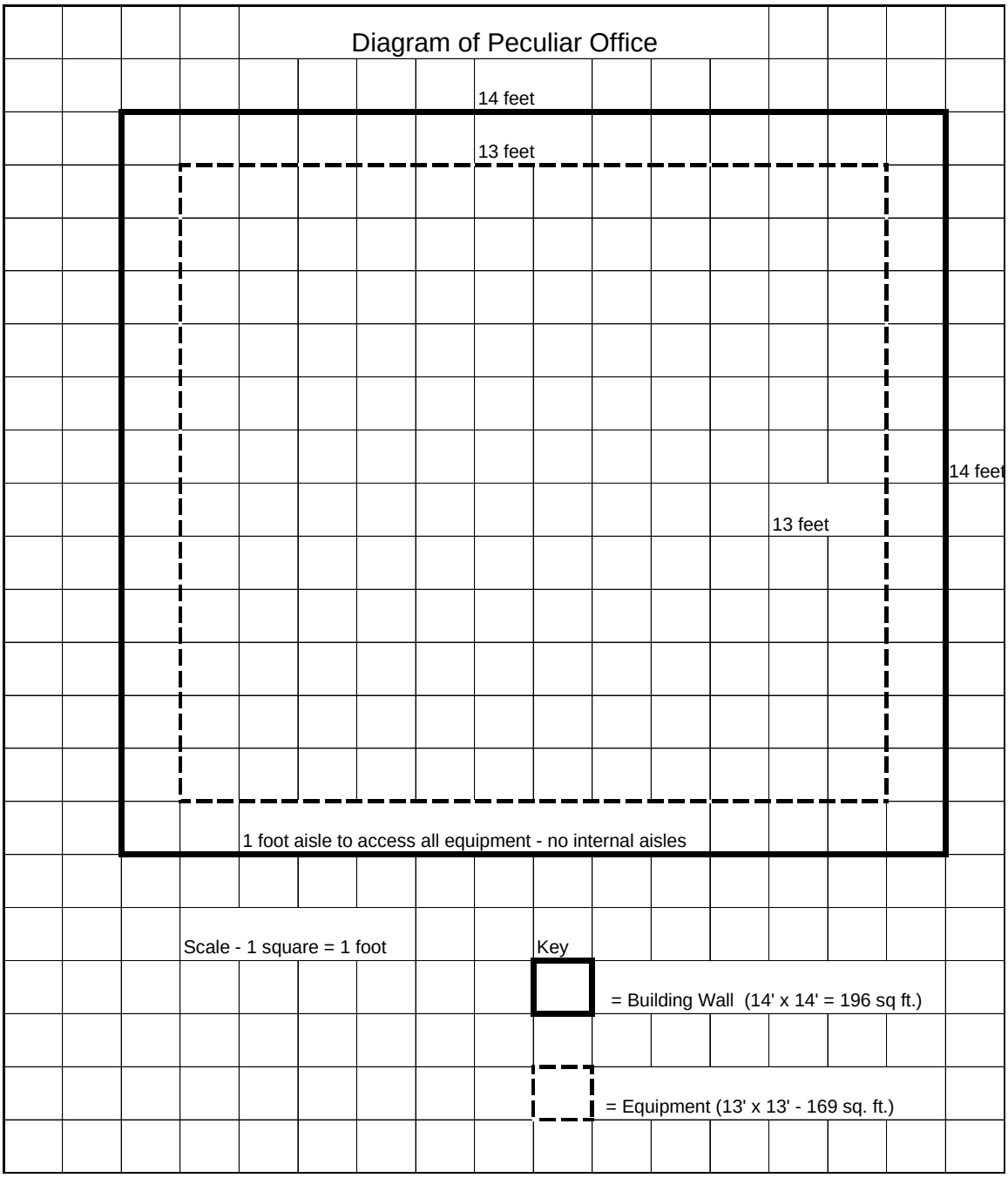
Respondents' position is overly broad and fails to provide substantive support for the decision. Respondents' position also contradicts the values in the FCC's *MAG Order*. Therefore, Respondents' position should be rejected in the Final Arbitration Report because it lacks an appropriate methodology or supporting evidence.

Issue 5. What is the appropriate floor space attributable to switching?

The Arbitrator adopted the position of T-Mobile/Cingular. However, Respondents' proposed reductions of land and building space are flawed. Respondents base their calculation of floor space on Data Request responses of Petitioners in this proceeding. The Data Requests did not ask for the floor space necessary for providing and maintaining a forward-looking efficient network. In fact, the Data Requests did not ask for any supporting space such as aisles. Instead, the Data Requests asked, "Provide an estimate of the square footage of floor space required for each of the Petitioner's end office switches (host and remote) identified in response to question 19. Show the space required for equipment bays versus aisles, hallways, etc., that may be included". (Schoonmaker, Rebuttal, p. 22) Petitioners responded, interpreting the request to mean the footprint of the equipment bays only, excluding aisles, hallways, etc. *Id.*

Respondents' proposed floor space is not adequate to house the host and remote switches or to provide the function they are intended to meet. Mr. Conwell only allowed floor space of 100 square feet for the remote switches (i.e., 10' x 10') and 200 square feet for host switches (i.e. 10' x 20'). (Conwell, Direct, p.52) This fails to provide access to or maintenance of the equipment, including aisles between the equipment

bays, entry facilities, space for heating and air conditioning equipment, and restrooms. The following diagram graphically displays the fallacy of Respondents' proposal. The switch footprint of 169 square feet inside the building footprint of 196 square feet only leaves a walkway of 1 foot around the outside of the switch equipment.



