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)	)	Case No. TO-2006-0147
Agreement with T-Mobile USA, Inc.	)	Consolidated

RESPONDENTS' JOINT POST-HEARING BRIEF

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EXECUTIVE SUMMARY

Executive Summary

The Commission has a unique and important decision before it. T-Mobile and Cingular ("Respondents") have taken great care to lay out the applicable federal requirements and to show how the record evidence relates to those requirements. Respondents believe that upon careful review the Commission will find that Respondents' positions (on both the rate and non-rate issues) are fully consistent with federal law. Respondents further believe that the Commission will agree that Petitioners have clearly failed to meet their burden of proof, especially with regard to the issue of appropriate transport and termination rates.

The Joint Issues Matrix in this case identified a total of 36 issues. The parties have resolved seven of them, and they are discussed briefly in Part I of this brief. In Part II, Respondents discuss the legal principles that govern this arbitration.

The balance of this brief discusses the 29 "open" issues in need of resolution by the Arbitrator. This discussion is divided into three general sections: (1) Joint Issues that are raised in both the Cingular and T-Mobile arbitrations, (2) Cingular-only Issues and (3) T-Mobile-only Issues. For the Commission's benefit, Respondents have organized their brief to follow the sequence of issues as listed in the Joint Matrix.

A. Joint Issues

First Joint Issue: Appropriate IntraMTA Rates

The first 13 issues in the Joint Matrix involve the rate Petitioners may charge for intraMTA transport and termination of mobile-to-land traffic (the reciprocal compensation rate). Respondents identify nine fatal flaws in Petitioners' cost studies that invalidate their proposed rate of 3.5 cents per minute of use ("MOU"), and these nine flaws comprise nine of the 13

Matrix issues. The other four Matrix issues (involving the appropriate intraMTA rate) require the Commission to establish appropriate transport and termination rates for each Petitioner, and also to establish the various components of the rates.

Issue 1: Must each Petitioner establish its own separate transport and termination rate based upon its own separate costs?

FCC rules are clear that each Petitioner must establish its own rate based upon its own costs. Since the proposed rate of 3.5 cents/MOU is higher than the forward-looking economic costs of every Petitioner, the Commission cannot adopt that rate for any Petitioner. Instead, the Commission must base each Petitioner's rate upon that Petitioner's own costs.

Issue 2: What is the appropriate transport and termination rate for each Petitioner?

Respondents have developed TELRIC-compliant rates for transport and termination for 20 of the Petitioners, ranging from a low of $0.0025/MOU (Grandby) to a high of $0.0147/MOU (Le-Ru).

BPS - $0.0039/MOU
Cass County - $0.0073/MOU
Citizens - $0.0046/MOU
Ellington - $0.0091/MOU
Farber - $0.0074/MOU
Fidelity - $0.0070/MOU
Granby - $0.0025/MOU
Grand River - $0.0071/MOU
Green Hills - $0.0077/MOU
Kingdom - $0.0078/MOU
KLM - $0.0103/MOU
Lathrop - $0.0046/MOU
Le-Ru - $0.0147/MOU
Mark Twain - $0.0076/MOU
McDonald County - $0.0097/MOU
Miller - $0.0084/MOU
New Florence - $0.0121/MOU
Oregon Farmers Mutual - $0.0081/MOU
Peace Valley - $0.0146/MOU
Steelville - $0.0081

Seven of the Petitioners (Craw-Kan, Holway, Iamo, Rock Port, Goodman, Ozark and Seneca) have not presented enough information in their data responses to allow the calculation of a proper transport and termination rate. Respondents identify in the brief the specific data that these seven Petitioners must provide so TELRIC-compliant rates can be adopted. Respondents recommend that the transport and termination rates for those Petitioners should be set at bill-and-keep on an interim basis until those Petitioners produce this data:

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

Petitioners' proposed cost to purchase new switches cannot be accepted because it is not based upon publicly available or verifiable data. Instead, it is based solely upon the judgment of Petitioners' cost consultant, who made a significant arithmetical error in comparing the HAI 5.0a model default value for switching cost to Petitioners' embedded switching costs. Respondents, in turn, have submitted switching costs that are based upon publicly available data from the FCC.

However, the Commission need engage in the valuation of Petitioners' switches only if it accepts Petitioners' assumption that 70 percent of local switching costs are usage-sensitive, which is discussed immediately below in Issue 4. If, on the other hand, the Commission finds (as recommended by Respondents) that the only usage-sensitive portion of a local switch is the trunk equipment, then the value of all of Petitioners' local switches need not be determined at all. Instead, as discussed in Issue 4, Respondents recommend that the HAI 5.0a default values for interoffice trunk equipment costs be used to compute usage-sensitive end office switching costs, which makes the valuation of the usage-sensitive portion of local switching a simple matter.

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

In determining the percentage of usage-sensitive local switching, Petitioners propose to use the 70% default value contained in HAI 5.0a, which would mean that the current cost of each Petitioner to purchase a modern digital switch should be reduced by 30% in computing transport and termination rates. This 70% value is inappropriate because it is not supported by any publicly available or otherwise verifiable data, and instead is based upon technology assumptions now ten years old. The most current version of the HAI model now assumes that no portion (0%) of a modern digital switch is traffic sensitive, which means that the entire cost of a modern switch should be excluded from transport and termination rates.

Respondents do not propose such an extreme position and instead acknowledge that the trunking equipment of a modern digital switch may be usage-sensitive (approximately 10% of the total cost of a new switch). This is the only portion of local switching costs that should be included in Petitioners' transport and termination rates. Respondents suggest that the HAI 5.0a default costs for trunk equipment be used, resulting in an end office switching cost of $0.0012/MOU. That valuation would be the same for each Petitioner.

As discussed above, if the Commission adopts this approach (which is supported by recent FCC and state commission decisions), then this Commission need not go through the laborious process of valuation of every switch of every Petitioner.

Issue 5: What is the appropriate amount of Petitioners' forward-looking floor space attributable to switching?

Petitioners would have the Commission adopt floor space estimates that grossly overstate actual requirements (as they borrow the HAI 5.0a default values of 500 square feet of building space for switches with up to 1,000 lines, and 1,000 square feet for switches with up to 5,000 lines). Respondents' counterproposal (100 square feet for remote switches, and 200 square feet for standalone/host switches) is based on Petitioners' responses to data requests asking for the amount of floor space actually occupied by Petitioners' switches.

Issue 6: What is the appropriate per MOU, forward-looking end office switching cost for all Petitioners?

This issue requires the Commission to compute the local switching component of each Petitioner's transport and termination rate. As discussed above, if the Commission adopts

Respondents' proposal regarding the amount of local switching costs that are traffic sensitive, then the determination of switching costs becomes a simple matter. If that assumption is adopted, then end office switching costs vary among Petitioners from $0.00116 to $0.00120/MOU. Respondents suggest that the Commission adopt the values listed in Schedule WCC-1 to the Conwell Direct Testimony.

Issue 7: What are Petitioners' appropriate, forward-looking interoffice cable lengths?

Petitioners' cost studies use the HAI 5.0a default assumption that the cable length in Petitioners' forward-looking transport networks would equal the sum of the interoffice distances between each Petitioner's switch(es) and the nearest BOC wire center. HAI 5.0a then doubles that distance to account for redundant facilities. HAI 5.0a thus assumes that in a forward-looking transport network, Petitioners would not directly connect their switches with each other, but instead would connect each of their switches indirectly by connecting first to the nearest BOC wire center – so that even Petitioners' local inter-switch calls would be transited and switched through the BOC network. Petitioners' proposal significantly increases the length of cable in their forward-looking transport networks which, in turn, greatly increases their proposed transport costs.

In contrast, Respondents propose that Petitioners' transport costs be computed by the use of the length of cable in Petitioners' existing transport networks, because that distance constitutes the "lowest cost network configuration" under FCC Rule 51.505(b)(1).

Issue 8: What are Petitioners' appropriate, forward-looking cable sizes?

Petitioners have adopted the HAI 5.0a default input value of 24-fiber cable for all interoffice cables for all Petitioners – ignoring entirely the capacity each Petitioner actually requires (two or four fibers) to meet demand for the interoffice transport system that carries mobile-to-land traffic.

In contrast, Respondents' cost expert used a mix of eight, 12 and 24 fiber cable in correcting Cass County Telephone's proposed interoffice cable costs. This was based on current fiber usage by cable route, increased to the next larger fiber cable size (using actual data Cass County provided in response to a data request). Without information about fiber cable sizes and fibers in service for other Petitioners, Respondents assumed an average 12-fiber cable for corrections to 19 other Petitioners' costs.

The Commission should hold that Petitioners, in computing their transport costs, may not use the HAI 5.0a assumption of 24 fiber cables on each interoffice route. The Commission should then require each Petitioner (other than Cass County, which has already supplied the necessary data) to submit company-specific information detailing each interoffice cable route, the number of fibers in each route, and the numbers of fibers in use on each route. In the alternative, Respondents urge the Commission to rule that a mix of eight, 12 and 24 fiber cables should be used for each Petitioner.

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?

Petitioners want to assign 100 percent of the interoffice cable cost to the interoffice transport system. This is improper under FCC regulations. In contrast, Respondents propose, consistent with FCC rules, to assign interoffice cable costs to all users of the cable in proportion to total demand for fibers. Then, Respondents propose to assign the share of interoffice cable costs attributable to interoffice transport systems in proportion to total demand for trunks or DS0 equivalents. The Commission should rule that pursuant to FCC Rule 51.511(a), Petitioners' cost studies should be corrected to assume that six fibers are used for interoffice transport based on the experience of Cass County Telephone. Costs of all other fibers in each Petitioner's transport system should be attributed to uses other than transport and termination.

Issue 10: What is the appropriate sizing of Petitioners' forward-looking, interoffice transmission equipment?

Petitioners adopt HAI 5.0a's default values and therefore assume that all Petitioners employ OC-48 systems. Also, because of HAI 5.0a's unrealistic assumption that interoffice cables are constructed from each of Petitioners' switches to the nearest BOC wire center (Issue 7 above), Petitioners assume that they need signal regenerators, when they actually need few, if any.

Respondents contend that OC-3 (or smaller) transport systems are adequate to meet the needs of Petitioners. If larger systems are needed, their costs should be shared with other users of the systems. In addition, few, if any, signal regenerators are needed for Petitioners' actual interoffice networks, given that distances between switches are less than 40 miles (the threshold for placement of a regenerator). The Commission should hold that each Petitioner's forward looking transport equipment be based upon OC-3 systems <u>without</u> optical regenerators.

Issue 11: What are the appropriate, forward-looking transport costs for each Petitioner?

This issue requires the Commission to compute the common transport component of each Petitioners' transport and termination rate. The Commission should rule that 20 Petitioners have produced enough information to allow appropriate transport costs to be computed and should adopt those costs as listed in Schedule WCC-1 to the Conwell Direct Testimony. The Commission should adopt transport costs for the remaining seven Petitioners once those companies have produced the necessary data listed above in Issue 2, using bill-and-keep as the interim compensation method – to give those LECs an incentive to produce the required data.

Issue 12: Should any of the costs identified in HAI 5.0a as dedicated transport be included in Petitioners' transport and termination rates?

Petitioners contend it is necessary to add dedicated transport costs to common transport costs to capture the full cost of transporting mobile-to-land traffic. This position defies common sense, however, because a mobile-to-land call cannot simultaneously pass over two types of transport: shared facilities and dedicated facilities. Neither T-Mobile nor Cingular send any traffic to Petitioners over dedicated facilities. Petitioners' proposed adjustment to the HAI model is thus pure fiction and a duplication of costs. The Commission should therefore rule that Petitioners' transport and termination rates should not be allowed to include any costs of dedicated transport.

Issue 13: What is the appropriate value of Petitioners' forward-looking signaling link costs?

Petitioners have simply adopted the signaling costs that the HAI model 5.0a produces. Those costs are inappropriate, however, because they assume that every switch of every Petitioner contains a signaling link, when in actuality only Petitioners' host switches contain such links. Respondents therefore propose that actual signaling link costs be used in the computation of transport and termination rates. The Commission should require Petitioners to use such actual signaling link costs.

Second Joint Issue

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

This issue involves Petitioners' claim for compensation for traffic exchanged from 1998 to 2001. The Arbitrator previously dismissed this claim, then brought it back into the arbitration simply so that the Commission could rule on an issue raised in the arbitration petitions. The Arbitrator was originally correct in dismissing this claim. The Commission lacks the jurisdiction to decide this issue, because Section 252 arbitrations can only decide issues arising after the request for negotiations, not before. In addition, the FCC has ruled that Petitioners may not condition interconnection negotiations upon the settlement of previous disputes. This claim, in short, is not properly part of this case.

Third Joint Issue

Issue 15: Must Petitioners pay Cingular and T-Mobile reciprocal compensation for intraMTA, wireline to wireless traffic that they hand off to interexchange carriers?[1]

The Commission has already decided this issue in the Alma arbitration, holding that Petitioners must pay reciprocal compensation for all intraMTA traffic, whether or not a third-party is involved in transporting the call. Every federal court that has decided this issue has ruled the same way. FCC regulations are clear that handing off a call to an IXC does not relieve Petitioners from the compensation obligation for intraMTA traffic.

Fourth Joint Issue – IntraMTA Ratios

Issue 16: Should the Commission establish an IntraMTA traffic Ratio for use by the parties in billing the termination of traffic?

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

Regardless of the Commission's ruling on Issue 15, the Commission must establish intraMTA traffic ratios for both T-Mobile and Cingular, since the companies cannot otherwise bill for the exchange of intraMTA traffic, and since not all intraMTA traffic originated by Petitioners is handed off to IXCs. IntraMTA traffic ratios are also necessary for any direct interconnections that the parties may establish in the future.

Because Petitioners propose average traffic ratios based upon incomplete samples of less than 40% of the total population, and because both T-Mobile and Cingular propose intraMTA ratios based upon samples from each and every Petitioner, the traffic ratios proposed by T-Mobile and Cingular should be adopted.

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1 Cingular takes no position on this issue.

B. <u>Cingular-Only Issues</u>

Issue 19: Should the parties employ bill-and-keep for compensation purposes if the traffic exchanged between Cingular and any Petitioner does not exceed a specific de minimis level (5,000 MOUs)?

The Tennessee Regulatory Authority recently ruled in Cingular's favor on this issue, adopting a 5,000 MOU per month threshold for billing purposes. Traffic below that level is simply too inconsequential to bill for – both for Petitioners and Cingular.

Petitioners' proposal – to bill only when MOUs have accumulated to 5,000 – will not save resources or money. In fact it will do just the opposite, because non-standard billing (at irregular intervals) will require manual intervention, which greatly increases costs.

<u>Dialing Parity Issues</u>

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

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

Petitioners would condition their obligation to provide dialing parity, both in their service territories (Issue 21) and in EAS zones (Issue 20), upon Cingular's establishment of direct interconnection trunks. In other words, Petitioners claim that they do not have to honor local numbers that Cingular lawfully obtains under FCC rules unless and until Cingular establishes a direct interconnection trunk. Without the establishment of direct trunks (which are rarely justified because of small traffic volumes between Cingular and Petitioners), Petitioners' customers are forced to place toll calls to Cingular customers located within Petitioners' service and EAS territories.

The dialing parity requirement of the Act and FCC regulations is **<u>not</u>** conditioned upon the establishment of direct interconnection trunks. Under federal law, the Commission must require Petitioners to provide dialing parity in the case of both direct and indirect interconnection.

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

Petitioners are required to provide direct interconnection by Section 251(a)(1) of the Act. Petitioners are given no exemption from that obligation. Thus, Petitioners must include provisions for direct interconnection in their agreements with Cingular.

Issue 23: Should Petitioners be entitled to claim the Rural Exemption?

Petitioners argue that, because of the rural exemption, they are not required to provide to Cingular either direct interconnection or dialing parity. Petitioners are wrong on both counts. Moreover, Petitioners should not be allowed to file a Petition for Arbitration against Cingular under the Act, then claim that they are exempt from certain requirements of the Act. Congress intended that the rural exemption be used as a shield, not as a sword.

C. <u>T-Mobile-Only Issues</u>

<u>Compensation for Pre-Negotiation Request Traffic: 2001-April 2005</u>

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

Issue 26: Should the Arbitrator authorize the Petitioners and all transit providers to block T-Mobile's traffic until the past compensation issues are resolved?

These issues involve the same principles as Joint Issue 14. In both cases, Petitioners are seeking compensation for traffic allegedly exchanged prior to the commencement of negotiations. These two T-Mobile-only issues are thus not properly part of this arbitration for the same reasons that Joint Issue 14 is not properly before the Commission.

Issue 28: Within the traffic deemed InterMTA by applying the agreed InterMTA factor, how should inter- and intra-state InterMTA traffic be addressed?

Petitioners did not meet their burden of identifying this as an unresolved issue, and therefore the Commission lacks the authority to decide the issue. Assuming this issue had been identified in the Petition and therefore had been properly raised in this proceeding, Petitioners have failed to present any relevant evidence to support their position and therefore have failed to meet their burden of proof. Despite Petitioners' failure to identify the issue and failure provide any evidence whatsoever on point, T-Mobile has offered an 80% interstate/20% intrastate allocation on this issue in the spirit of compromise. The Arbitrator should select T-Mobile's proposal.

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

T-Mobile's proposed net billing language allows the parties to compute the amount of traffic flowing in each direction and requires only one net payment for the corresponding compensation owed. Petitioners agree that a net billing arrangement is appropriate, and they have not offered any competing net billing language. Therefore, T-Mobile's proposed language should be adopted (subject to adjustment of the intraMTA traffic ratio as determined in Issue 17).

Issue 34: Should the interconnection agreement include call-blocking as a remedy for a dispute between the parties?

The blocking provisions Petitioners seek are completely unnecessary and would serve no legitimate purpose. The only harm Petitioners would face if a bill is not paid timely is a temporary loss of use of money, but the "late charge" that the parties have agreed to – which includes an 18% annual interest rate, a level far exceeding current rates – fully addresses any possible harm from untimely payment.

No carrier should be given government sanction to block consumer call attempts because of legal disputes between two service providers. T-Mobile urges the Commission to consider this blocking issue from the perspective of consumers – and not from the perspective of incumbent carriers whose incentive is to stifle competition.

Issue 35: What date should be selected as the effective date for the arbitrated agreement?

While the parties agree that the effective date of the arbitrated agreement should be April 29, 2005, Petitioners claim that this effective date should apply to them only and not to T-Mobile. This is because Petitioners assert that the Commission should excuse them from paying reciprocal compensation to T-Mobile until T-Mobile pays them their claims for non-reciprocal compensation for traffic exchanged prior to April 29, 2005.

Petitioners have invoked the federally-provided arbitration procedure for resolving disputes relating to forward-looking interconnection agreements effective as of the date negotiations of those items officially began, a timeline also defined by federal law. Petitioners cannot ask the Commission both to resolve such disputes and concurrently to excuse Petitioners from their statutory obligation to provide "reciprocal" compensation. Simply put, Petitioners cannot have it both ways.

Issue 36: Is the transit rate issue raised by Citizens a proper subject of this arbitration?

The Commission cannot entertain Citizens' transit claim, as a matter of law, because Citizens failed to include this claim in its arbitration petition.

RESPONDENTS' JOINT POST-HEARING BRIEF

Respondents, Cingular Wireless LLC ("Cingular") and T-Mobile USA, Inc. ("T-Mobile"), collectively referred to as "Respondents" or "Wireless Carriers," submit this joint post-hearing brief in this consolidated arbitration proceeding. This brief is divided into five major sections:

I. Issues that no longer require arbitration;

II. The legal standards that govern in this arbitration proceeding;

III. Open issues involving both Respondents;

IV. Open issues pertaining to Cingular only; and

V. Open issues pertaining to T-Mobile only.

For the Arbitrator's convenience, the Respondents will identify issues herein based on the number assigned to them in the Joint Issues Matrix that the parties filed on January 18, 2006.

I. THE ARBITRATION ISSUES THAT HAVE BEEN RESOLVED

Section 252(c) of the Communications Act directs an Arbitrator to resolve "open issues." Of the 36 issues identified in the Joint Issues Matrix, the seven issues identified below have been resolved, either by the parties or the Arbitrator. Accordingly, there remain twenty-nine "open issues" that the Arbitrator needs to address in his arbitration report.

A. Issue 18 (Cingular only). The issue is whether the contract should allow for modification of the intraMTA traffic ratio. As reflected by the parties' positions in the Joint Issues Matrix, the parties have resolved their dispute on this subject:

Cingular Position	Petitioners' Position
If a party can demonstrate, through a proper traffic study, that the traffic ratio has changed, then the contract should allow for modification of the ratio.	Petitioners do not believe that an intraMTA traffic factor is appropriate in this case. (See # 15 above.) But if the Commission chooses to require such a ratio, then Petitioners do not object to periodically modifying the intraMTA

	traffic ratio

B. Issue 24 (Cingular only). At issue is whether CLECs can seek arbitration of interconnection agreements with Cingular. The Arbitrator ruled in favor of Cingular on this issue at the beginning of the second day of the hearing. See Tr. Vol. 4, p. 291 l.15-17. Cingular requests that the Commission memorialize the Arbitrator's ruling by including it in the final written order in these consolidated causes.

C. Issue 27 (T-Mobile only). At issue are the interMTA factors that should be used in the agreement. The parties have resolved their differences on this issue, as reflected by the Joint Issues Matrix:

T-Mobile Position	Petitioners' Position
T-Mobile has agreed to the ILEC-specific interMTA factors set forth by the Petitioners in Appendix G to the Petition.	The parties have reached agreement on InterMTA factors. See Attachment A.

D. Issue 29 (T-Mobile only). At issue is whether the agreement should include an explicit statement that the compensation obligation for intraMTA traffic is reciprocal and symmetrical. The parties have resolved their differences on this issue, as reflected by the Joint Issues Matrix:

T-Mobile Position	Petitioners' Position
By federal law, the obligation to pay compensation for IntraMTA traffic is reciprocal and symmetrical.	Petitioners have no objection to including language in the Traffic Termination Agreement to the effect that the reciprocal compensation obligation for intraMTA traffic is reciprocal and symmetrical.

E. Issue 30 (T-Mobile only). At issue is whether the agreement should clarify which carrier pays for the trunks and associated costs of connecting each party's network with the third-party transit network. The parties have resolved their differences on this issue, as reflected by the Joint Issues Matrix:

T-Mobile Position	Petitioners' Position
Consistent with the PSC's Alma decision, the agreement should explicitly state that any transport costs for intraMTA traffic are paid by the originating carrier or its agent – and not by the terminating carrier.	Petitioners have no objection to including language in the Traffic Termination Agreement which clarifies that each originating carrier is responsible for paying for any trunks and associated costs it may incur in connecting its network with a third party transit carrier's network.

Petitioners and T-Mobile have also agreed upon the language to be included in the agreement on this issue.

F. Issue 31 (T-Mobile only). At issue is whether the agreement should require parties to send all traffic via a third-party LEC when the parties are indirectly interconnected. The parties have resolved their differences on this issue, as reflected by the Joint Issues Matrix:

T-Mobile Position	Petitioners' Position
No, the originating carrier (whether the LEC or CMRS carrier) has the right to determine what intermediary carrier to use in sending traffic to the terminating carrier.	Petitioners agree that the Traffic Termination Agreement should not require parties to send all traffic they exchange via a third party LEC when the parties are indirectly interconnected.

Petitioners and T-Mobile have also agreed upon the language to be included in the agreement on this issue.

G. Issue 33 (T-Mobile only). At issue is whether billing should be deferred until the amount owing equals at least $250. The Petitioners modified their position in the Joint Issues Matrix:

T-Mobile Position	Petitioners' Position
Requiring the parties to bill for amounts under $250 is inefficient for both parties. No late charges or interest should apply to deferred billings.	Petitioners do not object to a deferred billing arrangement whereby they would not render a billing totaling less than $250, but rather accumulate billing information and render one

	bill for multiple billing periods when the total amount due exceeds $250; provided, however, that the billing party shall render a bill at least once per quarter, even if the bill is for less than $250.

T-Mobile understands the Petitioners to have accepted T-Mobile's position with one exception: bills will be rendered "at least once per quarter, even if the bill is for less than $250." T-Mobile accepts this compromise proposal so the Arbitrator need not address this issue. Petitioners and T-Mobile have also agreed upon the language to be included in the agreement on this issue, including the quarterly billing exception and stating that no interest or late charges will apply to deferred amounts.

II. THE LEGAL STANDARDS THAT GOVERN THIS FEDERAL ARBITRATION PROCEEDING

Below are the legal standards applicable to this proceeding:

A. The Commission is required to follow federal law in this arbitration proceeding.

As the Commission has already determined, it has "only that authority which the Congress has expressly delegated to it. The obligation to apply federal law applies even if state law precedent differs from federal law." Alma/T-Mobile Arbitration Report, Case No. IO-2005-0468, at 15 (Oct. 6, 2005). The Missouri Supreme Court recently reaffirmed that interconnection/compensation disputes between rural LECs and wireless carriers are "controlled by the Federal Telecommunications Act of 1996." State ex rel. Alma Telephone v. Missouri Public Service Comm'n, 2006 WL 44350 at *2 (Jan. 10, 2006) (copy in Respondents' Appendix filed with this brief).

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:

> [T]he 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.[2]

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[2] 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 MoPSC's 11th Amendment immunity defense).

The Commission, in arbitrating and resolving the open issues, has only that authority which the Congress has expressly delegated to it.[3] The obligation to apply federal law thus 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*."[4] It bears noting that federal courts, not State courts, will entertain any appeal of the Commission's decision.[5]

Throughout this proceeding, Petitioners have cited to and relied upon prior decisions by the Missouri Commission and Missouri courts. Respondents submit that these State decisions are legally irrelevant to the extent they conflict with federal law, because the Commission is required in this arbitration proceeding to apply federal law.[6]

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3 As the Federal District Court of Missouri has held, "Absent Congressional authority, the PSC would have no right to participate in the unique dispute resolution process devised by Congress, in which the PSC is authorized to arbitrate disputes between private telecommunication companies." AT&T v. Southwestern Bell, 86 F. Supp. 2d at 946.

4 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 1256, 1263 (10th Cir. 2005) ("These FCC determinations have since been codified as regulations binding *on* the industry and *state commissions*.") (emphasis added).

5 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 determined 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).

6 For example, in Rural Iowa Independent Telephone Ass'n v. Iowa Utilities Board, 385 F. Supp. 2d 797, 813 n.36 (S.D. Iowa 2005), a federal district court chose not to follow decisions of the Missouri Commission upon which the rural ILECs had relied.

B. This Commission is required to follow FCC rules.

As the Missouri Supreme Court held recently, the "FCC is charged with implementing and enforcing the provisions of the FTA, and FCC regulations and decisions are binding on the industry and state commissions." State ex rel. Alma Telephone v. Missouri Public Service Comm'n, 2006 ML 44350 at *2-3 (supporting citations omitted). Notably, in a filing by a group including all of Petitioners, they "agree[d] that the Arbitrator must 'defer to the FCC's view' of reciprocal compensation and apply the federal regime."[7]

Petitioners, throughout this proceeding, have suggested that the FCC did not fully consider rural LECs in developing its rules and that this Commission should accordingly make "accommodations" to FCC rules for small companies like them.[8] Petitioners' suggestion that smaller company issues "weren't given consideration" by the FCC is wrong. In fact, the FCC devoted 37 pages (and over 100 paragraphs) of its 1996 Order *exclusively* to issues involving small companies, such as Petitioners.[9] In addition, as the FCC stated, "Comments on the impact of our proposed rules on small entities have been integrated into our analysis and consideration

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7 Small Telephone Company Group's *Amicus Curiae* Comments on the Arbitrator's Final Report, Case No. IO-2005-0468, at 8 (Sept. 27, 2005).

8 Petitioners' only witness, Mr. Schoonmaker, has testified in this regard:

> Issues related to smaller companies often weren't given consideration [by the FCC] because they were not the primary focus of the [FCC] efforts. Thus the [FCC] rules that were promulgated, while admittedly with applicability to all, did not necessarily deal with the unique circumstances of smaller ILECs.
>
> * * *
>
> **Q. Would it be reasonable for a state commission with the primary responsibility to implement the FCC TELRIC rules to make a similar accommodation to the rules for small companies?**
>
> A. Yes.

See Schoonmaker Rebuttal p. 9 l. 5-9 and 10 l. 4-7.

9 See Local Competition Order, 11 FCC Rcd 15499, 16143-80 ¶¶ 1324-1441 (1996).

of the final rules,"[10] and the FCC referred to rural and small LECs dozens of times throughout that portion of its Order that applies to all carriers. The FCC specifically noted that its "forward-looking economic cost methodology for determining prices is designed to permit incumbent LECs to recover their economic costs of providing interconnection . . . , which would minimize the economic impact of our decisions on small incumbent LECs."[11] It further observed that its cost rules would enable "small incumbent LECs and small entities [to] benefit from increased opportunities to compete effectively in local exchange markets."[12] But as the FCC further held, "Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service."[13]

That, in the end, is the central issue in this case - whether *consumers* in rural areas will benefit by increased facilities-based competition. Clearly, the Act presumes that increased competition benefits all consumers. Having additional competitive options only becomes feasible, however, if rural incumbent carriers are required to comply with the competitively neutral rules that Congress and the FCC have established.

Petitioners have also complained that preparing cost studies is burdensome and that they should not be held to the same standard as RBOCs.[14] Petitioners commenced this arbitration proceeding. They could have avoided arbitration (and the associated costs) by reaching agreement on rates during negotiations. Petitioners choose not to make any concessions on rates.

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10 Id. at 16147 ¶ 1335.

11 Id. at 16167 ¶ 1393.

12 Id. at 16173 ¶ 1418.

13 Id. at 16118 ¶ 1262.

14 See, e.g., Schoonmaker Direct, p. 9 l. 10 – p. 10 l. 7.

But having taken this "no-compromise" approach, a right they unquestionably possess, they cannot now credibly complain about the costs of arbitration, including the costs of preparing cost studies. Competitive carriers such as Cingular and T-Mobile understand well that these cost-avoidance considerations are the very type of factors that must be considered in commercial negotiations.

The same rules apply to all LECs, whether SBC or Peace Valley.[15] For example, the FCC's ruling – in any cost study, "[u]nderlying data must be verifiable, network design assumptions must be reasonable, and model outputs must be plausible"[16] – applies equally to all LECs, regardless of size. But a cost study that SBC-Missouri must prepare (involving over 100 switches and thousands of inter-office facilities) can hardly be compared to a cost study involving a rural LEC such as Peace Valley, with one switch and one interconnection facility three miles in length. In the end, the scope of the "burden" of preparing a cost study is directly related to size of the company and its network.

C. <u>Congress has also specified the legal standard the Commission is to utilize in rendering its arbitration decision.</u>

The governing legal standard for this arbitration proceeding is set forth in Section 252(c) of the Act, which provides:

> In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, *<u>a State commission shall</u>* –

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15 Mr. Schoonmaker curiously cites the FCC's jurisdictional separations and access charge rules for the proposition that the FCC has in some instances adopted different rules for small LECs. <u>See</u> Schoonmaker Rebuttal p. 9 l. 13 - 10 l. 3. But this testimony only proves Respondents' point – namely, given that the FCC did not adopt similar "accommodations" in its Part 51 interconnection rules, one can reasonably conclude that the FCC deliberately decided that such "accommodations" were not appropriate in the interconnection area.

16 <u>Virginia Arbitration Cost Order</u>, 18 FCC Rcd 17722, 17742-43 ¶ 38 (2003).

(1) *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; [and]

(2) *establish* any rates for interconnection, services, or network elements according to subsection (d) of this section (emphasis added).

Given the clarity with which Congress has spoken, this Commission does not possess the flexibility to adopt an order that does not provide for reciprocal compensation as required in Section 251(b)(5) or to adopt a rate that does not comply with the FCC's pricing rules that have been affirmed by the U.S. Supreme Court.[17]

Throughout this proceeding, Petitioners have cited to and relied upon agreements that carriers have negotiated voluntarily (without arbitration), suggesting these negotiated agreements are relevant to this arbitration proceeding.[18] The Petitioners are wrong; those negotiated agreements have no relevance to this arbitration proceeding – and it is notable that Petitioners have never explained how negotiated agreements are relevant under the Section 252(c) standard that this Commission must apply.

First, 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] Negotiated agreements necessarily entail compromises on many points and based on

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[17] A federal court will overturn a State commission's arbitration decision if the order does not follow the requirements of Sections 251 and 252 and the FCC's implementing regulations. See, e.g., AT&T v. Iowa Utilities Board, 525 U.S. at 378 n.6 ("[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.").

[18] See, e.g., Schoonmaker Direct, p. 7 l. 4-7 ("Additionally, other wireless carriers have agreed to rates of 3.5 cents per minute with Petitioners and, again, while those were negotiated rates, one would believe that if that rate is so far out of the realm of reasonableness then those wireless carriers would not have willingly agreed to that rate.").

[19] 47 U.S.C. § 252(a)(1). See also Southwestern Bell v. Missouri Public Service Comm'n, 236 F.3d 922, 923 (8th Cir. 2001) ("The prospective competitor and the incumbent LEC 'may negotiate and enter into a binding agreement . . . without regard to the obligations imposed by certain sections of the Act. For example, the parties may agree to rates or terms that would not otherwise comply with the law or be required under the Act, so long as the state commission ultimately approves.").

many considerations (including avoiding the cost of arbitration).[20] Thus, negotiated agreements often contain rates, terms and conditions that would not otherwise be consistent with federal law requirements.

Second, in approving negotiated agreements, this Commission does not "ensure" that the rates, terms and conditions comply with Sections 251-252 and FCC rules; rather, Congress has specified that a State commission may reject a negotiated agreement only if the agreement is contrary to the public interest or discriminates against a carrier not a party to the agreement. See 47 U.S.C. § 252(e)(2)(A). FCC Rule 51.3 provides in this regard: "[A] state commission shall have the authority to approve an interconnection agreement adopted by negotiation *only if the terms of the agreement do not comply with the requirements of this part.*" (emphasis added).

In stark contrast, Congress has made clear that 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." Id. at § 252(e)(2)(B). In other words, in approving an arbitrated agreement, the Commission must apply the same legal standard it applies in rendering its arbitration order – namely, ensure that the rates, terms and conditions comply with federal law requirements in all respects. Id. at § 252(c). The standard for state commission approval of negotiated agreements is far less exacting.

The Petitioners (as is their right) have chosen to arbitrate the reciprocal compensation issues rather than to engage in the compromise necessary for a negotiated agreement.[21] As a

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20 See, e.g., Pue Direct, p. 11 l. 9-16; Pruitt Rebuttal, p. 9 l. 14-15.

21 As but one example, if Petitioners had been willing to compromise on the rate for transport and termination, Respondents may have abandoned their claim for compensation for terminating all intraMTA calls, as they have done with other LECs in Missouri.

result, this Commission is now required to "ensure" that the rates, terms and conditions of the arbitrated agreement fully comply with federal law. Petitioners cannot complain; after all, it was they that filed the arbitration petitions.

D. The relationship between this arbitration and the Alma/T-Mobile arbitration proceeding.

The legal conclusions the Commission made in the Alma/T-Mobile arbitration are precedent (e.g., reciprocal compensation applies to all intraMTA traffic). In contrast, the factual determinations made in the prior arbitration (e.g., the rate for reciprocal compensation) have no bearing on, or relevance to, this proceeding. The record is uncontroverted that each Petitioner is unique (e.g., network, service area, number of subscribers, traffic volumes), and accordingly, each Petitioner has different forward-looking costs.[22] By definition, then, a factual determination made in connection with one LEC in one proceeding has no relevance to a different LEC in a different proceeding.

In addition, the Commission is required to render its decision based on the record evidence before it *in this case*. As the Arbitrator is undoubtedly aware, Respondents here have addressed the rate/cost study issue in far greater detail than T-Mobile did in the Alma arbitration

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22 See Conwell Direct, p. 11.

proceeding.[23] As discussed in subpart II.H below, the Commission must demonstrate that it has considered *all* relevant record evidence.[24]

E. Petitioners, not Respondents, have the burden of proving that their proposed costs are consistent with FCC regulations.

As noted above, Section 252(c) requires the Commission to ensure that its arbitration order complies with Sections 251-252 and the FCC's implementing rules. Petitioners, as incumbent LECs, bear the burden of proof on all issues,[25] including the important rate issue, as FCC Rule 51.505(e) makes clear:

> An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511.

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[23] The Arbitrator should also be advised that the Alma petitioners, in contravention of the explicit requirements of Section 252(b)(2)(A), did not share their cost study with T-Mobile until July 21, 2005 – many weeks after they filed their arbitration petition. Although the Commission chose not to sanction the Alma petitioners for their behavior, this delay in sharing critically important evidence substantially hindered T-Mobile's ability to conduct discovery and thus address the rate/cost study issue in more detail.

[24] As but one example, the Commission assumed that the rate T-Mobile was willing to pay the Alma petitioners was "*less than* the rate T-Mobile pays for traffic exchanged with SBC." Alma/T-Mobile Arbitration Report at 13 (emphasis in original). The record evidence in this case documents that the Commission's assumption was wrong in the Alma Arbitration and would be wrong if maintained by the Commission in this proceeding. Both T-Mobile and Cingular pay a rate of $0.0007 per MOU to SBC. See Hearing Exhibits 5 and 6. The rates proposed by Cingular and T-Mobile for Petitioners in this case are from 3.5 to 21 times higher than the rate paid by Cingular and T-Mobile to SBC. See Conwell Direct, p. 11.

[25] See, e.g., AT&T/GTE Minnesota Arbitration Order, Docket No. P442,407/M-96-939, 1996 Minn. PUC LEXIS 171 at *10 (Dec. 12, 1996) ("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.") (copy in Appendix)

As this Commission stated "the incumbent LEC has both the burden of production and the burden of persuasion on the issue whether its proposed rates comply with the forward-looking TELRIC methodology prescribed by the FCC."[26]

Thus, Petitioners are *not* entitled to the benefit of the doubt. If the Commission is unsure of the correct position on any given issue (i.e., which parties' position best reflects federal law), the Commission must rule in favor of Respondents because, on that issue, Petitioners necessarily have failed to meet their burden of proof.

F. Compliance with federal requirements cannot be avoided through the use of "baseball" arbitration procedures.

The Commission uses "issue-by-issue final offer arbitration." See 4 CSR 240-36.040(5)(A). With "final offer," or "baseball," arbitration, "each of the two tending parties must submit its final offer and all supporting evidence for consideration by the arbitrator. The arbitrator will then select from among the offers submitted by the parties."[27]

Importantly, use of "baseball" arbitration does not change an incumbent's LEC's burden of establishing that its proposals comply fully with federal law. The FCC itself uses "baseball" arbitration. Under 47 C.F.R. § 51.807(f), "[e]ach final offer shall":

> (1) Meet the requirements of section 251, including the rules prescribed by the Commission pursuant to that section; [and]

[26] Determination of Prices, Terms and Conditions of Certain Unbundled Network Elements, Case No. TO-2001-438, at 162 (Aug. 6, 2002). See also Local Competition Order, 11 FCC Rcd 15499, 15852 ¶ 695 ("[I]n the arbitration process, incumbent LECs shall have the burden to provide the specific nature and magnitude of these forward-looking common costs."); 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 LECs] to show that a proposed rate meets the required standards, a contention which the RTCs do not dispute in their reply brief.").

[27] KLM/CenturyTel Order, Case No. XO-2004-0157, at 2 (Oct. 14, 2003). See also Virginia Arbitration Cost Order, 18 FCC Rcd 17722, 17741 ¶ 36 (2003) ("We analyze the parties' proposed cost models for access to UNEs and interconnection and apply the baseball arbitration rules discussed above in order to choose between the parties' competing cost model proposals.").

(2) Establish rates for interconnection, services, or access to unbundled network elements according to section 252(d) of the Act, including the rules prescribed by the Commission pursuant to that section.

