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July 23, 2003

FILED[2]
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Missouri Public Service Commission

Mr. Dale Hardy Roberts
Secretary/Chief Administrative Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

Re: Case No. TK-2003-0535

Dear Secretary Roberts:

Enclosed for filing please find an original and eight (8) copies of the Compliance and Response of MITG to Order Directing Filings, Motion to Strike Revised Amendment No. 1 or Alternative Motion to Restart the 90-Day Period for Considering Approval of, or Rejection of, Portions of the Interconnection Agreement, and for Direction to File a New Procedural Schedule in the above-referenced matter.

If you have any questions or concerns, please do not hesitate to contact me. Thank you for seeing this filed.

Sincerely,

Lisa Chase

Lisa Cole Chase

LCC:sw
Enc.
cc: Dan Joyce, General Counsel
Mike Dandino, Office of Public Counsel
Lisa Creighton Hendricks, Sprint Mo Inc.
Carl Lumley, ICG
W. R. England, STCG
MITG Managers

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STATE OF MISSOURI

In the Matter of the Master Interconnection and Resale Agreement by and between Sprint Missouri, Inc., and ICG Telecom Group, Inc. Pursuant to Section 251 and 252 of the Telecommunications Act of 1996.	)))))	**Case No. TK-2003-0535**

COMPLIANCE AND RESPONSE OF MITG TO ORDER DIRECTING FILINGS, MOTION TO STRIKE REVISED AMENDMENT NO. 1 OR ALTERNATIVE MOTION TO RESTART THE 90-DAY PERIOD FOR CONSIDERING APPROVAL OF, OR REJECTION OF, PORTIONS OF THE INTERCONNECTION AGREEMENT, AND FOR DIRECTION TO FILE A NEW PROCEDURAL SCHEDULE

COMES NOW the Missouri Independent Telephone Company Group ("MITG"), and for its compliance with the Commissions's Order Directing Filings, its Motion To Strike Revised Amendment No. 1, its alternative Motion to Restart the 90-Day Period in which the Commission has to consider approval of, or rejection of, portions of the Interconnection Agreement, and for an Order directing a new procedural schedule to be developed, and sets forth the following:

1. The FCC decision cited by the MITG in their Brief Pertaining to Hearing at the bottom of page three as evidence the MITG is prepared to present at hearing has the following cite: In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, *Memorandum Opinion and Order*, CC Docket No. 00-218, para. 117 (rel. July 17, 2002). *see* Attachment 1 (only the Caption and paragraph 117 are provided due to the length of the decision -- 374 pages.)

2. The Kansas Corporation Commission decision cited by the MITG in their Brief Pertaining to Hearing at the top of page three as evidence the MITG is prepared to present at hearing has the following cite: In the Matter of the Petition of TCG Kansas City, Inc. for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to section 252 of the Telecommunications Act of 1996, *Arbitrator's Order 5: Decision*, Docket No. 00-TCGT-571-ARB, para 20 (Aug. 7, 2000). *see* Attachment 2.

3. According to prior filings, Sprint Missouri, Inc. and ICG Telecom Group, Inc. finalized their negotiated interconnection and resale agreement ("Agreement") on May 6, 2002. The parties entered into Amendment No. 1 to the negotiated interconnection and resale agreement on May 13, 2003, ("Amendment No. 1") amending Section 66.2.1 as recommended by the Staff of the Missouri Public Service Commission ("Staff"). On June 4, 2003, Sprint Missouri, Inc. filed an application with the Commission for approval of the Agreement and Amendment No. 1. This June 4, 2003 submission instituted the 90 day period in which the Commission has to approve the agreement, reject the agreement, or reject portions of the agreement. 47 USC USC 252(e)(4).

4. 90 days is an extremely limited time with which the Commission has to publish notice of the submitted agreement, consider intervention and opposition, develop a procedural schedule, conduct hearing, and issue a decision either accepting or rejecting the agreement, or rejecting portions thereof.

5. Although the original agreement was represented as a final agreement, Sprint and ICG file a proposed amendment after expiration of almost 50 days into the 90 day period.

6. The statutory 90 day period obviously does not envision the agreement being amended, and the notification, opposition, intervention, hearing and decision process starting

again within the same 90 day window. Any such amendment should not be considered at all, or the amendment should be construed as creating a new agreement starting the 90 day clock anew. If Sprint and ICG want this amendment to be considered, they should have withdrawn the original agreement and refiled it with the amendment. The Commission should order them to do so, or consider the original submission withdrawn and resubmitted by submission of the amendment.

7. It is apparent the amendment in question is intended as an attempt to eliminate the basis for MITG intervention and opposition. The amendment in question purports to remove toll traffic from the "transit" portions of the agreement. The amendment poses a change which fundamentally changes the character of the entire agreement. The 2 day time limit provided by the Commission to respond to the proposed amendment does not provide the MITG companies or their counsel with meaningful opportunity to confer and respond.

8. Counsel for the MITG companies recognizes that the amendment, if in fact the parties abide by it, may eliminate some of the basis for opposing the inclusion of toll. However counsel has strong concerns as to the ability of any entity to police the amendment, or to assure the parties are abiding by it. In TC-2002-194, the MITG companies discovered that the very parties to similar CLEC/ILEC interconnection agreements disputed whether or not toll traffic should have been placed on the FGC network, or popped out to the FGD network. Based on past misfortunes in dealing with CLECs and large ILECs, the MITG companies believe that the amendment lacks safeguards to assure the MITG companies that the amendment is capable of enforcement.

9. The proffered amendment does not eliminate any basis for opposition to the "local" transit traffic provisions of the agreement.

10. If Sprint and ICG truly wanted to eliminate the basis for opposition, they should have included the MITG and STCG in a stipulation process which would have effectuated an amendment to the agreement. With such a stipulation, the need for further proceedings could have been obviated.

11. The amendment appears to be calculated to appeal to the Commission as a basis to conclude there are no longer grounds for opposition. It appears calculated to pressure the Commission into considering the amendment under the assumption that the original 90 day deadline remains in effect. The MITG can understand how the Commission might be tempted to so consider the effect of the amendment. The Commission should not countenance such attempts, as that would set an undesirable precedent. The Commission, and the public interest, are better served by reasoned decisions of the Commission, with benefit of pros and cons submitted by adverse parties. The Commission should refuse to be held hostage by such late filed amendments.

12. Sprint and ICG's Revised Amendment No. 1 should be rejected in that § 252(e) anticipates that the Commission will be presented with the final agreement, and will have the entire 90 day-period upon which to render its decision. The federal statute does not contemplate the Commission to review revised agreements seven weeks into that 90-day window; that the proposed agreement will be changed after the Commission issues notice to potentially affected parties; that any affected third-parties will be provided only two days to respond to such agreements as changed; and that the Commission will be burdened with considering changes and the potential impact they have on burdened third-parties with only six weeks remaining in the 90-day time period in which a decision must be made. Accepting revisions to contested interconnection agreements before the Commission for approval is a poor precedent to set for the

above reasons. With subsequent interconnection agreements brought before the Commission for consideration, the timing of such revisions could be closer to the 90th day on which the Commission must make a determination.