Respondents' proposal is clearly insufficient, yet it is the position adopted by the Preliminary Arbitration Report.

Moreover, Respondents fail to provide evidentiary support to meet the FCC standard of forward-looking costs. Instead of providing a forward-looking cost methodology, Respondents use existing or historic information on the Petitioners' current facilities. With no reasonable alternative, this Commission should accept the HAI Model's input value for floor space which reflects an appropriate amount of building and land investment. The developers of the model provide default values that, based on their research, judgment and evaluation, represent appropriate values for each input element.

Issue 7. What are the appropriate forward-looking interoffice cable lengths?

The Arbitrator accepted T-Mobile's position. However, the Arbitrator qualified the decision by providing that the determination of interoffice cable lengths "is conditioned on cables going to the nearest switch; not necessarily the nearest SBC switch, but the nearest large LEC tandem switch."

Petitioners have no objection to using their existing switch locations and, to the extent they exist, using existing host/remote configurations. Petitioners agree with the Preliminary Order's finding that the forward-looking cable connecting Petitioners' network (be it a host/remote arrangement or a stand alone switch(es)) should extend beyond the current meet point. However, Petitioners do not believe that their cable should always extend to the nearest large LEC tandem nor should it always be

assumed to extend to the nearest large LEC end office. An example may best explain this situation:

In the case of KLM Telephone Company, which has a host switch located in Rich Hill, Missouri, the nearest large LEC tandem is in Springfield, Missouri which is approximately 110 miles away. The nearest large LEC end office is Shell City, Missouri which is only 15 miles away. Shell City, however, is a relatively small exchange with a population of approximately 327. It is a remote switch that homes off of CenturyTel's host switch in El Dorado Springs. It would not make any sense for KLM to extend its network to a remote switch in Shell City. By the same token, it does not make any sense for KLM to extend its network all the way to Springfield, which is the nearest large ILEC tandem. What is more realistic and more appropriate is for KLM to extend its facilities to Nevada, Missouri which is a host (or stand alone) switch served by SBC.

Petitioners are submitting revised cost studies which: (1) calculate the forward looking transport costs to the nearest LEC end office (which will tend to understate their forward looking transport costs), and (2) calculate the forward looking transport costs to the nearest large LEC tandem (which will tend to overstate their transport costs). Petitioners believe the more appropriate forward-looking transport cost is to assume that Petitioners will extend their facilities to the nearest large ILEC "host" switch. If the Commission agrees with this assumption, Petitioners are prepared to re-run their cost studies to reflect this more appropriate and realistic assumption.[9]

[9] Time constraints prevented Petitioners from re-running the studies in this manner, as it requires a company-by-company analysis of the nearest ILEC host or stand-alone switch.

Issue 9. What is the appropriate amount of sharing of Petitioners' interoffice cabling in order to reflect sharing with services other than transport and termination?

The Arbitrator adopts Petitioners' position stating that Respondents point to faults in the Petitioners' position but offer no methodology for their position.

While Petitioners obviously do not disagree with this finding, the Petitioners' position should be clarified for the final Order. The Preliminary Arbitration Order correctly identifies the Petitioners' reliance on the HAI Model, but it incorrectly states that "the HAI Model assigns the entire cost of interoffice fiber cable to transport, with a portion of the cost assigned to structures." Sharing is recognized in the HAI Model's formulas. A review of these formulas reveals that the cost of the fiber cable is assigned to nine different types of trunks. (Schoonmaker, Rebuttal, p. 32) Thus, the HAI model algorithms calculate sharing of interoffice facilities for uses other than for IXC/wireless transport and termination.

Issue 14. Upon what basis should Petitioners and Respondents T-Mobile/Cingular compensate each other for traffic exchanged between February of 1998 and the 2001 effective date of Petitioners' wireless termination service tariffs?

The Arbitrator made a preliminary conclusion that the Commission will not address this issue, that it is not relevant to the contemplated interconnection agreement, and that it is better addressed in the context of a complaint case. On the contrary,

Petitioners submit that this issue must be addressed, it is relevant, and it is best addressed in this proceeding.

First, this issue has been included in all of Petitioners' negotiations with wireless carriers, and it was presented in the Petition for Arbitration. In fact, the Arbitrator issued a decision on January 12, 2006 which specifically stated that "the Arbitrator will present this issue in his report to the Commission along with all other issues presented in this arbitration." The Act requires the Commission to resolve each issue set forth in the Petition. 47 U.S.C. §252(b)(4)(C). Therefore, this matter must be resolved rather than avoided in the Final Arbitration Report.