This Commission's rules parrot the FCC rules, with 4 CSR 240-36.040(5)(D) providing:

> Each final offer submitted by the parties to the arbitrator shall:
>
> 1. Meet the requirements of section 251 of the Act, including the rules prescribed by the commission and the [FCC] pursuant to that section; [and]
> 2. Establish interconnection, services, or access to unbundled network elements according to section 252(d) of the Act, including the rules prescribed by the Commission and the [FCC] pursuant to that section.

Thus, if Petitioners make a final offer that does not comply with federal law (e.g., their proposed rates exceed their forward-looking TELRIC costs), the Commission must reject Petitioner's final offer.[28]

G. <u>"Baseball" arbitration does not mean that the Commission has only two choices.</u> Ordinarily, with true "baseball" arbitration, "the arbitrator must select one of the parties' final offers and may not consider other arbitral awards or other offers."[29] What can the Arbitrator in this proceeding do if he finds that Petitioners' final offer does not comply with the Act?

The Arbitrator has three alternatives. Specifically, the Arbitrator may:

(a) Accept Respondents' position;

(b) Require "the parties to submit new final offers within a time frame specified by the arbitrator," 4 CSR 240-36.040(5)(E); <u>*or*</u>

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28 <u>See, e.g.,</u> <u>Sprint/GTE Arbitration Order,</u> TO-97-124, at 9-10 (Jan. 15, 1997) ("This provision expresses Congress's clear intent to ensure that interconnection agreements reflect the requirements of § 251 and § 252(d) of the Act and to set rates and terms accordingly. . . . The Commission's goal is to decide the arbitration issues in a manner which ensures that the interconnection agreement between GTE and Sprint conforms to the requirements of the Act.").

29 <u>Southern Pacific v. ICC,</u> 69 F.3d 583, 585 (D.C. Cir. 1995).

(c) Adopt "a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the Commission and the [FCC] pursuant to that section." Id.

In short, the Arbitrator has choices – as long as his decision meets the requirements of the Act and FCC regulations.

H. The Commission's arbitration order must meet minimal procedural requirements.

As noted above, it will be a federal court that will entertain any appeal of the Commission's arbitration order. The Commission, in preparing its arbitration report, should be aware of the legal standards that federal courts will apply in any such appeal.

Federal courts will review "a state commission's interpretation of federal law *de novo*."[30] In contrast, a federal court will review a State commission's "factual determinations under the arbitrary and capricious standard."[31] As the Eighth Circuit has explained, "the arbitrary-and-capricious standard is the same as the substantial-evidence standard."[32]

The arbitrary-and-capricious and substantial-evidence standards, as federal courts have applied them, mean:

> Substantial evidence "means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." Morall v. DEA, 412 F.3d 165, 176 (D.C. Cir. 2005).

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30 Ace Telephone v. Koppendrayer, 432 F.3d 876 (8th Cir. 2005). This is because "courts have held that interpretations of federal law by state agencies are not entitled to Chevron deference." AT&T v. Southwestern Bell, 86 F. Supp. 2d at 945. See also Iowa Network Services v. Qwest, 363 F.3d at 692 ("Federal courts have the ultimate power to interpret provisions of the 1996 Act, including whether § 251(b)(5)'s reciprocal compensation requires applies to the wireless traffic at issue here.").

31 Ace Telephone v. Koppendrayer, 432 F.2d at 878.

32 Id. at 880.

For example, in the Alma/T-Mobile arbitration, the Commission assumed – without any record evidence – that the rates T-Mobile was advocating were "less than the rates T-Mobile pays for traffic exchanged with SBC" and that this "fact" made T-Mobile's position "counter-intuitive." Alma/T-Mobile Arbitration Report at 13 (emphasis in original). As is discussed above, the evidence in this case establishes that the Commission's assumption was wrong and would continue to be wrong if made again.[33] It is therefore critically important that the Arbitrator base his decisions on record evidence, and not on unsupported assumptions.

> Agency action will be deemed arbitrary and capricious "where the agency has failed to provide a reasoned explanation." Petroleum Communications v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994). See also Horsehead Resource v. Browner, 16 F.3d 1246, 1269 (D.C. Cir. 1994) (To avoid acting arbitrarily, "the agency must . . . articulate a satisfactory explanation."). Specifically, an agency "must nevertheless 'examine the relevant data and articulate a satisfactory explanation for its action.'" AT&T v. FCC, 974 F.2d 1351, 1354 (D.C. Cir. 1992).

For example, in the Alma/T-Mobile arbitration, the Commission noted that T-Mobile had agreed voluntarily to a 3.5-cent rate with other rural Missouri LECs, and that the Commission had approved a 3.5-cent rate in approximately 70 negotiated agreements between rural LECs and wireless carriers. See Alma/T-Mobile Arbitration Report at 12-14. But in making those observations, the Commission never explained how such facts were relevant – that is, relevant to the Section 252(c) legal standard that the Commission must apply in arbitration proceedings, which, as discussed above, is very different than the legal standard applied in approving negotiated agreements. In fact, as also discussed above, rates and terms in negotiated agreements have no relevance whatever to this proceeding.

> An agency must "articulate a rational connection between the facts found and the choice made." Motor Vehicles Ass'n v. State Farm, 463 U.S. 29, 43 (1983).

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[33] See footnote 23 above. Both T-Mobile and Cingular pay a rate of $0.0007 per MOU to SBC. See Hearing Exhibits 5 and 6. The rates proposed by Cingular and T-Mobile for Petitioners in this case are from 3.5 to 21 times higher than the rate paid by Cingular and T-Mobile to SBC. See Conwell Direct, p. 11.

For example, in the Alma/T-Mobile arbitration, the Commission noted that HAI 5.0a was a "widely used model for calculating forward-looking costs" and has been "subjected to a vast amount of peer review and refinement," suggesting that these facts were somehow important to the legal conclusions reached. See Alma/T-Mobile Arbitration Report at 13. Such "facts," however, are not important, if, as in the present case, a challenge is made to the assumptions employed by the HAI model, and if Petitioners cannot demonstrate that such assumptions are reasonable as applied to them in 2006.

> "An agency [decision is] arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicles Ass'n v. State Farm, at 43. Thus, an agency is "required to give reasoned responses to all significant comments. . . . We will therefore overturn [an agency decision] as arbitrary and capricious where the [agency] has failed to respond to specific challenges that are sufficiently central to its decision." International Fabricare v. EPA, 972 F.2d 384, 389 (D.C. Cir. 1992).

For example, Petitioners would have the Commission believe that SBC may someday stop providing interconnection facilities to the various meet points with Petitioners and, therefore, Respondents should pay for duplicate facilities running from each Petitioner's switch to the nearest RBOC wire center. (This is one of the assumptions of HAI 5.0a that Cingular and T-Mobile challenge.) The Commission may not rule in favor of Petitioners on this issue without considering Respondents' challenge to the HAI 5.0a's assumption and Petitioners' complete lack of evidence on this point, nor may the Commission rule in favor of Petitioners on this issue without explaining why Respondents' challenge is deficient. In a case, such as the present one, involving a high level of detail presented in pre-filed testimony and discussed at length on cross-examination during the hearing, it is not sufficient for the Commission to adopt a rate, or rule on any other matter, without giving a reasoned response to the points raised by the parties.

> A court may "not find substantial evidence merely on the basis of evidence which in and of itself justifies [the agency's decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." Morall v. DEA, 412 F.3d 165, 177 (D.C. Cir. 2005). See it. El Rio Santa Cruz v. DHS, 396 F.3d 1265, 1278 (D.C. Cir. 2005) (finding agency action arbitrary and capricious in failing to address relevant evidence before it); Robinson v. NTSB, 28 F.3d 210, 216 (D.C. Cir. 1994) (agency may not ignore testimony bearing on critical fact in case); Lakeland Bus Lines v. NLRB, 347 F.3d 955, 962 (D.C. Cir. 2003) (court cannot find substantial evidence solely on the basis of the evidence that supports the result, without considering contradictory evidence.").

For example, in the Alma/T-Mobile arbitration, the Commission noted that T-Mobile's cost witness, Mr. Conwell, proposed "adjustments to Petitioners' results from the HAI model" (without even listing the adjustments). See Alma/T-Mobile Arbitration Report at 12. The Commission rejected *all* of Mr. Conwell's proposed adjustments because "some" were "based on inputs or standards used by [RBOCs] and were not necessarily representative of Petitioners' business practices." Id. at 12. But in reaching this conclusion, the Commission did not explain which proposed adjustments were based upon RBOC standards, nor did the Commission describe the RBOC standards in issue and how such standards differed from Petitioners'. In addition, the Commission never considered at all inputs proposed by Mr. Conwell, some of which were based on non-RBOC data, including data submitted to the Rural Utilities Service ("RUS") that is directly relevant to Petitioners' cost structure. Such a failure to analyze and respond to specific data will not satisfy the "arbitrary and capricious" standard, especially in a case like the present one in which the Respondents have gone to great lengths to explain in detail the deficient assumptions that Petitioners have borrowed from the eight-year-old HAI 5.0a model.

> An "unexplained departure from Commission precedent would have to be overturned as arbitrary and capricious." Pontchartrain Broadcasting v. FCC, 15 F.3d 183, 185 (D.C. Cir. 1994). See also Gilbert v. NLRB, 56 F.3d 1438, 1445 (D.C. Cir. 1995) ("It is, of course, elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent."); Hall

v. McLaughlin, 864 F.2d 868, 872 (D.C. Cir. 1989) ("Divergency from agency precedent demands an explanation."); Greater Boston Telephone v. FCC, 444 F.2d 841,852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) ("An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if any agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.").

For example, in the Alma/T-Mobile arbitration, the Commission ruled that as a matter of law, rural LECs have a reciprocal compensation obligation for all intraMTA land-to-mobile traffic, including traffic they send to IXCs. If the Commission were to change its decision in this case on that issue, the Commission must explain why it believes its prior decision was erroneous and why its new legal position is more consistent with federal law. Plus, the analysis must be "reasoned."

As was discussed at the hearing, Cingular and T-Mobile both operate in a fiercely competitive environment. Neither company has a guaranteed franchise. To survive, both companies must reduce their costs to the maximum allowed by federal law.[34] Indeed, Hearing Exhibit No. 22, introduced by Petitioners to demonstrate that Cingular earned a profit in the most recent quarter, also demonstrates that Cingular lost $495 million in the same quarter in 2004; that even in the most recent quarter, average user revenue continued to decline; that Cingular's operating expenses in the most recent quarter were $8.3 billion; and that Verizon Wireless (currently the second larger carrier in the wireless industry) is rapidly gaining on Cingular in terms of total subscribers.[35]

Simply put, Cingular and T-Mobile cannot function in a regulatory environment in which rates are set based upon what has been done in the past, without regard to the requirements of

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[34] Tr. Vol. 5, p. 567 l. 14-25.

[35] Tr. Vol. 5, p. 566 l. 15 – p. 567 l. 13.

federal law. Thus, in rendering a decision in this case, the Arbitrator and Commission must thoroughly analyze all issues raised by Respondents and must take pains to ensure that all decisions made in the case (including the appropriate rate for each Petitioner) are consistent with the absolute letter of the Act and FCC regulations.

III. JOINT ISSUES INVOLVING BOTH CINGULAR AND T-MOBILE

Cingular and T-Mobile jointly submit below their positions on the issues that are common to both of them. These "joint issues" fall into four categories: (a) the appropriate intraMTA rate that Petitioners may charge Respondents for intraMTA mobile-to-land traffic;[36] (b) Petitioners' claim for compensation for traffic exchanged during 1998-2001, (c) whether the Petitioners can excuse themselves from their statutory reciprocal compensation obligation for intraMTA traffic they send to an interexchange carrier ("IXC"); and (d) the appropriate intraMTA traffic balance ratio/percentage that the parties should utilize

A. FIRST JOINT ISSUE: APPROPRIATE INTRAMTA RATES: MATRIX ISSUE NOS. 1-13: ALL AVAILABLE RECORD EVIDENCE SUGGESTS THAT PETITIONERS' PROPOSED 3.5 CENT/MINUTE RATE GROSSLY EXCEEDS THEIR FORWARD LOOKING ECONOMIC COSTS

FCC Rule 51.505(e) makes clear that each "incumbent LEC must prove to the state commission that the rates for each element it offers [e.g., transport and termination] do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and Sec. 51.511." Respondents demonstrate below that Petitioners have not come close to establishing that their proposed 3.5 cent/minute rate for transport and termination does "not exceed" their forward looking economic costs. Indeed, when the record evidence is reviewed, there can be no question but the proposed rate exceeds their costs and, accordingly, is not permissible under FCC Rules.

In the sections that follow, Respondents describe and document in detail nine fundamental flaws with Petitioners' cost studies – three flaws relating to computation of termination costs and six flaws involving Petitioners' claimed transport costs. These nine flaws

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[36] Because wireless carriers ordinarily charge for land-to-mobile traffic the same per-minute rate that LECs charge for mobile-to-land traffic (see 47 C.F.R. § 51.711), the Commission in establishing the rural LEC rate will also effectively establish the reciprocal rate that Cingular and T-Mobile will use with the Petitioners.

are not minor issues, resulting in slight errors in transport and termination costs; they are fundamental, and their impact is severe.

Respondents recommend below specific corrections for each flaw. These corrections dramatically lower Petitioners' estimates of the costs they incur in transporting and terminating mobile-to-land traffic – resulting in reductions of 72 percent to 97 percent in the costs that Petitioners originally proposed. Importantly, however, *the rates Respondents are proposing for Petitioners still are up to 21 times higher than those charged Respondents by SBC-Missouri*. The corrections to Petitioners' claimed costs are absolutely necessary to properly determine forward-looking economic costs as the basis for reciprocal compensation rates according to the Act and FCC Rules. The following table shows the original and corrected transport and termination costs for 20 of 27 Petitioners. At this late date in the proceeding, seven Petitioners still have not responded to Respondents' requests for the minimal information needed to correct their studies.

Original and Corrected Transport and Termination Costs

Company	Original Cost / Minute	Corrected Cost / Minute	Percentage Change
BPS Tel. Co.	$ 0.0269	$ 0.0039	-85%
Cass County Tel. Co.	$ 0.0358	$ 0.0073	-80%
Citizens Tel. Co. - MO	$ 0.0381	$ 0.0046	-88%
Craw-Kan Tel. Coop. - MO	$ 0.1080	NA	NA
Ellington Tel. Co.	$ 0.2461	$ 0.0091	-96%
Farber Tel. Co.	$ 0.1854	$ 0.0074	-96%
Fidelity Tel. Co.	$ 0.0255	$ 0.0070	-72%
Granby Tel. Co. - MO	$ 0.0268	$ 0.0025	-91%
Grand River Mutual Tel. Co. - MO	$ 0.1128	$ 0.0071	-94%
Green Hills Tel. Co.	$ 0.1033	$ 0.0077	-93%
Holway Tel. Co.	$ 0.2613	NA	NA
Iamo Tel. Co. - MO	$ 0.2949	NA	NA
Kingdom Tel. Co.	$ 0.0547	$ 0.0078	-86%
KLM Tel. Co.	$ 0.0988	$ 0.0103	-90%
Lathrop Tel. Co.	$ 0.0466	$ 0.0046	-90%
Le-Ru Tel. Co.	$ 0.0738	$ 0.0147	-80%
Mark Twain Rural Tel. Co.	$ 0.0686	$ 0.0076	-89%
McDonald County Tel. Co.	$ 0.0554	$ 0.0097	-82%
Miller Tel. Co. - MO	$ 0.0497	$ 0.0084	-83%
New Florence Tel. Co.	$ 0.0430	$ 0.0121	-72%
Oregon Farmers Mutual Tel. Co.	$ 0.0561	$ 0.0081	-86%
Peace Valley Tel. Co.	$ 0.4596	$ 0.0146	-97%
Rock Port Tel. Co.	$ 0.1469	NA	NA
Steelville Tel. Exch. Inc.	$ 0.0263	$ 0.0081	-69%
Goodman Tel. Co.	$ 0.0552	NA	NA
Ozark Tel. Co.	$ 0.0681	NA	NA
Seneca Tel. Co.	$ 0.0418	NA	NA

NA: Not available; insufficient Petitioner information available to produce corrected costs.

Petitioners have proposed a uniform rate of $0.0350 per minute of use. This rate exceeds every corrected cost in the table above, and accordingly, is not permitted under governing FCC Rules. Rates for the individual companies whose costs have been corrected range from $0.0025 per minute for Granby Telephone to $0.0147 per minute for Le-Ru Telephone.

To correct the cost studies for the remaining seven Petitioners – those that still have not produced the data that was requested weeks ago – Respondents require the following information:

- A diagram of each Petitioner's current interoffice network showing the following:

- Cable distances or lengths by cable route for all routes in its interoffice network.
- Cable sizes (in fibers) by cable route and fibers in service. (Specify number of fibers used by interoffice transport system by route.)
- Interoffice transport system (over which mobile-to-land traffic is transported) between each pair of network nodes (or for ring(s) serving multiple nodes).
- Total demand in terms of DS0 equivalents in service on the interoffice transport system between each pair of network nodes, including DS0 equivalents for voice trunks, private lines, special access circuits, and any other traffic or circuits being transported.

▪ Each Petitioner's current monthly payments for SS7 interconnection links.

Clearly, these seven Petitioners cannot credibly claim they do not have access to such basic facts regarding their own networks.

Respondents recommend that until these seven Petitioners produce valid transport and termination cost data, the Arbitrator and Commission order these seven Petitioners to use a bill-and-keep arrangement with Respondents. It appears that only such a remedy will give these seven Petitioners sufficient incentive to produce the data Respondents require to develop corrected rates.

Respondents wish to make four brief points at the outset, before beginning the detailed discussion of the nine fatal flaws to Petitioners' cost studies. First, Respondents are not making a wholesale attack of the HAI 5.0a model that Petitioners have chosen to use. In fact, Respondents use the model's methods and cost data, in part, to develop their counterproposals, with adjustments as needed to comply with FCC Rules for TELRIC and forward-looking economic costs.

The nine fundamental flaws with Petitioners' cost studies involve Petitioners' use of outdated cost data and unsupported assumptions that they borrowed from the HAI 5.0a model, now over eight years old. Other flaws relate to Petitioners' use of unrealistic and inefficient design of interoffice networks.

The assumptions that the HAI developers made when they released their 5.0a version of the model in January 1998 *may* have been valid for LECs generally at the time, but this is *not* a matter the Commission need address. Rather, the question for *this* Commission in *this* proceeding is whether the nine flaws that Respondents have identified cause Petitioners' cost studies to be invalid, and whether the corrected costs prepared by the Respondents' cost expert more appropriately measure the forward-looking economic costs of transport and termination for the 20 Petitioners that provided sufficient detail in their discovery responses to enable Respondents to prepare corrected costs. We believe the evidence is clear: Petitioners' cost studies do not comply with FCC Rules and our corrections of Petitioners' costs provide a valid basis for rates that the Commission may establish under Section 252(c)(2) of the Act.

Two, some of the assumptions Petitioners' cost consultant makes, and of which Petitioners apparently are unaware (see below), have utterly no basis in reality – with the result that Petitioners are seeking to have Respondents pay for phantom costs Petitioners would never incur. Had Respondents not analyzed the HAI model and cost studies in such detail, Petitioners would have had the Commission accept these absurd cost results without question. For example,

- Peace Valley Telephone's cost study assumes it would build a transport network with 172 miles of cable, when its meet point **______________________** miles from

NP

its switch. In an even stranger twist, the study assumes this 172 miles of cable would be for 24-fiber cable **____**.

- Cass County's Telephone's cost study assumes the company would place 169.5 miles of 24-fiber cable to replace its existing **____** miles of cable and that none of this cable would be used for anything other than an OC-48 interoffice transport system that **____.**

  Yet, Cass County expects the Commission to approve rates whereby Respondents would pay for the facilities that their traffic does not use and for facilities that are used for entirely different purposes. Simply put, Cass County expects the Commission will approve an arrangement – in direct contravention of FCC rules – whereby Respondents would be required to subsidize Cass County's other operations.

- Petitioners' cost studies assume that OC-48 transport systems are used in all cases. Based on the default assumptions in HAI 5.0a, Cass County's demand for interoffice transport would consume only **__________** of the capacity of an OC-48 system. For smaller companies, the utilization rate for the network Petitioners claim they would build would be even lower.

- Cass County's cost study also assumes it would have 12 signaling links for its six switches, when today **____**

- Petitioners performed a comparison of their embedded switch investment to the HAI model results to justify their proposed switch investment of $520.14 per line. They actually believed that $520.14 per line indicated a 28 percent decline in switch costs over the years, which they considered to be reasonable (*albeit* without any supporting evidence). But, the comparison was calculated incorrectly; in actuality, Petitioners' $520.14 proposed investment would indicate an increase in switch costs over time, which defies common knowledge and their cost witness' concession that switch prices have been going down – not up.
- Petitioners want the Commission to believe that 70 percent of the cost of a new switch involves usage-sensitive costs that may be recovered in reciprocal compensation – even though they have not produced any credible evidence in support of this assumption and even though the FCC and State commissions have determined that none of the cost of a new switch is usage-sensitive. Apparently, Petitioners are hoping the Commission will simply put its head in the sand on this issue.

Unfortunately, the Petitioners were not aware of these assumptions underlying their cost studies, and it is not clear their cost consultant fully understood the ramifications of the flaws in the HAI 5.0a model as he used it for the Petitioners.

FCC rules specify that LEC cost studies must use "the lowest cost network configuration." 47 C.F.R. § 51.505(b)(1). The FCC has further held that underlying data in a cost study "must be verifiable, network design assumptions must be reasonable, and model outputs must be plausible." Virginia Arbitration Cost Study, 18 FCC Rcd 17722, 17742 ¶ 38 (2003). Had Petitioners and their cost consultant followed these simple rules, they would have quickly discovered that some of the major assumptions in their study are unwarranted and that, had they instead used assumptions that more closely match reality, it would be impossible for them to justify their proposed 3.5-cent/minute rate.

Three, one might be inclined at first blush to criticize the Petitioners for adopting such unreasonable assumptions, because they have the effect of dramatically increasing the rates they want Respondents to pay. But it became apparent during this proceeding that their cost consultant, Mr. Schoonmaker, did not advise his clients of many of the assumptions he used in their cost studies.[37] Had Mr. Schoonmaker shared this important data with Petitioners, they would have had a chance to perform a "reality check" and ensure that their studies used reasonable assumptions. This failure to communicate is unfortunate in retrospect because, had Petitioners been given the opportunity to replace unwarranted assumptions with more realistic ones, they might have developed a far more reasonable rate proposal, and it might have been possible for the parties to agree to rates voluntarily – without arbitration.

Four, Mr. Schoonmaker has extensive experience in the industry and can demand a **___ ____** Yet, all available evidence suggests that he does not understand the HAI 5.0a model fully. He has also repeatedly made in this proceeding blanket assertions that were either incorrect or unsupported. For example:

- Mr. Schoonmaker appears to have been unaware of the errors in his comparison of switch embedded investments to HAI model results that formed the basis for his justification of Petitioners' switch investments and costs.
- His staff apparently was unaware that the Nortel letter they obtained at the last minute to justify their 70 percent usage-sensitive assumption for end-office switching did not

37 Mr. Schoonmaker developed Petitioners' cost studies **______________________________________ ______________________________________** Tr. Vol. 3, p. 139 1.2-17.

address getting started costs, the major cost portion of the switch that in the past had been considered usage-sensitive, but is no longer accepted to be exhausted by usage. Instead, the letter addresses portions of the switch that are small cost items or not in dispute in this case.

- Mr. Schoonmaker attempts to respond to criticism of the large amounts of floor space assumed for small ILEC end office switches by suggesting that the corrected values that Respondents have recommended do not provide enough land area for sidewalks, parking, *etc.* However, he does not take into consideration the entire building in which switches would be located and the larger land area associated with the building.
- Mr. Schoonmaker appears not to have fully understood the implications of the HAI model assumptions that Petitioners would build cable routes from their existing switches (with two cables on each route) to the nearest BOC. If so, he would have recognized that this assumption dramatically overstated the costs of Petitioners, such as Peace Valley Telephone, Granby Telephone and all the others. Furthermore, he did not consider at all the simple alternative of building cables to reach the BOC network, if necessary, by running cable from the Petitioners' host switches, **______ ____**
- As late as the hearing, Mr. Schoonmaker appears still not to understand that under his approach, interoffice cable costs are not being shared in the HAI model based on fiber usage.
- Similarly, Mr. Schoonmaker points out the growth in interoffice demand driving larger cable sizes and transport systems, but then fails to realize that this is proof that

there are other users of cable fibers and transport system bandwidth that should share in the costs, but which the HAI model does not recognize.

- Mr. Schoonmaker criticized the corrections by Respondents' cost expert of Petitioners' claimed common transport cable and transmission equipment costs, but because Mr. Schoonmaker misunderstood the minutes of use in those corrections, he had to admit during the hearing that his criticism was wrong.
- Mr. Schoonmaker similarly criticized Mr. Conwell for allegedly failing to understand the HAI model's calculation of signaling link investments, but the reverse is true. Mr. Schoonmaker has not actually traced the investment calculations for Cass County Telephone. Had he done this he would understand that Mr. Conwell is correct.
- Finally, in an effort to recover more costs – costs not attributable to transport and termination – Mr. Schoonmaker recommends that dedicated transport costs be loaded on top of common transport costs, because the HAI model is, he claims, computing costs incorrectly, and therefore needs to be adjusted to rectify this claimed flaw. Mr. Conwell's correct common transport costs, however, make it unnecessary to duplicate costs by improperly including dedicated transport costs in Petitioners' rates.

The sheer number of these misstatements and misunderstandings, coupled with **______ ____** calls into question the very validity of Petitioners' cost studies.

Detailed Discussion of the Nine Flaws in Petitioners' Cost Studies

1. The Three Flaws in Petitioners' Cost Studies Pertaining to the Termination (Switching) Component of Reciprocal Compensation (Matrix Issue Nos. 3-5)

Section 251(b)(5) imposes on LECs the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." A rate for reciprocal compensation ordinarily has two components: one component for termination (or switching) and another component for transport (interoffice facilities). In this section, Respondents discuss the three issues related to the termination component.

The FCC has defined 'termination' for "purposes of section 251(b)(5) as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from the switch to the called party's premises." Local Competition Order, 11 FCC Rcd at 16015 ¶ 1040. See *also* 47 C.F.R. § 51.701(d). Under this definition, there are two network elements involved in termination of traffic: "the end-office switch and the local loop." See Id., 11 FCC Rcd at 16025 ¶ 1057. The FCC in its Local Competition Order further refined the definition of termination to be consistent with other provisions of the Act.

Specifically, Section 252(d)(2)(A)(ii) permits LECs to recover in termination "a reasonable approximation of the *additional* costs of terminating such calls" (emphasis added). The FCC has held that "once a call has been delivered to the incumbent LEC's end office serving the called party, the 'additional cost' to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching." Id., 11 FCC Rcd at 16024-25 ¶ 1057. The FCC has ruled that LECs may not include their loop costs or the non-traffic sensitive costs of local switching, because LECs do not incur *additional* costs in terminating calls using these network elements:

> The costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities. We conclude that such non-traffic sensitive costs should not be considered "additional costs" when a LEC terminates a call that originated on the network of a competing carrier. For purposes of setting rates under section 252(d)(2), only that portion of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an 'additional cost' to be recovered through termination charges.

Id., 11 FCC Rcd at 16025 ¶ 1057.

In addition, the FCC in a subsequent case, Virginia Arbitration Cost Order, 18 FCC Rcd 17722, 17872 n.933, 17876 n.1016, 17877 ¶ 391 (2003), further refined its delineation of usage-sensitive costs to exclude the "getting started" costs of switches and other components, such that little (if any) end office switching today is considered to be usage-sensitive. From the perspective of the FCC and several State commissions, LEC termination costs have become quite small, if not non-existent.

Respondents challenge as unreasonable three of the assumptions Petitioners have made in developing their proposed rate for termination: (1) their estimate of the cost to purchase and install a new end office switch; (2) their assumption that 70 percent of the cost of such a new switch is usage-sensitive; and (3) their assumptions concerning the amount of floor space that a new switch would require.

FCC Rule 51.505(e) specifies that an "incumbent LEC must prove to the state commission that the rates for each element [e.g., termination] it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511 of this part." Petitioners therefore have the burden of proving that the three assumptions Respondents challenge are reasonable based on the record evidence. Respondents demonstrate below that Petitioners have not begun to meet their burden of proof; in fact, their estimates of termination costs exceed their true forward-looking economic cost of termination.

(a) The First Flaw: The Appropriate Forward-Looking Cost to Purchase and Install a New End Office Switch (Matrix Issue No. 3 – "What is Petitioners' forward-looking cost to purchase and install new switches?")

LECs use end office switches in terminating mobile-to-land traffic, and ordinarily a State commission must establish the switch price LECs may use in their cost studies. However, as discussed in subsection B immediately below involving Matrix Issue #4, Respondents point out that if the Commission rules that the only usage-sensitive portion of the costs of the modern local switch are attributable to trunking equipment, then the Commission need not engage in the laborious process of determining the forward-looking economic costs of every switch for every Petitioner. In other words, the Commission need not address Matrix Issue No. 3 if it rules in favor of Respondents on Matrix Issue No. 4. (This point will also be discussed in detail later in this section).

End office switching costs are in large part determined by assumptions regarding the cost a Petitioner would incur today to purchase and install new digital electronic switching systems to replace its existing switches. Under FCC Rules, costs cannot be based on embedded (historical) costs – the costs Petitioners incurred in the past for their existing switches.[38]

[38] See 47 C.F.R. § 51.505(d)(1)("The following factors shall not be considered in a calculation of the forward-looking economic cost of an element: (1) Embedded costs. Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of accounts."). See *also* Virginia Arbitration Cost Order, 18 FCC Rcd 17722, 17742 ¶ 37 (2003)("Embedded costs (including those in the incumbent LEC's book of accounts) . . . may not be considered when determining the forward-looking economic cost of a UNE.").

Joint Matrix Issue No. 3 involves the issue of the switch price (per line) that Petitioners should use in the cost study. Following is a summary of Petitioners' and Respondents' positions on this issue:

Petitioners' Position: The key input value to HAI 5.0a affecting the cost to purchase and install a new end office switch is called the *constant EO [End Office] switching investment term.* HAI 5.0a assumes that this cost, on a per-line basis for small LECs like Petitioners, is \$416.11. As discussed below, Petitioners want the Commission to increase this default value by 25 percent – to \$520.14/line – even though they acknowledge that switch prices continue to decrease.

Applying Petitioners' assumption in the HAI model for Cass County Telephone results in estimates of current investments per-line for end office switches (including power plant) ranging from \$393 to \$435 for the Company's six switches.[39] The resulting end office switching cost that Cass County proposes approximates one penny (\$0.0091) per minute.

Respondents' Position: Respondents propose the following end office switch costs based on a 1999 FCC decision that took advantage of publicly available data, adjusted to reflect the overall decline in switch prices over the past seven years:

Fixed or getting started cost per switch:

Standalone or host switch = \$428,296.00.

Remote switch = \$142,384.00.

Variable cost per line = \$76.56.

Applying these values results in current investments per line for Cass County's six switches ranging from \$165 to \$542, and an end office switching cost of approximately one-half penny (\$0.0048) per minute – roughly half of what Petitioners propose. The same values (for standalone/host switches, remote switches and variable costs per line) should be applied to each switch for each Petitioner, except for very small standalone or host switches. This will

[39] The HAI model begins with the constant EO switching investment term of \$416.11/line for small LECs and adjusts the value downward reflecting the size of the switch (in lines) and other factors. Larger switches, therefore, tend to have lower current investments per line.

require separate computations for every switch owned by every Petitioner.

Respondents recommend that the FCC's fixed cost of $428,296 not be used for very small ILEC standalone or host switches (with fewer than 700 lines), since this value overstates the expected cost of such switches. Petitioner standalone or host switches serving less than 700 lines require vendor quotes for switches with such small line quantities.

As will be discussed below in detail, however, the Arbitrator and the Commission need engage in the valuation of all of Petitioners' switches only if they accept Petitioners' assumption that 70 percent of local switching costs are usage-sensitive. If, on the other hand, the Arbitrator and the Commission follow the FCC's most recent decision that little, if any, end office switching is usage-sensitive and find that the only usage-sensitive portion of a local switch is the trunk port cost, *then the value of all of Petitioners' local switches need not be determined at all.* Instead, as will be discussed below, Respondents recommend that the HAI 5.0a default values for interoffice trunk equipment costs be used to compute usage-sensitive end office switching costs, *which makes the valuation of the usage-sensitive portion of local switching a simple matter.*

(i) Petitioners have provided no evidence to support their proposed new switch cost of $520.14/line. It is important that the Commission understand how Petitioners developed their proposed switch price of $520.14 per line:

- The most obvious way to determine the current cost to purchase and install new digital switches would be to obtain quotes from switch vendors for the switch types that would be used. Petitioners failed to do this.[40]
  - Although Petitioners complain that obtaining quotes from venders is not practical and would be costly, the evidence shows they can consult with vendors when they

40 See Tr. Vol. 3, p. 162 l. 7-10.

wish to do so - even on short notice, as Mr. Schoonmaker's firm did in obtaining the Nortel letter..[41]

- Shortly before the hearing, an employee of Mr. Schoonmaker's firm contacted Nortel to secure a letter on a related switch issue – but remarkably, this employee did not ask for a vendor quote for a common switch (DMS-10) used by many rural LECs.[42] Such information would have spoken directly to this key issue.

- Furthermore, Petitioners' cost expert prepared **______________________________ ____**[43] Petitioners thus have had ample time to seek substantive information on the key issue of the costs of new switches.

- Instead, Petitioners based their proposed estimate of $520.14/line on a comparison of HAI model results to their embedded investment.[44] In effect, they asked the question, "What is a reasonable decline in current switch costs compared to those we incurred in the past?"

- Petitioners' approach is, at best, a difficult question to answer with a single value (or single dollar figure) applicable to all of the Petitioners.

  - Petitioners have installed their switches over many years as switch prices declined, rather than placing all their switches at a single point in time and comparing the price change from that point in time to the present.

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41 Tr. Vol. 3, p. 163 l. 1-6.

42 <u>See</u> Tr. Vol. 3, p. 164 l. 1-10.

43 <u>See</u> Tr. Vol. 3, p. 139 l. 2-17.

44 <u>See</u> Tr. Vol. 3, p. 160 l. 16 – p. 161 l. 6.

- Second, Petitioners have different mixes of standalone, host and remote switches, with significantly different costs for each. Thus, price changes from company to company are affected by their mix of switch types.
- Third, Petitioners' switches are significantly different in terms of size (equipped line capacity) and utilization; therefore, comparison of original costs to HAI model results will be different due to sizing differences. (This issue is described further below.)

- Nevertheless, Petitioners' cost expert ran the HAI 5.0a model using the default value for the *constant EO switching investment term* of $416.11 for small LECs. Mr. Schoonmaker determined that the results were 45 percent below the historical or embedded amounts that Petitioners spent on their existing switches. Mr. Schoonmaker then concluded this result was too low.[45]
- Mr. Schoonmaker then raised the HAI input value by 25 percent, from $416.11 to $520.14, and re-ran the model. The results in this case were purportedly 28 percent below Petitioners' embedded investment as a group (not individually).[46]
- Mr. Schoonmaker increased HAI's assumed switch cost for small LECs (which is based on 1995 data) even though he testified in his deposition and at the hearing that switch prices have decreased 10-20 percent over the past 10 to 15 years.[47]
- Mr. Schoonmaker's judgment of what is a reasonable decline in switch prices for switches placed at different points in time, of different types and different sizes, was not based on any quantitative information, such as current vendor pricing of

45 See Tr. Vol. 3, p 160 l. 21 – p. 162 l. 6.

46 See id.

47 See Tr. Vol 3, p. 159 l. 6-19.

comparable switches, telephone price indices, such as the Turner Price Index, or other substantive information.[48]

This is the sum total of the support Petitioners offer as proof for their $520.14 input value that determines end office switching costs – a key factor in Petitioners' cost studies and proposed rate.

On top of the lack of a substantive basis for the $520.14 input value, Mr. Schoonmaker's comparison of Petitioners' embedded investments to the HAI model results was performed incorrectly:

- The embedded investments reflect the actual capacities (in equipped lines) of Petitioner switches, whereas the HAI model reflects significantly lower line quantities applicable at the time the model was developed (prior to 1998) and much lower levels of spare capacity.[49]
- This difference alone causes the HAI model results to appear low, causing Petitioners to abandon the 1998 default value of $416.11/line and to instead raise it to $520.14.
- What Mr. Schoonmaker has done is analogous to a pilot's relying on faulty and incredible information from his instruments to make drastic altitude decisions without even bothering to look out the window to see whether his plane is actually climbing or descending. Petitioners' increase in the HAI model default value from $416.11 to $520.14 was similarly based on incorrect and improbable information. Without any "visual evidence" (*i.e.,* current vendor quotes), Petitioners inappropriately and drastically raised the switching investment per line. This is analogous to a pilot's

48 See Tr. Vol. 3, p. 162 l. 7 – p. 166 l. 13.

49 See Tr. Vol. 4, p. 375 l. 4 – p. 376 l. 15.

being misinformed that his plane is descending and countering by increasing altitude, when in fact the plane has been gaining altitude all the time.

Simply stated, Petitioners have produced an end office switching cost – $0.0091/minute in the case of Cass County – that greatly exceeds their true forward-looking economic cost of switching, in part because of an inflated – and completely unsubstantiated – starting point.

The FCC has ruled that "underlying data [in a cost study] must be verifiable" and that "any data used to estimate costs should either be derived from public sources, or capable of verification and audit without undue cost or delay." Virginia Arbitration Cost Order, 18 FCC Rcd at 17742 ¶ 38 and 17747 ¶ 48. Neither Petitioners, nor their expert, have used or provided any verifiable data.[50] Mr. Schoonmaker did not, for example, consult his clients (*i.e.*, Petitioners);[51] he did not use publicly available data;[52] and he did not attempt to obtain a quote from any switch vendor (even though one of his employees contacted Nortel on a related matter).[53] Mr. Schoonmaker has claimed that it would be "time consuming and costly" to obtain a switch quote from vendors.[54] Yet, one of his employees contacted Nortel shortly before the hearing, and that employee did not bother asking for a switch quote.[55]

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50 Since FCC rules prohibit use of embedded costs (See 47 C.F.R. § 51.505(d)(1), it does not matter, as Mr. Schoonmaker suggests, that embedded switch cost information is publicly available. See Tr. Vol 3, p. 276 1. 6-7.

51 Tr. Vol. 3, p. 140 l. 24 – p. 141 l. 4.

52 Tr. Vol. 3, p. 164 l. 24 - p. 165 l. 1.

53 Tr. Vol. 3, p. 162 l. 7-10; Tr. Vol. 3, p. 163 l. 4-10.

54 Schoonmaker Rebuttal, p. 11 l. 22.

55 Tr. Vol 3, p. 163 l 4-10. On redirect, Mr. Schoonmaker continued to assert that obtaining a vendor quote would "not [be] a simple matter" because one would have to develop "some parameters and information on the size of the switch you want." Tr. Vol. 3, p. 274 l. 15-17. But none of this work would be required if, as all evidence suggests, switch prices are based on the number of lines rather than capacity, so Mr. Schoonmaker's response constitutes an assumption not supported by any record evidence.

Petitioners suggest that Respondents' corrected switch investment is too low when compared to Cass County's embedded investment. A major reason for the disparity is that Cass County's embedded investment reflects **____

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______________________________**

In the end, the only evidence that Petitioners have submitted to support their $520.14 estimate of the cost of a new switch is Mr. Schoonmaker's personal judgment, which is not supported by any objective or verifiable evidence:

> A. . . . Based on my judgment, I felt that the result of $520.14 . . . would be a reasonable estimate of the forward-looking costs of the Petitioners' switches.
>
> Q. So what you did is you used your own best judgment, right?
>
> A. Yes.[56]

The FCC, however, has ruled – repeatedly – that the "unsupported statements" of "experts" is not sufficient for an ILEC to meet its burden of proof.[57]

Mr. Schoonmaker's further statement that vendors will "probably not" respond to an inquiry if "you're not really interested in purchasing a switch" (Tr. Vol. 3, p. 274 l. 21-25) is belied by the fact that one of his employees was readily able to obtain certain information from Nortel even though Petitioners were not going to buy new switches from Nortel. See Schoonmaker Rebuttal, Schedule RCS-8.