13. In the alternative, the Commission could treat the revised amendment as a material change to the agreement submitted, and that the new submission restarts the new 90-day period for Commission determination at the date the revision is filed with the Commission. Treating revisions to agreements in this manner will provide the Commission the full 90-day period in which to provide any additional notice and to consider the agreement as a whole; it will provide an adequate opportunity to respond to the affected third-party carriers.

14. Although the MITG has been provided a very brief period to consider the July 21, 2003 revision to Amendment No. 1 to the interconnection agreement, it provides the following observations and concerns:

A. Sprint and ICG now define "Transit Service" and "Transit Traffic" to include only local traffic and to exclude non-local traffic. Revised Section 66.1 states:

> "Sprint will provide transport and any necessary switching for non-Local Traffic in accordance with Sprint's access tariff. Sprint will provide transport and any necessary switching for MCA (Metropolitan Calling Area) traffic in accordance with Commission rules and orders."

Under the ICG tariffs, the local exchange service areas for ICG are those Sprint, Verizon and Southwestern Bell exchanges listed in Section 4 of ICG's tariff. MCA is not a service provided by ICG pursuant to its tariffs. None of the traffic from ICG is "local" to any of the MITG company exchanges, including MoKan. The non-local CLEC traffic is already required to be delivered to the MITG companies pursuant to their approved access tariffs. The "transit

provisions" in the interconnection agreement between ICG and Sprint are not a necessity to address traffic to third-party carriers such as the MITG, and should not be a part of negotiated agreements to which the MITG were not a party.

B. Revised Sections 66.2.2 and 66.3.1.2 address the type of records and who must pay third-party carriers *without any input from the third-party carriers to whom the agreement contemplates sending traffic.* Section 66.2.2 has been revised to state that the transiting party is not responsible to pay any third party carrier "for termination or [sic] any transit traffic" except as provided in section 66.3.1.2. However, under section 66.3.1.2, upon request of the terminating party, the transiting party must provide the originating record or the transiting party will be default billed, *but only to the extent the transiting party is capable of providing the record.* First, it is unclear if this provision is meant to provide the MITG companies default billing against Sprint because they are not a "party" to this agreement. Even if the provision is meant to do so, the revision which now includes "only to the extent the transiting party is capable of providing the record" weakens the prospect of payment on such traffic to mere conjecture.

C. ICG has no local exchange service areas in the exchanges of the MITG companies. The only potential 'local' traffic to any MITG company is MCA traffic. ICG does not provide MCA pursuant to its tariffs. If ICG chooses to participate in the MCA, the Commission has ordered CLECs to "create the necessary records that will allow Missouri's small ILECs to distinguish between MCA and non-MCA traffic sent by the CLEC to the small ILEC." In the Matter of an Investigation for the Purpose of Clarifying and Determining Certain Aspects Surrounding the Provisioning of Metropolitan Calling Area Service After the Passage and Implementation of the Telecommunications Act of 1996, *Report and Order*, Case No. TO-99-483, p. 23 (Mo.PSC issued. Sept. 19, 2000) [page reference is from Order downloaded from

MoPSC website, which pagination may differ from original order]. The Commission further stated in that Order, "[m]ost of the CLECs concede that they will be responsible for paying terminating access charges on non-MCA traffic, yet the small ILECs have no way to bill for this traffic if the CLECs do not track the traffic and create the appropriate records. Therefore, CLECs must: (1) separately track and record non-MCA traffic, and (2) send reports to the small ILECs for all non-MCA traffic. Alternatively, the CLECs may choose to separately trunk their MCA traffic." *Id.* At this time, ICG's tariffs provide that "No call detail records (CDR's) are provided with Switched Access Service." ICG Telecom Group, Inc. Tariff, Mo P.S.C. No. 2, Section 14.1.

15. The revised amendment is a bilateral attempt between Sprint and ICG to address the transit of traffic issue raised by MITG and STCG who are affected third-parties to the proposed agreement. The revised amendment does not resolve the concerns raised by the MITG. However, the MITG does believe that it is possible for the parties to work together to address its concerns regarding the provisions the MITG believes are discriminatory and not consistent with the public interest, convenience, and necessity.

WHEREFORE, on the basis of the foregoing, the MITG requests that the proffered amendment be rejected and not considered further in this case, or alternatively that the proffered amendment be considered a new submission under Section 242 (e)(4) of the Act, and that a new procedural schedule be developed in accordance with a 90 day period commencing with the date of filing of the profferred amendment.

Respectfully Submitted,

ANDERECK, EVANS, MILNE,
PEACE & JOHNSON, L.L.C.

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ATTORNEYS FOR MITG

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was mailed, via U.S. Mail, postage prepaid, this 23 day of July, 2003, to all attorneys of record in this proceeding.

Lisa Chase
Lisa Cole Chase, MO Bar No. 51502

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration	)	CC Docket No. 00-218
	)	
In the Matter of Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration	)	CC Docket No. 00-249
	)	
In the Matter of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc.	)	CC Docket No. 00-251

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 2002 **Released: July 17, 2002**

By the Chief, Wireline Competition Bureau:

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Attachment 1

disruption to AT&T's end users. Moreover, we are concerned that Verizon's proposal creates uncertainty and would be unworkable, because it puts Verizon in the position of determining whether AT&T has used "best efforts" and whether it has been unable to reach an agreement "through no fault of its own." We are thus concerned that Verizon's proposed language could lead to further disputes between the parties. Furthermore, we decline to adopt Verizon's proposal to the extent it envisions the Commission essentially arbitrating a competitive LEC-to-competitive LEC interconnection agreement.

116. We thus reject the sentence in section 7.2.4 beginning with "At the end of the Transition Period, Verizon may, in its sole discretion" and ending with "then Verizon will not terminate the Transit Traffic Service until the Commission has ruled on such petition." Instead, we direct the parties to insert language directing AT&T, as soon as it receives notice from Verizon that its traffic has exceeded the DS-1 cut-off (i.e., as soon as what Verizon calls the transition period begins),[384] to exercise its best efforts to enter into a reciprocal telephone exchange service traffic arrangement with the relevant carrier, for the purpose of seeking direct interconnection. This language should make clear that Verizon may use the dispute resolution process if it feels that AT&T has not exercised good faith efforts promptly to obtain such an agreement. We find that these modifications are not burdensome to Verizon. Verizon will be adequately compensated because it may levy its trunk and billing charges for the tandem transit service it provides during the time that AT&T negotiates with the other carrier. Moreover, any extension of Verizon's tandem transit offering would be limited, as Verizon would be able to terminate this offering if AT&T is ultimately found through the dispute resolution process not to be exercising its best efforts to obtain an agreement.

117. We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation.[385] While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 251(c)(2),[386] the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such a duty. In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a

[384] To remove ambiguity in this language and to remain consistent with our determination for Issue I-4, we modify Verizon's language specifying the measurement of the DS-1 threshold of traffic. We amend Verizon's proposed threshold from "one (1) DS-1 and/or 200,000 combined minutes of use ... for any three (3) months in any consecutive six (6) month period or for any consecutive three (3) months" to "200,000 combined minutes of use ... for any consecutive three (3) months." *See* Verizon's November Proposed Agreement to AT&T, § 7.2.4. *See also supra,* Issue I-4.

[385] *See* AT&T's November Proposed Agreement to Verizon, § 7.2.1-7.2.3.

