**BEFORE THE PUBLIC SERVICE COMMISSION OF MISSOURI**

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| **Southwestern Bell Telephone, L. P. d/b/a/ SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A")** | ) ) ) ) ) | **Case No. TO-2005-0336** |

**COMMENTS OF AT&T COMMUNCATIONS OF THE SOUTHWEST, INC., TCG ST. LOUIS AND TCG KANSAS CITY, INC.**

COMES NOW AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc. and files this its Comments on the Final Arbitrator's Report, and in support whereof, would show as follows:

## INTRODUCTION

As it did in bringing disputed issues to the Commission for resolution, AT&T will once again "narrowly tailor" the points on which it files comments on the Final Arbitrator's Report. The objective emphasized in the issues that AT&T chose to arbitrate was the need for interconnection terms that would provide stability in business planning and a sound economic foundation for its presence in the Missouri local telecommunications market. AT&T did not present a "wish list" of every desirable interconnection provision; AT&T presented a realistic request for terms that are, for the most part, critical to AT&T's ability to successfully operate as a competitive local exchange carrier in Missouri.

Before addressing the issues on which AT&T requests that the Commission reconsider the ALJ's determination, AT&T wants to take this opportunity to commend the Arbitrator for Herculean task he accomplished. The ALJ was presented with a large number of issues to consider and rule on in a short period of time, and while AT&T

believes the ALJ's thoughtful consideration of the evidence produced the right result for most issues, for a limited number of issues AT&T must assert error in an effort to obtain a final interconnection agreement that will support its continued presence in Missouri's local exchange market.

AT&T's approach to these Comments is to follow the order of issues as they were presented in the Final Arbitrator's Report. To the extent possible, AT&T has tried to consolidate related issues and note where issues are interrelated so that separate discussion of similar issues can be minimized. Finally, AT&T has provided an issue statement for each issue discussed. The issue statement is generally the one proposed by AT&T in the Final DPLs filed shortly before the hearing.

## SECTION III -- UNES

**AT&T UNE Issue 6: Should SBC MISSOURI's obligation to provide UNEs, if they can be made available via routine network modification, be dependent upon SBC's determination of whether spare facilities exist?**

**AT&T UNE Issue 18: How should routine network modifications be described in the ICA? Is SBC entitled to charge AT&T for routine network modifications?**

***The ALJ erred in adopting SBC's proposed language limiting its obligation to perform routine network modifications to spare facilities and by also including superfluous language in the UNE Attachment regarding ICB prices for routine network modifications.*** Together, AT&T UNE Issues 6 and 18 address routine network modifications. The Arbitrator addressed these issues together at Section III of his Report beginning at page 56. His determination on these two issues, along with related issues raised by other CLECs, is as follows:

> SBC Missouri may not limit "routine network modifications" to the attachment of electronics to DS1 Loops. SBC Missouri may recover the costs of such routine network maintenance through either recurring or

> nonrecurring rates. To the extent that it has an unbundling obligation under §251(c)(3), it must provide the service at TELRIC rates; to the extent that the obligation remains under §271, then the service must be provided at just and reasonable rates.[1]

As AT&T explained in its Post-Hearing Brief, the basis of the Parties' disagreement regarding routine network operations (AT&T UNE Issue 6) centers on whether SBC should be permitted to condition its obligation to provide UNEs on its unilateral determination of whether "spare facilities" exist within its network. The "spare facilities" loophole that SBC has inserted in its proposed language at Section 2.5 would permit SBC to establish (or maintain) a practice that discriminatorily reserves unused facilities for SBC's own use. Under this proposal, it is very likely that the "spare facilities" available to AT&T and other CLECs would end up being only those unused facilities that exceed SBC's current and *projected* needs. With regard to AT&T UNE Issue 18, the primary issue relates to SBC's language regarding individual case basis ("ICB") pricing for routine network modifications. SBC's language to which AT&T objects is in sections 4.8.7, 8.5.7.6, and 15.12.6.

Although the Arbitrator's Report does not explicitly discuss either the spare facilities language in Section 2.5 or the ICB language in sections 4.8.7, 8.5.7.6 and 15.12.6, the Detailed Matrix attached to the UNE Section of the Report indicates that the Arbitrator adopted SBC's proposed language for section 2.5, including the spare facilities language, as well as SBC's proposed ICB language in sections 4.8.7, 8.5.7.6 and 15.12.6. AT&T respectfully requests that the Commission reconsider both of these determinations.

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[1] Arbitrator's Report, Section III at p. 59.

If SBC is allowed to restrict access to only those UNE facilities that it deems to be "spare," then AT&T and other CLECs will be unfairly kept from otherwise accessible and available UNEs. This will deprive AT&T and other CLECs of the facilities necessary to provide service to end users, resulting in less competition and fewer customer choices. Moreover, it will unreasonably interfere with CLECs' non-discriminatory access to UNEs as required by the Act.

The "spare facilities" limitation is not the same as acknowledging that SBC is not required to construct new outside plant facilities for requesting CLECs. AT&T agrees that SBC's obligation to provide UNEs does not extend to new construction of aerial or buried cable. However, the limitation that SBC is attempting to impose here is very different, allowing, as it does, a discriminatory reservation of existing facilities for SBC's use that is not at all the same as a duty to construct new outside plant. Indeed, SBC's own witness testified on rebuttal that SBC does indeed reserve spare facilities in some circumstances: "SBC Missouri is willing to commit to the fact that it has no existing policy of reserving loop facilities **beyond maintenance spares**."[2] SBC, however, provides no quantification or limitation on the amount of or manner in which it designates facilities as "maintenance spares." Including this undefined term in the successor ICAs opens the door to potentially anticompetitive actions in the future by SBC, and presents the all-to-real possibility of future disputes at the Commission. Accordingly, the Commission should delete the word "spare" from section 2.5 of the language selected by the Arbitrator.

The Arbitrator's decision with regards to AT&T UNE Issue 6 and the inclusion of the word "spare" is also seemingly inconsistent with the Arbitrator's decision on a related

[2] *See* Smith Rebuttal at p. 5.

issue raised by Wiltel and the CLEC Coalition. On CLEC Coalition Issue 46 and Navigator Issue 12, discussed at page 60 of the UNE Section of the Arbitrator's Report, the Arbitrator reached the following determination: "SBC Missouri has a duty to provide access to UNEs where facilities exist. If it is acting unreasonably to delay access to UNEs or failing to use necessary precautions and procedures to avoid service disruptions when altering a service arrangement, then the CLECs should file a complaint with the Commission. **The designation of certain facilities as "spare" seems to create an unnecessary administrative burden on SBC Missouri with little potential benefit to CLECs or their customers.**" (emphasis added).