56 Tr. Vol. 3, p. 161 l24 – p. 162 l 6.

(ii) Respondents' counterproposal regarding the cost of new switches is far more reasonable and complies fully with FCC requirements. Respondents adopted a very different and fully supportable approach in developing a proposed per-line switch cost.

- Absent valid vendor information on the current cost to purchase and install new switches, Respondents have used the best publicly available switch cost data. This data was developed by the FCC in its Tenth USF Order, 14 FCC Rcd 20156 (1999), specifically to determine the forward-looking costs of end office switching.[58]
- The FCC switch cost data reflect a large population of large and small LECs, based on data from RBOC depreciation databases and switch costs for small telcos provided by the Rural Utilities Service ("RUS").[59]
- Petitioners have claimed that because the FCC's cost data reflects large LECs, it understates small ILEC switch costs. However, Mr. Conwell validated the reasonableness of the FCC switch cost data by comparing switch investments produced using the data with actual switch costs for 38 rural switches (21 host and 17

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[57] See, e.g., Tenth USF Order, 14 FCC Rcd 20156, 20276 ¶ 281 ("We rejected the use of the HAI and the BCPM default values because they are based on the opinions of experts without substantiating data."); id. at 20271 ¶ 270 (1999)("We rejected use of the BCPM and HAI default values because these values are based on the opinions of experts without data to enable us to substantiate those opinions."); id. at 20196 at ¶ 211 ("[W]e rejected the HAI and BCPM sponsors' default input values for structure costs because they were based upon the opinions of their respective experts and lacked supporting data that allowed us to substantiate these values); id. at 20203 ¶ 102 (Rejecting HAI 5.0a's assumptions for cable costs because they are "based upon the opinions of their respective experts [and] lacked additional support that would have enabled us to substantiate those opinions."); id. at 20232 ¶ 171 ("[W]e find that these expert opinions are unsupported and therefore unreliable."); id. at 20232 ¶ 172 (Rejecting parties' proposal because they "provided no evidence other than the unsupported opinions of their experts."); Virginia Arbitration Cost Order, 18 FCC Rcd at 17924-25 ¶ 515 (declining to adopt unsupported expert opinion on the average number of nodes per OC-48 SONET rings).

[58] Conwell Direct, p. 41 l. 10 – p. 42 l. 25.

[59] Id.

remote switches) obtained from comments filed by the RUS in the USF proceeding. This comparison completely undermines Petitioners' unsupported criticism.[60]

- The FCC considered the option of using default values in HAI 5.0a and the BCPM model – but decided against this because the values in these models were not based on publicly available information and were largely unsupported.[61] In effect, the FCC believed, after broad input from industry participants, that its switch cost data was the best available for determining forward-looking switching costs as of 1999.
- To bring the 1999 FCC cost data to 2006, Respondents' cost expert, Mr. Conwell, reduced these costs by a modest 12 percent to reflect continued price declines in switch costs over the past seven years. The percentage is supported by the Turner Price Index[62] and is consistent with the opinion of Mr. Schoonmaker, who acknowledged that switch prices have declined 10 – 20 percent over the past 10 years.[63]

Respondents' counterproposal overcomes all of the flaws of Petitioners' proposal. First, it is based on publicly available data, as the FCC has required – unlike the "personal judgment" of Petitioners' witness **____**[64] Second, the FCC has repeatedly held that estimates based on more recent data are better, particularly in connection with switch costs. <u>See, e.g., Virginia Arbitration Cost Order</u>, 18 FCC Rcd at 17868 ¶ 370 ("Technological improvements in switches, moreover, increase the

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60 Conwell Direct, p. 42 l. 27 – p. 43 l. 17.

61 <u>See Tenth USF Order</u>, 14 FCC Rcd at ¶ 297.

62 Conwell Direct, p. 44 l. 6 – p. 45, l. 5.

63 Tr. Vol. 3, p. 159 l. 6 – p. 160 l. 4.

64 Tr. Vol. 3, p. 138 l. 7.

importance of using recent data to determine switching costs."); id. at 17867 ¶ 369 ("[T]he Verizon switching cost study better complies with the Commission's TELRIC rules because it relies on more recent data and therefore better reflects forward-looking switching costs.").[65]

If the value of every switch of every Petitioner must be calculated, then the starting point must the publicly available FCC data. However, in Respondent's view, it is not necessary for the Arbitrator or the Commission to calculate the value of every switch of every Petitioner, for the reasons explained in the note immediately below.

Important Note

The current cost to purchase and install new switches may or may not be an important issue in this case, depending on the resolution of Matrix Issue No. 4 – Usage-Sensitive Portion of Switching. Petitioners take the position that 70 percent of the total switch cost is usage-sensitive and recoverable in termination rates. Thus, overstatements in the current costs of switches largely flow to termination rates. If the Arbitrator and the Commission accept this outdated value, then it will be necessary to compute an appropriate valuation for every switch of every Petitioner, then reduce that value by 30 percent. Such valuations, as discussed above, must be computed with the FCC switch cost data as the starting point.

As discussed below, consistent with the most recent FCC decision on this issue, Respondents take the position that only 10 percent of end office switches are usage-sensitive. More specifically, Respondents consider only the interoffice trunk equipment of the switch to be usage sensitive. The FCC cost data is not sufficiently detailed to identify the interoffice trunk equipment portion of switch costs; therefore, assuming the Commission adopts Respondents' position, Respondents have used the HAI model default values for interoffice trunk equipment investment have been used to compute an end office switching cost of $0.0012 per minute – applicable to every Petitioner. While Respondents might have reduced the HAI model interoffice trunk investment by 12 percent or more to reflect the decline in switch prices over the past decade, this would not have materially affected the end office switching cost of $0.0012 and the resulting termination rate.

If the Arbitrator and the Commission follow the FCC's most recent decision that little, if any, end office switching costs are usage-sensitive and rule that interoffice trunk equipment is the

[65] See also id. at 17896 ¶ 446 ("Data of more recent vintage are more appropriate for a forward-looking cost calculation than decade-old data."); id. *at* 17803 ¶ 199 ("We find that the most recent data (*i.e.,* 2000) provide a better basis to predict line growth."); id. at 17927 ¶ 522 ("[T]he Verizon proposal is the better of the two proposals because it relies on more recent vintage data."); id. at 17928 ¶ 524 ("[T]he Verizon proposal is superior because it uses more recent vintage data.").

only usage-sensitive component of local switching, then it will not be necessary to compute a value for every switch of every Petitioner. Instead, the HAI model default value for interoffice trunk equipment can be accepted – a far easier task – producing an end office switching cost for each Petitioner of $0.0012 per minute. This is the approach Cingular and T-Mobile recommend.

(b) The Second Flaw: The Appropriate Factor for the Usage-Sensitive Portion of Petitioners' Forward-Looking End Office Switch Costs (Matrix Issue No. 4 – "What is the appropriate value for the usage-sensitive portion of Petitioners' forward-looking end office switching costs?")

As discussed above, the issue of switch valuation is important in this case only if the Arbitrator and Commission accept the outdated assumption that 70 percent of switching is usage-sensitive. The following discussion will demonstrate in detail why that assumption is no longer valid. The only usage-sensitive portion of a modern digital switch is the trunk equipment, which can be valued by using the HAI 5.0a default cost data. If Respondents' position is adopted, then the valuation of every switch of every Petitioner becomes unnecessary, and local switching costs can be computed by using the same trunk port cost ($0.0012 per MOU) for each Petitioner – a far simpler process.

The FCC has ruled that for "the purpose of setting rates under section 252(d)(2), only that portion of the forward-looking, economic cost of end-office switching *that is recovered on a usage-sensitive basis* constitutes an 'additional cost' to be recovered through termination charges. Local Competition Order, 11 FCC Rcd at 16025 ¶ 1057 (emphasis added). The usage-sensitive portion of switch costs represent the charges for switch components whose capacity – and, therefore, costs – is determined by the expected volume of call attempts or minutes of calling handled by the switch. In contrast, non-usage sensitive switch costs represent charges for components whose capacity and costs are instead determined by the quantity of subscriber lines served by the switch (or measures of demand other than call attempts, minutes of use, *etc.*).

Only usage-sensitive costs caused by mobile-to-land traffic may be considered. The costs of other portions of the switch (e.g., line termination equipment) that are not affected or caused by mobile-to-land traffic may not be included in the rate for termination.

Joint Matrix Issue No. 4 involves the issue of the percentage of costs of a new switch that should be deemed usage (or traffic) sensitive and, thus, included in Petitioners' cost studies. Following is a summary of Petitioners' and Respondents' positions on this issue:

Petitioners' Position: Petitioners' adopt the assumption of HAI 5.0a that 70 percent of the costs to purchase a new switch are usage sensitive, although they provide no factual basis for their assumption.

Respondents' Position: All available facts suggest that the usage-sensitive portion of today's end office digital switch is limited to the switch's interoffice trunk equipment, which handles incoming and outgoing interoffice traffic and whose capacity is affected by total interoffice traffic volume. This plant and its costs represent 10 percent (or less) of total end office switching costs. This is the only portion of local switching costs that should be included in Petitioners' transport and termination rates.

Respondents suggest that the HAI 5.0a default costs for trunk equipment may be used resulting in an end office switching cost of $0.0012 per MOU. That valuation would be the same for each Petitioner.

(i) Petitioners have provided no factual basis for their assumption that 70 percent of end office switch costs are usage-sensitive. In addition, they have ignored widely known, more recent evidence to the contrary. There are numerous problems with Petitioners' 70 percent assumption, including:

- The FCC has ruled that "any data used to estimate costs should either be derived from public sources, or capable of verification and audit without undue cost or delay." Virginia Arbitration Cost Order, 18 FCC Rcd at 17742 ¶ 38 and 17747 ¶ 48.

Petitioners' 70 percent assumption is not based on public sources, nor is it capable of verification.

- The most obvious way to determine the usage sensitive portion of a new switch would be to contact one or more switch vendors and ask the vendor to specify the portion of switch price that is usage-sensitive. Petitioners tried this approach and attached the result as Schedule RCS-8 to the Rebuttal Testimony of witness Schoonmaker – a letter from Nortel to one of Mr. Schoonmaker's associates. Far from demonstrating that 70 percent of the cost of a modern digital switch is usage-sensitive, however, the letter demonstrates just the opposite. Specifically, the letter verifies Respondents' position – that the trunking facilities of a modern switch are usage-sensitive. Witness Schoonmaker confirmed this on cross-examination.[66] The letter does not discuss the "getting started" costs of a new switch, where the vast majority of switching costs previously, but no longer, considered to be usage-sensitive are contained. Again, Mr. Schoonmaker verified this during cross-examination.[67]
- Apart from the Nortel letter, which does not serve their purpose, Petitioners base their 70 percent assumption on the following three sources:
  - The default value in HAI 5.0a for the *end office non-port fraction* (or usage-sensitive percentage) is 70 percent;[68]
  - The FCC in its 10th USF Report used a 70 percent factor;[69] and

66 Tr. Vol. 3, p. 175 l. 3-18.

67 Tr. Vol. 3, p. 176 l. 23-25.

68 Tr. Vol. 3, p. 168 l. 12-16.

69 Tr. Vol. 3, p. 168 l. 18-23.

- The FCC's MAG order.[70]

- However, Petitioners' reliance on these sources is misplaced.

  - The 70 percent assumption in HAI 5.0a was originally unsupported and is today wholly outdated:

    - The HAI 5.0a model was developed over eight years ago. Any assumptions about the usage-sensitive portion of switching would have reflected technology and vendor pricing at the time. Five years after the development of HAI 5.0a, the FCC in its Virginia Arbitration Cost Order, 18 FCC Rcd 17722 (2003), clearly recognized that changes in technology have resulted in the costs of switch processors and other getting started costs no longer being driven by usage.

      Specifically, the FCC stated:

      > We conclude above, for purposes of determining the appropriate switch discount, that the 'getting started' cost of the switch is a fixed cost, meaning that it does not vary with the number of ports or the level of usage on the switch. We find here that the 'getting started' costs of the switch should be recovered on a per line port basis. . . . Given the record evidence that modern switches typically have large amounts of excess central processor and memory capacity, the usage by any one subscriber or group of subscribers is not expected to press so hard on processor or memory capacity at any one time as to cause call blockage, or a need for additional capacity to avoid such blockage. . . . Principles of cost causation, therefore, support a per line port cost recovery approach because, more than any other approach, it spreads getting started costs to carriers in a manner that treats equally all subscribers served by a switch.

      Id. at 17903 ¶ 463.

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70 Tr. Vol. 3, p. 169 l. 20-23.

- The support documentation for HAI 5.0a indicates that the 70 percent assumption was based on an "estimate of the average over several different switching technologies" a decade ago – not on publicly available data and not information about today's switches. Specifically, the HAI model documentation states:

  5.5.9. End Office Non Line-Port Cost Fraction

  Definition: The fraction of the total investment in digital switching that is assumed to be not related to the connection of lines to the switch.

  Default Value:

End Office Non Line-Port Cost Fraction
70%

  Support: This factor is a HAI estimate of the average over several different switching technologies.

  Thus, HAI 5.0a's reliance on the 70 percent factor is not based upon any publicly verifiable source – in contravention of expression FCC rulings. The factor is based upon the "best estimate" of the developers of the mode – nothing more.

- In this regard, the FCC in its Tenth USF Order, 14 FCC Rcd 20156 (1999) declined to use the HAI 5.0a model default values for switch cost data for the very reason that they were unsubstantiated and based on the opinions of model developers. The FCC stated:

  > "For reasons set forth below, we affirm our tentative conclusion to use the publicly available data from LEC depreciation filings, and to supplement the depreciation data

> with data from LEC reports to the RUS [Rural Utility Service]. We also affirm our tentative conclusion that we should not rely on the BCPM and HAI default values, because these values are largely based on non-public information or opinions of their experts, without data that enable us adequately to substantiate those opinions. Id. at ¶ 297.

It is reasonable to assume that the FCC's opinion would apply to the default value in the HAI model for the usage-sensitive portion of switching, since it too was not substantiated by the model developers.

- Although petitioners rely on the 70 percent assumption in HAI 5.0a, the HAI model developers themselves have abandoned the 70 percent factor. The latest version of the Hatfield model places the percentage of usage-sensitive switching costs at zero (0%) – that is, the most current Hatfield model assumes that no portion of a modern digital switch is usage-sensitive.[71]

- Thus, Petitioners have attempted to justify their assumption by saying it is the "default value" of the HAI model, knowing full well that the developers of the model no longer support this assumption and knowing that the FCC in 1999 (a year after the HAI 5.0a was released) generally declined to used the model's default values.

- Although Petitioners' cost witness has stated that the FCC in its Tenth USF Order, 14 FCC Rcd 20156 (1999), adopted a 70 percent factor, the witness did not cite any page or paragraph number, and Respondents have been unable to find any such discussion anywhere in the order.

[71] Tr. Vol. 3, p. 169 l. 13-19.

- The FCC's "MAG Order" upon which petitioners rely, First Multi-Association Group Order, 16 FCC Rcd 19613 (2001), has no relevance to this arbitration. That case involved interstate access charge reform for rate-of-return (rural) LECs, and interstate access charges are based on embedded costs – not TELRIC costs.[72]
- The FCC's 1999 Tenth USF Order and its 2001 MAG Order are outdated and superceded by the FCC's more recent decision in Virginia Arbitration Cost Order, 18 FCC Rcd 17722 (2003). There, the FCC ruled that none of the costs of the incumbent LEC's switches should be recovered on a usage-sensitive basis. See id. at ¶¶ 463-64. Thus, unlike the earlier cases upon which Petitioners rely, this case specifically dealt with the issue of switch costs in TELRIC studies and reflects the FCC's most recent opinion of the issue. Petitioners simply want the Commission to ignore the most recent FCC decision.
- Several leading State commissions have addressed this issue in the past several years, and have decided that little, if any, switch costs are usage-sensitive. Thus, in these States the unbundled network element rates for usage-sensitive switching

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[72] Tr. Vol. 3, p. 170 l. 7 – p. 171 l. 10. For RBOCs and other large incumbent LECs, the FCC required each ILEC to do a cost study. Access Charge Reform Order, 12 FCC Rcd 15982, 16036-37 ¶ 128 (1997). In contrast, the FCC later adopted special, more liberal provisions for small ILECs, not because the 70% factor was correct, but to minimize the administrative burden on small ILECs. See First MAG Order, 16 FCC Rcd at 19654 ¶ 90 ("To ease the burden of implementing this rate structure modification on small rate-of-return carriers, we will permit them to shift 30 percent of their local switching costs to the common line category in lieu of conducting a cost study."). As discussed above, the FCC deliberately chose not to excuse small ILECs from its Part 51 TELRIC cost-study requirements.

were eliminated, with all end office switching costs recovered through unbundled port charges.[73]

- Less than six weeks ago, the Eighth Circuit Court of Appeals affirmed the Minnesota Commission's decision that LECs should use bill-and-keep in exchanging traffic with each other, because it found that LECs do not incur any additional costs in terminating each other's traffic. See Ace Telephone v. Koppendrayer, 432 F.3d 876 (8th Cir., Dec. 29, 2005)("But if no additional costs are incurred, there is nothing to pay.").
- Two weeks ago, in an arbitration between several rural LECs and Verizon Wireless, rural LECs also argued for a 70 percent usage-sensitive factor, using the same type of arguments that Petitioners have employed in this case – including a similar Nortel letter. The Illinois Commerce Commission rejected the rural LEC position and adopted a usage-sensitive switch factor of zero percent:

> The Commission is of the opinion that the record is lacking clear evidence that the switch costs at issue here are usage sensitive, sufficient to have us alter our view expressed in the SBC case that, in general, switching costs are not traffic sensitive. We agree with Verizon Wireless that the evidence presented, essentially the information from Nortel regarding switch costs, is insufficient to show that the cost of the switch is traffic sensitive.
>
> That being the case, we see insufficient reason to depart from our reasoning in the SBC UNE case, 00-0700, and the analysis of the 8th

[73] See, e.g., The Costs of Telecommunications Services Provided by SBC Michigan, Case No. U-13531, 2004 Mich PSC LEXIS 318 (Sept. 21, 2004); Investigation into the Compliance of Illinois Bell Telephone Company with the Order in Docket 96-0486/0569, No. 98-0396, 2001 Ill. PUC LEXIS 1249 (Oct. 16, 2001); Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination, Cause No. 406-11-S1, Phase I, 2002 Ind. PUC LEXIS 219 (March 28, 2002). (Copies in Appendix)

Circuit Court of Appeals. Accordingly, we determine that this input should be set at 0%.[74]

- Recognizing the weakness of their position, Petitioners have attempted to justify their usage-sensitive assumption with a last minute letter from Nortel – *which Petitioners made available to Respondents only three business days before the hearing began* – indicating that portions of the Nortel DMS-10 end office switch are traffic-sensitive.[75] However, this letter – not a "verified document," as claimed by witness Schoonmaker[76] – does not prove anything of value:
  - The letter provides no analysis of the DMS-10 EF&I (engineer, furnish and install) charges in terms of non-volume-sensitive versus volume-sensitive charges and the drivers of volume-sensitive charges (e.g., switched line capacity, call attempts, minutes of use, *etc.*).
  - The letter mentions only portions of the DMS-10 switch, some of which are minor switch components representing very little of the switch's total costs.[77] Others are either non-traffic sensitive or associated with interoffice trunk equipment, about which Petitioners and Respondents do not disagree.[78]

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74 Hamilton County Telephone Co-op, et seq. Petitions for Arbitration to Establish Terms and Conditions with Verizon Wireless, Docket No. 05-0644, at 38 (Jan. 25, 2006). (Copy in Appendix)

75 Schoonmaker Rebuttal, Schedule RCS-8.

76 Tr. Vol. 3, p. 173 l. 6-19. At the hearing, Mr. Schoonmaker admitted that a similar letter had been used in the Illinois arbitration cited above, and that the letter in the Illinois case contained a verification page. Mr. Schoonmaker also admitted that the letter attached to his rebuttal testimony as Schedule RCS-8 in this case did not contain a verification page.

77 Tr. Vol. 3, p. 176 l. 3-11.

78 Tr. Vol. 3, p. 175 l. 3-24.

- Petitioners' cost witness admitted that the key portion of switching costs found in the FCC's Virginia Arbitration Cost Order to be non-usage sensitive, the "getting started" costs, were not even addressed in the Nortel letter.[79]
- Thus, as the Illinois Commission has already determined, the Nortel letter is an ill-fated, last minute attempt to shore-up an assumption that otherwise lacks any current basis.

In summary, Petitioners have submitted no credible evidence – and certainly not data "derived from public sources, or capable of verification," Virginia Arbitration Cost Order, 18 FCC Rcd at 17747 ¶ 48 – in support of their 70 percent assumption. Like the Illinois Commission quoted above, this Commission has no choice but to rule that Petitioners have not met their burden of proving that their proposed rate for termination does "not exceed" their TELRIC-based costs. As the Indiana Commission stated in a remarkably similar situation:

> [T]he level of detail in Ameritech's evidence is not remotely sufficient to allow us to resolve those issues. Ameritech has assumed numerous facts not in evidence; we need not, and we will not, base our decision on the rate structure or rate levels for the ULS-ST [unbundled local switching] offering on Ameritech's highly speculative arguments about the relative usage of Ameritech's switches, cost causation and allocation, and subsidization. * * * The burden is on Ameritech in this proceeding to support the inclusion of a usage-sensitive rate element in the rate structure for ULS-ST. For the reasons discussed in the previous paragraphs, Ameritech has not met that burden.[80]

(ii) Respondents' counterproposal – regarding the usage-sensitive portion of local switching – better reflects forward-looking switch technology and vendor pricing, is consistent with the most recent versions of the cost model used by Petitioners,

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79 Tr. Vol. 3, p. 176 l. 23-25.

80 Commission Investigation and Generic proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination, Cause No. 406-11-S1, Phase I, 2002 Ind. PUC LEXIS 219, at *110-11 (March 28, 2002). (Copy in Appendix)

and is supported by recent decisions by the FCC, several state commissions, and the Eighth Circuit Court of Appeals:

- Petitioners have failed to meet their burden of proof, because they have provided no analysis of the usage-sensitive portion of modern digital switches. As documented above, the FCC and several state commissions, after thorough analysis of the records in similar arbitrations, have concluded that modern end office switches are ***not*** usage-sensitive.
- Even though the FCC and state commissions have found that modern end office switching is not usage-sensitive, Respondents do not take such an absolute approach. Instead, they suggest that the trunking equipment of a modern switch is usage sensitive. In addition, they are willing to accept the HAI 5.0a default cost data for such trunking equipment (resulting in an end office switching cost of $0.0012 per MOU) without factoring the recent decline in switching prices. Such an approach allows Petitioners to recover approximately 10 percent of new switch costs in usage-sensitive charges.
- Respondents' approach is more liberal than the most current version of the HAI model, which does not consider any end office switching costs to be usage sensitive.
- If Respondents' approach is adopted, the Arbitrator and the Commission are saved from the laborious task of computing the value of every switch of every Petitioner (Matrix Issue No. 3). Instead, the HAI 5.0a default cost data for trunking equipment can be used for all Petitioners' switches (resulting in a termination cost of $0.0012 per MOU).

- Including additional switch costs, such as the "getting started costs," would require T-Mobile and Cingular to subsidize Petitioners' non-usage sensitive costs, which the FCC has ruled repeatedly, is not permitted by the Act.
- The $0.0012 per minute cost is TELRIC-compliant. A higher cost would not be.
- A Commission ruling that Petitioners may not charge for certain switching costs in their rates for termination does not mean that Petitioners cannot recover those costs. On the contrary, Petitioners can recover non-usage sensitive switch costs from a variety of sources – for example, line charges to end users, access charges, federal and state universal service funds, and/or contributions from vertical services.

Respondents' proposal thus overcomes the major flaw of Petitioners' proposal, because it is based on recent publicly available data. In this regard, the FCC has consistently ruled that more recent data is better. See, e.g., Virginia Arbitration Cost Order, 18 FCC Rcd at 17867 ¶ 369 ("[T]he Verizon switching cost study better complies with the Commission's TELRIC rules because it relies on more recent data and therefore better reflects forward-looking switching costs.").[81] And, the FCC has further observed that use of recent data is especially important with respect to switches. Id. at 17868 ¶ 370 ("Technological improvements in switches, moreover, increase the importance of using recent data to determine switching costs.").

Finally, Respondents' proposal, if accepted, will greatly simplify the task of the Arbitrator and Commission by obviating the need to calculate the value of every switch of every Petitioner.

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[81] See *also* id. at 17896 ¶ 446 ("Data of more recent vintage are more appropriate for a forward-looking cost calculation than decade-old data."); id. *at* 17803 ¶ 199 ("We find that the most recent data (*i.e.*, 2000) provide a better basis to predict line growth."); id. at 17927 ¶ 522 ("[T]he Verizon proposal is the better of the two proposals because it relies on more recent vintage data."); id. at 17928 ¶ 524 ("[T]he Verizon proposal is superior because it uses more recent vintage data.").

(c) The Third Flaw: The Appropriate Amount of Petitioners' Forward-Looking Floor Space Requirements for End Office Switches (Matrix Issue No. 5 – "What is the appropriate amount of Petitioners' forward-looking floor space attributable to switching?")

End office switches (standalone, host or remote) typically occupy space in buildings shared with other central office equipment (transmission equipment and others), and sometimes other LEC operations. To account for the cost of buildings and land, the HAI 5.0a model estimates the square footage of floor space required for switches of varying sizes. This space includes both the "footprint" of the switch and space for aisles, hallways and common areas. The floor space requirements in an appropriate TELRIC study should reflect space requirements of current switch technology and a reasonable share of space for aisles, hallways and common areas.

Joint Matrix Issue No. 5 involves the issue of the amount of floor space Petitioners should use in their cost studies. Following is a summary of Petitioners' and Respondents' positions on this issue:

Petitioners' Position:	Petitioners use the HAI model default values of 500 square feet of building space for switches with up to 1,000 lines, and 1,000 square feet for switches with up to 5,000 lines.
Respondents' Position:	Respondents' counterproposal is based on Petitioners' responses to data requests asking for the amount of floor space actually occupied by their switches. Respondents propose the use of 100 square feet for remote switches, and 200 square feet for standalone/host switches.

Changing floor space assumptions has a modest effect on total end office switching costs. For example, Cass County Telephone proposes a switch cost of \$0.0091/minute. As discussed above, a switch cost of only \$0.0048/minute can be justified for Cass County based on the current cost of new switches. Substituting Respondents' recommended floor space requirements lowers this valuation by approximately 17 percent, to $0.0040/minute.

As also discussed above, however, adopting the appropriate measure for the usage-sensitive portion of local switching obviates the need to determine costs for every switch of every Petitioner. If only the trunk equipment of modern switches is considered usage sensitive, then each of Petitioners' switches has a cost of $0.0012 per minute. In producing that figure, Respondents have incorporated the reduced floor space requirements. Again, the effect is quite small.

(i) Petitioners have provided no evidence in support of their floor space requirements and thus have failed to meet their burden of proof – and their proposed assumption is not even credible.

- Petitioners have not provided any data in support of their floor space assumptions; they have simply adopted the HAI model default input values for switch floor space requirements.
- Petitioners understandably have never contended that new switches require more floor space than existing switches. It is thus reasonable to use the floor space requirements of Petitioners' existing switches in determining the forward-looking floor space requirements of new switches.
- The amount of floor space that Petitioners require for their existing switches is readily available to Petitioners – yet their cost consultant chose not to use actual data.
- T-Mobile asked in a data request for each Petitioner to provide the current floor space utilized by each of its switches and to separately identify the switch "footprint" and aisles, hallways and common space; space of each type was to be included, but

separately identified. Petitioners' responses indicated a wide variation of floor space usage. For example, Cass County Telephone indicated that its remote switches utilize between **________** square feet each of space, and that its host switch utilizes **___** square feet of space.[82]

- In his rebuttal testimony, Mr. Schoonmaker stated that Petitioners understood T-Mobile's data request to ask for only the "footprint" for switches, and that their responses did not include "aisles, hallways, *etc.*"[83] According to Mr. Schoonmaker, "The responses to the data requests thus only include the space for the equipment footprint, not any of the aisles between the equipment bays, entry facilities, restrooms, space for heating and air conditioning equipment, storage space, etc."[84]
- However, for Cass County, as well as other Petitioners, use of the HAI 5.0a default value would mean that substantially more space is being used for aisles, hallways and common areas than is used by the switch equipment. Such an assumption is not credible.
- Mr. Schoonmaker does not support his claim by giving the floor space actually occupied by the common areas – even though the information was sought in T-Mobile's initial data request. Had he chosen, Mr. Schoonmaker easily could have done so. This once again represents a failure by Petitioners to meet their burden of proof. The burden is not on Respondents to demonstrate the floor space actually utilized by Petitioners' switches. The burden instead is on Petitioners.

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82 Conwell Direct, p. 52 l. 10-12.

83 Schoonmaker Rebuttal, p. 22 l.9-14.

84 Id.

- For Cass County's remotes, use of the HAI 5.0a default value of 500 square feet would require the Commission to believe that switching equipment occupies from **_______** square feet of space, while aisles, hallways and other common areas attributable to just the switch (but not other equipment and uses of the building) occupy between **__________** square feet of space. The assumption is not credible, nor is it supported by anything in the record.
- For Cass County's host switch, use of the HAI 5.0a default value would require the Commission to believe that the switch occupies **___** square feet of space, while aisles, hallways and other common areas attributable to just the switch occupy **___** square feet. This assumption is even more incredible and, again, is supported by no record evidence.

- Mr. Schoonmaker suggests that Respondents' proposal does not allow enough additional space for "utility and sidewalk easements . . . parking area and room for external generators for emergency power."[85] Mr. Schoonmaker fails to understand the HAI model. When the building space for a host switch is set at 200 square feet, the HAI model doubles this value (to 400 square feet) to allow 200 square feet for the building location and 200 square feet for outside space. The additional 200 square feet of outside space are not the total amount of space for sidewalks, parking, etc. Rather, the 200 square feet represents *the proportion of outside space attributed by the model to only the switch.* In addition to a switch, the wire center houses transmission equipment and other telephone company operations, all of which would be assigned a proportionate share of outside space. The total additional land

85 Schoonmaker Rebuttal, p. 22 l. 21 – p. 22 l. 2.

associated with all functions of the wire center (not just switching) would be adequate for sidewalks, parking, etc. Thus, Mr. Schoonmaker's criticism – that Respondent's have not allocated enough outside space for sidewalks, parking and other uses – is invalid because of his apparent lack of understanding of the HAI 5.0a model.

The FCC has ruled that underlying data in a cost study "must be verifiable" and that assumptions be "reasonable" and "plausible." Virginia Arbitration Cost Order, 18 FCC Rcd at 17742 ¶ 38. Petitioners' proposed assumption for floor space – unsupported by any evidence in the record – is not reasonable. Indeed, their proposal is not even plausible.

(ii) Respondents' counterproposal regarding floor space better reflects Petitioners actual switch space requirements.

- Respondents' expert, Mr. Conwell, used the data request responses of Cass County Telephone to develop general floor space requirements applicable to all Petitioners:
  - For remote switches, Mr. Conwell increased Cass County's current floor space utilization from **____** to 100 square feet - the equivalent of two 50 square feet collocation spaces (including aisle space) for two equipment bays. One hundred square feet (100 sq. ft.) allows **_______** square feet of space for aisles and other uses, in the event that Cass County's response to T-Mobile's data request reflects only the switch "footprint."[86]
  - For host switches, Mr. Conwell increased Cass County's **___** square feet of actual space usage to 200 square feet. This provides for four 50 square feet bays of space and again provides additional space for aisles and other uses.[87]

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86 Conwell Direct, p. 52 l. 16-22.

87 *Id.*

- To comply with FCC Rules, floor space attributed to switching must not include unused building space or space used by Petitioners' other plant or business operations. Otherwise, termination rates would include subsidies for Petitioner's other services – absolutely prohibited by FCC Rules.

Since Petitioners did not attempt to determine forward-looking, efficient space requirements (even though such basic facts were readily available to them), it is reasonable to use the actual floor space specifications of Cass County Telephone, **____________________ ____________** and with which he should be most familiar, to develop typical floor space requirements for all Petitioners. As discussed above, these requirements have been used to compute the $0.0012/minute end office switching cost for the Petitioners (See Matrix Issue No. 4).

This completes the discussion of the Respondents' three major flaws related to the computation of their rate for termination. Following is a discussion of Respondent's six major flaws related to the computation of transport costs.

2. The Six Flaws in Petitioners' Cost Studies Pertaining to the Common Transport Component of Reciprocal Compensation

In this section, Respondents discuss six issues in connection with the transport component of reciprocal compensation.

The FCC has defined 'transport' for "purposes of section 251(b)(5), as the transmission of terminating traffic that is subject to section 251(b) from the interconnection point between two carriers to the terminating carrier's end office switch that directly serves the called party (or equivalent facility provided by a non-incumbent carrier." Local Competition Order, 11 FCC Rcd at 16015 ¶ 1039. See *also* 47 C.F.R. § 51.701(c). The FCC has held that "[c]harges for transport subject to section 251(b)(5) should reflect the forward-looking cost of the particular provisioning method" that the incumbent LEC uses in its transport network. Id., 11 FCC Rcd at 16015 ¶ 1039.

Transport includes the LEC's interoffice cable and transmission facilities connecting the Public Switched Telephone Network ("PSTN") to the end office switch serving the LEC customer being called. The interconnection point with the PSTN for most Missouri rural LECs is their "meet point" with SBC-Missouri,[88] though some Petitioners interconnect with Sprint or CenturyTel. In addition, the transport rate element includes the costs associated with the Signaling System No. 7 ("SS7") network.

Respondents challenge as unreasonable six assumptions Petitioners have made in developing their proposed transport costs: (1) the estimate of the interoffice cable length for each Petitioner's proposed forward-looking transport network; (2) the estimate of the size of the cables Petitioners would use in this network; (3) the failure to allocate a portion of Petitioner's forward-looking interoffice cable to uses other than the interoffice transport system used for voice trunks and private line/special access circuits; (4) the estimate of the size of the transmission equipment employed in Petitioners' forward-looking transport network; (5) the proposal to include the costs of dedicated trunks that Respondents' traffic does not use; and (6) the assumptions underlying SS7 signaling link costs.

FCC Rule 51.505(e) specifies that an "incumbent LEC must prove to the state commission that the rates for each element [e.g., transport] it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511 of this part." Petitioners therefore have

[88] FCC Rule 51.5 defines "meet point" as "a point of interconnection between two networks, designated by two telecommunications carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends." The same Rule defines a "meet point interconnection arrangement" as an arrangement "by which each telecommunications carrier builds and maintains its network to a meet point."

the burden of addressing the six issues which Respondents have identified and to demonstrate that their costs are reasonable based on the record evidence. Respondents demonstrate below that Petitioners have not begun to meet their burden.

(a) The Fourth Flaw: The Appropriate Length of Petitioners' Interoffice Cable in a Forward-Looking Transport Network (Matrix Issue No. 7 - "What are Petitioners' appropriate, forward-looking interoffice cable lengths?")

FCC Rule 51.505(b)(1) specifies that an incumbent LEC's forward-looking transport network shall use "the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." The FCC recently noted that SONET is "the most efficient technology currently available for interoffice transport."[89] The FCC has further held that it is appropriate to use a LEC's existing SONET transport network as its forward-looking transport network, because an existing SONET network "uses the technology that would be deployed in a competitive environment."[90]

Joint Matrix Issue No. 7 involves the issue of how long (how many miles) each Petitioners' forward-looking transport network would be. Following is a summary of Petitioners' and Respondents' positions on this issue:

Petitioners' Position:	Petitioners employ the HAI 5.0a default assumption that the cable length in a forward-looking transport network would equal the sum of the interoffice distances between each Petitioner switch and the nearest Bell Operating Company ("BOC") wire center. HAI 5.0a then doubles that distance to account for redundant facilities.

89 Virginia Arbitration Cost Order, 18 FCC Rcd at 17920 ¶ 503. SONET stands for Synchronous Optical Network. See id. at 17916 n.1252.

90 Id. at 17922 ¶ 508. See also id. at 17925 ¶ 515.

HAI 5.0a thus assumes that in a forward-looking transport network, Petitioners would not directly connect their switches with each other, but instead would connect each of their switches indirectly by connecting first to the nearest BOC wire center – so that even Petitioners' local inter-switch calls would be switched through the BOC network. Petitioners' proposal significantly increases the length of cable in their forward-looking transport networks which, in turn, greatly increases their proposed transport costs.

Respondents' Position: Respondents propose that Petitioners use the length of cable in their existing transport networks, because that distance constitutes the "lowest cost network configuration" under FCC Rule 51.505(b)(1).

(i) Petitioners have provided no evidence that the transport networks proposed by HAI 5.0a constitute the "lowest cost network configuration."

- As was demonstrated at the hearing, HAI 5.0a, Petitioners in their cost studies assumed that each of their switches would be connected by two separate cables to the nearest BOC wire center, resulting in cable lengths that substantially exceed those of their current networks. For example, Cass County's existing transport network contains **____** miles of interoffice cable, yet HAI 5.0a assumes that Cass County's forward-looking transport network contains 169.5 miles of cable – a value **__** percent greater than the actual network.[91] In the case of Peace Valley Telephone, HAI 5.0a overestimates actual cable length by **_____** percent![92] Twelve other Petitioners gave responses to data requests sufficient to determine that HAI 5.0a has overestimated their transport cable lengths by amounts ranging from 22 percent to 248 percent.[93]

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91 Tr. Vol. 3, p. 200 l. 7-20.

92 Conwell Direct, p. 63 l. 22-23.

93 Conwell Direct, p. 63 l. 19-21.

- Petitioners do not deny that HAI 5.0a drastically overestimates the cable lengths in their transport networks. On the contrary, witness Schoonmaker – **______________

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____** [94] Nonetheless, Petitioners assert that HAI 5.0a correctly models a forward-looking transport network because small ILECs in the future *may* be required to build facilities all the way to the nearest BOC wire center, because the BOCs *may* someday abandon their existing facilities to the various "meet points."[95] However:

  - Petitioners provide no evidence (e.g., references to HAI 5.0a model documentation) that the HAI model developers assumed that BOCs would abandon their existing interconnection facilities and instead require each rural LEC to build new facilities to the nearest BOC switch. When asked if he had provided any citations to HAI 5.0a documentation on this point, in either his direct or rebuttal testimony, Mr. Schoonmaker replied, "I don't recall that I did."[96] (In fact, he did not do this.)

  - Petitioners have, moreover, not presented any evidence that SBC or any other large LEC in Missouri has announced an intention to abandon existing "meet point" facilities and require each rural LEC to build new facilities to the nearest BOC switch. Thus, even if the model developers made the assumption Petitioners

94 Tr. Vol. 3, p. 214 l. 9-15.

95 Tr. Vol. 3, p. 214 l. 16 – p. 216, l. 12.

96 Tr. Vol. 3, p. 215 l. 20.

claim, that assumption is not reasonable and is <u>not</u> supported by *any evidence whatever in the record.*

- In his rebuttal testimony, Mr. Schoonmaker claims to have had a conversation with a senior manager of Ellington Telephone Company, who supposedly said that SBC Missouri has resisted building *new* facilities to the current meet point.[97] This hearsay evidence suggests at most that SBC *may* be reluctant to construct new facilities to the meet point, <u>not</u> that SBC is going to abandon its existing facilities.
- If Petitioners are truly concerned that SBC will abandon existing facilities at some point in the future, they could propose that their interconnection agreements with T-Mobile and Cingular contain contingency provisions that transport rates will be renegotiated if SBC abandons its existing "meet point facilities" in a way that requires Petitioners to build new facilities from the current meet point to the nearest SBC switch. T-Mobile and Cingular would agree to such a proposal.
- Petitioners would rather have Respondents pay a transport rate that includes costs for cables that do not exist and that no Petitioner has plans to construct. For example, Peace Valley wants to base its transport costs not on the **____**-mile facility it currently has to the meet point, but instead on 172 miles of cable – two redundant cables of 86 miles each to connect the single Peace Valley switch to the nearest BOC wire center.[98]

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97 Schoonmaker Rebuttal, p. 25, l. 1-9.