[386] *See Local Competition First Report and Order*, 11 FCC Rcd at 15844, para. 672; 47 C.F.R. §§ 51.501, 51.503(b)(1).

section 251(c)(2) duty to provide transit service at TELRIC rates.[387] Furthermore, any duty Verizon may have under section 251(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.

118. For the reasons provided below, we reject Verizon's proposal to WorldCom.[388] Verizon's proposal to WorldCom allows Verizon to terminate transit service for transit traffic exceeding the level of 200,000 minutes of use in one month. Unlike Verizon's proposal to AT&T, its proposal to WorldCom does not provide a transition period during which WorldCom would be able to form an alternative interconnection arrangement before Verizon stopped providing transit service. Furthermore, Verizon's proposal to WorldCom does not suspend Verizon's ability to terminate transit service if WorldCom is unable, through no fault of its own, to form an alternative interconnection arrangement. We find that Verizon's proposal, which gives it unilateral authority to cease providing transit services to WorldCom, creates too great a risk that WorldCom's end users might be rendered unable to communicate through the public switched network. The Commission has held, in another context, that a "fundamental purpose" of section 251 is to "promote the interconnection of all telecommunications networks by ensuring that incumbent LECs are not the only carriers that are able to interconnect efficiently with other carriers."[389] In this instance, allowing Verizon to "terminate" transit service abruptly, with no transition period or consideration of whether WorldCom has an available alternative, would undermine WorldCom's ability to interconnect indirectly with other carriers in a manner that is inconsistent with the "fundamental purpose" identified above. Moreover, such a result would put new entrants at a severe competitive disadvantage in Virginia, and would undermine the interests of all end users in connectivity to the public switched network.[390] Thus, we decline to adopt Verizon's proposal to WorldCom.

119. We also reject WorldCom's proposal to Verizon.[391] Like AT&T's proposed language, WorldCom's proposal would require Verizon to provide transit service at TELRIC rates without limitation. WorldCom's proposal would also require Verizon to serve as a billing intermediary between WorldCom and third-party carriers with which it exchanges traffic transiting Verizon's network. We cannot find any clear precedent or Commission rule requiring

[387] *See supra,* Introduction (discussing the Commission's delegation of authority to the Bureau to conduct this arbitration).

[388] *See* Verizon's November Proposed Agreement to WorldCom, Part C, Interconnection Attach., § 11 *et seq.*

[389] *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, Fourth Report and Order, 16 FCC Rcd 15435, 15478, para. 84 (2001) (*Collocation Remand Order*), *aff'd sub nom. Verizon Telephone Cos. v. FCC*, Nos. 01-1371 *et al.* (D.C. Cir., decided June 18, 2002) (*Verizon v. FCC*).

[390] As the Commission has recognized, "increasing the number of people connected to the telecommunications network makes the network more valuable to all of its users." *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, 12 FCC Rcd 8776, 8783 para. 8 (1997).

[391] *See* WorldCom's November Proposed Agreement to Verizon, Attach. I, § 4.8 *et seq.*, and Attach. IV, § 10 *et seq.*

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Petition of TCG Kansas City, Inc. for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to section 252 of the Telecommunication Act of 1996.	)	Docket No. 00-TCGT-571-ARB

ARBITRATOR'S ORDER 5 : DECISION

The above-captioned matter comes before the Arbitrator for a decision. Being familiar with the record and aware of the pertinent facts the Arbitrator finds as follows:

TCG Kansas City, Inc. (TCG) filed a petition for compulsory arbitration of unresolved issues in its negotiations with Southwestern Bell Telephone Company (SWBT) on December 22, 1999, pursuant to 47 U.S.C. § 252(b). SWBT filed its Response on January 25, 2000, after receiving an extension of one week in which to respond. The parties filed a Joint Issues Matrix on February 21, 2000, and simultaneous direct testimony on February 29, 2000. In response to a Motion, a Protective Order was issued March 3, 2000. On March 9, 2000, the parties filed a Joint Motion for Extension of Time to file rebuttal testimony and to extend the overall time frame of the Arbitration, The Motion was granted on March 10, 2000. The Order provided that the Arbitrator would issue her decision three weeks after briefs were filed and that the Commission, in accordance with its arbitration procedure, would issue its final decision within 30 days of the Arbitrator's decision. A hearing was held on June 8, 2000. The parties elected to make panel presentations on the issues and only the Arbitrator asked questions. Briefs were filed on July 12, 2000. The Arbitrator contacted counsel for the parties on August 3, 2000, the day

this decision should have been issued pursuant to the March 10, 2000 Order, to request a few additional days to finalize the decision. Both parties agreed to the request.

The issues focus on two areas: network architecture and reciprocal compensation. The parties identified several sub-issues in each category. This Decision will address the issues in the order set out in the Issues Matrix. Some issues were resolved before the hearing and reflected in the Issues Matrix. During or after the hearing additional issues were settled by the parties. They are: Network Architecture Issues 5 and 7, which will be submitted in a separately filed Settlement Agreement; TCG Brief, 21, and Reciprocal Compensation Issues 3, 4 and 8. Tr. 62-64, SWBT Brief, 24-25.

NETWORK ARCHITECTURE ISSUES

1. Issue 1: What methods should be used to determine the quantity and location of Points of Interconnection (POIs) in the LATA? TCG takes the position that, if the parties cannot agree, interconnection should occur at each party's local and access tandem switch. For network interconnection purposes, TCG takes the position that each TCG switch should be deemed to be a tandem switch. TCG has cited to numerous arbitration decisions from other jurisdictions to support its argument that interconnection at the tandem switches, both local and access, is technically feasible and therefore must be permitted. TCG Brief, 2-13.

SWBT takes the position that the parties should establish at least one point of interconnection for the exchange of local traffic within each Kansas Commission approved local exchange area. SWBT agrees that interconnection at its local tandems is appropriate. Tr. 47. When an exchange is served with a host-remote arrangement, the POI for the exchange served by

the remote may be in the host switch location.[1] SWBT cites to the FCC's *First Report and Order* in CC Docket Nos. 96-98 and 95-l 85, Released August 8, 1996, (Local Competition Order) ¶ 1035, in which the FCC stated,

> state commissions have the authority to determine what geographic areas should be considered "local areas' for the purpose of applying reciprocal compensation obligations under section 25 1 (b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs. SWBT Brief, *4.*

47 U.S.C. § 251(c)(2) of the Federal Telecommunications Act (FTA) requires incumbent local exchange carriers to "provide . . . interconnection with the local exchange carrier's network (A) for the transmission and routing of telephone exchange service and exchange access; (B) at any technically feasible point within the carrier's network." 47 C.F.R. § 5 1.305(e) requires that "[a]n incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible."

SWBT relies on 47 U.S.C. § 2419b)(5) which addresses reciprocal compensation, not interconnection. The criterion for interconnection is whether interconnection is technically feasible at the requested point in the network. 47 U.S.C. § 251(c)(2). SWBT has not asserted that it is not technically feasible to also interconnect at the access tandem. The Arbitrator finds that SWBT has not carried the burden imposed on it by 47 C.F.R. § 5 1.305(e) to prove that interconnection at the access tandems is not technically feasible. The Texas 27 1 Order confirms that CLECs may interconnect "at any technically feasible point in the network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points.