With regard to SBC's proposed ICB language, AT&T would assert that it is unnecessary and superfluous given the Arbitrator's determination on AT&T Pricing Issue 2 that the costs of routine network modifications is already included in SBC's recurring and non-recurring rates.[3] AT&T Pricing Issue 2 asks the related issue whether "routine network modifications [should] be assessed an ICB rate, or, are the costs for routine network modifications already included within the UNE rates?" The Arbitrator correctly found that SBC should not be allowed to impose additional charges on CLECs to perform routine network modifications, as this would represent a double recovery. This is consistent with the FCC's findings in the *Triennial Review Order* that the costs of routine network modifications are most often already included in existing TELRIC rates:

> We note that the costs associated with these modifications often are reflected in the recurring rates that competitive LECs pay for loops. Specifically, equipment costs associated with modifications may be reflected in the carrier's investment in the network element, and labor costs associated with modifications may be recovered as part of the expense associated with that investment (*e.g.*, through application of annual charge factors (ACFs)). The Commission's rules make clear that there may not be any double recovery of these costs (*i.e.*, if costs are

[3] *See* Arbitrator's Final Report, Section IV Pricing at p. 16.

recovered through recurring charges, the incumbent LEC may not also recover these costs through a NRC).

*TRO*, ¶ 640.

Mr. Rhinehart submitted testimony that based on his review of cost studies that were used to establish SBC's UNE rates that the costs of routine network modifications were already included in SBC's recurring and non-recurring UNE rates.[4] As part of Mr. Rhinehart's work in the previous TELRIC cost cases, he analyzed and developed cost factors that were key to the development of the rates that were adopted. Based on that work, Mr. Rhinehart testified that SBC's costs to build, operate and maintain its network were generally captured in the adopted rates. Specifically, routine network modifications are the types of work that would be recorded on SBC's books as either maintenance or repair costs. Both of these types of costs were explicitly captured in SBC's recurring UNE rates and in its non-recurring rates. Thus, Mr. Rhinehart testified that SBC should not be allowed to establish new separate charges for routine network modifications because such charges would represent a double recovery.

The Arbitrator, in deciding AT&T Pricing Issue 2, specifically found Mr. Rhinehart's testimony on this issue to be compelling. The Arbitrator stated at page 16 of the Pricing Section of the Report: "**The Arbitrator finds Rhinehart's testimony to be compelling and concludes that SBC's costs for routine network modifications are included in its recurring and non-recurring UNE rates.** To the extent that SBC can demonstrate that they are not, then SBC must be allowed to recover its costs. However, SBC has not filed a cost study in this proceeding. For these reasons, the CLEC's language is preferable in each ICA." (emphasis added). Because the Arbitrator correctly

[4] Rhinehart Direct at pp. 57-58.

concluded with regard to AT&T Pricing Issue 2 that SBC's costs for routine network modifications are already included in its recurring and non-recurring UNE rates, SBC's proposed language at sections 4.8.7, 8.5.7.6, and 15.12.6 of the UNE attachment is extraneous and unnecessary, and should be deleted, as requested by AT&T.

**AT&T UNE Issue 9: Under what terms must SBC MISSOURI provide EELs to AT&T?**

***The ALJ's Report erred by adopting SBC's language regarding the manner in which costs associated with audits would be allocated (section 2.12.7.4.1) and requiring AT&T to submit proof of certification on a circuit-by-circuit basis (2.12.6).*** As a whole, the ALJ adopted SBC's proposed language regarding access to EELs, with limited instances in which he adopted AT&T's proposed language. Although AT&T disagrees generally with the adoption of SBC's proposed language, AT&T tailors its appeal on this issue to two paragraphs of SBC's language that the ALJ approved: namely, SBC's proposed sections 2.12.6 and 2.12.7.4.1.

To provide an overview for these sections of contract language, an EEL, or Enhanced Extended Link, is the combination of one or more segments of unbundled Dedicated Transport with unbundled loops (DS1s, DS3s, etc.) and, at the option of AT&T, may include multiplexing. EELs are essentially long loops -- loops that have been extended from the legacy ILEC wire center to a location where AT&T has a switch or some other network appearance. As such, EELs are important to AT&T's delivery of competitive services because they provide the natural bridge between resale or UNE-P and UNE-L, recognizing that it is not practical or prudent for AT&T to establish physical collocation in every SBC wire center in Missouri. If volumes of AT&T's dedicated transport traffic (and the transport component of EELs) cross the economic break-even

point to warrant self-provision given a particular transport route's construction cost (driven by rights-of-way, distance, and other cost factors), AT&T can then establish collocation in that end office, construct its own transport facilities, and roll service from EELs to UNE-L.[5]

With regard to section 2.12.6, SBC's proposed language would require that AT&T submit "proof" of certification on a circuit-by-circuit basis on a form provided by SBC. This requirement is not supported by the FCC rules, and runs the risk of creating a bottleneck and is of questionable value given SBC's audit rights. Accordingly, the Commission should determine that section 2.12.6 is not consistent with FCC rules, and delete it from the parties' successor ICA.

With regard to the adoption of section 2.12.7.4.1, Section 2.12.7 *et seq.* describes the process the parties will follow if SBC elects to audit AT&T's compliance with the criteria for access to EELs. Sections 2.12.7.4.1 and 2.12.7.4.2 describe how the cost of the audit will be borne:

> 2.12.7.4.1 To the extent that the independent auditor's report concludes that AT&T failed to comply in all material respects with this Section 2.12, AT&T must reimburse SBC MISSOURI for the cost of the independent auditor and for SBC MISSOURI's costs in the same manner and using the same methodology and rates that SBC MISSOURI is required to pay AT&T's costs under Section 2.12.7.4.2.
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> 2.12.7.4.2 To the extent the independent auditor's report concludes that the AT&T complied in all material respects with this Section 2.12, SBC MISSOURI must reimburse AT&T for its reasonable staff time and other reasonable costs associated in responding to the audit (e.g., collecting data in response to the auditor's inquiries, meeting for interviews, etc.).

[5] Rhinehart Direct at pp. 28-30.

Thus, under the language proposed by SBC and adopted by the ALJ, if the auditor's report concludes that AT&T complied with the eligibility criteria, then SBC must reimburse AT&T for its time and costs in responding to the audit. Conversely, if the auditor's report concludes that AT&T failed to comply with the eligibility criteria, then AT&T must reimburse SBC for its time and costs in responding to the audit.

It is this requirement in section 2.12.7.4.1 that AT&T reimburse SBC if non-compliance is found which AT&T appeals. There is no support in the FCC's Order and rules for such a requirement. Indeed, paragraphs 627 and 628 of the *Triennial Review Order* address this very point. Paragraph 627 does require a CLEC to true-up any difference in payments and make the correct payments on a going-forward basis, as well as reimburse the ILEC for the cost of the independent auditor if the audit finds that the CLEC failed to comply with the service eligibility criteria, a requirement which is reflected in section 2.12.7.4. Paragraph 628 of the TRO provides that if the audit concludes that the CLEC has complied with the eligibility criteria, the ILEC must reimburse the audited carrier for its costs associated with the audit, including staff time and other appropriate costs for responding to the audit, a requirement which is reflected in section 2.12.7.4.2.

Nothing, however, provides for reimbursement of the ILEC's internal time and costs associated with the audit, as required in section 2.12.7.4.1. This distinction recognizes the different work required by the companies involved in such an audit. In the event SBC seeks to audit AT&T's circuits, SBC's primary expense is the cost of the independent auditor, an expense that SBC is allowed to recover if AT&T is found to be out of material compliance. The primary expense to the company being audited is the

cost associated with the internal resources required to produce the information to be reviewed by the independent auditor. The FCC's rule creates a balance between the parties by allowing each to recover its primary costs if the audit results in a finding in their favor. If the audit reveals that AT&T is in compliance, AT&T can recover its primary costs, i.e. its internal costs. Similarly, if the audit reveals that AT&T has not complied with the EELs' service eligibility criteria, SBC is allowed to recover its primary cost, the cost of the independent auditor. Accordingly, the Commission should conclude that section 2.12.7.4.1 adopted by the Arbitrator is overly broad and inconsistent with the FCC rules, and either modify it or delete it from the parties' successor ICA.