98 Conwell Direct, p. 63 l. 25 – p. 64 l, 13.

- The forward-looking transport network assumed by HAI 5.0a contains several questionable or unrealistic assumptions and implications, including:
    - HAI 5.0a assumes that all Petitioners with state-of-the-art SONET ring architecture would abandon their existing facilities and construct redundant dual cables from each of their switches to the nearest BOC wire center. HAI 5.0a further assumes that a Petitioner would not connect its switches to each other, which would require local inter-switch traffic to be routed through a BOC wire center.[99] For example, Cass County Telephone would have the Commission believe that it would abandon its existing SONET ring network, **___** miles in length, and instead construct a new transport network 169 miles in length, connecting each Cass County switch to the nearest BOC wire center but not connecting its switches to each other, thereby requiring all local Cass County inter-switch traffic to be routed through the nearest BOC wire center. Such an assumption is completely unrealistic and supported by neither common sense nor anything in the record.
    - HAI 5.0a assumes, again in opposition to all common sense and all evidence in the record, that Petitioners would deploy a new transport network that would increase the cost of providing local exchange service to Petitioners' customers:
        - Petitioners' claimed new transport networks would require substantially more cable/fiber than their existing networks, thus increasing the cost of providing local exchange services; and

99 Conwell Direct, p. 60 l. 5-9.

- Petitioners' proposed transport networks would require all local inter-switch calls (for example, calls between a host and a remote switch) to be routed through the nearest BOC wire center, since HAI 5.0a models a transport network in which Petitioner's switches are not connected directly to each other but instead to an BOC wire center. The BOC – SBC Missouri – would charge Petitioners' for the use of the SBC network, also increasing the cost of local service.

- Even if SBC Missouri were to abandon the existing meet points and require Petitioners to place cables all the way to the SBC network (a contingency that is completely speculative and not supported by any evidence whatever), the most efficient design would not be to abandon current SONET ring or point-to-point systems and build dual cables from each rural LEC switch to the nearest BOC wire center. It would make far more sense, from both the perspective of the Petitioners and the BOC, to maintain the current fiber ring and point-to-point circuit designs connecting the Petitioners' switches and merely extend cable from current meet points to the BOC network.
  - From the Petitioners' perspective, this would avoid building multiple cable routes to the BOC.
  - With this approach, Petitioners would avoid having to pay transit charges to the BOC for local inter-switch traffic.
  - This approach would continue to concentrate Petitioners' existing traffic to the BOC network over larger, more efficient trunk groups.

> When asked about the "lowest cost" alternative in the event that Ellington Telephone Company were required to construct its transport network past the meet point to the SBC network, witness Schoonmaker confirmed that the HAI 5.0a assumption that he chose to use – dual cables from each Ellington switch to the nearest BOC wire center – would not be the "lowest cost" design:

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____ **.[100]

- Petitioners' cost witness, Mr. Schoonmaker, made the network design assumptions utilized in the cost studies <u>without</u> consulting Petitioners. Specifically:

  > Mr. Schoonmaker admitted that he had not informed Petitioners about HAI 5.0a's assumption regarding interoffice cable placement between their switches and the nearest BOC wire center.[101]

  > Mr. Schoonmaker admitted that he did not ask any of Petitioners to verify the cable distances assumed by the model against Petitioners' own records.[102]

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100 Tr. Vol. 3, p. 221 l. 14-25.

101 Tr. Vol. 3, p. 142 l. 24 – p. 143 l. 4.

- ➤ Mr. Schoonmaker admitted that he did not notify Peace Valley Telephone Company that the cost study he was submitting to the Missouri Commission assumed that Peace Valley operated 172 miles of interoffice cable, when in fact Peace Valley operates only **_____** miles of cable.[103]
- ➤ In sum, while Petitioners were given the results of their cost studies, they had no idea of the underlying assumptions that caused their interoffice cable costs, and therefore common transport costs, to be so high.

FCC Rule 51.505(b)(1) states unequivocally that a Petitioner's forward-looking transport network shall use "the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." Petitioners have not provided any evidence that their proposed transport network would be the "lowest costs network configuration." On the contrary, the transport networks proposed by HAI 5.0a are just about the "highest cost" networks imaginable – in other words, transport networks that no company would ever consider building.

(ii) <u>Respondents' counterproposal concerning cable lengths appropriately reflects Petitioners' "lowest cost" forward-looking interoffice network design and interoffice cable length.</u>

- The two proposals for the determination of interoffice cable lengths are fundamentally different. Petitioners' view – or more accurately, the view of HAI 5.0a – is completely unrealistic in assuming that (1) all Petitioners will be required to build facilities to the BOC network, and (2) every Petitioner will accomplish that task by

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102 Tr. Vol. 3, p. 143 l. 8-12.

103 Tr. Vol. 3, p. 143 l. 13 – p. 145 l. 1.

severing connections between company switches and building a dual cable system from each switch to the nearest BOC wire center – an architecture that would drastically increase interoffice cable length and require local interswitch traffic to be routed through the BOC network.

- Respondents' view is based on the network designs in place today. The fact that Petitioners are today able to complete calls, including their own local calls, with cable distances far less than what they want the Commission to approve, confirms that their existing network architecture is both workable and efficient – vastly more efficient and lower cost that the architecture assumed by HAI 5.0a.
- The interoffice cable distances that Respondents have used to correct the Petitioners' cost studies are based on *actual* distances provided by the Petitioners themselves in response to data requests. They are not derived distances, based on some independent analysis.
- To adopt the interoffice cable distances that Petitioners propose would result in a gross overstatement of costs and a transport rate far too high under FCC Rules. Simply put, Petitioners want the Commission to require Respondents to pay for costs that Petitioners do not incur. The inevitable result would be that Respondents would be paying rates that subsidize Petitioners' other operations, which is not permitted. See FCC Rule 51.505(d)(4).
- Respondents' witness Conwell has made corrections in Petitioners' interoffice cable length distances. An example of how the corrections were made is contained in Schedule WCC-16 to Mr. Conwell's Direct Testimony, which shows the corrections for Cass County. Similar corrections were made for other Petitioners and were

employed in deriving the appropriate transport and termination rates for Petitioners listed on page 11 of Mr. Conwell's Direct Testimony.

In ruling on this issue, the Arbitrator and the Commission merely need find that in computing interoffice cable distances, Petitioners' switches should be assumed to remain in current locations, and that the existing interoffice cable distances among those switches should be used to compute transport costs.

(b) The Fifth Flaw: The Appropriate Size of Interoffice Cable in Petitioners' Respective Forward-Looking Transport Networks (Matrix Issue No. 8 - "What are Petitioners' appropriate, forward-looking cable sizes?")

The parties agree that optical fiber cable is the forward-looking cable technology to be used in the Petitioners' transport networks. Between any two network nodes (or in this case, switches) there will be one or more cable routes consisting of a length of cable of a specific size – expressed in terms of the number of fibers per cable (six, eight, 12, 24, 48 or more).

Efficiently sized cable routes will be based on a reasonable forecast of the total demand for fibers.[104] The demand for fibers will consist of voice trunks and data circuits (**__________ __________________**),[105] digital loop carrier systems or loop concentrators used to provide end user subscriber lines (four fibers per system),[106] leased fibers,[107] and others. Cable sizes for small ILECs may, therefore, vary from as few as six to eight fibers to as many as 24 to 48 fibers

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104 47 C.F.R. § 51.511(a) provides: "The forward-looking economic cost per unit of an element equals the forward-looking economic cost of the element, as defined in § 51.505, divided by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period."

105 During cross-examination, witness Schoonmaker admitted that **______________________________ ____**. Tr. Vol. 3, p. 233 l. 12-17.

106 Tr. Vol. 3, p. 233 l. 20 – p. 234 l. 7.

107 Tr. Vol. 3, p. 234 l. 13-15.

or more, depending on the specific circumstances and type of uses of an interoffice cable route. Cass County, for example, currently has interoffice cable sizes ranging from as few **________ ________________________**.[108]

The cost to place cable depends on several factors, including the cost of engineering and installing the cable, the cost of structures supporting the cable (trenches and poles), and the cost of the cable material, which varies with the number of fibers. Based on data in HAI 5.0a, fiber material costs vary by $0.05 per fiber-foot. The difference in material costs and total placement costs between a 24-fiber cable and a 12-fiber cable is $0.60 per foot. This equates to a 12 percent difference in the total installed cost of these two cable sizes.[109] The difference between 24-fiber and 8-fiber cable installed costs is 16 percent.[110] Reflecting proper cable sizing is therefore an important consideration in computing forward-looking economic costs of interoffice cable and common transport.

It is important to note, as will be described in the next section, that the HAI model assumes that a LEC's interoffice cable is used and dedicated entirely to its interoffice transport system, which carries voice trunks and private line/special access circuits.[111] The model does not recognize that LECs often use their interoffice fiber cable for other purposes – including digital loop carrier systems and loop concentrators, Internet or video traffic, or capacity leased to third parties or affiliates. If the HAI model is to make this unrealistic assumption, then the size of the interoffice cable should be limited to, or be just large enough for, the interoffice transport

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108 Conwell Direct, p. 66 l. 12-13.

109 Conwell Direct, p. 66 l. 1-4.

110 Id.

111 Conwell Direct, p. 70 l. 9-10.

system, which requires **____

______________________________**).[112]

On the other hand, if Petitioners want to base interoffice cable costs on larger cable sizes, then they must reflect sharing of the cable costs between the interoffice transport system (on which mobile-to-land traffic is carried) and other users. Petitioners cannot have it both ways – that is, they cannot oversize interoffice cables for purposes of their cost study and then further assume that none of the cable cost is attributable to the other uses that have no relevance to mobile-to-land traffic.

Joint Matrix Issue No. 8 involves the issue of how to determine the appropriate size of interoffice cables that should be used in Petitioners' cost studies. Following is a summary of Petitioners' and Respondents' positions on this issue:

Petitioners' Position: Petitioners have adopted the HAI 5.0a default input value of 24-fiber cable for all interoffice cables for all Petitioners – ignoring entirely the capacity each Petitioner actually requires (two or four fibers) to meet demand for the interoffice transport system that carriers mobile-to-land traffic and other Petitioner voice trunks and private line/special access circuits.[113]

Respondents' Position: Interoffice cables should be sized based on expected fiber demand per cable route. The demand for fibers should reflect all uses of the cable, and the resulting cable costs should be apportioned among the users sharing the cable (see next section below).

Respondents' cost expert, Mr. Conwell, used a mix of eight, 12 and 24 fiber cable in correcting Cass County Telephone's proposed interoffice cable costs. This was based on current fiber usage by cable route, increased to the next larger fiber cable size (using actual data Cass County

112 Tr. Vol. 3, p. 233 l. 12-17.

113 HAI 5.0a assumes that all of Petitioners' interoffice cables contain 24 fibers. See Conwell Direct, p. 67 l. 19 – p. 68 l. 26. During cross-examination, witness Schoonmaker admitted that he did not notify Petitioners that the model assumes that all of their interoffice cables contain 24 fibers. Tr. Vol. 3, p. 145 l. 2-5.

provided in response to a data request). The average number of fibers per cable for Cass County was 12 fibers.[114] Without information about fiber cable sizes and fibers in service for other Petitioners, Respondents assumed an average 12-fiber cable for corrections to 19 other Petitioner's costs.[115]

(i) Petitioners have provided no evidence to support their claim that each Petitioner, regardless of size, requires a 24-fiber cable in each portion of the transport network to haul voice and data traffic. As evidenced by Petitioners' responses to T-Mobile data requests, the demand for fibers on many interoffice cable routes does not justify 24-fiber cable. Smaller cable sizes often are sufficient to meet fiber demand, resulting in lower costs and a more efficient network configuration. For example, Schedule WCC-13 to the Direct Testimony of Respondents' witness Conwell shows the various interoffice cable routes for Cass County, and the number of fibers in service on each route. The highest number of fibers in service on any route is **__**. The lowest number is **___**. Not a single Cass County interoffice cable route has **__** fibers in service, even though one route contains **__** fibers!

- Petitioners chose to adopt the HAI 5.0a model default assumption of 24-fiber cable for all Petitioners in all portions of their transport network. However, they have provided no evidence (e.g., current demand in their existing networks) to support this assumption. Notably:
  - Petitioners' cost consultant did not advise his clients about HAI 5.0a's 24-fiber cable assumption, so that Petitioners could validate it with respect to their current

114 Conwell Direct, p. 77 l. 12-16; Schedule WCC-16.

115 Conwell Direct, p. 80 l. 13-19.

cable sizes and anticipated needs.[116] Thus, Peace Valley was not asked, "Is it reasonable on a forward-looking basis to assume that you would require a 24-fiber cable from your **______________________________

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______________________________**), was not told that its cost study would include costs for interoffice cables and that these cables would be 24-fiber.

- As shown in Exhibit WCC-16 (Conwell Direct), Cass County Telephone today has cable routes with **______________________________

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  ______________________________**. (In other words, a portion of Cass County's network is "gold plated.")

- As described in the next section and discussed in Mr. Conwell's Direct Testimony, **

  ______________________________**.[117] Larger interoffice cables may sometimes be warranted, but only if there are uses other than the interoffice transport system carrying voice trunks and data circuits. **__________

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116 Tr. Vol. 3, p. 145 l. 2-5.

117 Conwell Direct, p. 71 l. 10-14.

118 Tr. Vol. 3, p. 233 l. 12-17.

- Petitioners will argue that future demand requires larger cable sizes to be placed, rather than placing smaller cables today and then having to make costly cable additions at a later date. But:
  - Petitioners have not submitted any data to substantiate this claim.
  - The only future capacity that is relevant to this arbitration is capacity needed to meet reasonably foreseeable demand for voice/data traffic – not capacity used for other purposes, such as Internet, video or capacity leased to other carriers. There is no evidence in the record, and indeed Petitioners do not even claim, **_______ ____** to transport and terminate voice-grade traffic. Fibers added for any future demand simply will not involve voice traffic.
- If demand for fibers does increase, then the lion's share of the cost of larger cables should be borne by this additional, non-voice demand. This is required by FCC Rule 51.511. As it is, the *entire* cost of the 24-fiber cables assumed by Petitioners in their cost studies is borne by the interoffice transport systems, **_____________________ _________** *to operate.* In effect, Petitioners are attempting to have some users of the interoffice transport system – the Respondents in this case – bear the costs of larger cable sizes that may or may not be required by future users, and certainly will not be required to terminate voice traffic. This type of subsidy is not permitted by FCC Rule 51.505(d)(4).

The FCC has held that "network design assumptions must be reasonable," that "any assumptions contained in the model should be verifiable," and that "any data used to estimate should either be derived from public sources or capable of verification and audit." Virginia

Arbitration Cost Order, 18 FCC Rcd at 17742 ¶ 38 and 17747 ¶ 48. Here, Petitioners have provided no facts in support of their assumption that every Petitioner, in every portion of its transport network, would require a 24-fiber cable. No support was provided because, as Mr. Schoonmaker admitted during cross-examination, Petitioners' need only **_______________** to terminate voice-grade traffic.[119]

Each Petitioner (had it been consulted by its cost expert) could have easily developed fiber capacity estimates based on current voice/data traffic volumes, the need for loop concentrators, *etc.*. But such estimates were never made, because Petitioners were never consulted.

FCC Rule 51.505(b)(1) requires LECs to use in their cost study "the lowest cost network configuration." In the end, Petitioners have not presented a scrap of evidence to demonstrate that their blanket 24-cable assumption for each Petitioner meets this requirement. Indeed, Mr. Schoonmaker's testimony during cross-examination makes clear that the blanket assumption is completely unwarranted.

(ii) Respondents' counterproposal to efficiently size interoffice cables to meet total fiber demand, rather than using an arbitrary constant cable size, complies with FCC Rule 51.505 and just makes common sense.

- The point is simply this – if the forward-looking demand for fibers does not justify 24-fiber cable, forward-looking economic costs must not reflect such an assumption. Cables must be sized to efficiently serve total demand, and this can be achieved for small ILECs in Missouri often using eight, 12 and perhaps other cable sizes smaller than 24 fibers. The resulting cost savings are significant.

119 Id.

- Petitioners should not be permitted to inflate their cable costs, causing Respondents to pay revenues to subsidize other uses of interoffice cables, such as video and subscriber loops. FCC Rule 51.505(d)(4) prohibits this.
- In correcting Cass County Telephone's interoffice cable costs, Respondents determined the cable size, cable route-by-cable route, to meet current total demand for fibers and allow for growth. This resulted in a mix of eight, 12 and 24-fiber cables, with the average being 12 fibers per cable. Absent detailed information for other Petitioners, Respondents used a similar assumption of an average of 12 fibers in making corrections to the transport costs of 19 other Petitioners. Unlike the arbitrary assumption made in the HAI model, this assumption is based on factual information for Cass County Telephone.
- Respondents, of course, would not object to larger cable sizes – *as long as the costs of the cables are shared among all users.* Given the large fixed costs (per foot) of placing fiber cable (for engineering, installation and trenching), larger cables have lower costs *per fiber*, but *only* if properly computed reflecting the sharing of cables. The HAI model does not reflect this sharing and assigns the full cost of the 24-fiber cable to the interoffice transport system – as described in the next section. This is the "worst of both worlds" – an oversized cable and no sharing of the cable. Under these assumptions, there are no cost savings for the users of the interoffice transport system, including Respondents. As the cable size is increased, the increased cost inappropriately placed on Respondents increases as well. This is entirely inconsistent with the requirements of FCC Rule 51.511.

In ruling on this issue, the Arbitrator and the Commission should hold that Petitioners, in computing their transport costs, may not use the HAI 5.0a assumption of 24 fiber cables on each interoffice route. The Arbitrator and Commission should then require each Petitioner (other than Cass County, which has already supplied the necessary data) to submit company-specific information detailing each interoffice cable route, the number of fibers in each route, and the numbers of fibers in use on each route. With such additional information, witness Conwell can then properly calculate appropriate cable sizes for each Petitioner. In the alternative, the Arbitrator and the Commission should rule that a mix of eight, 12 and 24 fiber cables should be used for each Petitioner. Again, given such a ruling, witness Conwell can properly calculate appropriate cable sizes.

(c) The Sixth Flaw: The Appropriate Amount of Sharing of Petitioners' Interoffice Cable to Reflect Use of the Transport Network by Services Other Than Transport and Termination (Matrix Issue No. 9 - "What is the appropriate amount of sharing of Petitioners' interoffice cabling in order to reflect sharing with services other than transport and termination?")

Interoffice fiber cable costs should be developed in four distinct steps. In the first step, the costs of interoffice cable per fiber are computed. This is done following FCC Rule 51.511(a).[120] To do this, a Petitioner would calculate its forward-looking costs of interoffice cable for each cable route, and then divide these costs by the total demand for fibers over each route. For example, if the cost of a 12-fiber cable over a hypothetical route 'A' is $5,000 per

[120] FCC Rule 51.511(a) provides: "The forward-looking economic cost per unit of an element equals the forward-looking economic cost of the element, as defined in Sec. 51.505, divided by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period."

year, and the total demand for fibers in the cable is eight fibers, the annual cost per fiber is $625. This calculation would be repeated for each of the other cable routes in the Petitioner's interoffice network.

In the second step, the Petitioner would assign a portion of the cable costs in each route to the interoffice transport system carrying mobile-to-land and other ILEC voice-grade traffic and private line/special access circuits. Depending on whether the transport system utilizes a fiber ring or a point-to-point circuit, two or four fibers would be required, respectively. If the transport system is a fiber ring (two fibers required), then for cable route 'A', two times $625 or $1,250 per year would be the cost of cable attributable to the transport system over cable route 'A'. The remaining cable costs of $3,750 over route 'A' ($5,000 less $1,250) would be assigned to other users of the remaining six fibers in service. These may be digital loop carrier systems, loop concentrators, fibers leased to other carriers or other uses.

In the third step, a second unit cost is calculated. This is the cost per trunk or voice grade equivalent circuit (DS0 equivalent). Assume that the transport system carries 100 voice trunks or DS0 equivalents (including private lines and special access circuits). The cost per trunk for cable route 'A' would be $12.50 per year ($1,250 for two fibers/100 DS0 equivalents carried by the interoffice transport system over those two fibers). This would be the unit cost per trunk, whether the trunk is a common transport trunk, a dedicated trunk or a direct trunk.

In the fourth and final step, the cost per trunk would be divided by the annual minutes per common transport trunk to calculate the common transport cable cost per minute. This would be added to the common transport transmission equipment cost to arrive at the total common transport cost and thereby provide the basis for a Petitioner's transport rate.

This four-step procedure is consistent with FCC Rules. It also should be noted (as will be discussed in the subsection immediately below) that this cost per minute of use for common transport fully captures the transport cable cost. It is not necessary to also include the portion of the cost of the two fibers assigned to dedicated transport. In the illustration shown here, as long as 100 DS0 equivalents are a proper measure of the total demand for the two fibers, it does not matter what the DS0 equivalents are called – common transport trunks, common dedicated transport trunks, direct transport trunks or whatever.

Petitioners' cost studies – based on HAI 5.0a – did not follow this four-step approach. The studies completely omitted steps one and two, instead allocating the entire cost of the interoffice cable to the interoffice transport system – and in the example above, to the 100 voice trunks and DS0 equivalent private line and data circuits. In Petitioners' cost studies, none of the cable costs are assigned to other users of the fiber, such as loop concentrators, other carriers leasing fiber and others.

Mr. Schoonmaker has agreed that cable sharing should be reflected in the Petitioners' cost studies.[121] However, he apparently misunderstands how the HAI model works. He believes that allocating total interoffice cable costs to the interoffice transport system's common, dedicated and direct trunks fully accounts for cable sharing, when it does not. He apparently does not understand that HAI 5.0a considers common, dedicated and direct trunks to all be part of the common transport system, and that, therefore, none of the cable costs are being attributed by the model to uses other than common transport, even though he admits that other uses exist.[122]

121 Tr. Vol. 3, p. 222 l. 10-16.

122 Tr. Vol. 3, p. 229 l. 8-17.

Joint Matrix Issue No. 9 involves the appropriate level of sharing that Petitioners' cost studies should utilize to ensure all users of the cable each pay a fair share. Following is a summary of Petitioners' and Respondents' positions on this issue:

Petitioners' Position:	Petitioners want to assign 100 percent of the interoffice cable cost to the interoffice transport system. In other words, they want the Commission to omit steps 1 and 2 above.
Respondents' Position:	Respondents propose to assign interoffice cable costs to all users of the cable in proportion to total demand for fibers. Then, they propose to assign the share of interoffice cable costs attributable to interoffice transport systems in proportion to total demand for trunks or DS0 equivalents. In short, Respondents propose to follow all four steps above.

(i) <u>Although Petitioners recognize that their cost studies must account for other uses of their interoffice cable, in fact, their studies do not do this, and their proposed transport rates are inflated as a result.</u>

- Mr. Schoonmaker admits that cable sharing should be reflected in Petitioners' cost studies.[123]
- He attempts to counter Respondents' point that interoffice cable costs are not being fully shared by pointing out that interoffice cable costs are apportioned among common, dedicated and direct trunks.[124] But these are all trunks *within* the interoffice transport system. None of the interoffice cable cost is being first assigned to loop systems, carriers leasing fibers, and other users. Mr. Schoonmaker has failed to acknowledge this fundamental flaw, though during cross-examination he was forced to admit that the **______________________________

123 Tr. Vol. 3, p. 222 l. 10-16.

124 Tr. Vol. 3, p. 232 l. 7-15.

______________________________**, for sharing purposes, in the total number of trunks (871) to which HAI 5.0a assigns cable costs.[125]

- Petitioners also argue that future growth will require interoffice cables larger than 24-fibers, even though Mr. Schoonmaker has admitted that **______________________ ______________________________**) are necessary to operate Petitioners' transport systems.[126] Thus, the only reason Petitioners may require more fibers in their network is because the network is being used for purposes unrelated to the exchange of mobile-to-land, voice-grade traffic and private line/special access circuits.

(ii) Respondents' counterproposal regarding cable sharing is again fully consistent with FCC Rules – and common sense.

- If the fibers in an interoffice cable are being used for an interoffice transport system traffic *and* for other uses (such as leased fibers and loop concentrators), then a portion of cable costs should be borne by the other users. This is required by FCC Rule 51.511(a)
- If total demand (for these other uses) justifies larger cable sizes, then all users benefit by lower unit costs per fiber. However, when the entire fiber is attributed to the interoffice transport system only, which is the method employed by HAI 5.0a and by Petitioners in this case, then transport costs are grossly overstated, and the other users get a "free ride." This is unacceptable and contrary to FCC Rule 51.511(a).

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125 Tr. Vol. 3, p. 231 l. 15 – p. 232 l. 5.

Q. Okay. The 871 number does not include **______________________**, does it?

A. Let me respond this way. I mean, not specifically, no.

126 Tr. Vol. 3, p. 233 l. 12-17.

- In correcting Cass County Telephone's common transport costs, Respondents' cost expert, Mr. Conwell, has shared the costs of cable for each cable route among the actual users of the cable.[127] As described in the previous section, the average corrected cable size for Cass County is 12 fibers; and, of these 12 fibers, on average, the costs of six fibers are borne by the interoffice transport system, while the costs of the remaining six fibers are attributable to other uses unrelated, and having nothing to do with, mobile-to-land traffic.[128] Respondents' approach is entirely consistent with the reality of the Company's network and complies with the FCC rules.
- Respondents followed a similar approach in correcting the costs of 19 other Petitioners that provided in data responses sufficient factual detail – that is the cost of six fibers of cable capacity is attributed to the interoffice transport system.[129] This provides ample working fibers for the system and a share of spare cable capacity.

On this issue, the Arbitrator and the Commission should rule that pursuant to FCC Rule 51.511(a), Petitioners' cost studies should be corrected to assume that six fibers are used for interoffice transport based on the experience of Cass County Telephone. Costs of all other fibers in each Petitioners' transport system should be attributed to uses other than transport and termination. That is the only ruling that need be entered on this issue. Based on such a ruling, an appropriate transport and termination rate can then be calculated for each Petitioner.[130]

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127 Conwell Direct, p.77 l. 9 – p. 79, l. 18. The full computations are included in Schedule WCC-16 to Mr. Conwell's Direct Testimony.

128 Conwell Direct, Schedule WCC-16.

129 Conwell Direct, p. 80 l.10-19. See also Schedule WCC-1.

130 As stated at the hearing (Tr. Vol. 3, p. 372 l. 24 – p. 373 l. 24), certain additional information will be required from seven Petitioners in order that a proper transport and termination rate may be calculated. Respondents will discuss the required information in detail in following sections.

(d) The Seventh Flaw: The Appropriate Size of Petitioners' Forward-Looking Interoffice Transmission Equipment (Matrix Issue No. 10 - "What is the appropriate sizing of Petitioners' forward-looking, interoffice transmission equipment?")

Just as it is important (in an appropriate TELRIC cost study) that interoffice cables be efficiently sized, so too is it important that the transmission equipment at the ends of the cables be properly sized. Petitioners use transmission equipment to multiplex or combine voice trunks and other circuits in higher bandwidth circuits and to convert electrical to optical signals for transport over fiber cable. This equipment includes add/drop multiplexers, terminal multiplexers, digital cross connect systems and signal regenerators. By including costs for transmission equipment which is unnecessarily large with respect to the Petitioners' needs, HAI 5.0a inappropriately inflates Petitioners' transport rates.

Joint Matrix Issue No. 10 involves the issue of the appropriate size of the transmission equipment that Petitioners use in their cost studies. Following is a summary of Petitioners' and Respondents' positions on this issue:

Petitioners' Position:	Petitioners adopt HAI 5.0a's default values and therefore assume that all interoffice transport is over OC-48 systems.[131] Also, because of HAI 5.0a's unrealistic assumption that interoffice cables are constructed from each of Petitioners' switches to the nearest BOC wire center (See Matrix Issue No. 7 above), Petitioners assume that they need signal regenerators, when they actually need few, if any.[132]
Respondents' Position:	OC-3 (or smaller) transport systems are adequate to meet the needs of Petitioners.[133] If larger systems are needed, their costs should be shared with other users of the systems. Respondents also believe that few, if any, signal

131 Tr. Vol. 3, p. 241 l. 11-15.

132 Conwell Direct, p. 81 l. 14-20.

133 Conwell Direct, p. 83 l. 12-13.

regenerators are needed for Petitioners' actual interoffice networks, given that distances between switches are less than 40 miles (the threshold for placement of a regenerator).[134]

(i) Petitioners have not submitted any evidence to justify the assumption in HAI 5.0a that each Petitioner requires an OC-48 transport system for existing and foreseeable traffic levels. By assuming OC-48 transport systems for each Petitioner, HAI 5.0a grossly overstates the capacity needed to support interoffice voice traffic.

- OC-48 transmission equipment has the capacity to handle up to 32,256 voice (or DS0 equivalent) circuits.[135] The assumption of HAI 5.0a that each Petitioner requires this level of transport capacity is both unsupported by anything in the record and absurd:
  - HAI 5.0a assumes 359 DS0 circuits are served by Cass County's Peculiar switch. HAI 5.0a also assumes that the Peculiar switch requires the capacity of an OC-48 system. As witness Schoonmaker admitted on cross-examination, HAI 5.0a thus assumes a transmission system for the Peculiar switch that has **________________________**.[136]
  - Peace Valley Telephone has only **____**.[137] Four DSI circuits are the equivalent of 96 DS0 circuits.[138] Thus, HAI 5.0a assumes that in a forward-looking network of efficient design, Peace Valley would install and use equipment capable of handling up to **______

134 Conwell Direct, p. 83 l. 13-14.

135 Tr. Vol. 3, p. 242 l. 1-7.

136 Tr. Vol. 3, p. 242 l. 14-24.

137 Tr. Vol. 3, p. 241 l. 23-25.

138 Tr. Vol. 3, p. 241 l. 23-25.

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______________________**

- HAI 5.0a estimates that the six switches in Cass County's network serve 871 DS0 equivalent circuits.[139] Yet, HAI 5.0a assumes that in a forward-looking network of efficient design, Cass County would install and use transmission equipment capable of handling up to **______________________________________

  ____

  ____**

- **____

  ____.**[140] **__________

  ____

  ____

  ____.**[141]

- Petitioners were unaware that their common transport costs were inflated by HAI 5.0a's assumption of OC-48 transport systems, because their cost consultant did not advise them of this fact.[142]

- HAI 5.0a also inflates Petitioners' transport rate in a second way – by including costs for equipment (optical regenerators) Petitioners likely would never purchase or use:

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139 Conwell Direct, Schedule WCC-15, cell I-15. See *also* Tr. Vol. 3, p. 202 l. 9-15.

140 Tr. Vol. 3, p. 242 l. 14-24. Witness Schoonmaker admitted that HAI 5.0a assumes that Cass County's Peculiar switch will have a transmission system with **____**% unused capacity.

141 Tr. Vol. 3, p. 242 l. 25 – p. 243, l. 18. Witness Schoonmaker admitted that an OC-3 system, as advocated by Mr. Conwell, would leave **__**% capacity for future growth at Cass County's Peculiar switch.

142 Tr. Vol. 3, p. 145 l. 6-9.

- ➤ As discussed in Matrix Issue No. 7 above, Petitioners propose cable lengths that far exceed their actual requirements.
- ➤ HAI 5.0a assumes that fiber optic systems require signal regenerators every 40 miles.[143]
- ➤ Peace Valley Telephone would not require a signal regenerator, because the distance between its switch and its meet point with CenturyTel is only **_____** miles.[144]

- Yet HAI 5.0a would have the Commission believe that an efficiently designed new network for Peace Valley would require 172 miles of cable and four optical regenerators (at a cost of $60,000).[145]

FCC Rule 51.505(b)(1) requires that a TELRIC cost study employ "the lowest cost network configuration." Assuming OC-48 transmission equipment for companies like Peace Valley, or for any other Petitioner, is clearly not the "lowest cost network configuration."

(ii) As in the case of interoffice cable size, Respondents' counterproposal to efficiently size transmission equipment is fully consistent with FCC Rules – and common sense.

- Respondents' cost expert, Mr. Conwell, in correcting the transmission equipment costs for Cass County, assumed a smaller OC-3 transport system capable of supporting up to 2,016 voice circuits, **____.**[146] In

[143] Conwell Direct, p. 81 l. 14-15.

[144] Conwell Direct, p. 82 l. 11-15.

[145] Id.

[146] Conwell Direct, p. 83 l. 12-13. See *also* Tr. Vol. 3, p. 242 l. 25 – p. 243 l. 18.

fact, for several the Petitioners, such as that of Peace Valley Telephone, an even smaller transport system would be justified.

- Mr. Conwell computed corrected costs for Cass County Telephone assuming the OC-3 system and using cost data from the HAI model.[147] The corrected transport transmission equipment cost was $0.0017 per minute, compared to $0.0025 per minute in the HAI model.
- Transport transmission equipment costs per minute based on the OC-3 transport system were then used to correct the costs for 19 other Petitioners, reflecting the number of network nodes in their systems and the volume of trunks at each node.[148]
- These corrections produce transmission equipment costs that are much closer to those of an efficiently sized interoffice network for each Petitioner and more consistent with the FCC Rules for forward-looking economic costs.

In ruling on this issue, the Arbitrator and Commission should hold that each Petitioner's forward looking transport equipment should be based upon OC-3 systems without optical regenerators. If such a ruling is entered, then appropriate transport costs can be computed for each Petitioner.[149]

(e) The Eighth Flaw: The Impropriety of Including Petitioners' Claimed Dedicated Transport Costs in Their Transport Rate (Matrix Issue No. 12 - "Should any of the costs identified in HAI 5.0a as dedicated transport be included in Petitioners' transport and termination rates?")

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147 Conwell Direct, Schedule WCC-18.

148 See Conwell Direct, Schedule WCC-1.

149 For seven Petitioners, certain additional information must be provided. Tr. Vol. 4, p. 372 l. 24 – p. 373 l. 24.

The cable (or fiber) contained Petitioners' interoffice transport network is generally placed in one of two categories (because different FCC rules apply to each category):

1. Dedicated facilities are cable "used by a single party – either an end user or an interconnecting network;" and
2. Shared facilities (sometimes referred to as common transport) are cables "used by multiple parties." Local Competition Order, 11 FCC Rcd 15873 ¶ 741.

Respondents' mobile-to-land traffic uses only Petitioners' shared facilities, because Respondents' traffic is commingled with the other traffic Petitioners receive from or send to other carriers. Respondents' traffic does not use Petitioners' dedicated facilities.[150]

Petitioners have chosen to use the HAI 5.0a model in developing their transport costs. For reasons unknown to T-Mobile and Cingular, HAI 5.0a computes costs for three types of interoffice transport (rather than the two categories used by the FCC):

- Common transport, which represents trunks between tandem switches and end offices carrying a combination of local and interexchange traffic over shared trunk facilities;
- Dedicated transport, which represents circuits used exclusively by interexchange carriers to exchange traffic with LECs; and
- Direct transport, which represents circuits providing direct connections between LEC end offices.[151]

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150 A wireless carrier might use a Petitioner's dedicated facilities only if the two carriers used a direct interconnection and if the rural LEC provides a portion of this interconnection facility. However, wireless carriers and rural LECs rarely use direct interconnection. See Alma/T-Mobile Arbitration Report at 22. There are no direct interconnection trunks between T-Mobile and any Petitioner. There are likewise no direct interconnection trunks between Cingular and any Petitioner. Pue Direct, p. 23 l. 10-11.

151 Tr. Vol. 4, p. 371 l. 8-22.

The three types of transport under this HAI assumption simply represent different trunks over the same interoffice transport facilities. HAI 5.0a assumes that mobile-to-land traffic reaches a Petitioner's switch by transiting the BOC network to the nearest BOC switch and then connecting over a common transport trunk to the Petitioner's end office. The HAI model follows this network architecture because, as discussed above, the model assumes that each Petitioner's switch is connected directly to the nearest BOC wire center, even though this is clearly not be the "lowest cost network configuration," as FCC Rules require.

Petitioners' cost witness, Mr. Schoonmaker, made an adjustment to the HAI model by including in Petitioners' transport rates certain dedicated facilities costs. In other words, Mr. Schoonmaker changed the HAI 5.0a assumption that Respondents' traffic is carried to Petitioners' switches on common trunk groups. Mr. Schoonmaker changed the model to assume that, in effect, T-Mobile's and Cingular's traffic is carried to Petitioners' switches over *both* common and dedicated trunks *simultaneously*.

Joint Matrix Issue No. 12 involves the issue of whether Mr. Schoonmaker's decision to include in Petitioners' cost studies the costs of dedicated facilitates not used by Respondents' traffic is reasonable. Following is a summary of Petitioners' and Respondents' positions on this issue:

Petitioners' Position:	Petitioners contend it is necessary to add dedicated transport costs to the common transport costs to capture the full cost of transporting mobile-to-land traffic.
Respondents' Position:	Petitioners' position defies common sense because a mobile-to-land call cannot simultaneously pass over two types of transport: shared facilities and dedicated facilities. Neither T-Mobile nor Cingular send any traffic to Petitioners over dedicated facilities. Mr. Schoonmaker's adjustment to the HAI model is thus pure fiction and duplication of costs.

(i) Petitioners have not justified their inclusion of dedicated transport costs, and their methodology impermissibly inflates their proposed transport and termination rates.

- The situation is as simple as this:
  - HAI 5.0a computes the total costs of interoffice cable and transmission equipment between Petitioners' switches and the nearest BOC switch. The model solves for the needed quantity of common, dedicated and direct trunks based on traffic parameters entered in the model, and then apportions the total costs of the interoffice facilities among the three types of transport. The amount assigned to common transport is divided by common transport minutes to arrive at the common transport cost per minute.[152]
  - Mr. Schoonmaker believes that the HAI model miscalculates (i.e., overstates) the dedicated transport trunk quantities, and therefore assigns too much of the interoffice facility costs to dedicated transport, and too little to common transport. His solution is to include the costs of both common transport and dedicated transport in the cost of mobile-to-land transport.[153]
- Mr. Schoonmaker's "correction" of HAI 5.0a is wrong for at least two reasons:
  - First, the HAI 5.0a quantity of dedicated transport trunks for each Petitioner includes both voice trunks and special access circuits. Mr. Schoonmaker apparently fails to recognize that special access trunks are included. For Cass

[152] See, e.g., Conwell Direct, Schedule WCC-15, which demonstrates that HAI 5.0a assumes a total of 871 interoffice trunks for Cass County. Of that 871, the model apportions 330 to common transport. See *also* Conwell Rebuttal, p. 13, Item 20, containing a detailed discussion of how HAI 5.0a apportions trunks.

[153] Schoonmaker Direct, p. 33 l. 1-16.

County Telephone, for example, HAI 5.0a assumes that special access circuits represent 202 of the 432 total dedicated trunks.[154] Thus, adding dedicated transport costs with common transport costs – as Mr. Schoonmaker has done – results in a substantial portion of special access costs being "loaded on top of" common transport costs. Mr. Schoonmaker thus would inappropriately require the transport and termination rates paid by T-Mobile and Cingular to subsidize special access services.