[1] The parties are in agreement that Point of Interconnection (POI) refers to physical (network) interconnection, while Interconnection Point (IP) defines financial responsibility. Tr. 10, 11, 53, 54. The Arbitrator will so use the designations.

We note that in SWBT's interconnection agreement with MCI (WorldCom), WorldCom may designate a single interconnection point within a LATA." ¶ 78.[2] The Arbitrator finds that TCG shall be permitted to interconnect for the purpose of establishing its POI at SWBT's local and access tandems. SWBT shall establish its POI at TCG's switch.

2. Issue 1.1: Should every TCG switch be considered a tandem switch for interconnection purposes? It is TCG's position that its switches should be considered to be tandem switches because they perform both a tandem and end-office function and the FCC has recognized parity between a CLEC end-office switch and a SWBT tandem when they cover the same geographic area. TCG asserts that its switch can connect to f"virtually any customer in the Kansas City LATA"and that TCG "has the ability to offer local exchange service across virtually all of the Kansas City LATA." Talbott, Dir. 39. TCG provides a map showing the coverage area of its Kansas City area switch and SWBT's Kansas City tandem switch. Talbott, Dir. Attachment 17. At the hearing TCG explained that the coverage area included the area colored white on the Kansas side of the map. Tr. 8. TCG cites to 47 C.F.R. § 5 1.7 11 (a)(3), which states:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate. Talbott, Dir. 15-I 6.

TCG asserts its switch performs certain access tandem functions in that it routes the preponderance of interLATA traffic directly to the applicable interexchange carrier. IntraLATA and intrastate traffic between two TCG customers may be completed wholly on TCG's network.

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*Memorandum Report and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas. CC* Dkt. No. 00-65. Rel. June 30, 2000. (Texas 271 Order)

With respect to intraLATA traffic between a SWBT customer and a TCG customer, TCG has established direct trunking to each SWBT tandem in the LATA so that such traffic may be completed without transiting multiple TCG switches or SWBT tandems. TCG concludes it obtains the same functional results from its switch that SWBT obtains from its tandem switches. Talbott, Reb. 2 1.

SWBT's testimony and its brief combine this network interconnection issue and reciprocal compensation issue 15 and address the two as one, "because they are so closely related that they must be considered together." SWBT Brief, 6. SWBT states that not all TCG switches perform tandem functionality, nor is every TCG switch identified in the LERG as an access tandem. SWBT continues that it is of the opinion that TCG's switch operates more like an end office switch and that tandem compensation is not appropriate. SWBT states it believes TCG must demonstrate it actually serves customers in an area comparable to that served by SWBT's tandem switch in order to make tandem compensation appropriate. Tr. 80-8 1. SWBT testifies "TCG's switch for purposes of local interconnection . . . is operating as an end office switch, performing line functions and homing off the SWBT tandem." Jayroe, Reb. 7. Mr Jayroe's testimony continues that "when setting up the trunk group between the TCG switch and the SWBT tandem or end office, TCG has used codes on the orders that indicate its switch is an end office. If the TCG switch were a tandem switch for local interconnection, it would not be homing off the SWBT tandem." Jayroe Reb. 7. See also, SWBT Brief, 8-9. SWBT claims the language of rule 47 C.F.R. 5 1.711 (a)(3) "relates directly to the function and geographic scope of the switch for determining whether to apply a tandem-rate for reciprocal compensation purposes." SWBT Brief, 9. SWBT asserts TCG's switch does not currently serve the entire area

served by SWBT's tandem switch and claims, "capable of serving" is not sufficient." SWBT Brief, 10.

TCG provided copies of decisions from other jurisdictions in which it had been determined that a competitive local exchange carrier switch would be treated as a tandem switch. (See footnote 3) SWBT, in its brief, cited to a California Arbitration decision in Application 00-01-022, issued June 13, 2000. That decision contains a discussion, pp. 422-43 1, of the testimony in that docket concerning the issue of whether AT&T's switches should be designated as tandem switches so as to make the tandem compensation rate applicable. The California arbitrator determined that AT&T failed to satisfy its burden to establish that its switches served geographic areas similar to those of Pacific's tandem switches in part because AT&T had more switches that PacTel had tandems. The evidence relied on in the California decision to deny tandem status to AT&T's switches is not present in this case.

The Arbitrator found it difficult to decide this issue. However, a decision on this issue is clearly within the parameters of a 47 U.S.C. § 252 arbitration. The Arbitrator is required to adopt the position of one of the parties unless 47 U.S.C. § 252(e)(2) criteria apply. The Arbitrator believes they do not and finds that TCG has met its burden of proof to demonstrate that its switch operates as a tandem. The evidence that TCG's switch is capable of serving a geographic area similar to that of SWBT's tandem, in accordance with 47 C.F.R. 5 1.7 11 (a)(3), is unrefuted. The opinions from other jurisdictions found that it was sufficient that a CLEC was capable of serving a comparable area, it did not currently need to serve the entire area. The Arbitrator agrees. A requirement that the CLEC actually serve the entire area would be difficult for a CLEC to meet initially. As long as the CLEC is certificated to serve the entire area and its

switch has the capacity to do so, that is sufficient.

The evidence establishes that TCG's switch functions as a tandem and an end office. The evidence provides no guidance to the Arbitrator to decide how to weigh those functions or whether different reciprocal compensation rates can apply to the different functions. 47 C.F.R. § 5 1.7 11 (a)(3) does not address function only geography. Opinions provided from other jurisdictions, with the exception of California, where different evidence resulted in a different determination, have found that CLEC switches have the functionality of ILEC tandem switches, although questioning the need to make that determination.[3] TCG has only provided evidence of the geographic coverage area of its Kansas City switch. The Arbitrator finds that this switch shall be considered to be a tandem switch. The Arbitrator expresses no opinion on other TCG switches.

3. Issue 1.2: Must TCG utilize its collocation space to house two-way interconnection trunks for interconnection with SWBT or should the trunks terminate on TCG's switch? TCG takes the position that each party should deliver traffic to the IP designated by the terminating party. Each party selects the method used to deliver interconnection traffic to the other party's IP. Those methods may include: leasing facilities from a third party, building facilities, or with mutual agreement a mid-span fiber meet. TCG may elect to use its collocation space for termination of its facilities. At TCG's discretion, SWBT may be allowed to use space and power in TCG's location to terminate interconnection traffic. TCG Brief, 2- 13.

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[3]Focal Communications Corporation of Illinois . . . . 00-027, May 8, 2000. In the Matter of the petition of MediaOne Telecommunications of Michigan, Inc. . . . . Case No. U-12198, March 3, 2000. In the Matter of ICG Telecom Group Inc.'s Petition for Arbitration . . . . Case No. 99- 1 153-TP-ARB, February 24, 2000, Rehrg. April 20, 2000.

SWBT's position is that the parties should share the costs for facilities between the SWBT tandem and SWBT end office when the parties establish direct end office trunking. TCG may bear its share of the costs by terminating the facilities in its collocation space or through some other negotiated method. SWBT Brief, 13.

SWBT's testimony makes it clear that there is no requirement that TCG utilize its collocation space to house two-way interconnection trunks. SWBT references several other methods, both in the Issues Matrix, its testimony and at the hearing. Jayroe, Dir. 8-9, Reb. 6. Tr. 55-56. It is clear that it is within TCG's discretion to interconnect through collocation and that it may prefer to do so. However, the evidence establishes that other methods are available.