**UNE Issue 20: Should SBC be required to provide access to DCS, and, if so, under what terms and conditions?**

*The ALJ's Report erred by adopting SBC's language limiting access to DCS to that provided under SBC's federal tariff.* The Arbitrator provided no reasoning in the Final Report for his determination on this issue, noting only that it had been discussed above. In the Detailed Matrix, however, it is apparent that the ALJ rejected AT&T's proposed language and adopted SBC's proposed language. That is erroneous, because to the extent SBC still has an obligation to provide access to dedicated transport an on unbundled basis, it remains obligated to provide access to DCS (Digital Cross-connect System) as a UNE, pursuant to Section 251 of the Act. The continued availability of Dedicated Transport at cost-based rates is essential to the continuation of competition in the local phone market and would promote consumer choice. A DCS is a device that enables access to, and management of, the digital signals of loop and transport facilities. Often a DCS will also provide multiplexing functions and test access capabilities. Because the DCS enables a carrier to groom facilities, thereby optimizing trunk and

facility utilization, access to the functionality of a DSC is important to AT&T.[6] As a functionality that is part of the unbundled Dedicated Transport UNE, SBC should be obligated to provide access to DCS.

SBC apparently does not dispute that it is obligated to continue to provide access to DCS as part of unbundled dedicated transport. *See* UNE DPL Issue 20, SBC Preliminary Position. However, under SBC's contract language that was adopted by the Arbitrator, SBC is only obligated to provide access to DCS in accordance with the terms of its federal tariff. SBC has not demonstrated that the rates contained in the tariff are TELRIC-based rates, nor has it provided the terms and conditions of that tariff to the Missouri Commission for review. Additionally, SBC is free to modify its federal tariff at any time. SBC should not be permitted to avoid its unbundling obligations by providing alternate access through federal tariffs. Because of these limitations with SBC's language, the Commission should adopt AT&T's language instead.

**Temporary Rider Issue 4b: Should the Rider contain language regarding the manner in which SBC converts delisted elements?**

With regards to UNE Rider Issue 4, the Arbitrator adopted on SBC's language in places, and adopted AT&T's language in other places. AT&T comments on two sections of AT&T's proposed language that the Arbitrator rejected, as well as three related sections of SBC's proposed contract language that the Arbitrator adopted that are arguably inconsistent with other determinations the Arbitrator made.

First, the Arbitrator rejected AT&T's proposed sections 2.3.4.1 and 2.3.4.2 in their entirety. The language in section 2.3.4.1 would ensure that conversions from transitional elements would take place "in a seamless manner without any customer

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[6] Rhinehart Direct Testimony at p. 61.

disruption or adverse effects to service quality." The language further provides that the Parties will work together to develop a mutually agreeable conversion process. The end of AT&T's proposed section 2.3.4.1 provides that if the Parties cannot agree on a mutually agreeable conversion process, the deadline for conversions is extended and SBC will continue to bill the transitional rates. The language in section 2.3.4.2 rejected by the Arbitrator is a companion to this language at the end of section 2.3.4.1, and provides that SBC may true-up to collect the difference between the transitional rates and the rates for the applicable alternative arrangement between the end of the transition period and the date the conversion requests are completed. Thus, AT&T's proposed section 2.3.4.2 ensures that SBC will be able to bill the full amount for post-transition services and will not suffer any monetary shortfall by being required to provide elements at the transitional rates past the end of the transitional period.

The language in section 2.3.4.1 and 2.3.4.2 is necessary to ensure that AT&T's customers are not negatively impacted by the conversion process. It is also consistent with the principles behind the TRRO. In the *TRRO*, the FCC, recognizing that the order was removing significant unbundling obligations that had formerly been placed on SBC, stressed the need for an orderly transition for competitive carriers and their customers from UNEs to alternative facilities or arrangements. AT&T's language requires the parties to work together to come up with a mutually agreeable conversion process—one that is seamless and not disruptive to end-user customers.

The Arbitrator also erred in adopting SBC's proposed language at sections 3.3, 3.3.1 and 3.3.2. The language in sections 3.3 and 3.3.2 is identical, and provides as follows: "CLEC shall be fully liable to SBC Missouri to pay such pricing under the

Agreement, including applicable terms and conditions setting forth interest and/or late payment charges for failure to comply with payment terms, notwithstanding anything to the contrary in the Agreement." Section 3.3.1 is related, and provides that "Regardless of the execution or effective date of this Rider or the underlying agreement, CLEC will be liable to pay the Transitional Pricing for Mass Market ULS Element(s) and Mass Market UNE-P, beginning March 11, 2005.

The language adopted in these sections is potentially inconsistent with language proposed by AT&T that the Arbitrator also adopted for this issue. Specifically, in AT&T Rider Issue 4, the Arbitrator adopted AT&T's proposed section 2.3.1, which provides as follows: "Regardless of the execution or effective date of this Rider or the underlying Agreement, CLEC agrees that the Transitional Pricing for all Affected Loop-Transport Element(s), shall apply beginning March 11, 2005, SBC Missouri will not bill AT&T for such rates, nor all the difference in the Transitional Prices be due, prior to the execution of this rider." In making this determination, the Arbitrator rejected SBC's proposed section 2.3.1, which is analogous to SBC's section 3.3.1, which the Arbitrator adopted.

The net effect of the Arbitrator's decision on sections 2.3.1, 3.3, 3.3.1 and 3.3.2 is that for Transitional Loop-Transport elements, although AT&T agrees to pay the transitional pricing for loop transport elements beginning March 11, 2005, SBC is not allowed to bill for the transitional rates until after the Rider's been executed. Because SBC cannot bill until after execution of the Rider, late charges and interest cannot apply until after that date either. However, for transitional switching elements and UNE-P, AT&T is liable for the transitional rates beginning March 11, 2005, and SBC is entitled to impose late payment charges and interest beginning on that date. These conflicting

results should be reconciled by adoption of AT&T's sections 3.3 and 3.3.1and rejection of SBC Missouri's sections 3.3, 3.3.1 and 3.3.2.

## SECTION IV -- PRICING

### A. DCS

**Pricing Issue 1: What are the appropriate cost-based rates for the elements in dispute between the Parties?**

**Pricing Issue 3: Should DCS rates be included in the ICA or should the ICA reference SBC's federal tariff for these rates?**

***The Arbitrator erred in determining that rates for DCS and DCS cross-connects need not be included in the ICA.*** Both AT&T Pricing Issue 3 and Pricing Issue 1 address whether rates for DCS and DCS cross-connects should be included ICA. With regard to Issue 3, the Arbitrator found: "The Arbitrator notes that the *TRO* and *TRRO* limited dedicated transport to facilities between ILEC offices, so DCS need not be provided as part of that UNE but rather on a wholesale basis as SBC suggests." Arbitrator's Report, Section III Pricing, page 15. Similarly, at page 6 of the Pricing Section of the Report, the Arbitrator found the following with regards to cross connects to DCS 4-Wire: "SBC does not propose to include these services in the contract as they are not Section 251(c)(3) elements. Under the FCC rules, DCS is not a UNE; instead it is a special access functionality which is available under the special access tariff to CLECs and IXCs on an equal basis as required by the FCC rules. Decision: The Arbitrator agrees with SBC for the reasons stated above."