Second, the question of wireless traffic that was delivered in the absence of an agreement is entirely relevant to this proceeding in which the Petitioners are seeking an agreement to establish rates, terms, and conditions for the transport and termination of intraMTA wireless calls. The Petitioners initiated negotiations and pursued arbitration in order to receive compensation for the Respondents' use of their rural networks – both for past usage and on a going-forward basis. Respondents, on the other hand, have disregarded prior Commission orders which prohibited wireless carriers from using rural LEC networks in the absence of an agreement.

Third, Petitioners have sought compensation for this traffic since 1998, and Petitioners are willing to accept whatever rate is ultimately established at the conclusion of this case for past traffic that was delivered between 1998 and 2001. Thus, all of the rate and minute of use information is before the Commission in this case, and it would be administratively efficient to resolve the matter now in this case. Conversely, requiring the Petitioners to file a complaint case would simply prolong the litigation of

this matter that has been ongoing since 1998. It simply makes sense to resolve the matter here and now instead of putting it off for yet another proceeding.

Finally, the Commission must resolve this issue because it would be confiscatory to allow Cingular and T-Mobile to avoid paying for their use of Petitioners' facilities between 1998 and 2001. Otherwise, the Commission will have prevented Petitioners from being compensated for providing transport and termination service during this time period and effectively approved a rate of $0.00 that is clearly confiscatory and unlawful. "The Commission cannot allow the wireless calls to continue terminating for free because this is potentially confiscatory." *See State ex rel. Sprint v. Public Service Commission*, 112 S.W.3d 20, 26 (Mo. App. 2003); *Smith v. Illinois Bell Tel. Co*., 270 U.S. 587, 591-92, 46 S.Ct. 408, 70 L.Ed 747 (1926).

Issue 15. Must Petitioners pay Cingular and T-Mobile reciprocal compensation for intraMTA, wireline to wireless traffic that they hand off to interexchange carriers?

The Preliminary Arbitration Report "adopts T-Mobile's position" on this issue and refers to the Commission's recent *Alma Arbitration* decision. The Preliminary Arbitration Report is wrong for two reasons. First, Cingular has taken no position on this issue and offered no testimony, so Cingular has effectively abandoned or waived the issue. In other words, Cingular has offered no position for the Commission to adopt, and the Commission cannot graft T-Mobile's position onto Cingular and impose it upon the Petitioners. Second, the *Alma Arbitration* report fails to address either the FCC's March 2005 *Notice of Proposed Rulemaking* or a subsequent December 2005 decision by the

Texas Public Utility Commission. The Preliminary Arbitration Report contradicts both of these decisions, so it must be amended.

a. Cingular Has Waived this Issue.

Cingular has taken "no position" in both its position statement and testimony before the Commission on Issue 15. Indeed, Cingular witness Pue's Direct Testimony specifically identifies the issue and states as follows:

> Question: What do you understand Petitioners' position to be on this issue?
>
> Answer: I understand Petitioners' position to be that they owe no compensation on land-to-mobile traffic that they hand off to an IXC.
>
> **Question: What is Cingular's position on this issue?**
>
> **Answer: <u>Cingular takes no position on this issue</u>.**

(Pue Direct, Ex. 19, p. 16); s*ee also* Issues Matrix ("**<u>Cingular takes no position on this issue</u>**.")(emphasis added) Cingular has offered no evidence or position on Issue 15, so it has effectively abandoned or waived that issue. Cingular now claims that the IXC issue is a "joint" issue, but this is impossible because Cingular has never taken a position on the issue.

Moreover, Cingular is probably prohibited from taking a position on the IXC issue because Cingular's parent company SBC (now AT&T) appears to follow Petitioners' position and does not pay reciprocal compensation to wireless carriers for IXC-carried traffic in Missouri:

Q. . . . [W]ould you agree with me that your testimony in the Alma arbitration case indicates that **SBC does not pay reciprocal compensation to wireless carriers on IXC-carried traffic**?

A. **Yes**.

(Pruitt, Tr. 400)(emphasis added) Cingular's parent AT&T/SBC has taken the same position in Texas, and the Texas Public Utility Commission recently distinguished the Oklahoma *Atlas II* case and held that reciprocal compensation does not apply to 1+ dialed traffic handled by an IXC.[10]

In short, Cingular has taken no position and has effectively abandoned or waived this issue, so it must be resolved in Petitioners' favor as to Cingular.[11]

b. The Preliminary Report Contradicts the FCC's March 2005 *NPRM*, and the 2005 Texas PUC Decision.