4. Issue 2: Should local and intraLATA toll traffic between the parties use one-way or two-way trunk groups? TCG's position is that the parties will establish one-way terminating trunk groups for exchange of traffic, unless they mutually agree otherwise. TCG Brief, 16. SWBT's position is that trunking for local and intraLATA toll traffic shall be two-way in order to maximize network efficiency. The parties are in agreement that two-way trunk groups should be established for Meet Point traffic. Meet Point service is jointly provided to an IXC customer by TCG and SWBT.

47 C.F.R. § 51.305(f) states, in pertinent part: "If technically feasible, an incumbent LEC shall provide two-way trunking upon request." TCG understands this rule to mean that one-way trunk groups are the norm and that two-way trunk groups are only provided if the CLEC requests them and it is technically feasible for SWBT to provide them. TCG wants one-way trunking because traffic between it and SWBT is not balanced. If traffic were balanced, it would be equitable to establish two-way trunk groups, but currently and for some time to come traffic will

be unbalanced because of the different size of the companies. TCG cites to the California Arbitration decision to support its interpretation. That decision cited to ¶ 290 of the Local Competition Order where the FCC stated, "We conclude here, however, that where a carrier requesting interconnection pursuant to section 25 1 (c)(2) does not carry a sufficient amount of traffic to justify separate one-way trunks, an incumbent LEC must accommodate two-way trunking upon request where technically feasible." TCG Brief, 16-20, Tr. 22-23. TCG's last best offer is:

> Unless mutually agreed otherwise, the Parties will establish one-way terminating trunk groups for local, intraLATA toll and transit traffic. The parties will establish direct trunks between TCG switches and certain SWBT end offices when traffic volume warrants such. Such end office trunks will be provisioned over interconnected facilities provided by TCG and SWBT, TCG providing the facility between its switch and the SWBT IP and SWBT providing the facility between the SWBT IP and the SWBT end office. The parties will establish two-way trunk groups for Meet Point traffic over mutually agreed to facilities. TCG Brief, 19-20.

SWBT observes that two-way trunk groups are more efficient and where facilities are shared or jointly provisioned, a two-way trunk group makes sense. Tr. 56-57. SWBT references the FCC order approving SWBT's entry into the interLATA market in Texas to support its position that two-way trunking is preferred.[4] SWBT refers to language in ¶69 in which the FCC finds SWBT has met interconnection obligations by provisioning two-way trunks. SWBT's last best offer is: "Trunking for local and intraLATA toll traffic will be two-way in order to maximize network efficiency." SWBT Brief, 16.

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[4] In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 27 1 of the Telecommunications Act of 1996 to Provide in-Region, InterLATA Services in Texas, Memorandum Opinion and Order, FCC 00-238, CC Docket No. 00-65. Released June 30, 2000. (Texas 271 Order)

The Texas 27 1 Order does not make any finding as to which carrier makes the determination whether one-way or two-way trunks should be required. In fact footnote 143, cited by SWBT confirms that one-way or two-way trunking is at the CLEC's discretion. It states in relevant part, "where a competitive LEC does not carry a sufficient amount of traffic to justify separate one-way trunks, an incumbent LEC must accommodate two-way trunking upon request wherever technically feasible." The issue here is not the amount of traffic TCG carries, but on the fact that as part of its business plan it has determined that it wants one-way trunking. All indications are that in the absence of a request from the CLEC for two-way trunking, one-way trunking is the norm. The Arbitrator finds TCG's interpretation of47 C.F.R. § 51.305(f) persuasive and consistent with the Texas 27 1 Order. There is no disagreement that two-way trunks are more efficient but the imbalance in traffic is a valid reason to prefer one-way trunks and the rule leaves the discretion with the CLEC even in the absence of a reason.

5. Issue 3: If the KCC affirms SWBT's network architecture for interconnection with TCG, what method should be used to determine the proportion of interconnection facilities that will be provided by each party? This issue becomes moot because of the Arbitrator's decision adopting TCG's proposed network architecture.

6. Issue 4: If the KCC affirms TCG's network architecture for interconnection with SWBT, should each party bear its own cost to convert from the existing interconnection arrangement to the interconnection arrangement described in the resulting interconnection agreement? TCG's position is that each party should bear its own cost to convert to the architecture required by the award. TCG Brief, 13. SWBT's position is that the parties should share the cost of conversion when there is mutual agreement that the existing network

interconnection architecture should be changed. If only one party wants a change in the existing network interconnection architecture, that party should pay for the cost of conversion. SWBT Brief, 17.

TCG argues that each party is in the best position to determine for itself what is its least cost and most efficient mechanism to provide for conversion from two-way trunking to one-way trunking. SWBT would lose the incentive to implement the least costly arrangement if TCG were required to pay for it. TCG cites to the California Arbitration Decision, p. 436, which determined that each party should bear its own costs of converting to one-way trunking to give both parties an incentive to minimize cost. TCG Brief, 13-14.

SWBT argues that neither party should be held hostage to the other party's changing business plans. Tr. 50-5 1. SWBT explains that it would incur considerable cost to change from the current two-way trunking originally requested by TCG to one-way trunking. Jayroe, Dir. 16. SWBT witness Lockett testifies that if one party unilaterally wants to make a change in the existing network interconnection architecture that party should bear the cost of the rearrangement. She observes that carriers do change their business plans over time and should bear the costs of those changes. She adds that if either party can expect the other party to help pay the cost of any change, parties would be unable to predict or control their costs of doing business. Lockett, Dir. 5-6.

The Arbitrator agrees that requiring both parties to pay their costs of conversion would promote efficiency and minimize cost. However, SWBT's arguments regarding the cost it would have to bear to convert existing interconnection arrangements, established by the existing interconnection agreement, because of the Arbitrator's approval of TCG 's change from two-

way trunking to one-way trunking, is persuasive. The Arbitrator finds that SWBT's position shall be adopted on this issue. If one party unilaterally seeks to change the network architecture from one previously agreed to by the parties, the party seeking the change shall pay the cost of conversion. The Arbitrator believes it is in the best interest of both parties to minimize cost, since at some future date SWBT could seek a change.

7. Issue 6: Are all IXCs required to interconnect with SWBT through provisions of the access tariff to get access to SWBT customers? TCG's position is that an IXC customer should be permitted in its ASR to designate to either TCG's or SWBT's tandem switch as the point of interconnection for terminating interexchange traffic. SWBT's position is that this issue is not properly before the Arbitrator because it does not address interconnection of local traffic. The Arbitrator agrees with SWBT that 47 U.S.C. § 252 arbitrations are limited to local interconnection issues and declines to address this issue.

8. Issue 10: Should TCG negotiate an alternate form of interconnection if SWBT does not choose the option of Space License in the future? Should Space License charges only apply to future arrangements? The parties are in agreement regarding the terms of Space License. TCG Brief, 14. They also agree that TCG will negotiate other forms of interconnection. Talbott, Dir. 26. The only remaining issue is whether SWBT should be required to pay for space it utilizes when it has previously placed equipment in TCG space for the provision of access service. TCG's position is that SWBT should be required to pay because the existing free space is required by SWBT's access tariffs and is not a negotiated agreement. TCG does not argue that SWBT should pay for space and power for equipment when it is used to provide tariffed interexchange access services, but that it should do so when the equipment is

used for local interconnection purposes. TCG Brief, 15- 16. SWBT's position is that it should not be required to pay for space that is occupied by existing facilities regardless of the purpose for which it is used. SWBT Brief, 19.