➤ Secondly, Mr. Schoonmaker's "correction" is not needed in the first place. The HAI model calculates a total of 871 common, dedicated and direct trunks for Cass County.[155] Of the total, 330 are common transport and 432 are dedicated transport as mentioned above, leaving 109 for direct transport.[156] In response to T-Mobile data requests, Cass County indicated it actually **__________________________ ______** more than the 871 trunks modeled by HAI 5.0a.[157] Furthermore, these **____**, which are included in the 871 figure. Thus, however the HAI model might classify trunks as common, dedicated or direct, the total trunk quantity, which determines the cost per trunk and cost per minute of use, is not overstated. It is understated by **___**, plus however many special access circuits Cass County provides. Mr. Schoonmaker should be *reducing*, not increasing, transport costs.

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154 Conwell Rebuttal, p. 13, Item 20.

155 Conwell Direct, Schedule WCC-15.

156 Conwell Rebuttal, p. 13, Item 20.

157 Id.

- Mr. Schoonmaker's adjustment also does not make common sense and is refuted by the record in this case. A minute of mobile-to-land traffic does not travel over a common transport trunk and a dedicated transport trunk simultaneously. *Neither T-Mobile nor Cingular sends any traffic whatsoever to any Petitioner over dedicated trunks.* And, under no circumstances should special access circuit costs be loaded on top of trunks carrying voice traffic.
- The analysis above applies to all of the Petitioners; Respondents reference Cass County only to illustrate the flaw in Mr. Schoonmaker's analysis and proposal.

In summary, Mr. Schoonmaker has taken common transport costs that were overstated due to the issues discussed in previous sections and then made matters much worse – without a reasoned justification.

(ii) Respondent's counterproposal not to include dedicated transport costs is supported by both the record and common sense.

- The record in this case is uncontroverted that neither T-Mobile nor Cingular sends any traffic to any Petitioner over dedicated trunks.[158]
- Allowing Petitioners to recover the costs of dedicated transport through transport and termination rates charged T-Mobile and Cingular will inappropriately allow Petitioners to recover costs for facilities that Respondents' traffic does not use, and will also inappropriately require T-Mobile and Cingular to subsidize Petitioners' special access services.

[158] See, e.g., Pue Direct, p. 23 l. 10-11: "Thus, at present, no direct interconnection trunks have been established between Cingular and any Petitioner."

On this issue, the Arbitrator and the Commission should rule that Petitioners' transport and termination rates should not be allowed to include any costs of dedicated transport. That is the only ruling needed.

(f) The Ninth Flaw: The Appropriate Value of Petitioners' Proposed Forward-Looking Signaling Link Costs (Matrix Issue No. 13 - "What is the appropriate value of Petitioners' forward-looking signaling link costs?")

Carriers use signaling to set-up and take-down interoffice calls, whether the call remains on their network or is destined to the network of another carrier. Most carriers use a Signaling System 7 ("SS7") network separate from the network used to transport voice or data communications.[159] An SS7 network may be used, for example, to retrieve information from a database (these are known as TCAP messages). Of relevance to this proceeding are ISUP messages over an SS7 network.

ISUP is an acronym meaning "ISDN User Part." ISUP signaling refers to the exchange of short data messages between Petitioners' end offices and computers used to set-up interoffice telephone calls. The computer is referred to as a Signal Transfer Point ("STP") and is part of the SS7 network. ISUP signaling and costs are the capital costs and operating expenses associated with plant used to handle these messages.[160]

Joint Matrix Issue No. 13 involves the issue of whether Petitioners have overstated their costs for the SS7 networks they utilize. Following is a summary of Petitioners' and Respondents' positions on this issue:

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159 As discussed above, although an SS7 network may use facilities that are separate from the facilities used in hauling voice communications, signaling costs are a necessary component of transport of voice communications and, therefore, are properly included in a LEC's rate for transport.

160 See generally Conwell Direct, p. 86 1. 4-15.

Petitioners' Position:	Petitioners simply adopted the ISUP signaling costs that the HAI model 5.0a produces.
Respondents' Position:	Respondents have identified two fundamental flaws in the HAI model calculation of the signaling link portion of ISUP signaling costs, errors that overstate their forward-looking costs. Respondents' cost expert therefore computed corrected costs using the Petitioners' actual current payments for signaling links.

(i) Petitioners have not meet their burden of proof for proposed SS7 signaling costs. In fact, they have not even responded to the first fundamental flaw identified by Respondents.

- Petitioners have simply adopted the ISUP signaling costs produced by the HAI model, and that model assumes that every one of Petitioners' switches – including remote switches – is connected directly to the SS7 network. This assumption, however, is neither reasonable nor supported by any record evidence:
  - The uncontroverted evidence is that Petitioners do not **____________________ ______________________________.**[161]
  - For example, Cass County Telephone **______________________________ ______________________________ ______________________________**.
  - However, remote switches are not capable of being connected directly to an SS7 network. In reality, Cass County **______________________________ ______________________________ ______________________________**.

[161] Conwell Direct, p. 87 l. 15-19 – p. 88 l. 1-2. Mr. Schoonmaker chose not to respond to this point in his rebuttal testimony.

- The same problem applies to all Petitioners with host–remote switching arrangements. For example, HAI 5.0a assumes that Fidelity Telephone has a pair of signaling links for eight switches, or a total of 16 links. It turns out that Fidelity **____

____

____

____________**.[162]

- HAI 5.0a also assumes that the signaling links would run over the same, fictitious interoffice cable routes as common transport (*i.e.*, a cable route from each Petitioner switch to the nearest BOC wire center). Consequently, Petitioners' signaling link costs suffer from all the problems Respondents identified in connection with Matrix Issues 7, 8 and 9.[163]

  - In response to this second problem, Mr. Schoonmaker has stated:

    > Mr. Conwell does not understand the signaling calculations for small ICO's and the differences between those calculations for the RBOCs. For small ICO's the HAI model uses a simplified investment input that is based on an amount per line per wire center. Thus, the calculation of signaling investment is totally unrelated to distance, cable sizes, cable sharing, etc. for small ICOs.[164]

  - However, it is Mr. Schoonmaker who misunderstands his own cost model. The HAI model computes a total signaling link investment for Cass County Telephone composed of two parts:

[162] Conwell Direct, p. 87 l. 17 – p. 88 l. 2.

[163] Conwell Direct, p. 88 l. 4-8.

[164] Schoonmaker Rebuttal, p. 38 l. 18-22.

- o The first part represents a tiny fraction of the total investment and is based on 6,633 switched lines multiplied times the "amount per line," referred to above by Mr. Schoonmaker.[165]
- o The second part (and vast majority) of the signaling link investment is based on the model's assumption of two links per switch multiplied times interoffice facility investments per trunk from $1,672 to $17,242. These investments per trunk are the same values underlying the common transport cost calculations and do indeed reflect overstated interoffice cable lengths, oversized cables, a lack of cable sharing, and oversized transport transmission equipment.[166]

- ➤ Thus, Mr. Schoonmaker's criticism of Mr. Conwell, even if it had validity, does not apply to the vast majority of signaling costs that Cass County is attempting to recover.
- ➤ The flaws Respondents identified with respect to Cass County apply as well to the cost studies prepared by all of the Petitioners.

The FCC has held that in a LEC cost study, "network design assumptions must be reasonable, and model outputs must be plausible." Virginia Arbitration Cost Order, 18 FCC Rcd at 17742 ¶ 38. The assumptions Petitioners used in developing their signaling costs are entirely unsupported and are neither reasonable nor plausible.

(ii) Respondents' counterproposal to use actual SS7 signaling costs is both reasonable and plausible.

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165 For the total number of switched access lines assumed by HAI 5.0a for Cass County, See Conwell Direct, Schedule WCC-3, cell H-14.

166 See Conwell Direct, Schedule WCC-15.

- Respondents have based their counterproposal on Petitioners' actual monthly payments to the Missouri Network Alliance and other SS7 service providers, as shown in Petitioners' responses to data requests.[167]
- The resulting signaling costs reflect current Petitioner costs for signaling links, not the unrealistic assumptions and overstated interoffice transport costs of the HAI model.
- Respondents' proposal reflects the actual number of links used by the Petitioners, rather than the incorrect quantities assumed for remote switches in HAI 5.0a.
- Respondents' proposal, based on reality rather than assumptions, results in higher ISUP signaling costs for some Petitioners, compared to the HAI 5.0a cost studies produced by Petitioners, and in lower costs for others. For example, HAI 5.0a produces a signaling cost of $0.0006/MOU for Granby Telephone,[168] while Respondents' proposal produces a cost of $0.0014/MOU.[169] Thus, for Granby, Respondents propose a higher signaling cost than does HAI 5.0a. On the other hand, the HAI 5.0a model produces a signaling cost for Cass County of $0.0011/MOU,[170] while Respondents propose a lower cost of $0.0007/MOU.[171]

On this issue, the Arbitrator and Commission should adopt the signaling costs set out in Schedule WCC-21 to the direct testimony of Respondent's witness Craig Conwell.

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167 Conwell Direct, p. 88 l. 12-13.

168 Schoonmaker Direct, Schedule RCS-4.

169 Conwell Direct, Schedule WCC-21.

170 Schoonmaker Direct, Schedule RCS-4.

171 Conwell Direct, Schedule WCC-21.

Respondents' Suggested Ruling on Matrix Issue Nos. 1-13

The discussion above describes in detail the nine fatal flaws contained in Petitioners' cost studies. As the Arbitrator and Commission have no doubt noticed, there are a total of 13 Matrix Issues involving the appropriate intraMTA rate for each Petitioner. All nine of the Respondents' cost study flaws are contained in the 13 issues in the Joint Matrix. The other four matrix issues (Nos. 1, 2 6 and 11) require the Arbitrator and Commission to establish appropriate transport and termination rates for each Petitioner, and also to establish the various components of the rates. As an aid in the decision-making process, the following chart lists each cost/rate issue, which is then followed by Respondents' suggested ruling on that particular issue

Issue	Respondents' Proposed Ruling
1. Must each Petitioner establish its own separate transport and termination rate based upon its own separate costs?	**Yes, each Petitioner must establish its own transport and termination rate based upon its specific forward-looking costs**
2. What is the appropriate transport and termination rate for each Petitioner?	**The following transport and termination rates are adopted for the following Petitioners: BPS - $0.0039/MOU Cass County - $0.0073/MOU Citizens - $0.0046/MOU Ellington - $0.0091/MOU Farber - $0.0074/MOU Fidelity - $0.0070/MOU Granby - $0.0025/MOU Grand River - $0.0071/MOU Green Hills - $0.0077/MOU Kingdom - $0.0078/MOU KLM - $0.0103/MOU Lathrop - $0.0046/MOU Le-Ru - $0.0147/MOU Mark Twain - $0.0076/MOU McDonald County - $0.0097/MOU Miller - $0.0084/MOU New Florence - $0.0121/MOU**

Issue	Respondents' Proposed Ruling
	Oregon Farmers Mutual - $0.0081/MOU Peace Valley - $0.0146/MOU Steelville - $0.0081 The following seven Petitioners have not presented enough information to allow the calculation of a proper transport and termination rate: Craw-Kan, Holway, Iamo, RockPort, Goodman, Ozark and Seneca. The transport and termination rates for these seven Petitioners shall be set at bill and keep on a interim basis until those seven Petitioners produce the following specific data that will allow appropriate rates to be calculated: • A diagram of Petitioner's current interoffice network showing the following: o Cable distances or lengths by cable route for all routes in interoffice network. o Cable sizes (in fibers) by cable route and fibers in service. (Specify number of fibers used by interoffice transport system by route.) o Interoffice transport system (over which mobile-to-land traffic is transported) between each pair of network nodes (or for ring(s) serving multiple nodes). o Total demand in terms of DS0 equivalents in service on the interoffice transport system between each pair of network nodes, including DS0 equivalents for voice trunks, private lines, special access circuits, and any other traffic or circuits being transported. • Petitioner's current monthly payments for SS7 interconnection links (as provided by other

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Issue	Respondents' Proposed Ruling
	Petitioners).
3. What is Petitioners' forward-looking cost to purchase and install new switches?	**Because the Commission finds that the only usage-sensitive portion of a modern digital switch is the trunking equipment, the Commission adopts the HAI 5.0a value for that equipment – $0.0012/MOU – as the appropriate forward-looking cost of each Petitioner to purchase and install new switches.** **If the Commission finds that more than the trunking equipment of a modern digital switch is usage-sensitive, then the Commission should use the publicly avail information from the FCC to determine the following costs:** **Standalone/Host Switch: $428,296.00** **Remote Switch: $142,384.00** **Per-Line Cost (All switches): $76.56**
4. What is the appropriate value for the usage-sensitive portion of Petitioners' forward-looking end office switching costs?	**The Commission finds that the only usage-sensitive portion of a modern digital switch is the trunking equipment. The Commission adopts the HAI 5.0a value for that equipment - $0.0012/MOU as the appropriate forward looking cost of each Petitioner for such trunking equipment.**
5. What is the appropriate amount of Petitioners' forward-looking floor space attributable to switching?	**Standalone/Host Switches: 200 sq. ft.** **Remote Switches: 100 sq. ft.** **These values have been used to compute the costs of trunking equipment adopted in Issue 4.**
6. What is the appropriate per MOU, forward-looking end office switching cost for all Petitioners?	**End office switching costs vary among Petitioners from $0.00116 to $0.00120 per MOU. The Commission adopts the values established in Schedule WCC-1 to the Direct Testimony of Respondents' witness Craig Conwell.**
7. What are Petitioners' appropriate	**Petitioners' switches should be assumed**

Issue	Respondents' Proposed Ruling
forward-looking cable lengths?	to remain in current locations, and the existing interoffice cable distances among those switches should be used to compute transport costs.
8. What are Petitioners' appropriate, forward-looking cable sizes?	The Commission finds that a mix of eight, 12 and 24 fiber cables should be used for each Petitioner.
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 Commission finds that Petitioners' cost studies should be corrected to assume that six fibers are used for interoffice transport based on the experience of Cass County Telephone. Costs of all other fibers in each Petitioners' transport system should be attributed to uses other than transport and termination of voice-grade traffic.
10. What is the appropriate sizing of Petitioners' forward-looking, interoffice transmission equipment?	The Commission finds that each Petitioner's forward looking transport equipment should be based upon OC3 systems without optical regenerators.
11. What are the appropriate, forward-looking common transport costs for each Petitioner?	The Commission finds that 20 Petitioners have produced enough information to allow appropriate transport costs to be computed. The Commission adopts those costs as listed in Schedule WCC-1 to the Direct Testimony of Respondents' witness Craig Conwell. The Commission will adopt transport costs for the remaining seven Petitioners once those companies have produced the data listed above in Issue 2.
12. Should any of the costs identified in HAI 5.0a as dedicated transport be included in Petitioners' transport and termination rates?	The Commission finds that no dedicated transport costs, as identified in HAI 5.0a, should be included in Petitioners' transport and termination rates.
13. What is the appropriate value of Petitioners' forward-looking signaling link costs?	The Commission finds that Petitioners' signaling link costs should be corrected to reflect current charges paid for SS7 interconnection. The Commission adopts the costs listed in Schedule WCC-21 to the Direct Testimony of

Issue	Respondents' Proposed Ruling
	Respondents' witness Craig Conwell.

B. SECOND JOINT ISSUE: MATRIX ISSUE NO. 14: PETITIONERS HAVE FAILED TO DEMONSTRATE ANY ENTITLEMENT FOR COMPENSATION FOR THE PERIOD 1998-2001

During the period between 1998 and 2001, Petitioners and Respondents exchanged traffic without paying each other for transport and termination. For all practical purposes, during this period the parties were using a de facto bill-and-keep arrangement, which is common among carriers that do not exchange a significant volume of traffic and which Congress has acknowledged is an acceptable form of reciprocal compensation. See 47 U.S.C. § 252(d)(2)(B)(i).

Petitioners contend that Respondents should compensate them for the intraMTA mobile-to-land traffic Respondents sent to them over this three-year period, stating in Issue No. 14 of the Joint Issues Matrix:

> The Petitioners' position is that they should be compensated at the same $0.035 per minute of use for all intraMTA 1998-2001 traffic that Petitioners have proposed for intraMTA traffic under the new agreement or at the rate finally determined by the Commission as a result of this arbitration.

For the following reasons, Petitioners are not entitled to the relief they seek.

1. The Contractual Language Proposed by Petitioners Does Not Accurately State the Facts

On this issue, Petitioners have proposed the same language to both T-Mobile and Cingular:

> At the same time that the Parties execute this Agreement, they are entering into a confidential agreement to settle all claims related to traffic exchanged between the Parties prior to the Effective Date of this Agreement. Each Party represents that this settlement agreement completely and finally resolves all such past claims.

This is the only language proposed by Petitioners on this issue, and the proposed language is simply incorrect. Neither Cingular nor T-Mobile has reached agreement with Petitioners to settle claims related to past traffic.[172] It would be totally inappropriate for the Commission to adopt language that misrepresents the facts.

2. In an Arbitration, This Commission Lacks Delegated Authority to Address Claims Involving a Period That Predates the Date of the Negotiation Request

The Arbitrator, consistent with Commission precedent,[173] granted on December 30, 2005 T-Mobile's motion to dismiss this claim, ruling that it is "not relevant to the [Section 252(c)] standards for arbitration" and is "not properly before the Commission in this arbitration." Order Granting Motion to Dismiss at 2 (Dec. 30, 2005). Petitioners filed an application for rehearing, and the Arbitrator then set aside his December 30 order so "the Commission will be able to consider all of the issues raised in the petition." Order Regarding Dismissal of Issues A and B Between T-Mobile and Petitioners (Jan. 9, 2006); Order Regarding Motion for Rehearing (Jan. 12, 2006). Subsequently, the Arbitrator denied Cingular's request that Petitioners' claims on this issue be dismissed as against Cingular, stating: "That the Arbitrator intends to present issues of past compensation is a reflection of his intent to abide by the procedural requirements of the Telecommunications Act and dispose of all issues in his report to the Commission, rather that his determination that issues of past compensation are relevant to this arbitration." Order Regarding Cingular's Motion to Dismiss (Jan. 18, 2006). At no time did the Arbitrator disturb his prior

[172] Pue Rebuttal, p. 5 l. 7-20.

[173] See Alma/T-Mobile Arbitration Order Regarding Motions in Limine (Aug. 3, 2005).

finding that the claim for past competition is "not relevant to the [Section 252(c)] standards for arbitration."[174]

As the Arbitrator has already found, the structure of Section 252 makes clear that the only relevant issues in an arbitration proceeding are those that "relate[] to the interconnection agreement" and that issues involving past claims are "not relevant":

> The [past] compensation concerns presented in [Petitioners'] issues A and B are not relevant to the [Section 252(c)] standards for arbitration. The standards set out above concern only the contemplated interconnection agreement, and the provisions to be included therein. The Commission's consideration of issues related to the interconnection agreement is therefore prospective. Neither issue A nor B has to do with interconnection agreements or arbitration under the Telecommunications Act. They are therefore not properly before the Commission in this arbitration proceeding and shall be dismissed. Order Granting Motion to Dismiss at 2 (Dec. 30, 2005).

The Arbitrator's view is confirmed by FCC rules, which make clear that the only compensation that is relevant in an arbitration proceeding is compensation for traffic exchanged *after* the date negotiations were requested.[175] The Arbitrator's view is further confirmed by two other State commission decisions that have rejected the same arguments that Petitioners repeat here – and in both cases, the federal courts rejected the rural LEC appeal of the dismissal of their claims for past compensation.[176] In addition, as one federal appellate court has held:

> If the FPSC must arbitrate *any* issue raised by a moving party, then there is effectively no limit on what subjects the incumbent must negotiate. This is

174 The Arbitrator, in rendering his January 9 and January 18 orders, did not rely on any of the reasons Petitioners cited in their application for rehearing.

175 FCC Rule 20.11(f) specifies that "[o]nce a request for interconnection is made" by a rural LEC to a wireless carrier, "the interim transport and termination pricing described in § 51.715 shall apply." FCC Rule 51.715(a)(2), in turn, makes clear that a carrier "may take advantage of such an interim arrangement only after it has requested negotiation." FCC rules contain no provision for the application of interim compensation to traffic exchanged prior to the request for negotiations.

176 See T-Mobile Motion to Dismiss Petitioners' Proposed Issues A and B, at 5-6 (Nov. 16, 2005). See also Pruitt Rebuttal, p. 4 l. 20 – p. 5 l. 15.

> contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate.[177]

And, as a federal district court stated more recently, "the [State] Commission lacked authority to arbitrate any issue beyond the scope of § 51.715, which specifically limited the compensation to the date when Western Wireless requested negotiations from Great Plains."[178]

In short, arbitrations involve matters that are prospective only, not retrospective. The Commission lacks the authority under the Act to consider or resolve – in a Section 252 arbitration proceeding – compensation claims for traffic exchange prior to the request for negotiations.

3. Petitioners Are Not Allowed to Condition Interconnection Negotiations Upon the Settlement of Unrelated Claims

The FCC has been very clear that an incumbent LEC cannot require a competitive carrier to negotiate and settle "separate matters" during interconnection negotiations.

> We believe that requesting carriers have certain rights under sections 251 and 252, and those rights may not be derogated by an incumbent LEC demanding *quid pro quo* concessions in another proceeding.[179]

In other words, Petitioners are not allowed to demand concessions, regarding compensation for past traffic, as part of current interconnection negotiations. T-Mobile and Cingular are under no obligation to negotiate past compensation issues, or reach agreement on any such issues. And, if agreement is not reached, Petitioners may not include the issue in the present proceeding.

The Fifth Circuit Court of Appeals has specifically held that "only issues *voluntarily* negotiated by the parties pursuant to § 251(a) are subject to the compulsory arbitration provision," and that that State commissions may arbitrate "only issues that were the subject of

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177 MCI v. BellSouth, 298 F.2d 1269, 1274 (11th Cir. 2002)(emphasis in original).

178 WWC License v. Boyle, No. 4:03CV3393, U.S. Dist. LEXIS 17201, at *15-16 (D. Neb., Jan. 20, 2005).

179 See Local Competition Order, 11 FCC Rcd 15499, 15576 ¶ 153 (1996).

the *voluntary* negotiations."[180] In other words, a party to a negotiation is "clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act."[181] Thus, neither Cingular nor T-Mobile had any obligation to accede to Petitioners' demand to tie negotiations for the future exchange of traffic with resolution of compensation claims for past traffic.

If Petitioners may not lawfully demand that T-Mobile and Cingular negotiate and resolve pre-negotiation claims, it necessarily follows that Petitioners cannot make such claims an "open issue" simply by including them in an arbitration petition. If it is unlawful for Petitioners to demand in Section 252(a) negotiations that T-Mobile and Cingular resolve claims that arose prior to negotiations, as the FCC has clearly held, it is similarly unlawful for Petitioners to ask this Commission to grant relief on such claims in an arbitration proceeding.

The Commission should therefore rule that the issue in question was not properly included in the subject Petitions for Arbitration, and that the Commission therefore lacks jurisdiction to rule on this issue.

4. Cingular and T-Mobile Had No Legal Duty to Pay Compensation for the Traffic at Issue

The Missouri Supreme Court recently affirmed this Commission's decision that, under federal law, Petitioners may not impose access charges for terminating intraMTA mobile-to-land traffic. See State ex rel. Alma Telephone v. Missouri Public Service Comm'n, 2006 Mo. LEXIS 2 (Jan. 13, 2006). If, as this Commission (and the Missouri Supreme Court) has held, Petitioners may not, consistent with federal law requirements, seek compensation under access tariffs, then Petitioners have no basis in law to recover compensation for the three year period at issue.

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180 Coserv v. Southwestern Bell, 350 F.3d 482, 484, 487 (5th Cir. 2003)(emphasis added).

181 *Id.*, at 488.

The FCC has held that, under federal law, there are "three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; (2) tariff; or (3) contract."[182] There is no contract between the parties that governs the exchange of traffic for the period 1998-2001.[183] There are no FCC rules that permit a LEC to assess access charges on wireless carriers for intraMTA mobile-to-land traffic in the absence of a contract or tariff.[184] And, given the Missouri Supreme Court's recent ruling that Petitioners' attempt to modify their intrastate access tariffs (to charge for the subject traffic) was unlawful under federal law, Petitioners obviously have no claim under their access tariffs. Thus, as a matter of federal law, Petitioners have no valid legal claim for compensation for the three-year period, 1998-2001, and the Commission should dismiss this claim in its entirety.

5. Commission Consideration of the Past Compensation Claims Would Contravene Respondents' Federal Constitutional Right to Due Process of Law

The Arbitrator did not reinstate Petitioners' claims for past compensation until January 9, 2006 – after all parties had filed direct testimony (which understandably did not include any evidence concerning past claims). The hearing began two weeks later, on January 25, so Respondents were not afforded an opportunity to conduct any discovery on these claims – even though 4 CSR 240.36-040(6) guarantees a right of discovery – nor were Respondents given an opportunity to file direct testimony on this issue.[185]

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182 Wireless Access Charge Declaratory Order, 17 FCC Rcd 13192, 13196 ¶ 8 (2002), aff'd AT&T v. FCC, 349 F.3d 692 (D.C. Cir. 2003).

183 Pruitt Rebuttal, p. 8 l. 7-8; Pue Rebuttal, p. 6 l. 18-20.

184 Pruitt Rebuttal, p. 8 l. 8-10.

185 Given the dismissal of past claims in the Alma/T-Mobile arbitration, both T-Mobile and Cingular had a reasonable expectation that the same type of claims would be dismissed in this proceeding and that, as a result, there was no need to conduct any discovery on this subject. The reasonableness of this expectation was confirmed when the Arbitrator initially granted T-Mobile's motion to dismiss.

The only evidence in the record concerning the past claims is the minimal evidence Petitioners included in their arbitration petitions, to which are attached the total number of minutes Petitioners claim T-Mobile and Cingular sent them during the three year period in question. Petitioners do not, however, provide any support for their data, other than state it is based on SBC's Cellular Transiting Usage Summary Reports ("CTUSR").[186]

The Commission has recognized that SBC's CTUSR reports are "summary in form," do "not distinguish interMTA traffic from intraMTA traffic," and do "not distinguish between intrastate traffic and interstate traffic."[187] Respondents have been denied any opportunity to examine the claimed minutes of use or to investigate the accuracy of the purported records. For the Commission to attempt to arbitrate Petitioners' claims for past compensation without affording T-Mobile and Cingular the opportunity to properly review the claim and prepare a defense would constitute a clear denial of due process. Nelson v. Adams, USA, Inc., 529 U.S. 460, 471 (2000) ("[J]udicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated.").

Given that a complaint remedy "would be a better vehicle for resolving" claims for past compensation and would "better protect" the parties' "due process rights," Order Regarding Motions in Limine, Case No. IO-2005-0468, at 2-3 (Aug. 3, 2005), there is utterly no reason for the Commission to resolve claims for past compensation in this arbitration proceeding.[188]

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186 See Petitioners' T-Mobile Arbitration Petition at 7, and Petitioners' Cingular Arbitration Petition at 5.

187 See BPS Telephone v. VoiceStream, TC-2002-1077 (Jan. 27, 2005); Mark Twain Wireless Termination Tariff Order, TT-2001-139 (Feb. 8, 2001).

188 The Eighth Circuit has previously "caution[ed]" the Missouri Commission to be "more circumspect in the process it employs," noting that the next party alleging due process infirmities "may well be able to demonstrate that the procedures employed . . . either were inherently lacking in due process or resulted in prejudice to the aggrieved party. Southwestern Bell v. Missouri Public Service Comm'n, 236 F.3d 922, 925 (8th Cir. 2001).

C. THIRD JOINT ISSUE: MATRIX ISSUE NO. 15: MUST PETITIONERS PAY TO CINGULAR AND T-MOBILE RECIPROCAL COMPENSATION FOR INTRAMTA LAND-TO-MOBILE TRAFFIC THEY HAND OFF TO AN IXC?[189]

Petitioners claim they have "no obligation to pay reciprocal compensation on landline traffic terminated to Respondents by third party carriers (such as IXCs) where that traffic is neither originated by, nor the responsibility of, Petitioners."[190] The Petitioners take this position even though the Commission rejected this argument only four months ago:

> Although federal appellate courts have held that the "mandate expressed in these [FCC rule] provisions is clear, unambiguous, and on its face admits of no exceptions," Petitioners nonetheless ask the Commission to create a new exception. Specifically, they claim that they should be excused from paying reciprocal compensation for intraMTA traffic they deliver to interexchange carriers ("IXCs"). But the Commission may not rewrite or ignore FCC rules.
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> * * *
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> The MTA's geographic boundary, and nothing else, determines whether reciprocal compensation applies. Every federal court that has considered the issue has reached the same conclusion.
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> * * *
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> [T]hese [FCC] rules apply to all intraMTA traffic exchanged between a LEC and a wireless carrier.

Alma/T-Mobile Arbitration Report, IO-2005-0468 at 16, 17 and 21 (Oct. 6, 2005) (emphasis and supporting citations omitted). Notably, Petitioners take their position even though they made the

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189 Cingular takes no position on this issue – that is, it supports neither Petitioners' nor T-Mobile's position. Nevertheless, this is a joint issue because the Commission's arbitration order must meet the requirements of Section 251(b)(5), and the decision the Commission reaches in the T-Mobile arbitration necessarily must be applied in the Cingular arbitration.

190 Joint Issues Matrix No. 15. See also Petitioners' T-Mobile Arbitration Petition at 9 (Oct. 4, 2005) (Issue E); Petitioners' Cingular Arbitration Petition at 7 (Oct. 4, 2005) (Issue D).

same arguments in the Alma/T-Mobile proceeding and even though the Commission necessarily rejected these arguments in reaching the conclusion it did.[191]

T-Mobile demonstrates below that the Petitioners have provided no credible support for their position that the Commission's prior decision on this legal issue is erroneous.[192]

1. Petitioners Have Made No Attempt to Demonstrate that the Commission's Alma Decision Is "Incorrect"

Petitioners' witness has asserted that in his "opinion," the Commission's Alma decision is "incorrect."[193] But as T-Mobile's witness has pointed out in response, Mr. Schoonmaker has not identified any error, factual or legal, in the Commission's decision.[194]

T-Mobile's witness explained in detail in his direct testimony how the Commission's decision is consistent with the Act, FCC rules, FCC decisions, and federal court decisions.[195] Notably, Petitioners' witness did not address this issue at all in his rebuttal testimony – that is, *Mr. Schoonmaker made no attempt in his rebuttal testimony to respond to any of the points Mr. Pruitt made on behalf of T-Mobile in his direct testimony.*

In summary, Mr. Schoonmaker's "opinion" that the Commission's Alma Order is "incorrect" is not supported by anything beyond the bald assertion itself.

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[191] A group including the Petitioners filed three pleadings in the Alma/T-Mobile arbitration on this "IXC" issue. See, e.g., Small Telephone Company Group's Comments on the Arbitrator's Draft Report (Sept. 19, 2005); Small Telephone Company Group's *Amicus Curiae* Comments on the Arbitrator's Final Report (Sept. 27, 2005); STCG Application for Rehearing (Oct. 7, 2005). Respondents assume that the Commission considered all of STCG's arguments given the Commission's obligation to "ensure" that its arbitration order "meet[s] the requirements of section 251 of this title." 47 U.S.C. § 252(c).

[192] This issue is a pure question of law. Petitioners "admit" that the two material facts are not in dispute. See Petitioners' Opposition to T-Mobile's Motion for Summary Determination of Issue E, at 5 ¶¶. 1 and 2 (Dec. 16, 2005).

[193] See Schoonmaker Direct, p. 51 l. 25-29 ("In my opinion, the Commission's decision in that case is incorrect insofar as it requires ILECs to pay CMRS providers for terminating intraMTA calls for which the ILECs have no authority to carry, as well as no relationship with the end user and collect no revenues for providing.").

[194] See Pruitt Rebuttal, p. 14 l. 19-25.

[195] See Pruitt Direct, pp. 5-12.

2. Petitioners Have Not Demonstrated That the Commission's Alma Decision "Contradicts" and "Misapplies" FCC Rules

Petitioners assert that the Commission's Alma Order "contradicts" FCC rules:

> The Arbitration Report contradicts current FCC rules. * * * The Arbitration Report erroneously misapplies the FCC rules. * * * The Arbitration Report cites the wording of FCC Rule 51.701, but the Arbitration Report misreads and misapplies that rule.[196]

In fact, it is Petitioners' position that is incompatible with FCC rules.

(a) <u>The FCC rules Petitioners cite do not support their position.</u> Petitioners have cited two FCC rules in support of their position that their statutory reciprocal compensation obligation applies only to traffic they classify as local and not to traffic they classify as toll. In fact, neither FCC rule supports their position.

(i) <u>The 1996 version of FCC Rule 51.701(a).</u> Petitioners' witness, Mr. Schoonmaker, has quoted and relied upon FCC Rule 51.701(a) as the Rule was originally adopted in 1996.[197] But as T-Mobile's witness has pointed out, Mr. Schoonmaker neglected to advise the Commission that in 2001 the FCC amended Rule 51.701, including Rule 51.701(a), to delete all reference to the word "local" because the inclusion of that word was creating "unnecessary ambiguities."[198] Because of this amendment, Mr. Schoonmaker's position – that Petitioners' reciprocal compensation obligation is limited to traffic that Petitioners classify as local, and does not include intraMTA traffic they classify as toll – collapses entirely.

Mr. Schoonmaker's decision not to advise the Commission of the 2001 rule amendment (and to quote instead from a rule no longer in effect) almost certainly was not an oversight on his

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196 STCG Application for Rehearing at 3 ¶ 3, 4 ¶ 4 and 9 ¶ 10 (Oct. 7, 2005). <u>See also</u> Petitioners' T-Mobile Arbitration Petition at 9 ("Petitioners' position . . . is consistent with the Act [and] FCC rules . . . .").

197 <u>See</u> Schoonmaker Direct, p. 44 1. 6-8.

198 <u>See</u> Pruitt Rebuttal, p. 17-18.

part. As T-Mobile's witness has documented, Mr. Schoonmaker made the same misstatement in the Alma arbitration and that misstatement was specifically pointed out to him.[199]

(ii) FCC Rule 51.701(b)(2). Petitioners also rely on a phrase in FCC Rule 51.701(b)(2) – traffic "between a LEC and CMRS provider" – and argue that traffic handled by an IXC is not "between a LEC and a CMRS provider":

> The majority of traffic leaving the Petitioners' exchanges for CMRS providers is traffic between an IXC and a CMRS provider, not traffic between the LEC and the CMRS provider.[200]

But Mr. Schoonmaker's argument is incorrect. The Commission has recognized that the "type of interconnection [direct or indirect] that carriers use has nothing to do with the compensation the carriers must pay each other." Alma/T-Mobile Arbitration Report at 20.[201] In other words, the reciprocal compensation obligation applies even when there is an intermediary carrier (such as an IXC) involved in the transmission.

In addition, FCC Rule 51.702(b)(2), when read in its entirety, makes clear that a LEC's reciprocal compensation obligation is triggered if a call "originates and terminates within the same Major Trading Area" – not whether the intraMTA call happens to be carried by a third, intermediary carrier.[202] Indeed, as this Commission has already determined, "[t]he MTA's geographic boundary, and nothing else, determines whether reciprocal compensation applies." Alma/T-Mobile Arbitration Report at 17 (emphasis omitted).

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199 See Pruitt Rebuttal p. 18 l. 4-22.

200 Schoonmaker Direct, at p. 47 l. 8-10. See also id. at 38 l. 17-19, 39 l. 15, and 44 l. 6-12.

201 See also Atlas Telephone v. Oklahoma Corporation Comm'n, 400 F.3d at 1268 ("[T]he RTCs' obligation to establish reciprocal compensation arrangements with the CMRS provider in the instant case is not impacted by the presence or absence of a direct connection.").

202 See Pruitt Rebuttal, p. 19 l. 10-20.

(b) In fact, it is Petitioners' local/toll distinction that is incompatible with the Act and FCC rules. Both the Act and FCC Rules make clear that reciprocal compensation applies to all intraMTA calls that originate on each carriers' "network facilities" – whether or not a LEC classifies for retail purposes an intraMTA land-to-mobile call as local or toll.[203]

Indeed, the new exception that Petitioners want the Commission to create for LEC-CMRS traffic is incompatible with FCC rules, because the FCC included such an exception in its rule pertaining to traffic that LECs exchange with "a telecommunications carrier other than a CMRS provider," but the FCC did not include the same exception in its rule pertaining to traffic exchanged between a LEC and a CMRS provider. *Compare* 47 C.F.R. § 51.701(b)(1) *with* § 51.701(b)(2).[204] As one federal appellate court has held:

> Significantly, the [FCC] did not carry forward that same [51.701(b)(1)] 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 exchanged, yet chose not to extend a similar exception to LEC-CMRS traffic. When in exercising its quasi-legislative authority an agency includes a specific term or exception in one provision of a regulation, but excludes it in another, we will not presume that such term or exception applies to provisions from which it is omitted.

Atlas Telephone v. Oklahoma Corporation Comm'n, 400 F.3d at 1265 (supporting citations omitted). Indeed, Petitioners' witness acknowledged at the hearing that the FCC in its Rule 51.701(b)(1) "obviously exclud[ed] access traffic" – that is, traffic a LEC sends to an IXC – from the scope of a LEC's reciprocal compensation obligation with respect to calls destined "to a telecommunications carrier other than a CMRS provider."[205]

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203 See 47 U.S.C. § 252(d)(2)(A)(i); 47 C.F.R. §§ 20.11(b)(1), 51.701(e); See also Pruitt Direct, p. 7 l. 1-21.

204 See Pruitt Direct, p. 8 l. 1-13.

205 Tr. Vol. 3, p. 257 l. 21.

In summary, nothing supports Petitioners' claim that this Commission's Alma decision "contradicts" and "misapplies" the Act and FCC rules.

3. This Commission's Alma Decision Is Consistent with FCC Decisions

Petitioners have additionally asserted that the Commission's Alma decision "contradicts" and "misreads and misapplies the FCC's . . . decisions."[206] Petitioners make this argument even though the FCC made clear in its order adopting Rule 51.701 that *all* intraMTA LEC-CMRS traffic is subject to reciprocal compensation:

> [W]e 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). . . . [W]e conclude that the largest FCC-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). . . . 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.
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> * * *
>
> We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges. Local Competition Order, 11 FCC Rcd 15499, 16014 ¶ 1036, 16016 ¶ 1043 (1996).

The FCC has, moreover, repeated this view in various orders issued since 1996, including:

- "The Commission also held that reciprocal compensation, rather than interstate or intrastate access charges, applies to LEC-CMRS traffic that originates and terminates within the same Major Trading Area (MTA)." ISP Remand Order, 16 FCC Rcd 9151, 9173 ¶ 47 (2001).
- "LEC-CMRS interconnection for calls that originate and terminate in the same MTA (as of the start of a call) are governed by section 251, and are subject to reciprocal

206 See STCG Alma Comments at 2 and 8 (Sept. 27, 2005).

compensation." Unified Intercarrier Compensation Regime, 16 FCC Rcd 9610, 9642-43 ¶ 91 (2001).

- "The term 'non-access traffic' means any telecommunications traffic that is . . . exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area (MTA)." Small Entity Compliance Guide: Reciprocal Compensation Arrangements Between LECs and CMRS Providers, 20 FCC Rcd 12158 (July 14, 2005).

It is Petitioners that misread and misapply FCC orders. For example, their witness, Mr. Schoonmaker, has quoted from the sixth sentence in paragraph 31 of the FCC's 2000 TSR Wireless Order in support of the Petitioners' local/toll distinction:

> Such [intraMTA] traffic falls under the reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier. Schoonmaker Direct, p. 40 l. 23-25 (underscoring added by Mr. Schoonmaker).

But in making this quote and point, Mr. Schoonmaker neglects to quote from the first two sentences of paragraph 31, in which the FCC rejected Mr. Schoonmaker's very argument by recognizing that a LEC's reciprocal compensation obligation applies regardless of how a LEC rates its calls to end users served by its network:

> Section 51.703(b) concerns how carriers must compensate each other for the transport and termination of calls. *It is does not address the charges that carriers may imposes upon their end users.* TSR Wireless v. U S WEST, 15 FCC Rcd 11166, 11184 ¶ 31 (2000) (emphasis added), aff'd Qwest v. FCC, 252 F.3d 462 (D.C. Cir. 2001).