1. The FCC's March 2005 Notice of Proposed Rulemaking

Numerous FCC decisions acknowledge that IXC traffic is not presently subject to the Act's reciprocal compensation provisions. For example, less than a year ago the FCC issued a *Notice of Proposed Rulemaking* ("*NPRM*") questioning whether it should retain the intraMTA rule for wireless traffic.[12] **In its March 3, 2005 *NPRM*, the FCC observed that IXCs, and not small rural ILECs, remain financially responsible for IXC traffic**. The FCC specifically identified the same issue that is present in this case

[10] *Fitch Affordable Telecom Petition for Arbitration against SBC Texas under §252 of the Communications Act*, Docket No. 29415, *Order Approving Arbitration with Modifications*, issued Dec. 19, 2005.

[11] In the event that the Commission does not resolve the matter based on Cingular's failure to take a position or offer testimony, then Petitioners' response below to T-Mobile should apply equally to Cingular.

[12] *Further Notice of Proposed Rulemaking in the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, issued March 3, 2005.

and recognized that its present rules require intraMTA calls dialed on a 1+ basis to be routed through IXCs and remain subject to the access compensation regime. The FCC invited comment on whether its existing rules and industry practices could be **changed** to allow traffic to be routed to wireless carriers and made subject to reciprocal compensation, but the FCC recognized that this is simply not the case today:

> For instance, we recognize that the current Commission rules may require that intraMTA calls dialed on a 1+ basis be routed through IXCs. ***Specifically, section 51.209 of the Commission's rules requires LECs to implement toll dialing parity through a presubscription process that permits a customer to select a carrier to which all designated calls on a customer's line will be routed automatically. Should this rule be changed***? We ask parties to explain what technical or network changes would be needed if all intraMTA CMRS traffic were routed to CMRS providers. ***We also seek comment on whether, in the alternative, all intraMTA calls can be made subject to reciprocal compensation without requiring LECs to alter the routing of their originated traffic***. We ask parties supporting a particular approach to address any other Commission rules that may be implicated."[13]

Here, the FCC clearly states that it would require a future ***change*** to its access and reciprocal compensation regimes to make IXC traffic subject to reciprocal compensation. This language confirms that IXC traffic is currently not subject to reciprocal compensation.

Additional language in Paragraph 17 of the *NPRM* the FCC also clarifies that IXCs, not LECs, are responsible for IXC-carried calls:

> ***[U]nder the existing regimes, the calling party's carrier, whether LEC, IXC, or CMRS provider, compensates the called party's carrier for terminating the call.***[14]

[13] *Id*. at ¶138.
[14] *Id*. at ¶17.

Thus, the IXC is the calling party's carrier for IXC-carried traffic, and it is the IXC that is responsible for compensating "the called party's carrier" (i.e. the wireless carrier) for the call. The *Alma Arbitration Order* erred by placing this burden on small rural ILECs and thereby contradicts the FCC's existing compensation regimes.

2. The Texas Public Utility Commission's 2005 SBC Decision

On December 19, 2005, the Texas Public Utility Commission issued an arbitration decision adopting the same position that Petitioners propose here. *See* Attachment A. In the Texas case, a CMRS carrier sought to receive compensation for the same type of traffic that is at issue here – intraMTA traffic that is dialed 1+ and handled by a third party IXC. Initially, the Arbitrator ruled in favor of the CMRS carrier, but the Texas Commission reversed and explained:

> It is the introduction of a third-party IXC that switches and transports calls between the LEC and the CMRS provider's network facilities that is in dispute in this arbitration. **In order to complete 1+ calls between carriers, IXCs are subject to originating and terminating access charges (exchange access), instead of the reciprocal compensation regime**.[15]

The Texas Commission also distinguished the *Atlas II* case which was the basis for the *Alma Arbitration* decision:

[15] *Fitch Affordable Telecom Petition for Arbitration against SBC Texas under §252 of the Communications Act*, Docket No. 29415, *Order Approving Arbitration with Modifications*, issued Dec. 19, 2005, pp. 3-4 (citing *TSR Wireless v. US West*, 15 F.C.C.R. 11166 (rel. June 21, 2000)(emphasis added).

> *Atlas II* did not, however, expressly discuss 1+ dialed traffic handled by an IXC. Thus, the Commission finds that **the *Atlas II* case is not relevant to this proceeding as it did not hold that intraMTA 1+ calls handled by an IXC should be subject to reciprocal compensation**.[16]

The Final Arbitration Report should adopt Petitioners' position on IXC-carried traffic because it is consistent with the FCC's 2005 *NPRM*, standard industry practice, and the Texas PUC's recent ruling.

Issue 17. What is the appropriate IntraMTA traffic balance ratio/percentage?