SWBT agrees that it should pay Space License for any new equipment it might locate on TCG premises. To permit SWBT to benefit from the fact that the equipment it has in place to provide access service by also using it for local interconnection purposes, when only the incumbent LEC can be in that position, is discriminatory and inequitable. The Arbitrator finds that to the extent SWBT utilizes equipment to provide both interexchange access service and local interconnection SWBT should pay in accordance with Space Licence. TCG's position is adopted.

RECIPROCAL COMPENSATION ISSUES

9. Issue 1: What prices should apply to intraLATA toll calls terminated by the parties over interconnection trunks? TCG proposes that all traffic exchanged between TCG's and SWBT's networks that originates and terminates within the LATA be compensated in the same manner. There should be no difference in compensation whether the call is local or intraLATA toll. TCG agrees that Feature Group D access traffic which is not generated through its local network, but through its long distance network should continue to be subject to payment of switched access charges. TCG argues this LATAwide compensation arrangement will benefit carriers and consumers because carriers receive fair compensation and expanded calling plans can be provided to customers. TCG states that adoption of its compensation plan would recognize that a minute is a minute regardless of retail classification of the call and put Kansas on the leading edge of states preparing for the competitive telecommunications market. TCG

states only SWBT can expand its local calling area without fear of incurring access charges. Swift, Dir. 2, Tr. 38-39, TCG Brief 23-24. TCG indicates New York has had a LATAwide compensation plan in place for several years and that such a plan eliminates the need for costly recording and billing functions. Swift, Dir. 3- 4. TCG asserts SWBT relies on legalistic arguments that ignore the customer's best interest and coming competitive realities. TCG refers to EAS plans which converted intraLATA toll service to EAS as proof that the Commission has authority to implement LATAwide compensation. TCG describes SWBT's argument that reciprocal compensation applies only to local traffic as a red herring, because the definition of local traffic is within the jurisdiction of the state commission. 47 C.F.R. § 51.701(b)(1). TCG further argues that nothing in the FTA prevents the Commission from expanding the definition of local traffic. TCG Brief 26-29.

SWBT's position is that Issue 1 is not properly before the Commission because it does not address reciprocal compensation for local traffic, but deals with intraLATA toll calls. SWBT cites to the Local Competition Order, ¶¶ 1033, 1034 and 1035, which as a legal matter differentiate between transport and termination of local traffic and access service for long distance services. The FCC states, "[t]he Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic." ¶ 1033. In ¶ 1034, the FCC states, "the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic." SWBT observes the Commission has never determined that the local service area is the entire LATA. In the absence of such a determination SWBT maintains the intraLATA compensation issue cannot be the

subject of arbitration pursuant to 47 U.S.C. §§ 251 and 252 of the FTA. SWBT Brief, 20-22.

The Arbitrator observes that TCG and SWBT appear to agree that the local service area must be redefined in order for the Arbitrator to find that LATAwide compensation is appropriate. It is the Arbitrator's opinion that such a decision must be made by the Commission, not by the Arbitrator. Based on the legal authorities cited by SWBT and the current definition of the local service area the Arbitrator agrees with SWBT that this issue is not a proper subject for an arbitration pursuant to 47 U.S.C. §§ 251 and 252 of the FTA.

10. Issue 2: Should a LATAwide reciprocal compensation rate be established if TCG's proposal for network architecture is adopted? TCG combines Issues 1 and 2 in its Brief. Its position is the same on both issues. TCG Brief, 22-30. SWBT opposes LATAwide compensation. SWBT believes TCG would be over compensated for truly local calls if TCG's proposal is adopted. Tr. 74. SWBT states TCG's proposal means that SWBT could be required to transport TCG's traffic all the way across Kansas, for example from Colby to Topeka. SWBT would be required to pay terminating compensation to TCG but receive no compensation for the cost of transport.

The Arbitrator finds that Issue 2 is a corollary of Issue 1 and the same legal analysis applies. LATAwide compensation would redefine local service areas. The Arbitrator finds this is outside the scope of her authority. It would also effect the elimination of intraLATA access charges for TCG. The Local Competition Order, in ¶¶ 1033, 1034 and 1035 indicates access charges continue to apply. In the absence of a Commission determination to redefine the local service area, this issue is outside the scope of arbitrations pursuant to 47 U.S.C. §§ 251 and 252 of the FTA.

11. Issue 5: What compensation rate should be applied to traffic terminated by TCG or SWBT if TCG's proposed network architecture is not adopted? The Arbitrator adopted TCG's proposed network architecture so this issue requires no decision.

12. Issue 6: Should bill and keep apply to all originating and terminating local traffic whenever TCG serves the end user using unbundled local switching? TCG's position is that bill and keep is in the best interest of both parties because otherwise the parties must exchange a significant amount of information in order to bill for reciprocal compensation. TCG is of the opinion that the cost of recording and exchanging the information and producing bills likely exceeds any benefit derived from the net revenue. Swift, Dir. 7. TCG states the traffic is likely to be in balance, so TCG and SWBT would be foregoing an approximately equal amount of revenue and expense. Swift, Reb. 12. TCG requests a finding that, "[b]ill and keep should apply to all originating and terminating local traffic whenever TCG serves the end user using unbundled local switching." TCG Brief, 41.

SWBT believes all local calls, including those made from unbundled local switching should be subject to the same reciprocal compensation rate. SWBT testifies that if bill and keep is adopted, SWBT would be obligated to pay reciprocal compensation to a third party CLEC for a call originating from unbundled switching that is terminated to a customer of the third party CLEC, while TCG whose customer originated the call would pay no compensation. Hopfinger, Dir. 9. SWBT's last best offer is: "[w]hen TCG serves an end user using unbundled switching, the compensation arrangement for that traffic will be handled no differently than that from an end user using TCG's own switch."

47 C.F.R. 5 1.713(b) allows a state commission to:

> impose bill and keep arrangements if the state commission *determines* that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption, (Emphasis added.)

TCG has expressed its opinion that "the traffic is likely to be in balance." Swift, Reb. 12. TCG has provided no supporting evidence for its belief. SWBT has not addressed the balance of traffic. TCG as the proponent of bill and keep has the burden of proof. TCG's opinion testimony does not provide sufficient evidence on which to base a determination that the traffic originated using unbundled switching is in balance, let alone that it is expected to remain so. The Arbitrator adopts SWBT's position on this issue.

13. Issue 9: What records should be required for the purpose of billing reciprocal compensation? TCG objects to the use of Category 92-99 originating records for billing reciprocal compensation. TCG asserts these records are only used in SWBT's five state area while the rest of the country uses a format called Category 11 terminating records. Tr. 42. TCG states SWBT uses Category 11 records for other billing purposes. Tr. 68. The use of originating records, Category 92-99, to pay for terminating traffic requires an honor system and does not permit a reasonable audit procedure. Tr. 42. TCG further states that in Texas, SWBT has now been ordered to do away with the use of Category 92-99 records in favor of Category 11 records. TCG Brief, 37. TCG objects to incurring an expense to establish non-standard systems. TCG Brief 38. TCG's last best offer is:

> If needed, any exchange of records necessary for the purpose of billing reciprocal compensation should be based upon industry standards as supported by the Ordering and Billing Forum (OBF). Any needed record exchange for reciprocal compensation should be based upon the industry standard 110 13 1 record, that is currently available from both TCG and SWBT. Category 92 records will not be

used for this purpose. TCG Brief, 38.