These issues are related to AT&T UNE Issue 20, which is discussed above. If the Commission reconsiders the Arbitrator's determination on AT&T UNE Issue 20 and determines, as it should, that DCS should be provided by SBC as a UNE as part of

dedicated transport, then pricing for DCS and related cross-connects should be included in the Schedule of Prices.

**B. Voice Grade Dedicated Transport Cross Connects**

**Pricing Issue 1: What are the appropriate cost-based rates for the elements in dispute between the Parties**

***The Arbitrator erred in determining that rates for voice grade dedicated transport cross-connects need not be included in the ICA.*** The Arbitrator noted in Pricing Issue 1 that "SBC proposes no prices as the provision of these cross connects is not subject to Section 251(c)(3) as no finding of impairment has ever been made by the FCC on voice grade dedicated transport. **Decision:** The Arbitrator agrees with SBC for the reasons stated above." This finding, however, is inconsistent with the Arbitrator's finding on Pricing Issue 5, regarding whether rates for voice grade/DS0 dedicated transport should be included in the ICA. The Arbitrator, at page 17 of the Pricing Section of the Report, agreed with AT&T that rates for voice grade dedicated transport should be included. That finding is consistent with his ruling on a related UNE Issue. Given that the Arbitrator has determined that voice grade dedicated transport is a UNE, and that rates for it should remain in the ICA, the Commission should reverse the inconsistent determination that voice grade dedicated transport cross-connects are not available under the ICA. Voice grade dedicated transport is of little utility without corresponding cross-connects.

**SECTION V. - - NETWORK ARCHITECTURE / INTERCONNECTION**

**Issue 10: Should interconnection trunks carry all 251(b)(5) traffic, including ISP bound and transit traffic, as well as intraLATA exchange traffic?**

*The Arbitrator's Report erred by adopting only a part of SBC's proposed language that was found to be consistent with the Report.* For this particular issue, as it

does for other Network issues, the Arbitrator's Report points to the Commission's recently adopted Enhanced Record Exchange rules in 4 CSR 240-29.10 et seq. As will be discussed below, AT&T does not believe those rules can be lawfully applied in circumstances where they conflict with the Act. For this particular issue, the Detailed Decision Matrix indicates that all of AT&T's proposed language for this issue is consistent with the Arbitrator's Report. The Matrix, however, also indicates that SBC's proposed language for Attachment 11, Part C, § 6.0 is consistent with the Report, but goes on to state that SBC's proposed language for Attachment 11, Part C, § 6.1 is not consistent with the Report. It is unclear to AT&T why the Report considers § 6.1 to be inconsistent with the Report, but it would be an error to include § 6.0 in the ICA without also including § 6.1. Sections 6.0 and 6.1 are companion paragraphs that operate in a reciprocal fashion. Section 6.0 addresses AT&T's routing of traffic to SBC and § 6.1 addresses SBC's routing of traffic to AT&T, and from AT&T's perspective they impose reciprocal obligations. AT&T does not object to the inclusion of SBC's language for § 6.0 as long as § 6.1 is also included, since it would be discriminatory against AT&T to only include § 6.0. Therefore, the Arbitrator's Report should be corrected to also find that § 6.1 should be included in the ICA.

**Network Issue 15:**

a. **May AT&T combine originating 251(b)(5) Traffic and intraLATA Exchange Access with interLATA Exchange Access Traffic on Feature Group D exchange access trunks AT&T obtains from SBC MISSOURI?**

b. **If AT&T is permitted to combine Section 251(b)(5) traffic, IntraLATA exchange access traffic and interLATA exchange access traffic, will the Parties utilize factors to determine proper billing?**

*The Arbitrator's Report erred by finding that the Commission's new Enhanced Record Exchange Rules can prohibit a technically feasible form of interconnection*

*requested by AT&T's that is permitted by § 251(c)(2) of the Act.*[7] This issue involves a single AT&T service, AT&T Digital Link ("ADL"), which is a local service provided to multi-line business customers using a PBX.[8] ADL is a business service currently offered to existing customers under a Commission-approved tariff. The service takes advantage of AT&T's massive investment in its long distance network (switching and transport) to provide local calling to a limited number of business customers. Consequently, this service involves the routing of local traffic over Feature Group D ("FGD") trunks groups (IXC "long distance" trunks to which switched access charges typically apply). In order to properly compensate SBC for terminating this traffic, AT&T has developed a factor to identify the ADL "local" traffic that is routed over the FGD trunks and this traffic is subject to TELRIC-based reciprocal compensation termination charges rather than access charges. This service has been available to businesses via an approved tariff, and the interconnection arrangement to support the service has been explicitly permitted by the AT&T/SBC Missouri interconnection agreement for the last six years. SBC has never filed a complaint with any state commission regarding AT&T's ADL service, nor did SBC raise this issue in Case No. TO-2001-455. In addition to Missouri, this interconnection arrangement is used to support ADL service in California, Connecticut, Texas, Oklahoma and Arkansas, and in Verizon, BellSouth, and Qwest territories.[9]

This method of interconnection for the routing of local traffic is clearly technically feasible, as evidenced by its implementation in multiple jurisdictions over the

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7 *See* Arbitrator's Report, Section V, at p. 21. Although the Decision portion of the Report does not clearly reject AT&T's position, that is the implication of the last sentence on page 21 (excerpted below in the body of these Comments). Furthermore, AT&T's proposed language is clearly rejected by the Summary Decision Matrix, Attachment V.B Part 1, at p. 6.

8 Tr. at 535 – 536.

9 Direct Testimony of AT&T Witness John Schell ("Schell Direct") at 86.

last six-plus years, and the use of factors for compensation purposes is a reasonable method for accurately ensuring SBC is appropriately compensated.[10] SBC has not contended that this is not a technically feasible form of interconnection, and therefore AT&T is entitled to this form of interconnection under FTA § 251(c)(2).

Furthermore, SBC's concerns about inaccurate compensation for termination of these calls are unfounded and not supported by any specific evidence in this proceeding. AT&T provides SBC with the Calling Party Number ("CPN") and, in those situations where the customer's PBX does not provide the CPN, AT&T populates the CPN field with the customer's local Automatic Number Identification ("ANI") number representing the customer's physical location. Thus, SBC will have information in the CPN Parameter field of the SS7 message for a local call 100% of the time to (1) verify the validity of the PLU factor that AT&T provides to SBC, (2) verify the true jurisdictional nature of the traffic, and (3) ensure there is no fraud.[11] Moreover, as Mr. Schell testified at hearing, AT&T uses the same process to develop its factor as it would to jurisdictionalize local and interexchange calls that it routes over separate trunk groups.[12] Therefore, the factor AT&T provides for ADL traffic is as accurate a way of jurisdictionalizing traffic as routing the calls over separate trunk groups.