With regard to traffic factors for Cingular, the Arbitrator adopts Cingular's position. However, Cingular's IntraMTA traffic factors include land-to-mobile traffic that is carried by interexchange carriers (IXCs). Since Cingular has taken no position on Issue No. 15 (regarding Petitioner's obligation to pay reciprocal compensation on traffic carried by IXCs), Cingular has abandoned or waived any claim for compensation for land-to-mobile traffic that is carried by an IXC. At the very least, Cingular should be required to rerun its traffic studies to exclude land-to-mobile traffic that is carried by IXCs. When Cingular does this, it will find that virtually all of the traffic between Cingular and Petitioners is mobile-to-land and that very little traffic, if any, is land-to-mobile. Therefore, adopting Cingular's proposed traffic factors overstates the amount of traffic from Petitioners to Cingular and for which Petitioners have an obligation to pay reciprocal compensation. The Arbitrator's preliminary decision must therefore be modified and, at the very least, Cingular must be required to rerun its traffic studies to exclude land-to-mobile traffic that is carried by IXCs.

[16] *Id*. at p. 4 (emphasis added).

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

The Arbitrator's Preliminary Report does not reach the merits of this question, but this issue should be resolved based on the Commission's precedent in prior arbitration cases. Cingular seeks to require the Petitioners to provide "local dialing" for calls to a Cingular NPA/NXX that is rate centered in Petitioners' Extended Area Service (EAS) calling scopes. For example, Kingdom Telephone Company's customers in Tebbetts, Missouri have an EAS route to Jefferson City that allows them to call Jefferson City customers on a locally dialed basis (i.e. on a 7-digit dialed basis). If Cingular obtains telephone numbers for its customers that are rated in the Jefferson City exchange, then Cingular wants those Tebbetts customers to be able to dial Cingular's customers on a locally dialed basis as well. (Schoonmaker Direct, Ex. 1, p. 60; Tr. 536-541) Petitioners are willing to implement local dialing for their customers to call Cingular customers with telephone numbers rated in the wire center or exchange with which Petitioners have EAS, <u>provided</u> that Cingular is also locally interconnected in the wire center or exchange to which Petitioners have EAS.

The clear precedent for this issue was established in the arbitration case involving SBC and Mid-Missouri Cellular. In that case, the Commission held:

> The Commission agrees with SWBT that a call from a SWBT landline customer to a MMC Cellular customer is **<u>properly rated as a local call only where: (1) the landline and cellular exchanges are locally interconnected; and (2) the V&H [vertical and horizontal] coordinates of the cellular exchange lie within the local calling area of the landline exchange</u>**.[17]

[17] *In the Matter of Missouri RSA No. 7's Petition for Arbitration with Soutwestern Bell*, Case No. TO-99-279, *Arbitration Order*, April 8, 1998 (emphasis added).

The Final Arbitration Report should follow this clear Commission precedent and avoid subsequent disputes and uncertainty.

Cingular's position should also be rejected because it would require Petitioners to incur additional costs to haul calls farther than they would under the traditional landline-to-landline EAS arrangements. (Tr. 539-41) For example, Kingdom would be required to carry the EAS call to Columbia to Cingular's point of presence/interconnection. Cingular's witness testified that Petitioners should not be able to recover these additional costs from either Cingular or Petitioners' own customers. This result has been rejected by the Commission in a series of cases involving wireline-to-wireless local number portability (LNP). In those cases, the Commission held that small rural LECs (including all of the Petitioners) should not be forced to bear the costs for transporting wireless calls outside of their local service areas. In the case involving Craw-Kan Telephone Cooperative the Commission explained:

> The FCC has yet to determine which carrier should bear the burden of transporting calls to ported numbers. In light of this uncertainty and the costs of securing facilities, arrangements and regulatory approval to transport calls to ported numbers, **the Commission finds that there would be an undue economic burden if Craw-Kan must transport calls outside of its service area**.
>
> * * *
>
> First, it is uncertain whether Western Wireless or Craw-Kan will ultimately be required to bear the costs of transporting calls to ported numbers. In order to transport calls outside of its service area, Craw-Kan will have to bear the costs of third-party arrangements and regulatory processes. Lastly, Craw-Kan stands to gain no benefit from these costs. **These factors combine to create an undue economic burden**.[18]

[18] *In the Matter of the Petition of Craw-Kan Telephone Cooperative for Suspension of the FCC's LNP Requirements*, Case No. TO-2004-0505, *Report and Order*, issued Sept. 23, 2004 (emphasis added).

This finding is equally appropriate here, and the Final Arbitration Report should deny Cingular's proposal for the same reasons.

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

The Preliminary Arbitration Report does not reach the substance of this issue, but clear Commission precedent supports Petitioners' position on this issue. In order to avoid future complaints and uncertainty, the Final Arbitration Report should reject Cingular's position outright.

This issue is commonly referred to as the "Virtual NXX" issue, and Cingular seeks to require the Petitioners to provide "local" dialing by carrying calls from the small rural carrier's service area to Cingular's facilities in Missouri's large metropolitan areas such as St. Louis or Kansas City. For example, New Florence Telephone Company is located approximately 100 miles west of the St. Louis metropolitan area. Under Cingular's proposal, Cingular could simply obtain a block of NPA-NXX numbers that are rate centered in the New Florence exchange so New Florence customers could dial Cingular customers on a local dialed basis. However, this would require New Florence Telephone Company to incur the costs of carrying those calls approximately 100 miles to St. Louis where Cingular is interconnected with the landline network. (Tr. 541-43, 550)

First, the Commission has clearly rejected Cingular's position on "Virtual NXX" in prior cases. For example, in the *Mid-Missouri Cellular* case, the Commission stated:

> The Commission agrees with SWBT that a call from a SWBT landline customer to a MMC Cellular customer is **properly rated as a local call only where: (1) the landline and cellular exchanges are locally interconnected; and (2) the V&H [vertical and horizontal] coordinates of the cellular exchange lie within the local calling area of the landline exchange**.[19]

Thus, the clear Commission precedent on this issue (involving Cingular's parent company AT&T/SBC) favors Petitioners' position.