Moreover, although Mr. Schoonmaker quoted the sixth sentence in paragraph 31, he also neglected to quote the very next (seventh) sentence:

> This may result in the same call being viewed as a local call by the carrier and a toll call by the end user. Id.

And, the FCC made clear with a concrete example (in the eighth and ninth sentences of paragraph 31) that, contrary to Mr. Schoonmaker's assertion to this Commission, a LEC's reciprocal compensation obligations apply *even if the calling party is assessed toll charges*:

> For example, to the extent that 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. *However, nothing prevents U S West from charging its end users for toll calls completed over the Yuma-Flagstaff T-1.* Id. (emphasis added).

Notably, Mr. Schoonmaker chose not to advise the Commission of the relevant sentences of paragraph 31 even though, again, this "oversight" had been previously pointed out to him.[207]

4. Petitioners Ignore Applicable Federal Court Decisions

Because any appeal of the Commission's arbitration decision in this case will be heard by a federal court, it is useful to review how federal courts have interpreted the FCC's federal reciprocal compensation rules. As the Commission has previously recognized, "[e]very federal court that has considered the issue has reached the same conclusion" as the Commission. Alma/T-Mobile Arbitration Report at 17.

- Both the federal district court and the Tenth Circuit affirmed the Oklahoma Commission's decision that the intraMTA rule applies to all 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

[207] See Pruitt Rebuttal, p. 17 l. 1-4.

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 of the Nebraska Public Service Commission to the extent it exempted (from the reciprocal compensation obligation) 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 intermediate 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 in Appendix).

- Last August, 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, 385 F. Supp 2d 797 (S.D. Iowa 2005). Notably, this federal court pointedly declined to follow Missouri Commission decisions upon which the Iowa rural ILECs had relied. See id. at 813 n.36.

- 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, CV-99-80-GF-CSO, 2003 U.S. Dist. LEXIS 24871 *67 (D. Mont., Aug. 22, 2003) (emphasis added) (copy in Appendix).

Petitioners have no meaningful response to any of these federal court cases; they do not, for example, even attempt to show that the courts' legal analysis is wrong in any way. Rather, Petitioners ask the Commission to ignore these consistent court rulings and instead base its decision on a single sentence contained in a footnote in a federal district court opinion,[208] where the court stated in passing:

> A call that originates from an MTA that does not correspond with a local telephone carrier's region is considered a "toll call" and a different system of compensation exists. VoiceStream d/b/a T-Mobile v. BPS Telephone, et al., No. 05-04037-CV-C-NKL, Slip op. at 3 n.3 (W.D. Mo., Aug. 24, 2005).

This sentence, to the extent one can even discern its exact meaning, is *dicta* – that is, the statement was not necessary to the decision the court made.[209] Federal courts have repeatedly held that "unless an issue is squarely presented in a case, any discussion of the question in the

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208 See Petitioners' Opposition to T-Mobile's Motion for Summary Determination of Issue E, at 8 (Dec. 16, 2005). See also Small Telephone Company Group *Amicus Curiae* Comments on the Arbitrator's Final Report, Case No. IO-2005-0468, at 2, 4 and 15 (Sept. 27, 2005).

209 Petitioners do not dispute that the sentence upon which they rely is *dicta*. See Petitioners' Opposition to T-Mobile's Motion for Summary Determination of Issue E, at 8 (Dec. 16, 2005).

opinion (*dicta*) is only a preliminary view and therefore not to be given precedential weight."[210] Courts have explained that they give no weight to *dicta* because, since the statement is "unnecessary to the outcome of the earlier case," the dicta is "not as fully considered as it would have been if it were essential."[211]

It is apparent that the BPS court did not fully consider the intraMTA issue. The sentence upon which Petitioners rely is not supported by any authority, such as FCC rules and orders. The court did not mention, much less discuss, any of the federal court decisions that have held unequivocally that the FCC's intraMTA rule applies to all intraMTA traffic, whether or not an IXC is involved in the transmission. And, the "Background" section in which this footnote sentence is found, contains numerous misstatements of fact, further suggesting that the court did not fully consider the facts and law pertaining to issues that were not material to its decision.[212]

5. The Commission Lacks Authority to Grant the Non-Reciprocal Relief Petitioners Seek

Congress has specified that in resolving this intraMTA issue, this Commission "*shall ensure* that such resolution . . . meet[s] the requirements of section 251." 47 U.S.C. § 252(c)(1) (emphasis added). In Section 251(b)(5), Congress imposed on Petitioners the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Thus, under the legal standard that Congress has imposed, the only decision that this

210 Time Warner v. FCC, 144 F.3d 75, 79 (D.C. Cir. 1998). See also Plaut v. Spendthrift Farm, 514 U.S. 211, 232 (1995) (Supreme Court's practice is not "to decide cases by the weight of prior dicta."); Conoco v. Skinner, 970 F.2d 1206, 1219 (3d Cir. 1992) ("We give no weight to the dicta of Sun Chemical."). The Commission, too, has declined to give weight to *dicta*. See, e.g., Second UtiliCorp/St. Joseph Light Order, Case No. EM-2000-292 (Feb. 26, 2004).

211 Parents Involved v. Seattle School District, 377 F.3d 949, 978 n.37 (9th Cir. 2004), quoting United States v. Crawley, 837 F.2d 291, 292-93 (7th Cir. 1988).

212 For example, the court stated that Petitioners here "receive no compensation for completing" intraMTA calls that T-Mobile delivers to an IXC. See Slip op. at 2.

Commission can make is one that ensures there exists reciprocal compensation between the parties.

The position the Commission adopted in its Alma/T-Mobile Arbitration Report ensures reciprocal compensation for all intraMTA traffic. Under this position, Petitioners would receive compensation for all intraMTA mobile-to-land calls – whether the parties are connected directly or indirectly, and if the latter, whether the intermediary transit carrier is classified as a LEC or an IXC. Similarly, under this position, Respondents would receive compensation for all intraMTA land-to-mobile calls.

In stark contrast, the position advocated by Petitioners would not result in "the mutual and reciprocal recovery by each carrier of 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." 47 U.S.C. § 252(d)(2)(A)(i). Under Petitioners' position, Petitioners would still receive compensation for all intraMTA mobile-to-land traffic. However, wireless carriers like Respondents would receive compensation for only some intraMTA land-to-mobile calls that "originate on the network facilities of the" Petitioners. Specifically, wireless carriers would receive compensation for intraMTA calls Petitioners classify as "local" for retail purposes, but they would not receive compensation for intraMTA land-to-mobile calls Petitioners classify as "toll" for retail purposes.[213]

However, because Petitioners' refuse to recognize local telephone numbers that wireless carriers obtain in compliance with FCC rules, unless Respondents establish direct interconnection trunks, and because no direct interconnection trunks currently exist between

[213] Petitioners' witness acknowledged at the hearing that they would continue to receive originating access charges from IXCs even if they pay reciprocal compensation for these land-to-mobile intraMTA calls. See Tr. Vol. 3, p. 259 l. 20-21. Petitioners' witness further acknowledged that it is technically feasible for Petitioners to comply with the Commission's Alma order. See id. at p. 264 l. 16-20.

Petitioners and Respondents, *every call dialed by a customer of a Petitioner to a customer of Respondents must be dialed as a toll call.* The practical effect of Petitioners' position is that *Petitioners would pay **no** compensation at all to Respondents* for the termination of intraMTA traffic, while Respondents would pay compensation to Petitioners for *all* such traffic. Petitioners' proposal is thus incompatible with the Act's reciprocal compensation regime.

6. Other Petitioner Assertions Lack Merit

Realizing the weakness of their case under the Act, FCC rules, FCC orders, and federal court decisions, Petitioners seek to divert the Commission's attention with meritless arguments. Because it is likely that Petitioners in their post-hearing brief will repeat the baseless arguments they have made in the past, and because there is no opportunity to submit a post-hearing reply brief, T-Mobile is compelled to address these assertions briefly.

(a) Assertion: Reciprocal compensation would result in wireless carriers being paid twice for the same call. Petitioners have asserted that "wireless carriers are already receiving compensation from the IXCs and the [Alma] Arbitration Report errs in that it would effectively allow the wireless carriers to be compensated twice for the same call: once from the IXC and a second time from the small rural LEC."[214] Similarly, in opposing T-Mobile's motion for summary determination on this intraMTA issue, Petitioners stated:

> At hearing, Petitioners intend to address the fact that T-Mobile is already being compensated for these calls by IXCs and/or their own customers. . . . Prior cross-examination of Respondent T-Mobile's own expert witnesses, [*sic*] Mr. Billy Pruitt, indicates that wireless carriers are already being paid for this traffic by IXCs. Petitioners' Opposition to T-Mobile's Motion for Summary Determination of Issue E at 6 (Dec. 16, 2005).[215]

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214 STCG Application for Rehearing at 10 (Oct. 7, 2005).

215 Petitioners' Opposition to T-Mobile's Motion for Summary Determination of Issue E at 6. (Dec. 16, 2005).

The only evidence that Petitioners have submitted on this factual issue is the testimony of their one witness, Mr. Schoonmaker, who stated in his direct testimony:

> [D]epending on their compensation arrangements with the IXC, the Respondents could be entitled to terminating compensation from their end users, the IXC, and the ILEC. (Schoonmaker Direct , p. 50 1. 3-5).

At the hearing, Mr. Schoonmaker again stated that "at times IXCs have paid access to [unidentified] wireless carriers."[216] But he further acknowledged that under "a FCC decision a couple of years ago" (i.e., the FCC's 2002 Wireless Access Charge Order), that "wireless carriers could only charge IXCs for terminating costs under contract."[217] And, Mr. Schoonmaker admitted that IXCs have no incentive to enter into such contracts with wireless carriers:

> IXCs aren't terribly interested in entering into contracts to pay for that terminating traffic when they can get it for free.[218]

In addition, the uncontroverted testimony was that IXCs that had been paying terminating access charges to Sprint PCS prior to 2002 stopped making such payments after the FCC released its Wireless Access Charge Order.[219]

Petitioners' suggestion that IXCs pay compensation to Respondents for terminating land-to-mobile traffic is wrong.[220] Moreover, Petitioners know they are wrong – *yet they choose to continue to mislead the Commission*. As T-Mobile's witness has testified – which Petitioners chose not to challenge in their rebuttal testimony:

> The Petitioners have mischaracterized my prior testimony. So the record is clear, T-Mobile does not receive, and has never received, compensation from IXCs for terminating land-to-mobile traffic that originates on the Petitioners' networks.

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216 Tr. Vol. 3, p. 259-60.

217 Id. at p. 260 l. 3-5.

218 Id. at l. 10-12.

219 Tr. Vol. 5, p. 406 l. 5-8.

220 See Pruitt Direct, p. 11-12; Pruitt Rebuttal, p. 24 1. 7-11.

In 2001, as a Sprint PCS employee, I testified for Sprint in TT-2001-139. I testified that Sprint PCS at that time was receiving compensation from some IXCs, but not all IXCs. However, there are three points that bear emphasis – points the Petitioners conveniently overlook.

First, the next year, in 2002, the FCC ruled that IXCs were not obligated to pay wireless carriers to terminate their traffic unless they agreed voluntarily to pay for the use of the wireless networks. . . . As the Commission might expect, following this decision, many of the IXCs that had been paying access charges to Sprint PCS began to dispute those charges and/or stopped making those payments.

Second, my testimony in TT-2001-139 was limited in scope to Sprint PCS – and not other carriers. Thus, there is no basis in fact for the Petitioners to conclude that I "admitted" that wireless carriers other than Sprint PCS were receiving access charge compensation in 2001.

Third, my testimony in the Alma/T-Mobile arbitration proceeding was unequivocal: "For starters, and so the record is clear, T-Mobile does not receive compensation from IXCs for terminating intraMTA calls that originate on the RLEC networks." Pruitt Rebuttal Testimony, IO-2005-0468, at 4 (July 28, 2005). Thus, there is utterly no factual basis for the petitioners to later make the assertion that I supposedly "admitted that wireless carriers are already being compensated by IXCs." [221]

In summary, there is no basis to Petitioners' suggestion that implementation of reciprocal compensation, as the Commission required in its Alma order, would result in wireless carriers being paid twice for the same call – once by IXCs and again by the Petitioners.[222]

(b) Assertion: The Commission's Alma decision is inconsistent with prior Commission precedent. Petitioners have asserted that the Commission's Alma order

[221] Pruitt Direct, p. 11-12. At the hearing, Petitioners' attorney made the point that Mr. Pruitt has no personal knowledge of T-Mobile's dealings with IXCs, because as an outside consultant, he was not retained to participate in any T-Mobile/ IXC discussions and that Mr. Pruitt instead relied on representations by T-Mobile employees. See Tr. Vol. 5 p. 385 l. 16; p. 410 l. 14-23. T-Mobile does not understand the importance of this point, as Mr. England's own witness often testified on matters on which he had no personal knowledge. See, e.g., Tr. Vol. 3. p. 163 1. 1-6; Schoonmaker Rebuttal, p. 20 1. 18-25; p. 25, 1. 3-9.

[222] At the hearing, Petitioners' attorney had an extended line of questions pertaining to the difference in business relationships that Petitioners have with IXCs as opposed to the relationship wireless carriers have with IXCs. Of course, wireless carrier relationships with IXCs differ from rural LEC relationships with IXCs given the vast difference between services provided to customers (e.g., rural LECs offer a small local calling area, while with wireless "one rate" plans, the local calling area is coextensive with the entire United States). But as explained above, the type of retail relationship a LEC or a wireless carrier has with its customers has no bearing on their respective reciprocal compensation obligations.

"contradicts . . . prior Commission orders."[223] In support, they cite to the Commission's 2001 Mark Twain order.[224] That Commission decision, however, was based on State law, not federal law.[225] And, as the Commission has recognized, federal law, not State law, governs this arbitration proceeding:

> The Commission has only that authority which the Congress has expressly delegated to it. The obligation to apply federal law applies even if state law precedent differs from federal law. Alma/T-Mobile Arbitration Report at 15.

Petitioners have never challenged this straightforward proposition of law. Indeed, they concede the Commission is correct in this regard: "The STCG agrees that the Arbitrator must 'defer to the FCC's view' of reciprocal compensation and apply the federal regime."[226] Thus, under Petitioners' own admission, prior State law precedent is irrelevant to this federal arbitration proceeding. See also State ex rel. Alma Telephone v. Missouri Public Service Comm'n, 2006 Mo. LEXIS 13 at *5 (Jan. 10. 2006) ("This case is controlled by the Federal Telecommunications Act of 1996 . . . and FCC regulations and decisions are binding on the industry and state commissions.") (supporting citations omitted).

(c) Assertion: The Commission should consider the rates and terms contained in voluntarily negotiated agreements. Petitioners repeatedly argue that the Commission's Alma decision "contradicts the terms and conditions of over seventy (70)

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223 STCG Comments at 2 and 3 (Sept. 27, 2005).

224 See, e.g., id. at 4 and 12; STCG Application for Rehearing at 1 and 10; Petitioners' Opposition to T-Mobile's Summary Determination Motion at 6; Schoonmaker Direct at 50 (lines 11-23); Schoonmaker Direct, p. 50 l. 11-23.

225 See Mark Twain Wireless Termination Tariff Order, Case No. TT-2001-139, at 29 (Feb. 8, 2001) ("The Commission concludes that Section 251(b)(5) of the Act simply does not apply to the proposed tariffs herein at issue."). Respondents must respectfully disagree with the conclusion the Commission reached in 2001. Indeed, as the Missouri Supreme Court recently held, "[t]his case is controlled by the Federal Telecommunications Act of 1996." State ex rel. Alma Telephone v. Missouri Public Service Comm'n, 2006 Mo. LEXIS 13 at *5 (Jan. 10. 2006). Thus, federal law governs compensation issues between rural LECs and wireless carriers, even if LECs use the State tariff procedure.

226 STCG Alma Comments at 8 (Sept. 27, 2005).

approved agreements between small rural LECs and wireless carriers, including T-Mobile."[227] It is not surprising that agreements reached by negotiation, without arbitration, involve rates that would differ from those established in an arbitration proceeding following the submission of a TELRIC cost study. As has been explained repeatedly, parties to agreements negotiated voluntarily can agree to terms "without regard" to the requirements of Sections 251-252. See 47 U.S.C. § 252(a)(1). Moreover, in approving negotiated agreements, the Commission does not ensure that every rate, term and condition of an agreed-to agreement complies with Sections 251-252. See id. at § 252(e)(2)(A). In contrast, in an arbitration proceeding, a State commission is required to ensure that its arbitration order complies with Sections 251-252 in all respects. See id. § 252(c). See also id. at § 252(e)(2)(B).

Petitioners additionally assert that SBC-Missouri, in its ***negotiated*** agreements with Respondents, does not pay reciprocal compensation for intraMTA traffic its sends to an IXC.[228] These SBC contracts are irrelevant to this arbitration proceeding, again because they are negotiated – not arbitrated – agreements. Respondents agreed to rates, terms, and conditions with SBC because SBC agreed to a reasonable overall package, including current reciprocal compensation rates of less than one-tenth of a penny ($0.007). Respondents almost certainly would have negotiated a similar arrangement with the Petitioners – if Petitioners had been willing to agree to reasonable rates for reciprocal compensation.

Petitioners, as is their right, chose to demand an unreasonable rate for reciprocal compensation (i.e., $0.035). Petitioners also have the legal right to have this Commission

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[227] STCG Alma Application for Rehearing at 11. See also Petitioners' Opposition to T-Mobile's Motion for Summary Determination of Issue E, at 9 No. 7 (Dec. 16, 2005).

[228] See Petitioners' Opposition to T-Mobile's Motion for Summary Determination of Issue E, at 7 No. 3 (Dec. 16, 2005).

arbitrate the issue of whether their claimed costs comply with federal law requirements. But having chosen to seek rates above TELRIC costs, Petitioners cannot now complain that Respondents agreed voluntarily to rates with SBC that are 50 times lower than the rates Petitioners demand.

(d) Assertion: Reciprocal compensation would be incompatible with the Commission's Record Exchange Rule. Petitioners assert that their non-reciprocal position is "consistent with the Commission's recent enacted Enhanced Record Exchange (ERE) Rules."[229] But Petitioners never explain how the Commission's decision in the Alma arbitration is incompatible with these ERE rules; to the contrary, Petitioners only cite 4 CSR 240-29.020(15), which defines IXC traffic.[230] Moreover, even if there were a conflict, the Commission's ERE rules were adopted pursuant to State law, and in this arbitration, the Commission has the "obligation to apply federal law . . . even if state law precedent differs from federal law." Alma/T-Mobile Arbitration Report at 15.

(e) Assertion: Reciprocal compensation would be incompatible with Petitioners' certificates of authority. Petitioners' witness has claimed that compliance with the Section 251(b)(5) reciprocal compensation obligation would be incompatible with Petitioners' "certificates . . . issued by the Missouri Public Service Commission."[231] T-Mobile demonstrated in response that it is "not apparent at all how the Petitioners' certificates have any relevance to this arbitration proceeding,"[232] and Petitioners chose not to cross-examine T-Mobile's witness on this point. Besides, given the supremacy of federal law (and even assuming that Petitioners'

229 See Petitioners' Opposition to T-Mobile's Motion for Summary Determination of Issue E, at 8 No. 4 (Dec. 16, 2005).

230 Id.

231 Schoonmaker Direct, p. 48 l. 4-12.

232 Pruitt Rebuttal, p. 21 l. 14-19.

certification do impose some type of obstacle for complying with federal law), federal law would clearly control.

(f) Petitioners' attempt to rely on other State commission decisions on the intraMTA issue. Petitioners will likely rely in their brief on decisions rendered by other State commissions. Other State commission decisions are of marginal usefulness here. After all, federal courts have held that State commission decisions on federal law are not entitled to deference.[233] But the Commission should also take account of the clear trend that is developing:

- Federal courts have consistently affirmed State commission decisions that have held that a rural LEC's reciprocal compensation obligation includes the intraMTA traffic it sends to an IXC;[234] while
- Federal courts have consistently reversed and vacated State commission decisions that have excluded such intraMTA IXC traffic.[235]

Realizing this trend, Petitioners may urge the Commission to follow recent State commission decisions where federal courts have not yet had the opportunity to review the order for compliance with federal law requirements. For example, Petitioners might rely on a recent Texas Commission arbitration order involving an RBOC and a paging carrier.[236] In this order, the Texas Commission reversed the decision of its arbitrator and held that the paging carrier was

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233 Federal courts have held that "interpretations of federal law by state agencies are not entitled to *Chevron* deference." AT&T v. Southwestern Bell, 86 F. Supp. 2d at 945. See also Iowa Network Services v. Qwest, 363 F.3d at 692 ("Federal courts have the ultimate power to interpret provisions of the 1996 Act, including whether § 251(b)(5)'s reciprocal compensation requires applies to the wireless traffic at issue here."); Ace Telephone v. Koppendrayer, 432 F.3d at 878.

234 See, e.g., Atlas Telephone v. Oklahoma Corporation Comm'n, 400 F.3d at 1264, aff'g 309 F. Supp. 2d at 1309-10; Rural Iowa Independent Telephone Ass'n v. Iowa Utilities Board, 385 F. Supp 2d 797.

235 See, e.g., WWC License v. Anne C. Boyle, et al., No. 4:03CV3393, Slip op. at 5-6 (D. Neb., Jan. 20, 2005).

236 See F. Cary Fitch d/b/a Fitch Affordable Telecom Petition for Arbitration Against SBC Texas under § 252 of the Communications Act, Order Approving Arbitration Award with Modifications, PUC Docket No. 2945 (Texas, Dec. 19, 2005).

not entitled to reciprocal compensation for intraMTA land-to-mobile calls that the RBOC sends to an IXC. The Texas Commission reversed the arbitrator's decision on a single ground: it "appears" the arbitrator based his decision on the Tenth Circuit Atlas case but, according to the Commission, the Atlas case is "not relevant to this proceeding as it did not hold that intraMTA 1+ calls handed by an IXC should be subject to reciprocal compensation."[237] The Texas Commission reached this conclusion even though the Tenth Circuit explicitly held: "Nothing in the text of these [FCC rule] provisions provides support for the RTC's contention that reciprocal compensation requirements do not apply when traffic is transported on an IXC network."[238] And, the Texas Commission made no attempt in its order to demonstrate that its decision was consistent with the Act and FCC rules, as Section 252(c) requires. Does this Commission really believe that this Texas Commission order will survive federal court review for compliance with the Act and FCC rules?[239]

D. FOURTH JOINT ISSUE: INTRAMTA RATIOS

Matrix Issue No. 16: Should the Commission establish an IntraMTA Traffic Ratio for use by the parties in billing the termination of traffic?

As an initial matter, intraMTA traffic ratios should be determined in this arbitration regardless of the outcome of Issue 15 (Scope of Reciprocal Compensation Obligation). Although Petitioners attempt to make their position on the intraMTA traffic ratio contingent upon the Commission continuing to adhere to its ruling in Alma on the scope of reciprocal

237 Id. at 4.

238 Atlas Telephone v. Oklahoma Corporation Comm'n, 400 F.3d at 1264.

239 See, e.g., Morall v. DEA, 412 F.3d at 177 ("The agency's departures from the [ALJ's] findings are vulnerable if they fail to reflect attentive consideration to the [ALJ's] decision."); East Tennessee Natural Gas v. FERC, 953 F.2d 675, 681 (D.C. Cir. 1992) ("Because the ALJ relied on substantial evidence in the record, coupled with a well-reasoned and highly sensible analysis, in reaching [its] conclusion . . . , we can find no basis upon which to accept the [agency's] unsupported and ill-reasoned conclusion to the contrary.").

compensation,[240] the logic of Petitioners' position holds true only to the extent that IXCs carry every intraMTA call terminating to Cingular and T-Mobile.

Petitioners' own witness presents conflicting evidence on this point, however. Mr. Schoonmaker has stated that a portion of Petitioners' traffic is handed off to IXCs: "The majority of traffic leaving the Petitioners' exchanges for CMRS providers is traffic between an IXC and a CMRS provider,"[241] and intraMTA traffic handled by IXCs is "almost all traffic" from Petitioners' exchanges.[242] But Mr. Schoonmaker has also represented that all Petitioners' intraMTA calls are carried by IXCs: "all calls from customers in the Petitioners' service areas are carried by IXCs."[243] Apart from the issue of IXC-carried traffic, the parties will owe reciprocal compensation to each other for all intraMTA traffic exchanged through the tandem of a third-party local provider such as AT&T Missouri (formerly SBC Missouri) or Sprint (or exchanged over direct interconnections should they be established). In light of Petitioners' inconclusive evidence on how they deliver the whole of their traffic terminating to Cingular and T-Mobile, the intraMTA traffic ratio must be addressed.

The Commission should establish an intraMTA traffic ratio (alternatively called intraMTA traffic balance percentages) because the parties have agreed to billing methods that are based upon intraMTA traffic ratios.[244] During negotiations, Cingular and the Petitioners agreed

240 Schoonmaker Direct, p. 52 l. 5-12.

241 Id., p. 47 l. 8-10.

242 Schoonmaker Rebuttal, p. 41 l. 3-5.

243 Schoonmaker Direct, p. 52 l. 24-25.

244 Currently, Cingular and T-Mobile do not have the system-wide capability to routinely measure traffic that they each receive from Petitioners. This is not unusual in the wireless industry. Other wireless carriers also lack that capability. Pue Direct, p. 16 l. 20-22. In the wireless industry, "standard industry format" for carriers that lack the capability to measure traffic requires the wireless carrier to base its bills to a landline carrier upon the bills received from that same landline carrier. In order for such a process to work, the parties must agree upon a traffic ratio.

to a cross-billing approach. In this proceeding, T-Mobile has indicated it can accommodate both net billing and cross-billing,[245] and the Petitioners have stated that they will accept a net billing approach with T-Mobile.[246] Petitioners do not object to establishing an intraMTA traffic ratio (subject to their position on reciprocal compensation). They have, in fact, proposed intraMTA traffic ratios in this arbitration.

Matrix Issue No. 17: What is the appropriate IntraMTA Traffic Ratio?

(a) Burden of Proof

Petitioners have failed to meet their burden of proof on this issue[247]: they themselves acknowledge that their position relies on incomplete evidence. Schoonmaker Direct, p. 53 l. 10-15 (identifying Petitioners' evidence as a "sample"). In contrast, both Cingular and T-Mobile presented evidence showing actual traffic ratios with each Petitioner, and this complete evidence should be used to set intraMTA traffic ratios in this proceeding.

The Petitioners ask the Commission to rely upon partial evidence plus various assumptions about the missing evidence. Petitioners' "sample" of traffic data includes only 8 Petitioners for traffic exchanged with T-Mobile and 11 Petitioners for traffic exchanged with

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Accordingly, many of T-Mobile's and Cingular's contracts (those that do not provide for bill-and-keep) with landline carriers contain a stipulated traffic ratio (and all of Cingular's contracts that pre-date its merger with AT&T Wireless, which properties did have some measurement capability). For example, Cingular has recently entered into agreements stipulating a traffic ratio of 70% mobile-to-land to 30% land-to-mobile. Under Cingular's cross-billing approach, if the "traffic factor" is set at 70/30, the minutes of use billed by the landline carrier to Cingular (i.e. the Mobile-to-Land traffic) represent 70% of the total traffic exchanged in both directions between the parties. Cingular, in turn, uses the known minutes of use billed by the landline carrier to calculate the remaining 30% of the traffic exchanged between the parties for which Cingular bills the landline carrier (i.e. the Land-to-Mobile traffic). In the 70/30 example, the minutes of use billed by Cingular to the landline are determined by the following simple formula: Mobile-to-Land minutes of use x (30/70) = Land-to-Mobile minutes of use to be billed by Cingular. *Id.*, p. 16 l. 25 – p. 17 l. 12.

245 Pruitt Direct, p. 16 l. 19-25.

246 Joint Issues Matrix, Issue 32, Petitioners' Position ("Petitioners believe that if the Commission adopts a traffic factor for intraMTA traffic then a net billing arrangement is appropriate").

247 Petitioners, as incumbent LECs, bear the burden of proof on all issues. See *AT&T Communications/GTE Minnesota Arbitration Order*, Docket No. P442,407/M-96-939, 1996 Minn. PUC LEXIS 171 at *10 (Dec. 12, 1996) ("the burden of proof in proceedings to implement the Act should fall on the incumbent") (Copy in Appendix).

Cingular. However, even where Petitioners provided traffic data, it does not appear to accurately represent intraMTA traffic. The Petitioners' study for BPS, for example, measured both intraMTA and interMTA traffic for Cingular and T-Mobile traffic, which invalidates the results for that incumbent LEC.[248] Compared with the number of original incumbent LEC Petitioners (24 for T-Mobile and 26 for Cingular, not including the CLEC petitioners that have been dismissed), the number of intraMTA traffic studies offered by Petitioners amounts to less than 29% of Petitioners for T-Mobile and 38% of Petitioners for Cingular. The Petitioners themselves recognize that many assumptions would be required before the Commission could conclude that such incomplete evidence reflects actual traffic ratios of the Petitioners as a whole. Schoonmaker Direct, p. 53 l. 8-16. The partial evidence relied upon by Petitioners fails to satisfy their burden of proof on this issue and should be disregarded.

Cingular and T-Mobile each conducted traffic studies for intraMTA traffic exchanged with each Petitioner, making unnecessary the conjecture advocated for by Petitioners. Each wireless carrier conducted studies designed to measure the amount of traffic that would be subject to the agreement that results from this arbitration. Cingular and T-Mobile have slightly different approaches to determining the actual numbers to be used for the intraMTA traffic ratio. Both approaches are consistent with the purposes for which intraMTA traffic ratios are established and how they are implemented.

(b) <u>Traffic Ratio Established by Cingular's Traffic Studies</u>

For Cingular, Petitioners propose that for every Petitioner (even those that did not conduct studies), the traffic ratio with Cingular be established at 83% mobile-to-land and 17%

[248] Schedule RCS-6 indicates that the "BPS minutes include IntraMTA and InterMTA traffic." Although BPS has exchanges in two different MTAs, it did not separate its traffic corresponding to the two MTAs. Tr. Vol. 3, p. 247 l. 24 – p. 248 l. 8.

land-to-mobile based on traffic studies conducted by only 11 companies, including the BPS traffic study which measured both interMTA and intraMTA traffic.[249] This proposed ratio is based upon an arithmetical (non-weighted) average of the traffic studies shown in Schedule RCS-6 to the Schoomaker Direct testimony. Even if a non-weighted, arithmetical average traffic were appropriate – and Cingular believes an average ratio (whether weighted or not) is not appropriate – it is certainly not appropriate to base an average on a sampling of less than 40% of the Petitioners.

Unlike witness Schoonmaker, Cingular conducted a traffic study with all 26 Petitioners. The results are shown on Confidential Schedule B to the Direct Testimony of Eric Pue. The ratios are very similar to those found in Petitioners' studies. Indeed, Petitioners' witness Schoonmaker has admitted that "the percentages that the Cingular schedule show are in a reasonable range with the studies that the Petitioners have performed."[250] The primary difference between Cingular's traffic studies and those of Petitioners is that Petitioners surveyed only ten companies for intraMTA traffic, while Cingular surveyed all 26. For that reason alone, the Commission should adopt the 26 individual traffic ratios set out in Confidential Schedule B to the Direct Testimony of Eric Pue.

An additional reason for adopting the Cingular proposal is that nothing in the Act or FCC regulations authorizes the establishment of an "average" traffic ratio. On the contrary, FCC regulations are clear that:

> An incumbent LEC must prove to the state commission that the rates for each element *it offers* [not an element offered by another carrier] do not exceed the

249 *Id.*, p. 53 l. 4-6.

250 Schoonmaker Rebuttal, p. 43 l. 19-20.

> forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511.[251]

Requiring Cingular to pay reciprocal compensation based upon an average rate established through a sample involving less than 40% of Petitioners would insure that Cingular pays more compensation to some companies that would be otherwise owed. Each Petitioner, however, is required by FCC regulations to produce its own cost study based upon its own specific costs. Similarly, each Petitioner should be required to base its traffic ratio upon its own individual traffic patterns with Cingular.

Because not all Petitioners have measured traffic with Cingular, and because Petitioners' own witness finds Cingular's 26 separate traffic ratios to be "in a reasonable range," the Commission should adopt the traffic ratios shown on Confidential Exhibit B to the Direct Testimony of Eric Pue.

(c) Traffic Ratio Established by T-Mobile's Traffic Studies

Petitioners ask the Commission to establish an intraMTA traffic ratio for all Petitioners based on an average of their partial data.[252] With regard to the Petitioners' proposal to incorporate an average traffic ratio in the resulting agreements with T-Mobile, T-Mobile accepts this approach. T-Mobile strongly contends, however, that any such average should reflect data for all Petitioners, instead of Petitioners' limited sampling of the evidence.

Using an average for all Petitioners is consistent with the role the intraMTA traffic ratio plays in billing for intercarrier compensation under a traffic termination agreement. As noted above, a traffic ratio is used between wireless carriers and LECs when the companies' systems are not designed to capture the data needed to bill each other routinely based upon actual traffic

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251 47 C.F.R. § 51.505(e). Emphasis and bracketed comment added.

252 Joint Issues Matrix, Issue 17, Petitioners' Position.

data. The traffic factor replaces actual traffic volume data in the administrative billing process. Because carriers structure their billing departments in different ways, it follows that each carrier would approach the billing process and use of traffic factors differently (for example, some companies prefer cross-billing and others net billing). Consequently, an average number may be used for more than one participating carrier if the parties agree to use an average. In this proceeding, T-Mobile is willing to apply an average traffic ratio to all Petitioners, provided that the average is supported by evidence for each Petitioner. Since Petitioners themselves utilized an arithmetical (non-weighted) average, T-Mobile assumes they have in essence agreed to this method of calculating an average number.

T-Mobile's traffic studies for each Petitioner resulted in an average traffic ratio of 75% mobile-to-land and 25% land-to-mobile.[253] Pruitt Direct, p. 17 l. 20-23; Pruitt Direct, Attachment 1. The Petitioners' witness confirmed these results.[254] Tr. Vol. 3, p. 252 l. 1-12. These numbers reflect the traffic originated by Petitioners that arrived at T-Mobile's switch with sufficient call detail to identify the originating carrier.[255] Calls with insufficient call detail to identify the originating carrier generally do not exceed 10% of all calls received.[256] If 10% of calls from all carriers lack identifying call detail, it is logical (and fair) to assume that 10% of calls from each carrier lack identifying call detail. Therefore, T-Mobile proposed adjusting the traffic ratio in this logical and fair manner, resulting in a 65% mobile-to-land and 35% land-to-mobile traffic ratio with the Petitioners.

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253 Pruitt Direct, p. 17 1. 20-23; Pruitt Direct, Attachment 1.

254 Tr. Vol. 3, p. 252 1. 1-12.

255 Pruitt Rebuttal, p. 26 l. 20-21.

256 Id., p. 26 l. 21-25.

Petitioners may seek to compare the intraMTA traffic data and proposed ratios at issue in this arbitration with ratios included in voluntarily negotiated agreements with other carriers or with arbitrated ratios resulting from proceedings with other carriers. As T-Mobile has repeatedly emphasized, such carrier-specific results are irrelevant to the fact-based inquiry between the parties to this arbitration. Voluntarily negotiated agreements reflect the business give-and-take of the negotiated process, and not necessarily actual traffic volumes. Moreover, such agreements with other carriers are specific to the relationship between those carriers. Agreements with other carriers do not reflect the relationship, much less the actual traffic ratio, between Petitioners and T-Mobile. This observation holds true for arbitrations conducted with other carriers. Any evidence upon which the Commission might have relied in other arbitrations, such as Alma, would have been based upon the carrier-specific evidence provided in those separate proceedings.

As one example, Petitioners might ask the Commission to look at the interconnection agreement between T-Mobile (VoiceStream) and SBC in relation to the intraMTA traffic ratio.[257] As Mr. Pruitt testified, however, the shared facilities factor of 80%/20% included in the agreement by T-Mobile and SBC in 2000 is not relevant to the intraMTA traffic ratio issue between Petitioners and T-Mobile in this arbitration.[258] That agreement was with another carrier, the shared facilities factor was voluntarily negotiated, the provision itself allows the parties to modify the factor, and the percentage is dated, having been agreed to six years ago. Moreover, as Mr. Pruitt further explained, a shared facilities factor does not necessarily reflect what an

257 See e.g., Tr. Vol. 5, p. 442 l. 8-16.

258 Tr. Vol. 5, p. 442 l. 8-16.

intraMTA traffic ratio attempts to represent — the actual traffic balance between the parties.[259] This is particularly true with SBC, because T-Mobile has a cross-billing relationship with SBC under that agreement, and that cross-billing is based upon actual traffic data. Mr. Pruitt testified that, quite different from the dated shared facilities factor in the 2000 agreement, the current intraMTA traffic ratio between SBC and T-Mobile is roughly balanced (approximately 48%-52%).[260]

The proper focus in this proceeding is on the evidence presented in this arbitration relating to traffic exchanged between Petitioners and T-Mobile. Petitioners seek a traffic ratio of 86% mobile-to-land and 14% land-to-mobile based upon the traffic studies they conducted for 8 Petitioners, including the BPS traffic study which measured both interMTA and intraMTA traffic.[261] Using the data of less than 30% of Petitioners is less complete and therefore less representative of the actual traffic exchanged between the parties than is traffic data for every Petitioner. T-Mobile presented traffic data for each Petitioner, and arrived at an average traffic ratio using the same mathematical calculation as the Petitioners and adjusted fairly to account for missing call detail. The Commission should adopt T-Mobile's average because it is based on the only complete evidence presented in this proceeding.

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259 Tr. Vol. 5, p. 442 l. 17 – p. 443 l. 17.

260 Tr. Vol. 5, p. 492 l. 15 – p. 493 l. 21.

261 Id., p. 53 l. 4-6.

IV. CINGULAR-ONLY ISSUES

Cingular discusses below the issues that are unique to its arbitration with Petitioners. Again, Cingular refers to issues by the number used in the Joint Issues Matrix.

A. MATRIX ISSUE NO. 19: SHOULD THE PARTIES EMPLOY BILL-AND-KEEP IF THE TRAFFIC THEY EXCHANGE DOES NOT EXCEED A SPECIFIC DE MINIMUS LEVEL (5,000 MOUS)?

This issue boils down to whether the parties should bill each other for amounts of traffic so small that the cost of generating bills exceeds the amount of reciprocal compensation collected. As Cingular has pointed out,[262] assuming it and a Petitioner exchange a total of 5,000 minutes of use a month, that the transport and termination rate is 3.5 cents per MOU (as Petitioners claim), and the traffic ratio is 70% mobile-originated/30% landline-originated, then the amount of compensation due Petitioner each month would be only $70.00 (5,000 x 40% x $0.035). If a more reasonable transport and termination rate of 0.5 cents per MOU is assumed, then the compensation due Petitioner would be only $10.00 per month.

Both Petitioners and Cingular will lose money if required to bill for such tiny amounts.[263] In addition, Petitioners' proposal – that bills be sent only when accumulated minutes of use reach 5,000 – would create additional and unreasonable administrative costs. Since it may take several months for 5,000 minutes of use to accumulate, bills would be generated on a random basis under Petitioners' proposal. Bills might be issued twice a year, three times a year, or some other number of months. Issuing a bill only when 5,000 minutes of use have accumulated would require manual intervention, which would increase billing costs – not reduce them. Consumers

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262 *See* Pue Direct, p. 20 l. 3-9.

263 Id., l. 10-11.

do not benefit when regulators force service providers to use costly procedures to keep track of and bill for de minimis levels of traffic.