In rejecting AT&T's position, the decision in the Report relies exclusively on the Commission's new Enhanced Record Exchange rules, 4 CSR 240-29.10 et seq.[13] First, the Report mentions that the new rules require calling party information to be passed to the receiving carrier. As noted above, AT&T's unrebutted evidence is that CPN is passed

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[10] *Id* at 84 – 85.
[11] *Id.* at 87.
[12] Tr. at 516 – 517.
[13] Arbitrator's Report, Section V, at p. 21.

with these calls, so there are no grounds to reject AT&T's language on the basis that CPN will not be passed.

Second, the Report states: "In addition, those rules require the originating and transiting carriers to deliver certain traffic over separate trunks when requested to by a telecommunications company who provides call completion on the LEC-to-LEC Network as defined in 4 CSR 240-29.010(18)."[14] After being closely involved with the development of the Chapter 29 rules for an extended period of time, AT&T did not comment on the rules that were finally published on January 3, 2005 because it was AT&T's belief that the rules were exclusively concerned with the routing of access, or IXC, traffic over the local interconnection network (which the rules refer to as the LEC-to-LEC network). The arbitrage problems that gave rise to the rules were created by carriers placing long distance traffic that properly belonged on the IXC Feature Group D ("FGD") Network on the local, or Feature Group C ("FGC"), Network, which generally resulted in the failure to pay access charges, often as a result of the failure of CPN to be passed to the terminating carrier. This focus of the rule is reflected in 240-29.30(5), which says that nothing in the new Chapter 29 rules is intended to change the current record creating and billing processes for traffic exchanged on the FGD Network. Accordingly, the Chapter 29 rules should not be used as a basis to prohibit a form of interconnection that is currently in use today and for which the parties have developed record creating and billing processes. Moreover, any Chapter 29 rule that presumptively prohibits AT&T's routing of local traffic over the FGD Network as ADL traffic is routed today would violate § 251(c)(2) of the Act. As noted above, § 251(c)(2) entitles AT&T to interconnect with SBC for the exchange of local traffic in any technically feasible

[14] 240-29.120(18) is the correct cite.

manner. The Commission cannot enforce a state rule that conflicts with § 251(c)(2) and that denies AT&T a technically feasible form of interconnection. There has been no other problem with the ADL service that would legally justify prohibiting its current FGD routing. Consequently, the Chapter 29 rules cannot be used as the basis for rejecting AT&T's proposed interconnection for its ADL service.

In the final analysis, AT&T's interconnection arrangement for ADL is lawful and the Arbitrator's decision on this issue should be reversed.

## SECTION VI - - INTERCARRIER COMPENSATION

**Issue 1a. (Joint): What is the proper definition and scope of § 251(b)(5) traffic?**

**Issue 1b: What IP Enabled Traffic should be excluded from the § 251(b)(5) reciprocal compensation and subject to access in accordance with the FCC's Phone-to-Phone IP Telephony Order, FCC 04-97 (rel. April 21, 2004)?**

**Issue 1c: Should IP Enabled traffic that does not meet the criteria set forth in the FCC's Phone-to-Phone IP Telephony Order, FCC 04-97 (rel. April 21, 2004), be addressed within the context of this arbitration?**

**Issue 1f: (SBC) What is the appropriate routing, treatment and compensation of ISP calls on an Interexchange basis, either IntraLATA or InterLATA?**

**Issue 1g: (Joint) What is the correct definition of "ISP-Bound Traffic" that is subject to the FCC's ISP terminating compensation plan?[15]**

*The Arbitrator's Report erred in adopting SBC's definition of "Section 251(b)(5) traffic" because that definition limits reciprocal compensation to "local" traffic and improperly denies an access exemption for Information Services (including IP Enabled Services).* The Arbitrator accepted SBC's position that only traffic in which the

[15] Section VI of the Report also decided SBC's Network Issue 18a, which has to do with the routing of Switched Access traffic, including IP Enabled traffic, under the issues related to IP Enabled Services. Therefore AT&T also requests that the Arbitrator's decision on 18A be reversed. SBC's Issue Statement for Network Issue 18a reads as follows: SBC MISSOURI's Issues: What is the proper routing, treatment and compensation for Switched Access Traffic including, without limitation, any PSTN-IP-PSTN Traffic and IP-PSTN Traffic?

originating end user and terminating end user are both physically located within the same mandatory local calling area is subject to reciprocal compensation. As a result, all other traffic, regardless of the governing FCC rules or the real jurisdictional nature of the traffic, will be forcibly and automatically subject to switched access charges. AT&T's position is that all telecommunications traffic is subject to §251(b)(5) unless it is expressly excluded by §251(g) of the Act. Section 251(g) "carves out" certain types of traffic, such as information access and exchange access traffic, from reciprocal compensation (§251(b)(5)) obligations and only for traffic pricing regimes established *prior* to the passage of the 1996 Act.

Although the parties presented numerous sub-issues under Issue 1, in many ways Issue 1a is the threshold issue and all of the other sub-issues are simply more discrete aspects of the larger issue presented by Issue 1a. Consequently, AT&T has grouped all of the sub-issues as the header for this discussion. However, AT&T will use additional subheaders below to identify where arguments that are more specific to some of the discrete sub-issues begin, even though those arguments will generally apply to the threshold issue under Issue 1a.

It is somewhat difficult to know exactly what the Arbitrator's rationale is for adopting SBC's position, as the Report simply provides a recitation of SBC's arguments, a recitation of AT&T's and other CLEC's arguments, and a recitation of SBC's rebuttal arguments (although no recitation of AT&T's rebuttal arguments), and then concludes with a statement that SBC's reasoning is more reasonable and its language is adopted. The simplest explanation is that the Arbitrator agrees that only traffic that physically originates and terminates within a mandatory local calling area, i.e., SBC's definition,

accurately describes the traffic that is covered by § 251(b)(5). However, when the language of the FCC's current implementing rule, 47 C.F.R. § 51.701(b)(1), is examined, it is clear that AT&T's proposed language is more consistent with the current rules than SBC's.

First, SBC's definition of § 251(b)(5) traffic is indisputably the classic but outdated definition of "local" traffic.[16] As the Report correctly points out, AT&T's testimony clearly argues that the FCC abandoned the concept of "local" for the purposes of defining § 251(b)(5) traffic. Notably, in its *ISP Remand Order*, the FCC expressly found that it had erred in attempting to distinguish between local and long distance traffic for the purpose of determining when reciprocal compensation should apply.[17] The FCC said, "The term 'local,' not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g)."[18] Moreover, the FCC amended 47 C.F.R. Part 51, Subpart H, to completely eliminate the use of the term "local" and revised 47 C.F.R. Section 51.701(b)(1) to change the definition of services subject to Section 251(b)(5) of the Act.

Prior to this amendment, under Section 51.701(b)(1), reciprocal compensation applied to "Telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within *a local service area established by the state commission.*" That is the version of the rule SBC continues to rely on today even though that rule has not been in effect for over four years. Section

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[16] With one notable exception, which is that SBC's definition relies on "physical" location, and the FCC's previous definition never relied on physical location, and the industry has always used NPA-NXX's as a location proxy routing and rating purposes. This is clearly demonstrated by the existence of Foreign Exchange Services, Call Forwarding Services, Wireless Services, etc.

[17] Order on Remand, *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, FCC 01-131, at Para. 26 (April 27, 2001) (the "*ISP Remand Order*").

[18] *Id.* at ¶ 34.