Second, the *Mid-Missouri Cellular* case also emphasized that local call rating without local interconnection was inappropriate where the necessary compensation issues had not been addressed:

> The Commission agrees with SWBT that **local call rating without local interconnection is inappropriate because the interexchange facilities of SWBT and of Sprint, a stranger to this action, would necessarily be employed in completing such calls. MMC has not addressed the compensation issues necessarily raised by its proposal**.[20]

Cingular's position in this case suffers from the same deficiencies that the Commission identified in the *Mid-Missouri Cellular* arbitration case because Cingular has failed to address the compensation issues raised by its proposal. (*See* Tr. 539-41; 561-62) The *Mid-Missouri Cellular* case also reveals this issue to be yet another example where

[19] *In the Matter of Missouri RSA No. 7's Petition for Arbitration with Soutwestern Bell*, Case No. TO-99-279, *Arbitration Order*, April 8, 1998 (emphasis added).
[20] *In the Matter of Missouri RSA No. 7's Petition for Arbitration with Southwestern Bell*, Case No. TO-99-279, *Arbitration Order*, issued April 8, 1998 (emphasis added).

Cingular expects Missouri's small rural LECs to provide a service and take on responsibilities that its large parent company SBC (now AT&T) is not willing to do.

The Arbitrator's Final Report should reject Cingular's position because it fails to address the additional costs that transporting calls outside of their service areas would create, and this outcome would be unduly economically burdensome. (Schoonmaker Direct, Ex. 1, pp. 62-63) In the recent wireline-to-wireless LNP waiver proceedings, the Commission determined that it would be economically burdensome for rural LECs to transport calls outside of their service areas in consideration of the costs for them to secure facilities, arrangements, and regulatory approval:

> **[T]he Commission finds that there would be an undue economic burden if Craw-Kan must transport calls outside of its service area**.… First, it is uncertain whether Western Wireless or Craw-Kan will ultimately be required to bear the costs of transporting calls to ported numbers. In order to transport calls outside of its service area, Craw-Kan will have to bear the costs of third-party arrangements and regulatory processes. Lastly, Craw-Kan stands to gain no benefit from these costs. **These factors combine to create an undue economic burden**.[21]

The Final Arbitration Report should reject Cingular's position for the same reason.

Third, Cingular's own witness admitted that if Cingular wants toll free calling, then Cingular has the ability to negotiate to pay reverse toll charges. In fact, the agreement between Cingular and its parent AT&T/SBC contains such a reverse toll billing provision. (Tr. 521-22) Thus, if Cingular wants a wireless customer in St. Louis to be able to receive calls from a distant landline exchange such as New Florence on a toll-free basis, then Cingular can pay AT&T/SBC to do so under the terms of their existing

[21] *In the Matter of the Petition of Craw-Kan Telephone Cooperative for Suspension of the FCC's LNP Requirements*, Case No. TO-2004-0505, *Report and Order*, issued Sept. 23, 2004 (emphasis added).

reverse toll billing provision. (Tr. 522-23) Cingular has requested no such arrangement with the small rural LECs in this case. Instead, Cingular seeks to have small rural LECs incur costs and provide for free the same service that its parent company would apply charges to under the reverse toll billing provision. This provides yet a third reason for the Final Arbitration Report to reject Cingular's proposal.

Finally, this issue is currently an "open" issue before the FCC in CC Docket No. 01-92,[22] and the Commission should reject Cingular's attempt to make an end run around a nation-wide issue that has been hotly contested before the FCC.

Issue 22. Should the contract contain provisions for both direct and indirect interconnection?

The Preliminary Arbitration Report does not rule on the issue and appears to correctly recognize that the issue is not ripe. Indeed, neither Cingular nor the Petitioners have requested a direct connection.

> Q. Would you agree with me to date Cingular has made no specific requests to any of the Petitioners for a direct interconnection?
>
> A. I would say that's correct, we have not issued a BFR for direct interconnection.

(Tr. 554) Thus, the issue is not ripe for a Commission decision, and there is no reason for the Commission to address direct connection at this time.[23] Accordingly, the Final

[22] *Further Notice of Proposed Rulemaking in the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, issued March 3, 2005, ¶91.

[23] The ripeness doctrine is grounded in both the jurisdictional limits of Article III of the Constitution and policy considerations of effective court administration. *Public Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930 (8th Cir. 2005). Article III limits

Arbitration Report should rule that this issue is not ripe because neither party has requested direct interconnection.