SWBT supports the continued use of Category 92-99 records. SWBT states the Ordering and Billing Forum has not adopted standards for inter-company intraLATA and local compensation. Murphy, Reb. 12, 14, Tr. 68-69. SWBT further explains it cannot currently bill local and intraLATA toll compensation using Category 11 records. Tr. 69. SWBT also explains it uses Category 92-99 records for compensation with other ILECs and CLECs. Tr. 92. SWBT states that no audit can be performed because TCG's switch is not yet capable of passing the Calling Party Number (CPN) which is necessary to identify the originator of the call. Tr. 93. The evidence establishes that TCG is not currently passing records to SWBT, nor has SWBT sent records to TCG because it has never received the appropriate information for sending them. Tr. 108. SWBT's last best offer is: "[t]he exchange of originating Category 92-99 records is the basis for billing reciprocal compensation in Kansas." SWBT Brief, 29.

The evidence demonstrates that Category 92-99 records are only used in the SWBT five state region. It also establishes that SWBT is incapable of billing local traffic pursuant to Category 11 records. On July 3 1, 2000, TCG provided a copy of the Texas Arbitration Award in Docket No. 21982. That Award found that Category 92-99 records would not be used for billing, and required use of the terminating carriers' records for billing. The Texas solution is not an option available to the Arbitrator in this proceeding since the choice is between use of Category 92-99 records, SWBT's last best offer, or Category 11 records, TCG's last best offer. The Arbitrator finds that it makes little sense to require TCG to establish the systems to enable it to exchange Category 92-99 records. SWBT's five state region is the only area where those are in use and SWBT has been required to move away from use of these records in Texas. On the other

hand, since SWBT is currently not capable of billing for reciprocal compensation on the basis of Category 11 records, the Arbitrator finds that it is not consistent with the public interest, convenience and necessity to require the use of either method and returns this issue to the parties for further negotiation. 47 U.S.C. § 252(e)(2)(A).

14. Issue 10: If TCG's proposal on transit call is not accepted, should SWBT be responsible for ensuring that TCG receives record (billing) data from the third party caller? TCG made it clear at the hearing that it was withdrawing its proposal that SWBT act as its billing agent for transit traffic. Tr. 99. In its Brief TCG sets out its understanding of negotiations in Texas relevant to this issue. TCG requests that the Arbitrator order incorporation of the agreement ultimately derived in Texas into the Kansas agreement. TCG Brief, 43-44. SWBT objects to any requirement that it function as an intermediary between TCG and any other party. TCG must be required to enter into agreements with third party carriers for the exchange of billing data. SWBT Brief, 30. SWBT does not address the Texas negotiations.

In the absence of an agreement by the parties to be bound by the results of the Texas negotiations, the Arbitrator is reluctant to require the parties to be bound by something as yet unknown. To the extent this issue is resolved through negotiation in Texas the Arbitrator finds that it is appropriate to incorporate it into the Kansas agreement. If, however, it is decided through Arbitration or Commission ruling, the Arbitrator finds the parties may resubmit the issue.

15. Issue 11: On long distance calls originating or terminating to TCG customers, should TCG receive the switched access rate element of the transport interconnection charge? TCG asserts it should receive the interconnection charge from the carrier when the end user is a

TCG customer, in accordance with its access tariffs. SWBT states this is not a local interconnection issue and therefore should not be decided in an arbitration pursuant to 47 U.S.C. §§ 251 and 252. Tr. 72. Hopfinger, Dir. 14. The Arbitrator agrees that this is not a local interconnection issue. TCG's testimony makes it clear that this issue addresses inter and intrastate toll, not local service. Swift, Dir. 16. TCG states "the issue is teed up and ready for decision here." TCG Brief, 41. That is not sufficient to confer jurisdiction.

15. Issue 12: What is the appropriate compensation for 8YY traffic? TCG's position is that 8YY calls that originate and terminate in the same local calling area should be subject to reciprocal compensation because they have been handled exclusively over local interconnection facilities. TCG requests the following finding:

> An 8YY call that originates on the physical network of one of the Parties and is determined to terminate on the network of the other Party without the need for the call to be handed off to an IXC for transport should be carried on the local interconnection trunks and compensated via the reciprocal compensation mechanism in place. The Party whose end user customer originates the call will receive the appropriate reciprocal compensation from the other party, as well as any applicable database dip charges, and will provide records to the other Party to enable customer billing. TCG Brief, 42.

SWBT's position is that this issue should not be considered in the arbitration because it is an access charge issue, the consideration of which is not appropriate in an arbitration of a local interconnection agreement. SWBT asserts, without explanation that the involvement of an IXC in intraLATA 8YY traffic is not relevant. Hopfinger, Dir. 14, SWBT Brief, 32. SWBT's position is that 8YY calls delivered over Local/IntraLATA trunks should be compensated as toll calls, with the appropriate rates contained in each party's intrastate Access Service Tariff.

The Arbitrator is persuaded by TCG's argument that 8YY calls that are not handed off to

an IXC for transport should be carried on local interconnection trunks and compensated in accordance with the local reciprocal compensation mechanism. SWBT's assertion that the involvement of an IXC is, not relevant, without any explanation, is not persuasive.

17. Issue 13: If TCG uses SWBT's network (transit call) to originate a call to a third party cellular customer, what is TCG's obligation to bill and collect its customers, under a calling party pays arrangement? TCG states in its Brief, that based on discussions at the hearing, it believes the parties do not have a substantive dispute on this issue, but the parties have as yet been unable to stipulate. TCG requests a finding that,

> TCG has no obligation to bill and collect the cellular airtime or paging charges from TCG's customers unless a separate billing and collection agreement is signed with either SWBT or the service provider. TCG Brief, 44-45.

SWBT, relying on testimony of TCG witness Swift at the hearing, agrees that "there does not appear to be an issue presented for the Arbitrator or Commission to resolve." Tr. 100, SWBT Brief, 33-34. SWBT requests the Arbitrator find that TCG's proposal cannot prohibit SWBT from billing for transiting charges regardless of whether TCG and the third party cellular carrier have entered into the necessary billing arrangement. SWBT Brief, 34. SWBT requests a finding that,

> TCG is required to establish compensation arrangements with all third party carriers, including cellular carriers, before using SWBT's tandem to complete transit calls to the third party carrier. SWBT will bill TCG the appropriate transiting rate located in the pricing appendix on a per minute of use basis. TCG shall indemnify SWBT against any and all charges levied by such third party carriers and any attorney fees and expenses. SWBT Brief, 34.

Although the parties state they do not believe there is an issue to be decided, it seems to the Arbitrator that their last best offers differ and may have different results. The parties are in

agreement regarding the need to have agreements with third party carriers, but differ as to the consequences of a failure to have such agreements in place. Adoption of TCG's last best offer, seemingly could encourage carriers to be less than diligent about entering into such agreements. The Arbitrator adopts SWBT's last best offer.