51.701(b)(1), as amended by the FCC in the *ISP Remand Order*, provides that reciprocal compensation applies to "*Telecommunications traffic* exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access." (emphasis supplied) In other words, unless an exception applies, all telecommunications traffic *is* subject to § 251(b)(5). That is the current state of the law. AT&T's definition, which generally includes all traffic types except the ones specifically enumerated by § 51.701(b)(1), is clearly more accurate than SBC's definition, which is simply a re-worded version of the original FCC rule that was rejected by both the D.C. Circuit and the FCC. The rule in its present form supports AT&T's position, not the one proposed in the ALJ's Report. Therefore, AT&T's definition should be adopted. To do otherwise is to commit legal error.

Indeed, outside of Missouri even SBC agrees in some other states that the local/non local distinction is no longer relevant for determining if traffic is to be treated as Section 251(b)(5) calling. Following is an excerpt from the Michigan Public Service Commission's Opinion and Order in Case No. U-12952:

> Ameritech Michigan objects and argues that the previous Commission orders finding that FX calls are subject to reciprocal compensation under 47 USC 251(b)(5) did so based on the finding that FX calls are local. That finding, Ameritech Michigan argues, is contrary to current law. It argues that the ISP Remand Order ruled that the question of whether traffic is or is not subject to reciprocal compensation under Section 251(c)(5) (sic) does not turn on whether the traffic is local. Rather, Ameritech Michigan argues, the FCC amended 47 CFR 51.701 by deleting the word "local" from the rule and establishing new determinants for whether particular traffic is subject to reciprocal compensation.[19]

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[19] *In the matter of* p*etition for arbitration to establish an interconnection agreement between TDS METROCOM, INC. and AMERITECH MICHIGAN*, Opinion and Order, Case No. U-12952, (Mich. PSC Order issued Sept. 7, 2001), at p. 23; cited in Schell Rebuttal at 7-8.

This case was cited to in AT&T's testimony,[20] and it was not addressed by SBC in its post-hearing brief. Nor does the Report address how SBC's contrary position in Michigan (which obviously benefited SBC in that state) undermines SBC's position in this Missouri arbitration. In addition, in the *Illinois Bell Decision* a federal district court judge recently held that calling between different rate centers could be treated for reciprocal compensation purposes in the same fashion as Section 251(b)(5) local traffic, and rejected SBC's theory to the contrary.[21]

Finally, regarding SBC's arguments that AT&T's proposed definition includes traffic types which have been carved out by § 251(g), or have otherwise been carved out by the FCC, it is still more appropriate to adopt AT&T's language. The Report cites to SBC's various arguments without any citation to where SBC made these arguments, but they can be found at pages 5 – 6 of the Report, Section VI.

***ISP-Bound Traffic***

*The Report errs by excluding ISP-bound traffic from the ICA's definition of § 251(b)(5) traffic, and inappropriately defining ISP-bound traffic that is subject to the FCC's compensation scheme for ISP-bound traffic, thus unlawfully imposing access charges on a portion of such traffic.* In connection with its § 251(b)(5) arguments, SBC first argues that including ISP-bound traffic in the definition of § 251(b)(5) traffic is improper because the FCC has specifically classified ISP-bound traffic as an information service and not subjected ISP-bound traffic to § 251(b) but has instead subjected it to the FCC's jurisdiction under § 201 of the Act. The FCC itself has expressly stated that *all* traffic is subject to Section 251(b)(5) reciprocal compensation unless is it exempted under

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[20] Schell Rebuttal, at p. 97.

[21] See *Illinois Bell Decision,* slip op. at 9, which is attached as Exhibit 1.

Section 251(g) of the Act.[22] Although the FCC did initially apply the 251(g) carve out to ISP-bound traffic, the D.C. Circuit Court of Appeals rejected the FCC's rationale for exempting ISP-bound traffic from 251(b)(5) reciprocal compensation. [23] Because the D.C. Court did not vacate the FCC's new § 51.701 rule or the *compensation mechanism* that the FCC established for ISP-bound traffic, they currently remain in effect. However, neither the rule nor the compensation mechanism establishes that ISP-bound traffic is an information service that is not subject to § 251(b), and the D.C. Circuit clearly rejected the FCC's "information services" rationale in the *ISP Remand Order* itself. Therefore, this traffic can only be subject to 251(b)(5). And, as a practical matter, the definition of traffic that is subject to § 251(b)(5) under the ICA is used to determine which traffic is subject to reciprocal compensation or bill and keep, as opposed to switched access. In this case, AT&T and SBC have agreed that ISP-bound traffic is going to be subject to either bill and keep or the FCC's compensation scheme for ISP-bound traffic. Other than the parties' discrete dispute over the definition of "ISP-bound traffic," which is discussed immediately below, SBC should have no practical problem with including ISP-bound traffic within the definition of § 251(b)(5) traffic.

Much of AT&T's and SBC's arguments regarding whether the FCC's compensation scheme in the *ISP Remand Order* is intended to apply to "local" ISP-bound traffic has already been touched on in the discussion above regarding how the FCC has rejected the concept of "local" for traffic that is subject to § 251(b)(5). It is absurd for SBC to argue, and for the Report to accept, that the FCC rejected the concept of "local" traffic for purposes of § 251(b)(5) in the *ISP Remand Order* but intended to apply the

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[22] *ISP Remand Order* at ¶¶ 32 and 46.
[23] *WorldCom, Inc. v. FCC*, 288 F. 3d 429 (D.C. Cir. 2002).

concept of "local" to ISP-bound traffic. Neither the FCC nor the D.C. Circuit Court of Appeals decisions distinguished between local and non-local ISP-bound traffic. Therefore, SBC has no basis for arguing that certain types of ISP-bound traffic should be subject to a pricing scheme different than that established by the FCC. As a practical matter, AT&T pays access charges on some ISP-bound traffic, i.e., ISP-bound traffic exchanged over Feature Group D trunks. These practical limitations, however, should not be construed to mean that AT&T is *obligated by law* to pay access charges on ISP-bound traffic. Therefore, AT&T should not be required by the terms of its interconnection agreement to pay access on ISP-bound traffic as SBC has proposed in Section 1.2 of Attachment 12. All ISP-bound traffic that is routed over local interconnection trunks, including Foreign Exchange ("FX"), should be subject to reciprocal compensation.[24] It has never been the FCC's intent to impose access charges on ISP-bound traffic that is already subject to flat-rated local calling, i.e., to reverse a 20-year trend of exempting ISP-bound traffic where the call takes advantage of the Enhanced Service Provider Access Exemption, discussed below in connection with the Report's decision on Information Services and IP Enabled Services. AT&T Post-Hearing Brief discussed in some detail how the *ISP Remand Order* must be interpreted in light of this intent of the FCC. However, the Report did not address those arguments.