Furthermore, as a legal matter, direct interconnection is covered by Section 251(c) of the Act. The Arbitrator's Preliminary Report recognizes in Issue No. 23 that Petitioners currently have a rural exemption from this obligation under Section 251(f) of the Act. Thus, Cingular is required to issue a bona fide request for termination of Petitioners' rural exemption, and the Commission must hear evidence and make findings that the request is: (1) not unduly economically burdensome; (2) technically feasible; and (3) consistent with universal service principles. 47 U.S.C. §251(f). None of these conditions have been met. Moreover, the Commission's own rules require it to issue any such order terminating Petitioners' rural exemptions before a Petition for Arbitration is filed. *See* 4 CSR 240-36.040(2). This requirement has not been met either. Accordingly, the Final Arbitration Report should adopt the Petitioners' position on this issue.

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courts to deciding actual "Cases" and "Controversies," U.S. Const. art. III, §2, thereby prohibiting them from issuing advisory opinions, *Bender v. Education Credit Mgmt. Corp.,* 368 F.3d 846, 847-48 (8th Cir. 2004). One kind of advisory opinion is an opinion "'advising what the law would be upon a hypothetical state of facts.'" *Preiser v. Newkirk,* 422 U.S. 395, 401, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1975). As for policy, courts avoid resolving disputes based on hypothetical facts because to do so would be a poor use of scarce judicial resources. *Bender,* 368 F.3d at 848. Whether a case is ripe depends on the state of the case at the time of review, not at the time of filing. *Nebraska Public Power Dist. v. MidAmerican Energy Co.,* 234 F.3d 1032, 1039-40 (8th Cir. 2000). In this case, neither Cingular nor the Petitioners have requested a direct interconnection. Therefore, the issue of direct interconnection is not ripe, and the Commission should decline to "advise what the law would be on a hypothetical state of facts."

Issue 25. Upon what basis should Petitioners and T-Mobile compensate each other for traffic exchanged between 2001 and the BFR date?

The Preliminary Arbitration Report states that this issue is "not relevant" to this arbitration and "is better addressed in the context of a complaint case." But the majority of the Petitioners have already completed the complaint case process with T-Mobile. In fact, on January 27, 2005, this Commission sustained a complaint against T-Mobile finding that T-Mobile failed to pay for its post-tariff wireless traffic and ordering T-Mobile to do so, including interest, late fees, and reasonable attorney's fees.[24] T-Mobile did not appeal the Commission's decision to the circuit court or name the Commission in any of its various federal lawsuits, yet T-Mobile has failed to comply with the Commission's decision.

T-Mobile currently owes Petitioners nearly $1,750,000.00 for its post-tariff traffic as detailed in Attachment E (Proprietary) of the Verified Petition for Arbitration.[25] This past due balance is a significant amount for small rural carriers such as Petitioners. Although Petitioners' tariffs have been upheld by both the Missouri Court of Appeals and the FCC[26] as lawful for the time period at issue here, T-Mobile has failed to compensate the Petitioners for this traffic. T-Mobile is the only wireless carrier in Missouri that has refused to pay for wireless traffic delivered between 2001 and April of 2005.

[24] *BPS Telephone Co. et al. Complaint*, Case No TC-2002-1077, *Report and Order*.
[25] Schoonmaker Rebuttal, p. 50 (This amount does not include late fees or attorneys' fees, both of which are authorized by the tariffs.).
[26] *T-Mobile Petition for Declaratory Ruling*, CC Docket No. 01-92.

T-Mobile argues that the matter is currently on appeal in the federal courts,[27] but none of the various federal courts where T-Mobile has filed appeals have stayed the Petitioners' tariffs. The only federal court to issue a decision in one of T-Mobile's appeals thus far is the U.S. District Court for the Western District of Missouri, Central Division (Jefferson City). In that case, the Judge dismissed T-Mobile's complaint and commented on T-Mobile's "transparent litigation strategy." In short, at no point has any federal court stayed the Petitioners' tariffs.[28]

T-Mobile should not be allowed to continue disregarding the Commission's decisions in Case Nos. TT-97-524, TT-2001-139, and TC-2002-1077. Until T-Mobile's past due amounts are paid in full, T-Mobile should not get the benefit of a new agreement. Rather, Petitioners and any transit carriers (such as SBC) should be authorized to take the necessary steps to block Respondent's traffic from terminating to Petitioners' exchanges over the LEC-to-LEC network. This condition is standard practice not only for telephone interconnection agreements but for any service agreement where a customer has not paid its prior bills. For example, in an *Order Approving Interconnection Agreement* issued September 21, 2005, the Commission approved the following language in an agreement between Sprint Missouri, Inc. and a competitive local exchange carrier (CLEC):

[27] Tr. 462.

[28] Again, T-Mobile has failed to name the Commission as a defendant in any of its federal court complaints, even though T-Mobile claims that it has appealed the Commission's decisions.