For these reasons, the Tennessee Regulatory Authority, which included now FCC Commissioner Deborah Tate in the hearing panel, recently ruled in favor of Cingular on this issue:

> As to this issue [de minimis traffic], the Arbitrators voted unanimously that the parties should exchange de minimis amounts of traffic on a bill-and-keep basis. Further, the Arbitrators found that, in the absence of an agreement among the parties as to what level of traffic should be considered as de minimis, the parties shall file with the Authority by January 25, 2005 what level of traffic is to be considered de minimis. Petition for Arbitration of Cellco Partnership D/B/A Verizon Wireless, Docket No. 03-00585, Order of Arbitration Award, at 44 (Jan. 12, 2006).

The Order also notes that the parties subsequently agreed to a de minimis factor of 5,000 minutes of use, the factor that Cingular is proposing in the present case.

Cingular's proposal is fast becoming the industry standard, and it will not prejudice Petitioners, since the amounts of compensation involved are so small – especially when compared with the cost of generating and auditing bills and processing checks. Cingular therefore requests that its proposed language be adopted.

B. MATRIX ISSUE NOS. 20-21: SHOULD PETITIONERS BE REQUIRED TO PROVIDE LOCAL DIALING FOR CALLS TO A CINGULAR CUSTOMER WITH A LOCALLY-RATED NUMBER, INCLUDING IN EAS AREAS, AND EVEN THOUGH THE PARTIES ARE NOT DIRECTLY INTERCONNECTED?

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

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

Issues 20 and 21 both involve the concept of dialing parity. Issue 20 involves Petitioners' calling scopes for extended area service ("EAS"). Issue 21 involves all calls originated by

Petitioners, whether an EAS calling scope is involved or not. In both issues, Cingular is asking that Petitioners' customers be allowed to dial seven digits to reach Cingular customers with local telephone numbers, even in the absence of direct interconnection trunks between Cingular and the individual Petitioner involved.[264] Seven digits is the number Petitioners' customers dial to complete a local call. In both issues, Petitioners contend that they should not be required to provide local dialing unless and until Cingular establishes direct trunks with them.

Congress in Section 251(b)(3) has imposed on LECs like the Petitioners the "duty to provide dialing parity to competing providers of telephone exchange service." The FCC's implementing local dialing parity rule provides:

> A LEC shall permit a telephone exchange service customer 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. 47 C.F.R. § 51.207.

Moreover the FCC has made clear that Petitioners' duty to provide local dialing parity extends to wireless carriers like Cingular.[265]

Petitioners' obligations under federal law are crystal clear. If Cingular customers are assigned local numbers rated in a Petitioner's EAS calling scope, then the Petitioner must allow its end users to dial those local numbers to reach Cingular customers. This proposition is Issue 20. Similarly, if Cingular customers are assigned local numbers rated in a Petitioner's local

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264 For example, if a customer of New Florence calls a Cingular customer with a St. Louis telephone number, New Florence would treat the call as a toll call (just as it does when one of its customers calls a SBC landline customer with a St. Louis telephone number). However, if a New Florence customer calls a Cingular customer with a local number rated to New Florence's rate center, New Florence would treat the call as a local call (just as it would if the calling party called someone with a local New Florence landline number).

265 *See* Second Local Competition Order, 11 FCC Rcd 19391, 19429 ¶ 168 (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.").

calling scope (when EAS is not involved), then Petitioners must once again allow their end users to dial those local numbers to reach Cingular customers. This is Issue 21.

Petitioners do not seriously contest their local dialing parity obligation. Rather, they want to limit the scope of their obligation by taking the position that they will not provide local dialing parity unless and until a wireless carrier like Cingular installs a direct interconnection facility to their network (presumably to their meet point with SBC).[266] This Commission has noted that rural LECs and wireless carriers generally interconnect indirectly because they do not exchange a sufficient volume of traffic to cost-justify a direct interconnection.[267] As a practical matter, Petitioners hope that if the Commission approves their position, they will effectively be excused from having to provide local dialing parity at all.

It is important the Commission understand the implications of Petitioners' proposal:

- Example No. 1. One of Petitioners' customers calls a neighbor on his landline phone. The calling customer dials only seven digits to make this local call. If, however, the same customer calls the same neighbor on the neighbor's wireless phone, according to Petitioners, the customer must instead dial 11 digits (1+10 digit telephone number) and incur toll charges – even though the neighbor has a locally rated wireless number.
- Example No. 2. One of Petitioners' customers calls her spouse at the grocery store on the spouse's wireless phone. Even though the spouse has a locally rated mobile number, according to Petitioners, the customer at home would have to dial 11 digits

266 The record evidence is uncontroverted that Petitioners currently refuse to program their switches to recognize local numbers assigned to Cingular in the absence of direct interconnection trunks. *See* Pue Direct, p. 23 l. 4-15. Thus, Cingular does not seek only "an abstract statement of law." *See* Alma/T-Mobile Arbitration Report at 24.

267 *See* Alma/T-Mobile Arbitration Report at 22 ("Historically, wireless carriers and rural LECs have found it most efficient to interconnect indirectly with each other.").

and will incur toll charges simply to call her spouse to remind him to buy a loaf of bread.

Few consumers will consider wireless as a competitive alternative to an incumbent LEC's local services if friends, family and colleagues must dial extra digits and incur toll charges in making a local call to a wireless handset. It is thus apparent that Petitioners are hoping the Commission will approve an arrangement that will make it far more difficult for wireless carriers to compete against them.

Petitioners' position – that they can excuse themselves from their dialing parity obligation unless a wireless carrier installs a direct trunk to their network – is flatly inconsistent with federal law. In fact, under FCC rules, adoption of Petitioners' position would only increase needlessly their own costs of providing their own local services.

(a) Federal law does not permit Petitioners unilaterally to demand direct interconnection as a condition to their provision of local dialing parity. The Commission must understand that Petitioners are refusing to honor locally rated telephone numbers that wireless carriers obtain pursuant to FCC rules. The FCC has recognized that "to enable the rating of incoming wireline calls as local, wireless carriers typically associate NXXs with wireline rate centers that cover either the business or residence of end-users."[268] FCC rules specify that a carrier like Cingular can obtain local numbers in any LEC rate center where it "is or will be capable of providing service."[269]

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268 Numbering Optimization, 14 FCC Rcd 10322, 10371 n.174 (1999). *See also* First Numbering Optimization Order, 15 FCC Rcd 7574, 7577 n.2 (2000)("A carrier must obtain a central office code for each rate center in which it provides services in a given area code."). Since these orders, most carriers are now engaged in pooling and acquire a thousands block at one time, not an entire NXX code.

269 *See* 47 C.F.R. § 52.15(g). The FCC has exclusive jurisdiction over telephone numbers. *See* 47 U.S.C. § 251(e). Moreover, courts have held this FCC authority extends to local dialing patterns. *See* New York v. FCC, 267 F.3d 91, 103-04 (2d Cir. 2001).

FCC rules do not require a carrier like Cingular to directly interconnect with the incumbent LEC as a further condition to using local numbers. Cingular is not limited to providing local service in an ILEC's area only if Cingular directly interconnects with the ILEC. To the contrary, pursuant to guidelines established under the auspices of the North American Numbering Council ("NANC"), a Federal Advisory Committee[270] – the rules used by the North American Numbering Plan Administrator ("NANPA") and the Number Pool Administration – carriers may use local numbers *even if they use indirect interconnection*.[271]

Moreover, a federal appellate court has already rejected Petitioners' position:

> The RTCs [Rural Telephone Companies] interpret 47 U.S.C. § 251(c) as imposing a requirement of direct connection on a competing carrier. We disagree. As detailed above, the affirmative duty established in § 251(c) runs solely to the ILEC, and is only triggered on request for direct connection. The physical interconnection contemplated by § 251(c) in no way undermines telecommunications carriers' obligation under § 251(a) to interconnect "directly or indirectly."[272]

In summary, there is no basis whatsoever to Petitioners' assertion that federal law permits them to require wireless carriers to use direct interconnection as a condition to using locally rated telephone numbers.

(b) <u>Petitioners and their customers would not benefit by their direct interconnection proposal</u>. Petitioners contend – without any explanation or support – that they would avoid costs by requiring a wireless carrier to use a direct interconnection. Petitioners are either misguided or disingenuous.

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270 *See* 47 C.F.R. § 52.11.

271 *See* Central Office Code (NXX) Assignment Guidelines, ATIS-0300051, at § 6.2.2 (Jan. 13, 2006)("*Each* switching center, *each* rate center and *each* POI may have unique V&H coordinates.")(emphasis added).

272 <u>Atlas Telephone v. Oklahoma Corporation Comm'n</u>, 400 F.3d at 1268.

FCC Rule 51.709(b) describes how the costs of a direct interconnection facility are recovered:

> 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 interconnecting carrier to send traffic that will terminate on the providing carrier's network.

Assume, for example, that the traffic balance between a rural LEC and a wireless carrier is 70% mobile-originated/30% LEC-originated. Under FCC Rule 51.709(b), in these circumstances, Cingular would pay 70 percent of the cost of the direct interconnection facility while a Petitioner would pay 30 percent of these costs.

This Commission and one of Petitioners' own national trade associations have recognized that rural LECs and wireless carriers generally use indirect interconnection because *it is more economical than direct connection. See* Alma/T-Mobile Arbitration Report at 22 (quoting the National Telecommunications Cooperative Association). Thus, Petitioners' proposal – that the parties should use direct interconnection even when traffic volumes do not justify the associated cost – would increase the costs paid by both Petitioners and wireless carriers – because both Petitioners and wireless carriers would be paying for the cost of more expensive direct interconnection trunks. This makes no sense, and Petitioners' proposal arbitrarily to increase costs certainly does not promote the public interest or consumer welfare.

Because the Act and FCC regulations do not condition the dialing parity obligation upon the establishment of direct interconnection trunks, the Commission must adopt Cingular's proposed language for Issues 20 and 21.

C. MATRIX ISSUE NO. 22: SHOULD THE CONTRACT CONTAIN PROVISIONS FOR BOTH DIRECT AND INDIRECT INTERCONNECTION?

As discussed above, Petitioners claim, in defiance of the Act and FCC regulations, that they should not be required to recognize wireless local numbers in Petitioners' switches unless a wireless carrier first establishes direct interconnection trunks. Petitioners also contend that 47 U.S.C. § 251 (f)(1) shields them from providing direct interconnection unless and until a wireless carrier files a petition and this Commission affirmatively orders Petitioners to provide direct interconnection. Petitioners specifically assert:

> . . . Petitioners have an exemption from direct interconnection. Direct interconnection is governed by 251(c)(2) of the Telecommunications Act. And under 251(f), rural telephone companies like Petitioners have an automatic exemption from direct interconnection until, unless and until the requesting carrier, in this case it could be Cingular, has made that – made a bona fide request for direct interconnection, has made that request with the State Commission, and the State Commission has found that that direct interconnection is not unduly economically burdensome and it is technically feasible.[273]

Petitioners are claiming that they cannot be forced to allow direct interconnection unless the Commission first lifts the "automatic exemption" of Section 251(f)(1). But more than this, Petitioners are also claiming that they cannot be required to provide dialing parity unless Cingular first establishes direct interconnection trunks, which Petitioners claim they are exempt from providing. Thus, Petitioners are claiming, in effect, that they have an automatic exemption from both the obligations of direct interconnection *and* dialing parity.

Petitioners are wrong on both counts. The automatic exemption of Section 251(f)(1) applies only to Section 251(c) obligations. Dialing parity is a Section 251(b) obligation. Thus, the automatic exemption does not apply to it.[274] Since Petitioners' construction of the Act would grant them an "automatic exemption" from dialing parity, their construction cannot be adopted.

In addition, the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers" is established by Section 251(a), not by

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273 Tr. Vol. 2, p. 103 l. 2-13.

274 *See, e.g.,* Local Competition Reconsideration Order, 12 FCC Rcd 7236,7304 ¶ 119 (1997)("Because Sections 251(b) and 251(c) are separate statutory mandates, the requirements of Section 251(b) apply to a rural LEC even if Section 251(f)(1) exempts such LECs from a concurrent Section 251(c) requirement. To interpret Section 251(f)(1) otherwise would undercut Section 251(c).").

subsection (c), which by its express terms is limited to interconnection "*within* the carrier's network." 47 U.S.C. § 251(c)(2)(B)(emphasis added). The automatic exemption of Section 251(f)(1) does not apply to subsection (a) obligations. In other words, the duty of Petitioners to interconnect "directly or indirectly" with Cingular, including the duty to include provisions for direct interconnection in the negotiated contract, is established by Section 251(a). *The Act does not allow Petitioners any exemption from Section 251(a).*

Indeed, the U.S. 10th Circuit has already rejected the very argument that Petitioners repeat here:

> We also find that the RTCs' interpretation of § 251(c)(2) would operate to thwart the pro-competitive principles underlying the Act. Although § 251(c)(2) interconnection is only triggered by request, the RTCs would make such interconnection obligatory to all carriers seeking to exchange local traffic. At the same time, however, the Act exempts RTCs from the application of § 251(c) until a request is made and the appropriate "State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent [with other provisions of the Act]." Id. § 251(f)(1)(A). If Congress had intended § 251(c)(2) to provide the sole governing means for the exchange of local traffic, it seems inconceivable that the drafters would have simultaneously incorporated a rural exemption functioning as a significant barrier to the advent of competition. In sum, accepting the RTCs' interpretation of § 251(c) would compel us to assume too much and ignore altogether the express language of the statute.[275]

In sum, Petitioners' argument that they cannot be required to provide direct interconnection (and therefore dialing parity) unless the "automatic" exemption of Section 251(f)(1) is affirmatively terminated, "would operate to thwart the pro-competitive principles underlying the Act."

275 Atlas Telephone Co. v. Okla. Corp. Comm'n, 400 F.3d at 1266.

For the above reasons, the contracts between Cingular and Petitioners must include provisions for direct interconnection. Cingular's proposed language should therefore be adopted.[276]

D. MATRIX ISSUE NO. 23: SHOULD PETITIONERS BE ENTITLED TO CLAIM THE RURAL EXEMPTION?

Petitioners have proposed language (section 21.1) stating: "The Parties acknowledge that ILEC may be entitled to a rural exemption as provided by 47 U.S.C. 251(f), and ILEC does not waive such exemption by entering into this Agreement." Such language is inappropriate in this proceeding, because it belies Petitioners' intent to misuse the rural exemption – to avoid their direct interconnection and dialing parity obligations under Section 251 while at the same time reaping the reciprocal compensation benefits of the very same section.

Petitioners contend that they should not be estopped in the instant case from preserving the rural exemption because the exemption is provided for in the very statute that they seek to enforce. However, the section 251(f) rural exemption was designed by Congress as a defensive measure to be used by rural carriers only when another party seeks to enforce the Act against them – for example, when another party seeks to enforce the number portability obligation of

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276 Petitioners make two other arguments in support of their claim that they are not required to include provisions for direct interconnection in their contracts with Cingular. First, Petitioners claim that Cingular has not requested direct interconnection with any Petitioner. (Schoonmaker Direct, p. 58 l. 10-13.) This argument is inapposite. Interconnection agreements routinely contain provisions for services that are not being used now but may be used in the future. For this reason, Cingular routinely includes provisions for direct connection in its contracts with rural carriers, even though Cingular does not currently seek direct interconnection. When traffic volumes warrant, direct interconnection is cheaper because Cingular is not required to pay a transiting fee to the intermediary carrier. Cingular wants the interconnection agreements with Petitioners to contain provisions for direct interconnection so that when traffic volumes warrant (and wireless traffic continues to grow), Cingular can order direct interconnection trunks without the need of additional, protracted and expensive negotiations.

Petitioners also claim that Cingular's proposed provisions for direct interconnection are inadequate. "Direct interconnection," Petitioners claim, "is a very complicated process." (Schoonmaker Direct, p. 59 l. 15.) The direct interconnection provisions proposed by Cingular are taken directly from the form interconnection agreement that Cingular routinely offers to rural telephone companies. (Pue Rebuttal, p. 16 l. 11-14.) Far from being inadequate, the provisions are standard in the industry.

Section 251(b)(2). Only last year did the FCC allow rural ILECs to file arbitration petitions against wireless providers.[277] Section 251(f) thus could not have been intended by Congress or the FCC to be used as Petitioners contend; i.e., to allow Petitioners to file petitions for arbitration under the Act while also claiming exemption from portions of the Act that Petitioners don't like.

The rural exemption may be used only as a shield. It may not be used, as Petitioners herein seek, as a sword.[278] Since Petitioners affirmatively sought to invoke the Act through the filing of petitions for arbitration, they are estopped from claiming the exemption provision of section 251(f)(1).[279]

For the above reasons, Petitioners proposed language in Section 21.1 of the interconnection agreement should be rejected.

V. T-MOBILE-ONLY ISSUES

T-Mobile discusses below the issues that are unique to its arbitration with Petitioners. Again, T-Mobile refers to issues by the number used in the Joint Issues Matrix.

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277 Matter of Developing a Unified Intercarrier Compensation Regime, T-Mobile et al., Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, FCC 05-42, CC Docket NO. 01-92, Declaratory Ruling and Report and Order (Feb. 24, 2005). *See also* 47 C.F.R. §20.11 as amended by this decision.

278 See, for example, In re State ex rel. St. Johns Reg'l Med. Ctr. v. Dally, 90 S.W.3d 209 (Mo. 2002), in which the Court held that claims of privilege and exemption may be waived when the claim is "invoked in some fundamentally unfair way." More specifically, the Court held that "it is unfair to permit a party to make use of privileged information as a sword when it is advantageous for the privilege holder to do so, and then as a shield when the party opponent seeks to use privileged information that might be harmful to the privilege holder." That principle is applicable in this case. It is fundamentally unfair to allow Petitioners to use the sword of a petition for arbitration under the Act against Cingular, seeking to impose a reciprocal compensation rate pursuant to Section 251(b)(5), and then also allow Petitioners to use the Act as a shield, claiming exemption from other provisions of the Act – 251(b)(3) (dialing parity) and 251(a)(1) (direct and indirect interconnection) – that Petitioners do not like.

279 It will not avail Petitioners to claim that the doctrine of estoppel/waiver has no application in a proceeding, such as this, governed by federal law. The doctrine is also recognized in federal jurisprudence. For example, in Robb v. Robb, the Court held that a debtor in bankruptcy who had previously deducted alimony payments on his income tax returns could not thereafter claim that such payments were made for something other than alimony. "[Q]uasi-estoppel forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or effects." 23 F.3d 895, 898 (4th Cir. 1994). The Eighth Circuit Court of Appeals has cited Robb v. Robb as authoritative in Amtrust, Inc. v. Larson, 388 F.3d 594, 601 (8th Cir. 2004).

A. MATRIX ISSUE NOS. 25-26: COMPENSATION FOR PRE-NEGOTIATION REQUEST TRAFFIC: 2001-APRIL 2005

Petitioners seek compensation for a four-year period from February 19, 2001, when their wireless termination tariffs ("Tariffs") apparently took effect, until April 29, 2005, when those Tariffs became void under federal law.[280] See Petition at 7-8 (Issue B). Petitioners first requested interconnection agreement negotiations from T-Mobile on April 29, 2005. This claim thus involves compensation for traffic that the parties exchanged *before* Petitioners' request for negotiations.

This Arbitrator, consistent with Commission precedent,[281] granted on December 30, 2005 T-Mobile's motion to dismiss this claim, ruling that it is "not relevant to the [Section 252(c)] standards for arbitration" and is "not properly before the Commission in this arbitration." Order Granting Motion to Dismiss at 2 (Dec. 30, 2005). Petitioners filed an application for rehearing, and without giving T-Mobile an opportunity to submit any opposition,[282] and the Arbitrator then set aside his December 30 order so "the Commission will be able to consider all of the issues raised in the petition." Order Regarding Dismissal of Issues A and B Between T-Mobile and Petitioners (Jan. 9, 2006); Order Regarding Motion for Rehearing (Jan. 12, 2006). The

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[280] FCC Rule 20.11(d) provides that LECs may "not impose compensation obligations for traffic not subject to access charges upon [CMRS] providers pursuant to tariffs." This new rule took effect on April 29, 2005. See Intercarrier Compensation Order, 60 Fed. Reg. 16141 (March 30, 2005).

[281] See Alma/T-Mobile Arbitration Order Regarding Motions in Limine (Aug. 3, 2005).

[282] Petitioners filed their application for rehearing on January 5, 2006, and 4 CRS 240-2.080(15) specifies that T-Mobile had up to 10 days (until January 17) in which to respond to this application. The Arbitrator entered his reversal order on January 9, before T-Mobile had an opportunity to submit an opposition. It is not apparent why the Arbitrator acted so promptly on the rehearing application when Petitioners did not request expedited action on their application. See 4 CSR 240-2.080(16).

Arbitrator did not, however, disturb his prior finding that the claim for past compensation is "not relevant to the [Section 252(c)] standards for arbitration."[283]

1. The Commission Should Dismiss Petitioners' Past Compensation Claims for 2001 – 2005 Traffic for the Same Reasons it Should Dismiss Petitioners' Claims for 1998-2001 Past Compensation

T-Mobile demonstrates below that the Commission should dismiss Petitioners' request for compensation for 2001-2005 traffic for any one of three reasons. Each of these reasons is discussed in detail in Part III.B above, and those arguments are incorporated here by reference:

- In an arbitration, the Commission lacks delegated authority to address claims involving a period that predates the date of the interconnection agreement negotiation request. See Part III.B.2, above.[284]
- Petitioners are not allowed to condition interconnection negotiations upon the settlement of unrelated claims. See Part III.B.3, above. T-Mobile has not agreed to link past compensation negotiations to the going-forward agreement being arbitrated. This Commission, which acts only pursuant to federal delegated authority, cannot grant relief to Petitioners whose request for that relief is unlawful.
- Commission consideration of the past compensation claims in this arbitration would needlessly contravene T-Mobile's federal constitutional right to due process of law. See Part III.B.5, above. Further, Petitioners have provided insufficient evidence upon

[283] T-Mobile further notes that the Arbitrator's January 9 order did not distinguish between Petitioners' two past compensation claims (1998-2001 and 2001–2005), and did not rely on any of the reasons Petitioners cited in their application for rehearing.

[284] In addition to the arguments made in connection with the 1998-2001 past claims, T-Mobile additionally comments on the January 12, 2006 rehearing order, in which the Arbitrator concluded that Section 252(b)(4)(C) "requires the state commission to resolve each issue set forth in the petition." T-Mobile submits this does not reflect the intent of the statute. Under this construction, one must necessarily assume that Congress expected State commissions to resolve – under a very expedited time frame – potentially dozens of issues completely irrelevant to the arbitration of issues necessary for the execution of an arbitrated interconnection agreement. T-Mobile is not aware of any evidence suggesting Congress had such an intention.

which to base their 2001–2005 claim for past compensation.[285] Moreover, Petitioners have already pursued the other remedies available to them, and that matter is currently pending in federal court.[286] Given that a complaint remedy "would be a better vehicle for resolving" claims for past compensation and would "better protect" the parties' "due process rights," Order Regarding Motions in Limine, Case No. IO-2005-0468, at 2-3 (Aug. 3, 2005), there is no reason for the Commission to resolve past claims in this arbitration proceeding.[287]

In addition to the above reasons to dismiss Petitioners' past compensation claims from this arbitration proceeding, which apply to both the 1998-2001 and 2001-2005 claims, there are several additional reasons to dismiss the 2001–2005 claims.

2. The Commission Must Still Dismiss Petitioners' Claims for Past Compensation Even If It Determines Such Claims Are an "Open Issue" Under Section 252

The Commission must, for two independent reasons, dismiss Petitioners' claim for past compensation even if it determines that the claim is an "open issue" that can be considered in this arbitration proceeding.

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285 The only evidence in the record is the minimal evidence Petitioners included in their Arbitration Petition, Attachment E, listing the total number of minutes they claim T-Mobile sent to them over the 2001-2005 time frame (e.g., one Petitioner claims T-Mobile sent a total 231,284 minutes over this period). Petitioners do not, however, break down this summary usage data by the 50 or so months at issue, nor do they provide any support for their data, other than to state it is based on SBC's Cellular Transiting Usage Summary Reports ("CTUSR"). See Petitioners' T-Mobile Arbitration Petition at 7. Petitioners do not separate the CTUSR traffic into interMTA and intraMTA traffic or intrastate traffic and interstate traffic, which the Commission has recognized is all included in the summary form of the CTUSR reports. See BPS Telephone v. VoiceStream, TC-2002-1077 (Jan. 27, 2005); Mark Twain Wireless Termination Tariff Order, TT-2001-139 (Feb. 8, 2001).

286 See VoiceStream PCS II Corp. d/b/a T-Mobile, et al. v. BPS Telephone, et al., Appeal No. 05-4377 (8th Cir.).

287 The Eighth Circuit has previously "caution[ed]" the Missouri Commission to be "more circumspect in the process it employs," noting that the next party alleging due process infirmities "may well be able to demonstrate that the procedures employed . . . either were inherently lacking in due process or resulted in prejudice to the aggrieved party. Southwestern Bell v. Missouri Public Service Comm'n, 236 F.3d 922, 925 (8th Cir. 2001).

(a) Petitioners' claim is not reciprocal and thus incompatible with their Section 252(b)(5) obligation to establish reciprocal compensation. Section 252(c) specifies that in "resolving by arbitration . . . any open issues . . . a State commission shall (1) ensure that such resolution . . . meet[s] the requirements of section 251 this title." Section 251(b)(5) specifies that "each" Petitioner has the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Congress has defined reciprocal compensation to mean that "each carrier" recovers its costs of transporting and terminating calls that "originate on the network facilities of the other carrier." 47 U.S.C. § 252(d)(2)(A)(i).

Petitioners want the Commission to establish a non-reciprocal arrangement for traffic exchanged between 2001 and 2005, whereby T-Mobile would pay Petitioners for terminating intraMTA mobile-to-land traffic, but they would not pay T-Mobile for terminating intraMTA land-to-mobile traffic. Given the explicit and unequivocal Congressional directive that this Commission "shall ensure" its arbitration order "meets the requirements" of Section 251(b)(5), the Commission cannot, as a matter of law, grant the non-reciprocal relief Petitioners here seek.

(b) Petitioners' proposed rates for the 2001-2005 period also do not comply with federal law requirements. Section 252(c) specifies that in "resolving by arbitration . . . any open issues . . . a State commission shall . . . (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section." FCC implementing rules affirmed on appeal specify that an incumbent LEC "must prove to the state commission" that its rates for transport and termination do "not exceed the forward-looking economic cost" of providing transport and termination. 47 C.F.R. § 51.505(e). In other words, the only rates that a State commission may establish in a federal arbitration proceeding are rates that comply with the FCC's forward-looking TELRIC rules.

The rates Petitioners ask the Commission to establish for traffic exchanged between 2001 and 2005 do not meet these federal law requirements. In approving Petitioners' wireless termination tariffs, the Commission made no attempt to evaluate the proposed rates for compliance with FCC requirements; to the contrary, it held that "the pricing standards at Section 252(d) simply do not apply to the proposed Wireless Termination tariffs."[288] Rather, the Commission approved the proposed rates because they were based "upon the Filing Companies' terminating access rates," with the Commission concluding that the proposed rate levels are "not so high as to be facially outrageous."[289] The FCC has held repeatedly that LECs like the Petitioners may not assess access charges for terminating intraMTA mobile-to-land traffic.[290] And, the Missouri Supreme Court has read federal law in the same way in rejecting Petitioners' argument they can impose access charges on intraMTA mobile-to-land traffic. See State ex rel. Alma Telephone v. Missouri Public Service Comm'n, 2006 Mo. LEXIS 13 (Jan. 10, 2005).

There is, in short, no record evidence in this proceeding that the rates Petitioners want the Commission to approve for past periods in this arbitration do not exceed Petitioners' forward-looking TELRIC costs, and this alone is grounds to dismiss their claim as a matter of law.

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288 See Mark Twain Wireless Termination Service Order, TT-2001-139 (Feb. 8, 2001).

289 See id.

290 See, e.g., Local Competition Order, 11 FCC Rcd 15499, 16016 ¶ 1043 (1996)("We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges."); ISP Remand Order, 16 FCC Rcd 9151, 9173 ¶ 47 (2001)("The Commission also held that reciprocal compensation, rather than interstate or intrastate access charges, applies to LEC-CMRS traffic that originates and terminates within the same Major Trading Area (MTA)."); Unified Intercarrier Compensation Regime, 16 FCC Rcd 9610, 9642-43 ¶ 91 (2001)("LEC-CMRS interconnection for calls that originate and terminate in the same MTA (as of the start of a call) are governed by section 251, and are subject to reciprocal compensation."); Small Entity Compliance Guide: Reciprocal Compensation Arrangements Between LECs and CMRS Providers, 20 FCC Rcd 12158 (July 14, 2005)("The term 'non-access traffic' means any telecommunications traffic that is . . . exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area (MTA).").

3. T-Mobile's Response to Miscellaneous Petitioner Assertions That Lack Merit

There is no opportunity to submit a post-hearing reply brief under the procedural schedule that has been established in this case. Because it is likely that Petitioners in their post-hearing brief will repeat baseless arguments they have made in the past, T-Mobile is compelled to respond briefly to these assertions.

(a) Assertion: T-Mobile did not appeal the Commission's complaint order. Petitioners' witness, Mr. Schoonmaker, would give the Commission the erroneous impression that T-Mobile has not appealed the Commission's complaint order in BPS Telephone v. VoiceStream d/b/a T-Mobile, TC-2005-1077 (Jan. 27, 2005), after which he asserts that T-Mobile has still "failed to comply with the Commission's decision." Mr. Schoonmaker stated,

> On January 27, 2005, the Commission sustained a Complaint filed by [a] number of Petitioners against T-Mobile finding that T-Mobile had 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. Although T-Mobile did not appeal the Commission's decision to the circuit court, T-Mobile has failed to comply with the Commission's decision.[291]

However, as Mr. Schoonmaker knows full well, T-Mobile has appealed this Commission order and that appeal is currently pending. See VoiceStream d/b/a T-Mobile, et al. v. BPS Telephone, et al., Appeal No. 05-4377 (8th Cir.).

Petitioners further assert (without *any* legal support) that T-Mobile's federal court appeal is invalid because the "exclusive" remedy for appeals of Commission decisions is in State court.[292] But Petitioners overlook the fact that T-Mobile, a federal licensee, raises federal law issues in its federal court appeal, not State law issues. The U.S. Supreme Court has held that

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291 Schoonmaker Rebuttal. p. 50 l. 9-14.

292 See Petitioners Opposition to T-Mobile's Motion to Dismiss Issues A and B, at 8 and 17 (Nov. 28, 2005).

federal courts have a duty to entertain appeals of State commission orders where, as here, federal preemption is at issue.[293]

(b) Assertion: The FCC has "expressly upheld" Petitioners' wireless termination tariffs.[294] T-Mobile cannot agree, and this is the central issue in the pending federal court appeal.

To be sure, the FCC in its Wireless Termination Tariff Order, 20 FCC Rcd 4855 (2005) held that the *procedure* of using tariffs was not unlawful *per se* prior to April 29, 2005. However, T-Mobile does not believe that the FCC addressed in this Order the separate question of whether State tariffs must comply with Sections 251-252 as a matter of federal *substantive* law. To the contrary, the FCC was very clear that "we need not decide whether such tariffs satisfy the statutory requirements of that section" 251(b)(5):

> Although a tariffed arrangement would not be unlawful per se under the current rules, we make no findings regarding specific obligations of any customer of any carrier to pay any tariffed charges. Id. at 4861 n.40 and 4862 n.49.

In addition, the FCC has previously ruled that incumbent LECs cannot ignore their substantive federal law obligations by hiding behind State law tariffs of their own creation. For example, the FCC has squarely rejected the ILEC assertion that it could excuse itself from federal reciprocal compensation rules simply by preparing and filing an incompatible State tariff:

> [A]ny LEC efforts to continue charging CMRS or other carriers for delivery of such traffic would be unjust and unreasonable and violate the Commission's rules, *regardless of whether the charges were contained in a federal or state tariff.* TSR Wireless v. U S WEST, 15 FCC Rcd 11166, 11184 ¶ 29 (2000)(emphasis added), aff'd Qwest v. FCC, 252 F.3d 462 (D.C. Cir. 2001).

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293 See Verizon v. Maryland Public Service Comm'n, 535 U.S. 632, 642 (2002).

294 See Petitioners Opposition to T-Mobile's Motion to Dismiss Issues A and B, at 16 (Nov. 28, 2005).

The FCC did not discuss this TSR Wireless precedent in its Wireless Termination Tariff Order. Nevertheless, Petitioners would have the Commission believe that the FCC approved their wireless termination tariffs as compliant with federal law substantive requirements and, in the process, implicitly overruled its TSR Order. But, it is a settled principle of administrative law that where "an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious."[295] In others words, in order to sustain their position, Petitioners want the Commission to believe that (a) the FCC implicitly overturned its prior orders despite not mentioning those orders (much less providing an explanation for its change in position), *and* (b) in taking this assumed action, the FCC intended to render its Wireless Termination Tariff Order invalid for being arbitrary and capricious (because it did not explain its reasons for departing from precedent).

(c) Assertion: Sections 251(d)(3) and 252(e)(3) empower the Commission to ignore the Section 252(c) legal standard as applied to claims for past compensation.[296] In fact, Section 251(d)(3) has no relevance to this case because it limits FCC authority (rather than empowers State commissions). Besides, this statute makes clear that State commissions orders involving State law requirements must be "consistent with the requirements

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295 Ramaprakash v. FAA, 346 F.3d 1121, 1130 (D.C. Cir. 2003). See also IRS v. Federal Labor Relations Authority, 963 F.2d 429, 434 (D.C. Cir. 1992) ("It is well established that where an agency departs from its prior cases, it must do so pursuant to reasoned decisionmaking."); Gilbert v. NLRB, 56 F.3d 1438, 1445 (D.C. Cir. 1995)("It is, of course, elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent."); Hall v. McLaughlin, 864 F.2d 868, 872 (D.C. Cir. 1989) ("Divergency from agency precedent demands an explanation."); Greater Boston Telephone v. FCC, 444 F.2d 841,852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)("An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if any agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."); Pontchartrain Broadcasting v. FCC, 15 F.3d 183, 185 (D.C. Cir. 1994)("[A]n unexplained departure from Commission precedent would have to be overturned as arbitrary and capricious."); Northpoint v. FCC, 312 F.3d 145, 156 (D.C. Cir. 2005)("[A]n unexplained departure from prior Commission policy and practice is not a reasonable one . . . [and] is unauthorized.").

296 See Petitioners' Opposition to T-Mobile's Motion to Dismiss Issues A and B, at 10-13 (Nov. 28, 2005).

of" Section 251(b)(5) and "not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3)(B), (C). Obviously, the non-reciprocal arrangement Petitioners seek would not be consistent with the requirements of Section 251(b)(5).

The second statute that Petitioners have cited, Section 252(e)(3), which recognizes that State commissions may impose "other requirements" (e.g., service quality standards) "in its review of an agreement," is likewise irrelevant to this arbitration proceeding. Section 252(e)(1) is very clear that a State commission may "review an agreement" only *after* negotiations or an arbitration have been completed. Neither of these events has occurred.

More fundamentally, the statutes upon which the Petitioners rely are savings clauses.[297] Federal savings clauses do not grant authority to a State commission as the Petitioners assert (notably again, without *any* supporting authority). Rather, savings clauses recognize, or preserve, whatever authority a State commission may independently possess.[298] The Commission does not possess such independent authority here. As the Commission has previously recognized, under Missouri law, wireless carriers are "not subject to the general regulatory jurisdiction of the Commission."[299] If the Commission has no general regulatory authority over

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297 The Arbitrator should be aware that the Supreme Court has "declin[ed] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law." United States v. Locke, 528 U.S. 89, 106 (2000). See also Bastien v. AT&T Wireless, 205 F.3d 983, 987 (7th Cir. 2000)("To read the [savings] clause expansively would abrogate the very federal regulation of mobile telephone providers that the act intended to create. Therefore, we have to read the savings clause narrowly to avoid swallowing the rule.")(internal citations omitted).

298 See, e.g., Gorbach v. Reno, 219 F.3d 1087, 1094 (9th Cir. 2000)(en banc)(A "saving clause protects such powers as the Attorney General has . . . . But this clause does not expressly grant any power. Absence of implied repeal does not amount to creation of some new power. Under the savings clause, what authority the Attorney General has, she keeps, but it does not give her more.").

299 See Application of Missouri RSA No. 7 Limited Partnership, Case No. TO-2003-0531 (Nov. 30, 2004), citing Section 386.020(53)(c).

wireless carriers under State law, it obviously cannot compel a wireless carrier to participate in State arbitration over its objection.[300]

(d) Assertion: T-Mobile seeks a "free ride" on Petitioners' networks.[301] Admittedly, T-Mobile has not paid, to date, Petitioners for terminating mobile-to-land calls that originate on its wireless network for the 2001-2005 period. But likewise, Petitioners have not paid T-Mobile for the costs it has incurred in terminating land-to-mobile calls that originate on their landline networks over the same period. In that sense, all parties (including Petitioners) are seeking a "free ride" (although with bill-and-keep, the absence of cash exchanged between two carriers does not mean the two carriers are receiving a "free ride").

Congress has imposed on LECs the "duty to establish reciprocal compensation arrangements," 47 U.S.C. § 251(b)(5), and this duty applies even if carriers exchange traffic without an interconnection agreement.[302] Bill-and-keep, where neither carrier pays the other for call termination, is one form of reciprocal compensation. See 47 U.S.C. § 252(d)(2)(B)(i). The "mutual and reciprocal recovery by each carrier of the costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," See id. at § 252(d)(A)(i), which presumably will occur at the conclusion of this arbitration petition, is yet another form of reciprocal compensation. What Congress has not authorized a State commission to do in an arbitration proceeding is to approve the *non*-reciprocal

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300 Missouri law does empower the Commission to arbitrate disputes between two parties if "all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrators." Section 386.230 RSMo. T-Mobile does not consent to State arbitration of issues beyond that specified in Section 252(b) of the Communications Act, including issues that pre-date the request for negotiations.

301 See Petitioners' Opposition to T-Mobile's Motion to Dismiss Issues A and B, at 15 (Nov. 28, 2005). See also id. at 3 ("free use"), 4 ("free pass"), and 21 ("free pass").

302 See, e.g., TSR Wireless v. U S WEST, 15 FCC Rcd 11166, 11184 ¶ 29 (2000), aff'd, Qwest v. FCC, 252 F.3d 462 (D.C. Cir. 2001).

regime that Petitioners seek – namely, T-Mobile pays them for terminating mobile-to-land calls, but they do not pay T-Mobile for terminating land-to-mobile calls that originate on their networks. T-Mobile's request that Petitioners comply with their unequivocal "duty to establish reciprocal compensation arrangements" can hardly be considered action taken in "bad faith," as they repeatedly suggest.[303]

(e) Assertion: T-Mobile has "violated" the Commission's 1997 order in TT-97-524 by sending mobile-to-land traffic without an agreement."[304] Notably, at least one of the Petitioners, Fidelity Telephone, does not even agree with this position of Petitioners. In seeking to dismiss itself from this arbitration proceeding, Fidelity obviously has determined it can lawfully exchange traffic with T-Mobile without an approved agreement.

In fact, every wireless carrier in Missouri has "violated" this order because all wireless carriers have sent mobile-to-land traffic to Petitioners without an agreement. It appears that wireless carriers did not participate in the TT-97-524 docket. Had they participated, they surely would have advised the Commission that it lacked the authority to enter the order it did. Wireless carriers are "not subject to the general regulatory jurisdiction of the Commission,"[305] and thus the Commission lacked authority in State law to prohibit wireless carriers from sending their mobile-to-land traffic in the absence of an interconnection agreement – because in entering such an order, the Commission necessarily would be exercising regulatory authority over wireless carriers. Further, the Commission may not enforce its TT-97-524 order even if it

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303 See Petitioners' Opposition to T-Mobile's Motion to Dismiss Issues A and B, at 14, 15, 16 and 17 (Nov. 28, 2005).