SBC's position results from a mis-reading of the *ISP Remand Order.* However, if the *Order* is read closely it is obvious that the FCC defines the problem it is addressing in the *ISP Remand Order* as one involving exchange of traffic between originating LECs and terminating LECs who serve ISPs that take advantage of the ESP Access Exemption

[24] Technically, bill and keep is also form of intercarrier compensation under the FCC's reciprocal compensation rules.

and are therefore users of local services rather than payers of access charges. In other words, *the problem is unlimited flat-rated local calling between locally interconnected LECs. The FCC's solution, however, does not include the renewed application of access charges.*

The FCC was concerned about a regulatory arbitrage problem that affects both the local exchange *and* the exchange access markets. A close reading of the *ISP Remand Order*, and the accompanying *Unified Intercarrier Compensation NPRM,* demonstrates that in the *ISP Remand Order* the FCC was attempting to deal with an arbitrage problem that resulted from the nature of all ISP-bound traffic. The specific aspects of ISP-bound traffic's nature that created the problem were two-fold: 1) the inbound only, high volume character of the traffic, and 2) the fact that ISPs are exempt from access charges as a result of the *ESP Exemption Order.* These two things are closely interrelated. The FCC included a discussion of the ESP access exemption when it provided the "background" to the problem its *ISP Remand Order* addresses:

> ISPs, one class of enhanced service providers (ESPs), also may utilize LEC services to provide their customers with access to the Internet. In the *MTS/WATS Market Structure Order*, the Commission acknowledged that ESPs were among a variety of users of LEC interstate access services. Since 1983, however, the Commission has exempted ESPs from the payment of certain interstate access charges. Consequently ESPs, including ISPs, are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network (PSTN). Thus, despite the Commission's understanding that ISPs use *interstate* access services, pursuant to the ESP exemption, the Commission has permitted ISPs to take service under *local* tariffs.[25]

Thus, ISPs have "the option of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs rather than from interstate access tariffs used

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[25] *ISP Remand Order*, ¶ 11 (emphasis in original) (original citations omitted).

by IXCs. Typically, [ISPs] have used this exemption to their advantage by choosing to pay local business rates, rather than the tariffed interstate access charges."[26] Of course, it is unlikely that any ISPs ever purchase their access out of interstate access tariffs. As the FCC also stated in the *Access Reform Order*: "ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state lines."[27]

If ISPs were themselves not exempted from the interstate access charge regime, then there would be no problem to be addressed regarding the intercarrier compensation scheme between two LECs, such as AT&T and SBC, when they collaborate to complete a call to an ISP. If ISPs were paying inefficient and non-cost based access charges then the inbound only, high volume nature of ISP-bound traffic would by itself preclude the arbitrage problems that the FCC was trying to address in the *ISP Remand Order*. Or, put another way, there would be no inbound only, high volume traffic to ISPs if they were paying inefficient and non-cost based access charges to receive that traffic. Economically, ISPs could not sustain such a cost of doing business without passing the cost on to their subscribers. Subscribers today would not be making 60, 120, 240 minute or more "calls" to their ISPs if they were paying the equivalent of toll rates to do so. The whole point of the ESP access exemption was to make access to computers, and eventually the Internet, affordable for end users by ensuring that ESPs, and eventually ISPs, were not subject to inefficient non-cost based access charges.[28] The arbitrage problem arose because ISPs are permitted to take service under a LEC's *local* tariffs,

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[26] *ISP Remand Order*, ¶ 27 (emphasis in original)

[27] Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 15998-99, ¶ 342 (1997) (*Access Reform Order*), *aff'd, Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998). (emphasis added).

[28] *Id.* at ¶ 342 – 345.

which spared them from the access charge regime and means there is no artificial and regulatory-imposed uneconomic restraint from using telecommunications resources to access the Internet. Making ISPs "local" customers also brings the problem within the ambit of local interconnection between LECs. Compensation disputes therefore arose in the context of § 252 arbitrations between two LECs regarding compensation for traffic delivered to ISPs *that are subject to the ESP Access Exemption.* Consequently, the *ISP Remand Order* addresses compensation for all ISP-bound traffic that suffers from the type of arbitrage problems inherent in allowing ISPs to take advantage of the ESP access exemption. This includes, most notably, ISP-bound traffic delivered over an FX arrangement, which is a flat-rated call to the originating end user. Such FX calls do not satisfy SBC's definitions of § 251(b)(5) traffic nor of ISP-bound traffic. Nevertheless, they are exactly the types of calls that the FCC addressed in the *ISP Remand Order.* The FCC prescribed a remedy for this situation, and it is a reduced form of intercarrier compensation. The FCC did not prescribe the imposition of access charges.

Furthermore, as a matter of public policy, applying access charges to ISP-bound traffic that appears as a flat-rated "local" call to the originating end user is simply a bad idea. Just the thought of *extending* the current archaic and inefficient access charge regime to any traffic that is not clearly subject to such charges today is extremely questionable. Such an approach here is inconsistent with the FCC's stated desire to move toward bill and keep in general, or towards a uniform cost-based scheme. In addressing interstate access reform in its 1997 *Access Reform Order* the FCC was quite clear about the "non-cost based rates and inefficient rate structures" inherent in interstate access

charges.[29] (And interstate access charges, both in 1997 and now, are dramatically lower than intrastate access charges.) Moreover, the Commission does not need expert testimony to appreciate the public outcry that would likely result from ISP subscribers suddenly learning that they will now have to either pay toll rates to reach their ISP that that currently reach with a flat-rated "local" call, or else will see their ISP subscription rate go up significantly as a result of the ISP passing on its increased costs from paying switched access-based rates. More economic access to the Internet, and not less, is a major public policy goal. Accordingly, the FCC has allowed ISPs to avoid access charges for over 20 years. The FCC stated in the *Access Reform Order* that preserving the ESP Exemption from access charges for ISPs "advances the goals of the 1996 Act"[30] regarding the development of the Internet. The FCC cited to Section 230(b) of the 1996 Act, which defines the United States' policy regarding the Internet:

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and State regulation;

SBC's position treating ISP-bound traffic as not subject to § 251(b)(5) and limiting ISP-bound traffic to only calls that physically originate and terminate in the same mandatory local calling area, which would potentially subject some ISP-bound traffic to access charges, is totally inconsistent with these well established and clearly articulated federal policies. Consequently, the Report's decision to adopt SBC's definitions is inconsistent with those policies as well as with the requirements of the *ISP Remand Order.*

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[29] *Access Reform Order,* ¶ 344.
[30] *Id.*

***Information Services and IP Enabled Services***

*The Report errs by excluding Information Services, including IP Enabled Services, from the ICA's definition of § 251(b)(5) traffic that is subject to reciprocal compensation and by adopting SBC's definition of "Switched Access" that inappropriately subjects Information Services traffic to access charges.* The second point that SBC makes with regard to the definition of § 251(b)(5) and the treatment of Information Services in general, which the Report appears to agree with, is that AT&T's proposed definition is inappropriate because it includes both "Information Services" and "IP-Enabled Services" traffic. To be clear, AT&T's proposed definition for § 251(b)(5) traffic refers to Information Services traffic, although AT&T includes "IP Enabled Service" as a subset of Information Services traffic (and AT&T's language includes a specific definition of "IP Enabled Service," in part so as to help define the IP Enabled traffic that *is* subject to switched access). AT&T includes Information Services under its proposed definition of § 251(b)(5) for the practical reason that such traffic is exempt from access charges, consequently such traffic is subject to the § 251(b)(5) compensation scheme that the Parties have agreed to. There is no need to create another category of "non-§251(b)(5) traffic" for the ICA. AT&T's approach with its language is to broadly define § 251(b)(5) traffic, which will either be subject to reciprocal compensation or bill and keep, and then to define the specific exceptions where traffic is subject to access charges. This is the basic approach that both the FCC and the D.C. Circuit have taken in interpreting the application of § 251(b)(5). AT&T includes Information Services in its definition of § 251(b)(5) and, as discussed below, in a different section provides an

exception for one form of IP Enabled traffic that the FCC has found is subject to interstate access charges.