> **§5 TERM AND TERMINATION**
> This Agreement shall be deemed effective upon the Effective Date first stated above, and continue for a period of two years until July 18, 2007 ("End Date"), unless earlier terminated in accordance with Section 5, **provided however that if CLEC has any outstanding past due obligations to Sprint, this Agreement will not be effective until such time as any past due obligations with Sprint are paid in full**.[29]

Thus, it commonplace for agreements to address the payment of past due obligations, and the Final Arbitration Report should expressly rule that the arbitrated agreements resulting from this case are not effective until T-Mobile's past due bills have been paid. *See* 47 U.S.C. §252(c)(3)(Commission can impose conditions and "provide a schedule for the implementation of terms and conditions by the parties to the agreement.").

Issue 32. What billing mechanism should be used to reflect the IntraMTA traffic balance percentage?

This issue has two parts. The first part involves the appropriate method of calculating the intraMTA traffic balance percentage. The second part involves the question of which records are used with the formulas.

a. Net Billing Is Not Appropriate for InterMTA Traffic.

The Preliminary Arbitration Report correctly concludes that "**net billing should only include intraMTA traffic and not interMTA traffic**." This resolves the first part of the issue regarding the appropriate method of calculating the intraMTA traffic balance percentage. Thus, InterMTA traffic, if any, must be identified and removed from total

[29] *In Re: The Interconnection Agreement by and between Sprint Missouri, Inc. and Missouri Network Alliance, LLC pursuant to Sections 251 and 252 of the Telecommunications Act of 1996,* Case No. IK-2006-0054, *Order Approving Interconnection Agreement*, issued Sept. 21, 2005.

terminating usage before performing a net billing calculation on the remaining intraMTA minutes of use. During the hearing, T-Mobile's witness expressly agreed with this position:

> Q. Well, isn't it intuitive that if you're only applying a traffic factor to intraMTA traffic, you've got to perform an interMTA allocation first to get to that intraMTA traffic?
>
> A. Yes, if you have a – and I'll just make up some numbers. If you have 1,000 minutes, you know, and ten percent of those are interMTA, you would use – commonly could use the 90 percent number.
>
> Q. Use the remaining 900 minutes –
>
> A. Yes.
>
> Q. To perform your net billing calculation, right?
>
> A. I believe that's correct.

(Pruitt, Tr. 445-46) Cingular's witness also agreed that this is typically the way the billing mechanism works for interMTA traffic. (*See* Pue, Tr. 528) Accordingly, the Final Arbitration Report should remain consistent with the Preliminary Report on this issue.

b. Use of the Tandem Company's Transiting Usage Records

The second part of this issue involves the appropriate records to use for calculating the intraMTA traffic percentages. Petitioners propose the use of the tandem company's cellular transiting usage reports, but T-Mobile seeks to require Petitioners to perform additional studies each month (at significant cost) to capture IXC traffic. The record evidence in this case demonstrates that there is simply no economically feasible way for the Petitioners to determine what traffic from IXCs is associated with T-Mobile's customers. Although some of the Petitioners were able to make such a calculation on

an isolated basis, this was done at significant time and expense. (Schoonmaker Direct, Ex. 1, p. 57) To perform such a study every month would be extremely burdensome and economically unreasonable in light of the level of revenue at issue in this case.

The problem of capturing IXC traffic is just as complicated on T-Mobile's end, and this fact was established in both T-Mobile's direct testimony (at page 18, lines 4-7)[30] and cross-examination:

> Q. And I guess my question is that you basically testify that on the land-to-mobile traffic that not all intraMTA land-to-mobile traffic could be reliably captured. Do you see that?
>
> A. Yes.
>
> Q. Okay. You go on to say that **T-Mobile does not have a workable mechanism to reliably capture all intraMTA land-to-mobile traffic that LECs send to interexchange carriers. Do you see that**?
>
> A. Yes.

(Tr. 430) T-Mobile's own evidence demonstrates that the use of IXC records is not appropriate for this agreement. Indeed, T-Mobile's own testimony reveals that T-Mobile is unable to capture traffic that is delivered via an IXC, yet T-Mobile expects the small rural carriers to do so. Accordingly, the Final Arbitration Report should adopt Petitioners' position that net bills be issued by ILECs based solely on the tandem company's cellular transiting usage reports.

[30] "Not all the land-to-mobile ItraMTA traffic could be reliably captured, however. For example, T-Mobile does not have a workable mechanism to reliably capture all IntraMTA land-to-mobile traffic the LECs' send to Interexchange carriers."

III. CONCLUSION

Petitioners' original cost studies and positions are appropriate, and the Final Arbitration Order should be amended or modified to be consistent with these cost studies and proposals. Alternatively, if the Arbitrator does not adopt Petitioners' original positions, then the Arbitrator should modify or alter the Final Arbitration Report to be consistent the comments and corrections that have been identified above.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or via electronic mail, or hand-delivered on this 24th day of February, 2006, to the following parties:

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