304 See Petitioners' Opposition to T-Mobile's Motion to Dismiss Issues A and B, at 2, 3 and 11 (Nov. 28, 2005).

305 See Missouri RSA No. 7 Limited Partnership, Case No. TO-2003-0531 (Nov. 30, 2004), citing Section 386.020(53)(c).

possessed regulatory authority under State law over wireless carriers. Congress has determined that "no State or local government shall have any authority to regulate the entry of . . . any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). A Commission order prohibiting wireless carriers from sending mobile-to-land calls unless they satisfy certain preconditions (e.g., execute an interconnection agreement with each LEC in the State) would clearly constitute entry regulation that is prohibited by this federal statute. Accordingly, federal law preempts the TT-97-524 order (even assuming independent authority existed in State law).

(f) Assertion: The "filed rate" doctrine excuses Petitioners from complying with federal law.[306] Again, it is not surprising that Petitioners cite no federal authority in support of their argument. As one federal court held in preempting rural LEC State tariffs because they were inconsistent with their federal law requirements:

> The preemption doctrine, which derives from the Supremacy Clause of the United States Constitution, allows federal law to preempt and displace state law under certain circumstances. . . . Thus, in the instant case, the filed tariffs at issue in this case, which have the force of state law, are subject to potential preemption by federal law. 3 Rivers Telephone v. U S WEST, 2003 U.S. Dist. LEXIS 24871, at *50 (D. Mont., Aug. 22, 2003).

(g) Assertion: T-Mobile is "barred by the principles of *res judicata* and collateral estoppel from contesting the wireless tariffs and its past due amounts."[307] Petitioners are mistaken. These doctrines apply only if one is a party to prior litigation,[308] and T-Mobile was not a party to any of the State court litigation over the Petitioners' various State

306 See Petitioners' Opposition to T-Mobile's Motion to Dismiss Issues A and B, at 8 and n.11 (Nov. 28, 2005).

307 See Petitioners' Opposition to T-Mobile's Motion to Dismiss Issues A and B, at 22 (Nov. 28, 2005). See also id. at 17 and 21.

308 See, e.g., Kremer v. Chemical Construction, 456 U.S. 461 (1982); GTE Sylvania v. Consumers Union, 445 U.S. 375 (1980).

tariffs.[309] Notably, the Missouri appellate courts rulings Petitioners reference contain errors of fact and law.[310] Moreover, federal courts, the "experts" at construing federal law, have reached the opposite result in interpreting the same federal law as the Missouri appellate courts.

If anything, the kinds of arguments that Petitioners advance help make the case that the Arbitrator should not include past compensation issues in this arbitration proceeding because none of these issues is relevant to the chief question before the Arbitrator: whether the Petitioners' proposed rate for reciprocal compensation complies with the FCC's TELRIC rules.

B. MATRIX ISSUE NO. 28: THE APPROPRIATE INTRASTATE/INTERSTATE FACTOR FOR INTERMTA TRAFFIC

As noted in Section I.C (Issue 27) above, the parties have agreed upon the interMTA traffic factors to be included in the agreement. With all but three Petitioners the interMTA traffic factor is zero percent (0%). For the three remaining three Petitioners, the interMTA traffic factors are: Craw-Kan 7%; BPS 52%; and Mark Twain 70%. Petitioners proposed these interMTA traffic factors in their Petition, and T-Mobile accepted them in its Response.[311] Petitioners did not propose any further break down or allocation of the interMTA traffic factor in their Arbitration Petition or their accompanying proposed Traffic Termination Agreement.

Petitioners did not meet their burden of identifying this as an unresolved issue, and therefore the Commission lacks the authority to decide the issue. Section 252(b)(2) of the Act specifies that a party filing an arbitration petition "*shall*, at the same time as it submits the

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309 Nor is T-Mobile foreclosed from raising its federal law claims as applied to the Petitioners' State tariffs. Federal law is settled that a carrier can challenge an order or tariff not only at the time the order or tariff takes effect, but also when the order or tariff is applied to the carrier. See Functional Music v. FCC, 274 F.2d 543 (D.C. Cir. 1958), and its progeny.

310 Indeed, the Missouri Supreme Court, in recently ruling that compensation arrangements between rural LECs and wireless carriers are governed by federal substantive law, undermines completely the entire premise of the Missouri appellate court decision in State ex rel. Sprint Spectrum v. Missouri Public Service Comm'n, 112 S.W.3d 20 (Mo. Ct. App. 2003).

311 See T-Mobile Response at 10, ¶ 15.

petition, provide the State commission all relevant documentation concerning (i) the unresolved issues; [and] (ii) the position of each of the parties with respect to those issues" (emphasis added). In addition, Section 252(b)(4) of the Act provides that a State commission "*shall limit its consideration* of any petition under paragraph (1) (and any response thereto) *to the issues set forth in the petition*" (emphasis added).

T-Mobile noted the Petition's absence of the interstate-intrastate issue in its Response, because an interstate-intrastate allocation of an interMTA factor in an interconnection agreement is generally a separately negotiated item.[312] Indeed, Petitioners themselves have recognized how familiar they are with the interstate-intrastate jurisdictional split issue, as they have negotiated such factors in their agreements with other wireless carriers.[313] Because Petitioners did not raise the interstate-intrastate allocation as an unresolved issue and because the parties had not reached agreement on a negotiated allocation, T-Mobile could only assume that an "uncontested" split would be 100% interstate and 0% intrastate.[314] This is simply a logical position for T-Mobile to take; after all, if the issue had been important to the Petitioners, they would have raised it in the Arbitration Petition as required by federal law. T-Mobile cannot be faulted for preserving its interests. T-Mobile has done more than that here, however, and proposed, in the spirit of compromise, an 80% interstate/20% intrastate allocation of the traffic identified by the interMTA factor.[315]

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312 See T-Mobile Response at 11, ¶ 16

313 Instead of providing evidence to support their position, Petitioners point to the agreements they have reached with other CMRS providers in which they negotiated interstate-intrastate percentages for the interMTA factor. See Schoonmaker Direct, p. 55 l. 19-21.

314 Id., p. 11, ¶ 16.

315 See Joint Issues Matrix, Issue 28, T-Mobile Position.

Even assuming this issue had been identified in the Petition and therefore had been properly raised in this proceeding, Petitioners have failed to present any relevant evidence to support their position and therefore have failed to meet their burden of proof.[316] Petitioners did not seek to amend their Arbitration Petition or otherwise address the interstate-intrastate allocation of interMTA traffic issue until direct testimony.[317] Even then, instead of providing evidence to support their proposed allocation of 80% intrastate/20% interstate, the Petitioners asked the Commission to ignore their lack of evidence and look instead to irrelevant items in deciding this issue.[318]

With respect to the interstate/intrastate allocation of the interMTA traffic factor, Petitioners have a strong motive to over-report in the intrastate jurisdiction due to the wide disparity between their respective interstate and intrastate access charges. Petitioners have a significant incentive to advocate for a large intrastate figure because their intrastate access charges are many times greater than their interstate access charges. Petitioners admit that they decided to try to rely on numbers reached in separate negotiations rather than perform traffic studies to support their position in their direct testimony.[319] Rather than prepare traffic studies using T-Mobile traffic, they instead attempt to rely on the following four pieces of irrelevant evidence:

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316 AT&T Communications/GTE Minnesota Arbitration Order, Docket No. P442,407/M-96-939, 1996 Minn. PUC LEXIS 151 at *10 (Dec. 12, 1996) ("[T]he burden of proof in proceedings to implement the Act should fall on the incumbent").

317 Schoonmaker Direct, p. 55 l. 19-21.

318 Schoonmaker Direct, p. 55 l. 19 – p. 56 l. 18.

319 Schoonmaker Rebuttal, p. 44 l. 8-9.

- First, they ask the Commission to look to the interstate-intrastate allocation included in agreements Petitioners have voluntarily negotiated with other carriers.[320]
- Second, Petitioners point to the percentages included in voluntarily negotiated agreements between other ILECs and wireless carriers in Missouri.[321]
- Third, although they were not petitioners in the recent Alma/T-Mobile proceeding, Petitioners count on the carrier-specific interstate-intrastate allocation of the interMTA factor determined in that proceeding.[322] Petitioners neglect to mention, however, that *the Alma petitioners each listed the interstate-intrastate issue in their arbitration petition and produced traffic studies with carrier-specific calling data upon which the Arbitrator in that case relied to establish the allocation in that arbitration.* See Alma/T-Mobile Petition, IO-2005-0469, *et. al*, Consolidated at 6, Second ¶ 1; Alma/T-Mobile Arbitration Report, at 10 (Oct. 6, 2005)
- Finally, the Petitioners make broad claims about what other, unidentified wireless carriers have told them about their internal routing decisions. "Because interstate calls are typically routed to IXCs for termination to ILECs, the preponderance of calls routed over the transit facilities of SBC would be intrastate."[323]

None of Petitioners' arguments provide evidence relevant to the traffic exchanged between the Petitioners and T-Mobile, which is the focus of this arbitration. Negotiated numbers and numbers arbitrated between a different set of carriers carry no weight in allocating the interMTA factor between Petitioners and T-Mobile. The traffic exchanged between two carriers

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320 Schoonmaker Direct, p. 55 l. 19-21.

321 Schoonmaker Direct, p. 55 l. 19-21.

322 Schoonmaker Direct, p. 56 l. 14-18,

323 Joint Issues Matrix, Issue 28, Petitioners' Position; Schoonmaker Rebuttal, p. 44 l. 16-18.

is necessarily specific to those carriers. Likewise, an interMTA factor and the further allocation of that factor into interstate and intrastate, is similarly particular to those carriers. As just one example, Petitioners have widely different interMTA factors – Mark Twain has a 32% interMTA factor with Cingular and a 70% interMTA factor with T-Mobile. Agreements that one of the parties has voluntarily negotiated with *other* carriers, or terms in voluntarily negotiated agreements to which none of the companies in this case is party, do not necessarily reflect, and certainly do not prove, the appropriate percentages between the parties in this arbitration.

For the Arbitrator to adopt Petitioners' position on an issue, Petitioners must meet the burden of proving by competent and substantial evidence that their proposal is more reasonable than T-Mobile's. Petitioners have not provided any such evidence here. Petitioners will no doubt argue that their rebuttal view of T-Mobile's *intra*MTA traffic study should influence the Arbitrator's decision of this *inter*MTA traffic allocation issue. In his rebuttal testimony, Mr. Schoonmaker again admitted that Petitioners had chosen not to conduct studies on this issue.[324] Instead of having any evidence to present, Petitioners' witness was left to discuss an apples-to-oranges analysis one of the Petitioners performed on a T-Mobile *intra*MTA traffic study for a single Petitioner.[325]

It is important to keep in mind that the interMTA traffic factor included in an interconnection agreement is not meant to represent the amount of all interMTA traffic originated by a wireless carrier to an incumbent LEC. The interMTA traffic factor is not intended to include mobile-to-land interMTA traffic that is delivered to the incumbent LEC by an IXC over access trunks. Rather, the interMTA factor recognizes that some traffic exchanged

324 Schoonmaker Rebuttal, p. 44 l. 8-9.

325 See Schoonmaker Rebuttal, p. 45 l. 3-16. The Petitioners' analysis looked at a traffic study designed to capture intraMTA traffic instead of interMTA traffic. See Mr. Tr. Vol. 5, p. 422 l. 7-10; Tr. Vol. 5, p. 423 l. 13-18.

between parties under an interconnection agreement (which is targeted to intraMTA traffic) may be interMTA traffic. Use of an interMTA factor in this manner is standard in the industry because both wireless service providers and incumbent LECs generally lack the capability to measure how much traffic exchanged under an interconnection agreement is interMTA traffic.[326] Petitioners' shoe-horned rebuttal of intraMTA traffic data, which was designed to capture different data than an interMTA traffic jurisdiction allocation, does not rise to the level of evidence Petitioners must produce to support their position.

Despite Petitioners' failure to identify the issue and their failure provide any evidence whatsoever on point, T-Mobile has offered an 80% interstate, 20% intrastate allocation on this issue in the spirit of compromise. The Arbitrator should select T-Mobile's proposal on Issue 28.

C. MATRIX ISSUE NO. 32: BILLING

This issue corresponds to the practical question of how to bill for traffic under an agreement that provides for reciprocal compensation. T-Mobile proposed net billing language and indicated that it can also accommodate cross billing. Net billing is a streamlined approach to tracking and billing for traffic under an interconnection agreement. T-Mobile's proposed net billing language for Paragraphs 5.1.1 and 5.1.2 of the Traffic Termination Agreement allows the parties to compute the amount of traffic flowing in each direction and requires only one net payment for the corresponding compensation owed. Petitioners agree that a net billing arrangement is appropriate,[327] and they have not offered any competing net billing language. Therefore, T-Mobile's proposed language should be adopted (subject to adjustment of the intraMTA traffic ratio as determined in Issue 17).

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326 Pruitt Rebuttal, p. 10 l. 22 – p. 11 l. 8.

327 Joint Issues Matrix, Issue 32, Petitioners' Position.

Petitioners appear to seek clarification about the mechanics of T-Mobile's net billing language. In his direct testimony, Mr. Schoonmaker stated that Petitioners had reached "general agreement" with T-Mobile regarding how billing would work, with but "one exception." He described that exception as relating to what records would be used to determine the minutes of use needed to start the net billing calculation.[328] Through Mr. Schoonmaker's direct testimony, Petitioners asked the Commission to "order that net bills be issued by ILECs based solely on the tandem company's transiting usage reports."[329]

T-Mobile's witness, Mr. Pruitt, explained in response that T-Mobile's net billing language provides flexibility by "allowing the parties to identify and agree upon the appropriate sources for determining the volume of calls exchanged between the parties."[330] T-Mobile's net billing provision states that "Total Minutes of Use will be calculated based on total IntraMTA MOUs (identified by CTUSR records plus records of intraMTA calls handed off to IXCs or *other mutually acceptable calculation*) . . . ."[331] This flexibility allows the parties to identify relevant records as those records or recording capabilities change over the life of the traffic termination agreement (for example, this same flexible, T-Mobile language was included in the arbitrated agreement resulting from the Alma arbitration, as adequately addressing the rural LECs' concern that the records they received were different than CTUSRs).

Petitioners did not repeat their reservation about the traffic records in the Joint Issues Matrix, and it is unclear whether Petitioners' need for clarification on this point remains. It appears that Petitioners may have dropped this exception to their agreement to the net billing

328 Schoonmaker Direct, p. 57 l. 1-2.

329 Id., p. 58 l. 5-7.

330 Pruitt Rebuttal, p. 27 l. 9-14.

331 T-Mobile Response, Exhibit A, Section 5.1.2 (emphasis added).

proposal and substituted a new exception. In the Joint Issues Matrix, Petitioners state that InterMTA traffic "should be identified and removed from total terminating usage before performing a net billing calculation on the remaining intraMTA minutes of use."[332] Petitioners likely refer to the fact that three of the agreements resulting from this proceeding will include an interMTA traffic factor (for BPS, Mark Twain and Craw-Kan), and those Petitioners would like to understand better how the interMTA traffic factor and intraMTA net billing relate.

Walking through the net billing provision with an eye to the role of both the interMTA traffic factor and net billing calculation demonstrates how the two work together. The net billing provision identifies the amount of minutes of use upon which intercarrier compensation will be calculated under the agreement. Because actual land-to-mobile minutes are generally not available, one starting point for determining total minutes of use between the parties is often the mobile-to-land minutes of use as reflected in the records of the transiting LEC. The number of mobile-to-land minutes is then divided by the mobile-to-land percentage of the traffic ratio to obtain the total minutes of use exchanged between the parties. For example, if the transiting LECs' records show 100 mobile-to-land minutes of use in a billing period, and the intraMTA traffic ratio is 65%-35%, the calculation is: 100 ÷ .65 = 154. The total minutes of use exchanged between the parties in this example is 154.

Once the total minutes of use are calculated, those minutes are allocated between T-Mobile and a Petitioner. In our example, to arrive at the land-to-mobile minutes of use, the 154 MOUs of total traffic are multiplied by the 35% land-to-mobile traffic balance percentage: 154 x .35 = 54 land-to-mobile MOUs. The mobile-to-land minutes are then calculated by the complementary 65%: 154 x .65 = 100 mobile-to-land MOUs. Under the traffic termination

332 Joint Issues Matrix, Issue 32, Petitioners' Position.

agreement with T-Mobile's net billing provision, a Petitioner would owe reciprocal compensation for the land-to-mobile minutes of use.

To calculate the amount T-Mobile owes for its mobile-to-land minutes of use, its MOUs must be divided between interMTA MOUs (when applicable) and intraMTA MOUs. The total mobile-to-land MOUs should be multiplied by the interMTA traffic factor. If the interMTA traffic factor is 52% (as with BPS), T-Mobile's MOUs are divided for compensation purposes into 52 interMTA MOUs (100 x .52 = 52) and 48 intraMTA MOUs. If the interMTA traffic factor is 7% (as with Craw-Kan), T-Mobile's MOUs are divided for compensation purposes into 7 interMTA MOUs (100 x .07 = 7) and 93 intraMTA MOUs. A Petitioner would then calculate the total amount it owes T-Mobile for land-to-mobile traffic and the amount Petitioner owes for interMTA traffic and intraMTA traffic. Separating the mobile-to-land minutes of use into interMTA (when an interMTA factor applies) and intraMTA ensures that the incumbent LEC does not bill T-Mobile twice under the traffic termination agreement for the same MOUs.

The net billing process described above identifies the appropriate number of land-to-mobile minutes of use upon which a Petitioner owes reciprocal compensation. In contrast, the land-to-mobile MOUs would be understated if the interMTA traffic factor were applied to the initial number of mobile-to-land MOUs shown in the transit provider's records before calculating the total number of MOUs exchanged between the parties. Using the same example as above, with 100 mobile-to-land MOUs and an interMTA factor of 52%, if the interMTA factor is applied (100 x .52 = 52 interMTA MOUs and 48 intraMTA MOUs) before determining the total minutes of use (48 ÷ .65 = 74 total MOUs), the resulting land-to-mobile minutes is less than half of the number than the land-to-mobile minutes of use obtained when the calculation is performed correctly (74 x .35 = 26, compared with 154 x .35 = 54). Thus, to properly reflect the basis for the traffic ratio—allocating the total number of MOUs exchanged between the parties under the agreement—the total number of minutes must be calculated and allocated between mobile-to-land and land-to-mobile before compensation is calculated, using the reciprocal compensation rate and, when applicable, the interMTA traffic factor and corresponding access rate(s).

The Arbitrator should adopt T-Mobile's proposed net billing language and approach to integrating the interMTA traffic factor and intraMTA traffic ratios under net billing.

D. MATRIX ISSUE NOS. 26 AND 34: WHETHER THE AGREEMENT SHOULD INCLUDE CALL BLOCKING AS A REMEDY FOR DISPUTE RESOLUTION BETWEEN THE PARTIES

Petitioners ask the Commission to give them the right to block T-Mobile's mobile-to-land traffic if they determine, in their sole judgment, that a bill has not been paid timely.[333] Petitioners apparently believe that under the authority they seek, they would have the "right" to block T-Mobile's traffic even though T-Mobile may have litigation pending challenging the lawfulness of the charges.[334]

The blocking provisions Petitioners seek are completely unnecessary and would serve no legitimate purpose. The only harm Petitioners would face if a bill is not paid timely is a temporary loss of use of the money at issue. However, the parties agree the arbitrated agreement should contain a provision that would enable Petitioners to assess a "late charge" of 1.5 percent monthly (effectively, 18 percent annually) if a bill is not paid within 30 days – an interest level

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333 See Paragraph 19 of Petitioners' Proposed Agreement.

334 Although the proposed agreement suggests that blocking will not be utilized if there is a "bona fide dispute" or if one of the parties brings an action in "any lawful forum" (see ¶ 7.3, ¶ 7.4 of Petitioners' Proposed Agreement), as evidenced by the facts of this case, Petitioners do not consider T-Mobile's pending action in federal court as involving a "bona fide dispute" in a "lawful forum." In other words, because Petitioners alone will determine when they will exercise a blocking option, they also necessarily will control how contract terms such as "bona fide dispute" and "lawful forum" will be interpreted. This unacceptable situation simply confirms the need for a government agency to determine whether call blocking should be used before the drastic remedy is implemented.

that far exceeds interest rates in today's market.[335] This late charge fully addresses any possible harm from untimely payment. Indeed, Petitioners would be better off financially if T-Mobile did not pay timely any of its bills, because the 18 percent Petitioners will receive from T-Mobile would far exceed the four percent (4%) interest it might receive if it deposited the same sum in a local bank. Given these facts, the additional remedy of blocking is completely unnecessary.

In fact, the blocking remedy Petitioners seek is financially irrational. Because Petitioners have stated they lack the capability to block mobile-to-land traffic themselves, they would have to ask the transit carrier to block the traffic for them, and the transit carrier undoubtedly will expect payment for providing this blocking service to Petitioners. Thus, Petitioners apparently are willing to spend money for blocking services so they do not receive revenue generated by mobile-to-land traffic from the transit carrier.

T-Mobile submits that, in a competitive environment, no carrier should be permitted to dictate how another carrier chooses to route its own traffic.[336] No one carrier – and certainly not the incumbent carrier – should be permitted to unilaterally impose costs on other carriers. Finally, no one carrier should be given government sanction for a scheme that would encourage it to block consumer call attempts because of legal disputes between two service providers. T-Mobile urges the Commission to consider this blocking issue from the perspective of consumers – and not from the perspective of incumbent carriers whose incentive is to stifle competition.

Petitioners do not discuss any of the factors above – and understandably so. Rather, the only argument they make in support of their blocking proposal is that the Commission has

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335 See Paragraph 5.3 of Petitioners' Proposed Agreement.

336 Indeed, Petitioners agree to this general principle as evidenced by their abandoning their initial position that all traffic the parties exchange should be sent through a "LEC" transit carrier only. See Joint Issues Matrix, Issue 31, Petitioners Position.

always approved blocking provisions in the past.[337] But rote invocation of prior precedent will not suffice where, as here, T-Mobile makes arguments that the Commission has never before considered. Indeed, under Petitioners' argument, the Commission could never change its policies and would forever be stuck following decisions made years (or decades) ago – even though circumstances may have changed.

Federal courts have observed that an agency is "entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest."[338] Agencies are also "obligated to respond to 'relevant' and 'significant' comments,"[339] as T-Mobile makes above. T-Mobile therefore urges the Commission to reject Petitioners' blocking proposals. They are completely unnecessary and would harm the public interest and consumer welfare.

E. MATRIX ISSUE NO. 35: THE COMMISSION DOES NOT POSSESS THE DELEGATED AUTHORITY TO EXCUSE THE PETITIONERS FURTHER FROM THEIR STATUTORY OBLIGATION TO PAY RECIPROCAL COMPENSATION

While the parties agree that the effective date of the arbitrated agreement should be April 29, 2005, Petitioners nonetheless claim that this effective date should apply to them only and not to T-Mobile. This is because, as made apparent from the Joint Issues Matrix, Petitioners assert the Commission should excuse them from paying reciprocal compensation to T-Mobile until T-Mobile pays them their claims for non-reciprocal compensation for traffic exchanged prior to April 29, 2005:

Issue	T-Mobile Position	Petitioners' Position
What date should be selected as the effective date for the	The effective date should be April 29th, 2005, the date	April 29, 2005 is the effective date for the agreements, but

337 See, e.g., Joint Issues Matrix, Issue 34, Petitioners' Position.

338 DirecTV v. FCC, 110 F.3d 816, 826 (D.C. Cir. 1997).

339 Horsehead v. Browner, 16 F.3d 1246, 1269 (D.C. Cir. 1994). See also HBO v. FCC, 567 F.2d 9, 35 and n.58 (D.C. Cir. 1977).

arbitrated agreement with T-Mobile?	negotiations were requested.	this effective date should not prohibit Petitioners from being compensated for pre-and post-tariff traffic sent to Petitioners by T-Mobile (see # 14 & 15 above), and it should not relieve T-Mobile from complying with Commission orders and tariffs.

Petitioners make the same point in their position on Joint Issue Matrix No. 26, where they state:

> The Commission has the authority to require T-Mobile to pay its past due bills before taking advantage of a new agreement, and similar requirements have been approved by the Commission in numerous other agreements.

To implement their proposal, Petitioners want the Commission to include, over T-Mobile's objection, the following two sentences in the arbitrated agreement:

> At the same time that the Parties execute this Agreement, they are entering into a confidential agreement to settle all claims related to traffic exchanged between the Parties prior to the Effective Date of this Agreement. Each Party represents that this settlement agreement completely and finally resolves all such past claims. Petitioners Proposed Contract at ¶ 5.4.

Petitioners, in seeking this relief, have not demonstrated that the Commission even possesses the authority to grant the relief they seek.

1. Petitioners Have Not Demonstrated That the Commission Possesses the Delegated Authority to Grant the Non-Reciprocal Relief They Seek

Petitioners seek non-reciprocal relief from the Commission. Specifically, they want the Commission to order T-Mobile to pay them the arbitrated rate for mobile-to-land traffic sent since April 29, 2005, the agreed-to effective date of the arbitrated agreement. On the other hand, Petitioners want the Commission to excuse them from paying T-Mobile for land-to-mobile traffic until T-Mobile "settle[s] all claims prior to the Effective Date of this Agreement." But in seeking this relief, Petitioners have not demonstrated that the Commission possesses the authority to grant such non-reciprocal relief.

(a) The Commission can only enter reciprocal relief in this arbitration proceeding. The legal standard the Commission must apply in this arbitration is contained in Section 252(c). Congress was both explicit and unequivocal in this statute that a "State commission *shall* (1) *ensure* that [its] resolution [of the open issues] meet[s] the requirements of section 251" (emphasis added). Section 251(b)(5) imposes on Petitioners the "duty" to establish "reciprocal compensation arrangements for the transport and termination of telecommunications." A Commission order requiring the parties to use during the term of the arbitrated agreement (*i.e.,* from April 29, 2005) bill-and-keep or to pay each other the rate the Commission establishes would be consistent with Section 252(c), because either approach is a form of reciprocal compensation. Section 252(c)(1) does not, however, empower the Commission to order the non-reciprocal arrangement Petitioners seek.

It is important to note that in Section 252(c), Congress specified that a State commission "shall ensure" that its order "meets the requirements of section 251." Congress did not include any waiver or variance authority that would permit it ignore this explicit command of Congress. This is particularly the case where, as here, Petitioners' prior claims are based on State law – that they themselves wrote by unilaterally preparing and filing tariffs – that conflict with federal law.

Petitioners have invoked the federally-provided arbitration procedure for resolving disputes relating to forward-looking interconnection agreements effective as of the date negotiations of those items officially began, a timeline also defined by federal law. Petitioners cannot ask the Commission both to resolve such disputes and concurrently to excuse Petitioners from their statutory obligation to provide "reciprocal" compensation. Simply put, Petitioners cannot have it both ways.

(b) The FCC has already ruled that interconnection rights cannot be tied to settlement of other disputes. As discussed above (See Part III.B.3 supra), the FCC has already ruled that incumbent LECs like Petitioners engage in bad faith if they demand that a competitive carrier settle separate matters as a condition to agreeing to an interconnection agreement:

> We believe that requesting carriers have certain rights under sections 251 and 252, and those rights may not be derogated by an incumbent LEC demanding *quid pro quo* concessions in another proceeding. Local Competition Order, 11 FCC Rcd 15499, 15576 ¶ 153 (1996).

Obviously, Petitioners cannot do indirectly what they cannot do directly. If, as the FCC has squarely held, it is unlawful (*i.e.,* constitutes bad faith) for Petitioners to demand in Section 252(a) negotiations that T-Mobile resolve matters in a different proceeding, it is similarly unlawful for Petitioners to ask this Commission in an arbitration petition to grant the same result (*i.e.,* tie the availability of an arbitration agreement to concessions in another proceeding). And if, as the FCC has squarely held, it is unlawful for Petitioners to demand in Section 252(a) negotiations that T-Mobile resolve matters in a different proceeding, T-Mobile submits it would be unlawful for a State commission to order the same unlawful relief.

(c) Petitioners have not shown that this Commission possesses the authority to order one party to settle ongoing litigation, much less order that party to settle on the terms its opponent is demanding. T-Mobile and Petitioners have not reached agreement on compensation for traffic predating their request for negotiations.[340] Rather, the parties are

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340 See Pruitt Rebuttal, p.3 l. 8-9.

litigating the issue and that litigation is pending. See VoiceStream d/b/a T-Mobile, et al. v. BPS Telephone, et al., Appeal No. 05-4377 (8th Cir.).

Petitioners have cited no legal authority for the proposition that a State commission can compel anyone to settle pending litigation, much less settle on the particular terms that one of the parties to the litigation is demanding. And, Petitioners have cited no legal authority for the proposition that a State commission can compel a federal licensee to abandon federal claims made in federal court pursuant to rights guaranteed by federal law – which is the relief Petitioners effectively are seeking.

2. Petitioners' Miscellaneous Arguments Lack Merit

Petitioners presumably will repeat in their post-hearing brief arguments they have made in the past, so T-Mobile briefly addresses those arguments here since there is no opportunity for a reply brief.

(a) Assertion: It is "standard practice" for carriers to settle past disputes as part of an interconnection agreement.[341] What may, or may not, be "standard practice" in negotiated agreements is irrelevant to the law that must be applied in an arbitrated agreement. As noted above (See Part III.B.3 supra), the FCC has recognized that two carriers can, voluntarily, "mutually agree to link section 252 negotiations to negotiations on a separate matter."[342] However, the FCC has further made clear that an incumbent LEC cannot demand that a competitive carrier settle separate matters – that is, refuse to negotiate and execute an interconnection agreement pending settlement of the separate matter – because such a demand "would undermine good faith negotiations":

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341 See Petitioners' Opposition to T-Mobile's Motion to Dismiss Issues A and B, at 19-20 (Nov. 28, 2005).

342 See Local Competition Order, 11 FCC Rcd 15499, 15576 ¶ 153 (1996).

> We believe that requesting carriers have certain rights under sections 251 and 252, and those rights may not be derogated by an incumbent LEC demanding *quid pro quo* concessions in another proceeding.[343]

(b) Assertion: The Act "prohibits the Commission from approving agreements that discriminate against another telecommunications carrier not a party" to the agreement.[344] There are many flaws with this argument.[345] But a major flaw is that the statute Petitioners cite has no relevance to this proceeding. Section 252(e)(2)(A)(i), the anti-discrimination clause they quote, applies to *negotiated* agreements only. Congress, however, has adopted very different requirements in Section 252(e)(2)(B) to govern *arbitrated* agreements.

(c) Assertion: Section 252(c)(3) empowers the Commission to establish non-reciprocal arrangements.[346] It is not surprising that Petitioners once again cite no legal authority for this argument, because Section 252(c)(3) – which authorizes a State commission to provide "a schedule for implementation of the terms and conditions by the parties to the agreement" – has nothing to do with the relief Petitioners seek.

In the first place, Section 252(c)(3) applies to "operational issues" such as the date the incumbent LEC begins providing unbundled network elements or access to operations support systems.[347] Second, even if this provision applies to rates – as opposed to "terms and conditions" – Section 252(c)(3) would at most permit the Commission to establish an effective date other

343 Id.

344 See Petitioners' Opposition to T-Mobile's Motion to Dismiss Issues A and B, at 21 (Nov. 28, 2005).

345 For example, under Petitioners' interpretation of Section 252(e)(2)(A)(i), every negotiated agreement would have to be identical because any difference among agreements would be discriminatory (e.g., the agreement to a provision by one carrier would require all other carriers to include the identical provision in their negotiated contracts).

346 See Petitioners' Opposition to T-Mobile's Motion to Dismiss Issues A and B, at 20 (Nov. 28, 2005); Petitioners' Application for Rehearing, at 3 ¶ 6 (Jan. 5, 2006).

347 See, e.g., Third Advanced Services Order, 14 FCC Rcd 20912, 20988 ¶ 177 (1999); U S WEST OSS Waiver Order, 12 FCC Rcd 17437, 17439 n.13, 17444 n.44 (1997).

than the date that one of the parties requested negotiations. This statute does not permit, however, a State commission to establish one effective date for one party and a different effective date for another party – that is, excuse an incumbent LEC of its statutory duty to provide reciprocal compensation – which would directly conflict with the explicit directive Congress imposed in Section 252(c)(1).

It bears remembering that the FCC has held that incumbent LECs must comply with their reciprocal compensation obligations (including implementing FCC rules) even if a wireless carrier does not have an agreement (negotiated or arbitrated) with the incumbent LEC.[348] If, as the FCC has held, Petitioners must establish reciprocal compensation arrangements even when no interconnection agreement exists, it necessarily follows that a State commission cannot impose a non-reciprocal arrangement in an arbitration agreement.

F. MATRIX ISSUE NO. 36: MAY CITIZENS INCLUDE IN THIS ARBITRATION ITS COMPENSATION CLAIM FOR TRANSIT?

One of the Petitioners, Citizens Telephone Company ("Citizens"), seeks in this arbitration compensation for providing transit services for Alma Telephone Company ("Alma"), which is not a party to this proceeding. The extent of Citizens' evidence on this claim is limited to the following two questions and answers in Mr. Schoonmaker's written testimony:

> **Q. Can you please describe the nature of the dispute on the transiting service performed by Citizens?**
>
> A. Yes, Citizens is the only Petitioner that performs transiting for another carrier, specifically, Alma Telephone Company. Accordingly Citizens believes it appropriate for it to receive a reasonable level of compensation for the transiting functions it performs on T-Mobile's behalf for calls from T-Mobile to Alma. Citizens proposes a $0.01 per minute rate for this transit function.
>
> **Q. Why do you believe Citizens [*sic*] proposed $0.01 rate is appropriate?**

[348] See, e.g., TSR Wireless v. U S WEST, 15 FCC Rcd 11166, 11184 ¶ 29 (2000), aff'd Qwest v. FCC, 252 F.3d 462 (D.C. Cir. 2001).

A. The rate proposed by Citizens has been agreed to by a number of CMRS carriers, including most recently U.S. Cellular and Cingular. In addition, at least two other wireless carriers have agreed to a higher rate (Verizon Wireless and Sprint PCS). So the rate proposed is consistent with the prevailing market rate for the transiting service performed by Citizens. I would also point out that the volume of traffic that Citizen's [*sic*] transits on behalf of Alma Telephone Company is quite small and the revenue associated with this element at the proposed rate is very minimal. Therefore, I propose that the Commission accept Citizen's [*sic*] cost of providing this transiting service.[349]

T-Mobile demonstrates below that the Commission cannot, as a matter of law, grant the relief Citizens seeks for any one of three reasons. It is important to point out that the issue is *not* whether Citizens is entitled to compensation in providing transit services.[350] Rather, the question for the Commission is whether Citizens is entitled to arbitrate this matter in *this* arbitration proceeding.

1. The Commission Does Not Have Delegated Authority to Consider Citizens' Transit Claim in This Arbitration

The Commission possesses "only that authority which the Congress has expressly delegated to it." Alma/T-Mobile Arbitration Report, at 15 (Oct. 6, 2005). See also Order Granting Motion to Dismiss CLEC Petitioners, TO-2006-0147 (Dec. 20, 2005)(Commission lacks delegated authority to arbitrate disputes between CLECs and wireless carriers). Here, the Commission cannot entertain Citizens' transit claim because Citizens failed to include this claim in its arbitration petition.

Section 252(b)(2) of the Act specifies that a party filing an arbitration petition "*shall*, at the same time as it submits the petition, provide the State commission all relevant documentation concerning (i) the unresolved issues; [and] (ii) the position of each of the parties with respect to

349 Schoonmaker Direct, p. 67 l. 14 – p. 68 l. 7.

350 See Pruitt Rebuttal, p. 29 l. 4-6.

those issues." 47 U.S.C. § 252(b)(2)(emphasis added). In addition, Section 252(b)(4) of the Act provides that a State commission "*shall limit its consideration* of any petition under paragraph (1) (and any response thereto) *to the issues set forth in the petition*." Id. at § 252(b)(4)(emphasis added). In this regard, federal courts have confirmed that "State Commissions are limited to arbitrating open issues raised by the parties."[351]

This arbitration was commenced on October 4, 2005 by the filing of one, consolidated petition for arbitration. This Arbitration Petition did not list Citizens' transit claim as an "open" or unresolved issue, nor did the Petition list the positions of the parties relative to Citizens' transit claim. Rather, the Petitioners, which include Citizens but not Alma, made clear that their Petition was limited in scope to mobile-to-land traffic that they terminate on their respective networks. For example:

- The Petition sought recovery of costs for "wireless-originated traffic [that] is *terminated to Petitioners* over common trunk groups owned by Southwestern Bell Telephone Company d/b/a SBC, Sprint Missouri, Inc. and/or CenturyTel." Arbitration Petition at 2, ¶ 1 (emphasis added);
- The Petitioners proposed a rate of $0.035 per minute for providing "wireless *termination* service." Id. at 8 (emphasis added); and
- Their proposed agreement, titled "Traffic *Termination* Agreement," stated that "[t]his Agreement shall cover traffic . . . *terminated to the other Party* without the direct interconnection of the Parties' networks." Arbitration Petition, Attachment D at § 1.1 (emphasis added).

351 WWC License v. Boyle, No. 4:03CV3393, U.S. Dist. LEXIS 17201, at *15 (D. Neb., Jan. 20, 2005). See also U S WEST v. Minnesota PUC, 55 F. Supp. 2d 968, 984 (D. Minn. 1999)("[U]nder section 252(c) state commissions are limited to arbitrating open issues.").

FCC Rule 51.701(d) defines "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." A transit carrier does not provide termination. To the contrary, as Mr. Schoonmaker recognizes, when Citizens provides a transit function for Alma, it is Alma that terminates the traffic. Thus, the transit claim Citizens raised in Mr. Schoonmaker's testimony is outside the scope of the Arbitration Petition.

In summary, because Citizens failed to list this transit issue in its arbitration petition, the transit issue is not an "open issue" and as a result, the Commission may not, as a matter of federal law, arbitrate this issue in this proceeding.

2. In Any Event, the Commission May Not Establish a "Market Rate" as a Matter of Law

The Arbitrator must dismiss Citizens' transit claim from this arbitration even if he were free to overlook Citizens' failure to comply with the plain commands of Section 252(b)(2) and the limitations Congress imposed on State commission arbitration authority under Section 252(b)(4). This is because Section 252(c)(2) specifies that in "resolving by arbitration under subsection (b) of this section *any open issues* . . . , the Commission *shall* . . . (2) establish any rates for interconnection, services or network elements according to subsection (d) of this section" (emphasis added). Thus, in an arbitration proceeding, the only rates that a State commission may lawfully establish are rates that comply with the "additional cost" standard of Section 252(d) and the FCC's implementing rules. Put another way, the Commission may not, consistent with the requirements of Section 252(c)(2), establish a non-cost-based "market rate."

3. In any Event, the Commission Must Dismiss Citizens' Transit Claim Because It Failed to Produce an Appropriate Cost Study

FCC Rule 51.505(e) provides:

> An incumbent LEC *must prove* to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, *using a cost study* that complies with the methodology set forth in this section and Sec. 51.511 (emphasis added).

Citizens has not submitted in connection with its transit claim "a cost study that complies with the methodology set forth in this [51.505] section and Sec. 51.511." Accordingly, even if the Arbitrator could consider Citizens' transit claim in this arbitration proceeding, he would still be required to dismiss the claim because Citizens failed to file an appropriate cost study and failed to satisfy its burden of demonstrating its proposed rate does not exceed its forward-looking TELRIC costs.

If Citizens wants to recover its transit costs from T-Mobile, it should make a request for negotiations so the parties can follow the procedures Congress established in Section 252 of the Act – including, possibly, resolving the issue by voluntary negotiations without Commission intervention (other than approving any negotiated agreement).

CONCLUSION

WHEREFORE, Respondents ask for relief as requested herein.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and final copy of the foregoing was served via electronic transmission on this 8th day of February, 2006, to the following counsel of record:

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