18. Issue 14: Where TCG is not sending calling party number on originating traffic, what method should be used to determine the charges for that traffic? TCG's position is that a compensation method for traffic for which the jurisdiction cannot be identified because it comes into a switch without calling party number (CPN) should be established cooperatively. TCG asserts this method should take into account available historical data for jurisdictional patterns of traffic and compensation based on that data. TCG adds that it is uniform industry practice to use estimates or traffic studies to determine the jurisdiction of access traffic in the absence of CPN. TCG Brief, 38-39. In prefiled testimony TCG states, "[w]here the Parties are exchanging traffic using SS7, the likelihood that calling party number (CPN) will not be available is quite minimal." TCG continues that "on those *rare* occasions when it does happen . . . ." (Emphasis added) Swift, Dir. 15. At the hearing TCG testified that its Lucent 5ESS switch in Kansas City has a number of PBX trunks, which is the product TCG sells the most of, and that the switch cannot pass CPN for that product. TCG's witness further stated that software to enable the switch to pass CPN will hopefully be available in the 4th quarter of this year. She objected to SWBT's 90 percent threshold because it did not take technological impossibility into account. Tr. 40-41.

TCG's last best offer is:

> Where CPN is not available to determine the jurisdiction of traffic handed off between the parties, the parties should work cooperatively to correct the problem, for example by relying on historical information where available, including

establishing a method for assessing the correct level of charges. TCG Brief, 40.

SWBT proposes that when the percentage of calls passed by a carrier without CPN is greater than 90 percent, the calls without CPN will be billed as local or intraLATA toll traffic in direct proportion to the respective minutes of use of the calls exchanged with CPN. If the percentage of calls with CPN is less than 90 percent, SWBT proposes to bill the calls without CPN as Switched Access. Lockett, Dir. 9, 1 l-l 3. SWBT's last best offer is:

> Where SS7 connections exist, if the percentage of calls passed with calling party number (CPN) is greater than 90 percent, all calls exchanged without CPN information will be billed as local or intraLATA toll traffic in direct proportion to the minutes of use exchanged with CPN information. If the percentage of calls passed with CPN is less than 90 percent, all calls passed without CPN will be billed as intraLATA switched access. SWBT Brief, 36.

SWBT's reason for proposing that all calls without CPN be billed switched access rates, if less than 90 percent of exchanged calls are passed with CPN is that it believes that, in such instances, the exchanging carrier is engaging in arbitrage. Lockett, Dir. 9.

The evidence establishes that TCG and SWBT use SS7 to exchange traffic. The Arbitrator finds TCG' testimony confusing. First, TCG refers to the rare occasion when CPN cannot be passed. Then, it appears that in most instances TCG is unable to pass CPN. This makes the Arbitrator question the representative nature of the available historical information on which TCG wants to base the jurisdictional determination, Although the Arbitrator is sensitive to SWBT's concern about arbitrage, SWBT's presumption is not supported by any evidence, but seems to be only an assumption. The Arbitrator finds that there is no evidence to support that 90 percent is a reasonable number and it is potentially punitive to adopt this unsupported assumption, when the evidence shows that TCG cannot pass CPN for 90 percent or more of its

traffic and would therefore automatically be presumed to be engaging in arbitrage and subject to paying the higher access charge rate, without any possibility of documenting the true jurisdictional nature of its traffic. The Arbitrator rejects both parties' last best offer, pursuant to the Commission's October 1, 1996 Order in Docket No. 94-GIMT-478-GIT, which established the ground rules for arbitrations pursuant to 47 U.S.C. §§ 25 1 and 252 of the FTA. In that Order the Commission provided that an arbitrator could deviate from the final offer style arbitration to ensure compliance with the FTA.

47 U.S.C. § 252(e)(2)(A) provides three grounds for rejection of agreements. Subsection (e)(2)(A)(ii) provides for rejection if "the implementation of such agreement or portion is not consistent with the public interest, convenience and necessity." TCG's last best offer is not in the public interest because there is no demonstration that reliance on historical CPN data to assign jurisdiction to current traffic passed without CPN will prevent arbitrage and fairly compensate SWBT. TCG's testimony, that CPN cannot be passed for the product of which it sells the most, is evidence of the unreliability of that data. SWBT's last best offer, on the other hand, is punitive, because it has no evidentiary basis and TCG is currently technically incapable of passing CPN to meet SWBT's 90 percent criterion.

The Arbitrator suggests the parties resume negotiation on this issue. If TCG will be able to pass CPN by the end of this year, perhaps an interim compensation arrangement subject to true-up could be put in place?

19. Issue 15: Should TCG be allowed to charge the tandem rate to SWBT for calls originated on the SWBT network and terminated to TCG's network? The Arbitrator determined in Network Architecture, Issue 2 that TCG's Kansas City switch is capable of serving a

geographic area comparable to that of SWBT's tandem. Pursuant to 47 C.F.R. § 5 1.7 1 l(a)(3) "the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate." TCG should be allowed to charge the tandem rate.

20. Issue 16: Must SWBT at TCG's sole discretion be required to receive Transit Traffic from TCG? TCG explains it merely wants to ensure the agreement enables TCG to offer Transit Traffic Services to third party carriers if it chooses to do so. TCG requests a determination that the compensation arrangements for such services should be comparable to the arrangements applicable to Transit Traffic Services offered by SWBT. TCG Brief, 45. TCG testimony makes it clear that it is not TCG's intent to require SWBT to accept transit traffic. Swift, Dir. 16.

SWBT's Brief states that this issue asks whether SWBT should be required to accept transit traffic from TCG. SWBT objects to any requirement that it accept transit traffic. Hopfinger, Dir. 18. SWBT requests a determination that it is not required to accept transit traffic from TCG at TCG's sole discretion, nor should SWBT be required to subscribe to any transiting service offered by TCG and that TCG shall not interject itself into any effort by SWBT to establish direct interconnection agreements with third party carriers that do not require TCG to transit traffic. SWBT's last best offer is that all parties wishing to terminate traffic on SWBT's network shall have their own interconnection agreement with SWBT for such purpose. SWBT Brief, 36-37.

The Arbitrator agrees with SWBT that local exchange carriers have a duty to establish reciprocal compensation arrangements for the transport and termination of traffic. 47 U.S.C. § 251(b)(5). Consistent with that obligation, no other carrier should be authorized to interject itself

into the interconnection arrangements of the local exchange carrier, without its agreement. There is no indication in the statute that transit services are considered. Clearly, parties may agree to accept calls on a transiting basis, but SWBT has indicated its unwillingness to do so and has expressed a preference for negotiating its own agreement. SWBT's last best offer is adopted.

The Commission's procedure provides the parties with an opportunity to comment on the Arbitrator's decision. Such comments shall be filed on or before the 15th day after the date of the decision. The Commission shall then issue its final order 30 days after the date of this decision.

Eva Powers

Eva Powers, Arbitrator

Dated: August 7, 2000.

CERTIFICATE OF SERVICE

(00-TCGT-571-ARB)

I hereby certify that a true and correct copy of the above and foregoing was deposited in the United States mail, first class postage prepaid, on this 7th day of August, 2000, addressed to the following:

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