Notably, SBC does not propose definitions for Information Service and IP Enabled Service types of traffic that are clearly exempt from access charges, but instead only approaches the topic by 1) opposing AT&T's inclusion of any such traffic in the definition of § 251(b)(5) traffic, and 2) including definitions of IP Enabled traffic that would unlawfully subject such traffic (namely IP-to-PSTN) to access charges. Therefore, under SBC's proposed language the Enhanced Services Provider Access Exemption ("ESP Exemption"), which is applicable to both Information Services and IP Enabled services, is *never recognized in the ICA.*

With this one-sided approach SBC doesn't even have to address when an IP Enabled Service is an Information Service for purposes of determining the applicability of the ESP Exemption. The Arbitrator appears to agree with SBC's assertion that the ESP Exemption allows for an exemption from access charges only where access services are used to provide the link between an information service provider and its subscribers. SBC claims all other uses of the PSTN by information service providers (like sending traffic to a LECs' local exchange subscriber served on the PSTN) are subject to access charges. According to SBC, the Enhanced Service Exemption does not change the applicability of terminating access charges when an information service call of one party is terminated to an end user of another party. SBC claims that the compensation rules for such an information service call are no different than the rules for a telecommunications services call.

SBC's assertion that the ESP Exemption only applies when an enhanced service provider is communicating with its own end users, (when a call is being *sent to* the ESP from the ESP's customer), is simply not supportable and has never been applied in such a narrow manner. As noted in detail in AT&T's testimony, enhanced service providers are defined as end users for purposes of access charge rules and end users are in turn entitled to purchase local business lines, such as ISDN PRIs. The FCC has never held that the ESP exemption is subject to any other limitations.[31] The fact is that in the *Access Reform Order* the FCC described the scope of the ESP Exemption and stated without limitation that "[I]in [1983] the FCC decided that, although information service providers may use Incumbent LEC facilities to originate and *terminate* interstate calls, ISPs should not be required to pay interstate access charges."[32] If SBC's position were accurate, the FCC would not have referenced call termination in its description of the ESP Exemption. Moreover, if SBC's position were accurate, the FCC's stated purpose for adopting the ESP Exemption, to promote the development of the information services industry, would essentially be thwarted since the exemption could only be applied in a very limited circumstance.

The FCC has ruled that some IP Enabled traffic that is not Information Services Traffic is subject to access charges and not subject to the ESP exemption. In an AT&T declaratory ruling order the FCC found that a specific type of IP Enabled Service that is no longer offered by AT&T was a Telecommunications Service and not an Information

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[31] Schell Direct at 106.

[32] *Access Reform Order 12 FCC Rcd 21905 (1996)* paragraph 241 (emphasis added); see also *Amendment of Part 69 of the Commissions Rules relating to Enhanced Service Providers,* CC Docket No. 87-215, Notice of Proposed Rulemaking , 2 FCC Rcd. 4301, paragraph 2. (1987) (Commission had "initially intended to impose interstate access charges on enhanced service providers for the use of local exchange facilities to originate and *terminate* their interstate offerings" (emphasis added).

Services, and therefore on a going forward basis would not qualify for the ESP Exemption. However, the FCC made it very clear in that decision that its findings were prospective only, addressed only interstate access charges, and were limited to those services that shared the same specific characteristics of the services that were the subject of AT&T's petition.[33]

AT&T took this decision into consideration in its proposed ICA language. In Section 2.1.1 of Attachment 12, AT&T specifically provides that IP Enabled Services that are the same as those services that were the subject of AT&T's petition are to be treated as exchange access traffic subject to 251(g) of the Act and subject to exchange access charges on a prospective basis. The language provides that:

> **Exchange access traffic that is subject to 251(g) of Act, also includes only the following category of IP Enabled Service: 1+ interLATA and 1+ intraLATA calls that: (1) use ordinary customer premises equipment (such as a traditional telephone) with no enhanced functionality; (2) originate and terminate on the public switched telephone network (PSTN); (3) undergo no net protocol conversion as defined in 2.1.1.1 below; and (4) provide no enhanced functionality to end users that result from the provider's use of IP technology.**

The characteristics listed in AT&T's language match each of the service characteristics that the FCC identified as controlling in its decision on the prospective treatment for such traffic.

Most notably, and ignored by the Report, is the fact that the decision to forcibly impose switched access charges on certain IP calling marks a dramatic change from the status quo here in Missouri.[34] AT&T is not proposing to change the regulatory status quo. As noted earlier in the testimony the Enhanced Service Exemption already exists

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[33] *Petition for Declaratory Ruling that AT&T's Phone to Phone IP Telephony Services are Exempt from Access Charges,* 119 FCC Rcd. 7457 (2004) ("*Phone to Phone IP Telephony Order*").

[34] *See* Schell Direct, at 112 – 113.

and applies to all traffic that is Information Services Traffic. AT&T is simply proposing to maintain the regulatory status quo that gives IP Enabled Traffic that is within the rubric of Information Services Traffic the benefit of the Enhanced Service Exemption.

The Report, on the other hand, carves out IP Enabled Traffic from the benefits provided by the ESP Exemption and allows SBC to receive access charges for this traffic. By adopting SBC's position, it allows SBC to levy access charges on traffic that heretofore have been exempt from such charges by completely ignoring the existing state of the law. The ESP Exemption has been in place now for more than two decades and it has never been interpreted in the manner suggested by SBC. Beginning to apply access charges to IP Enabled traffic will impede the development of IP Enabled technology and services in Missouri. IP Enabled providers should not be burdened with the imposition of above-cost access charges. If they are, they will simply do business in other states with a more pro-competitive regulatory atmosphere. Such a proposal alters the economics of providing the services in a way that will threaten the efficient deployment of emerging technology and the services it brings.

AT&T is simply asking the Commission to apply the Enhanced Services Exemption in the manner that the current law provides. Should the FCC, in the IP NPRM,[35] expand the scope of the exemption – or narrow it – the Parties can deal with that change pursuant to the provisions in the ICA for change in law. There are no adverse consequences if AT&T's proposal to continue the status quo is adopted. AT&T's proposal ensures that IP Enabled Traffic continues to receive the benefits of the Enhanced Service Exemption that was specifically adopted by the FCC to promote the development of the information services industry by not burdening it with above-cost

[35] *IP Enabled Services NPRM* , WC Docket No 04-36, 19 FCC Rcd. 4836 (2004).

access charges. As such, it will promote the development of innovative services and technology and provide an avenue for robust facilities-based competition and affordable service, to the benefit of all consumers in Missouri. The Commission should therefore grant this appeal and reverse the ALJ Report's proposed finding on this issue.

## SECTION XI -- COMPREHENSIVE BILLING

**Issue 3:**

a. **Should SBC MISSOURI be required to provide to AT&T the OCN or CIC, as appropriate, of 3rd party originating carriers when AT&T is terminating calls as an unbundled switch user of SBC MISSOURI?**

b. **Should SBC MISSOURI be billed on a default basis when it fails to provide the 3rd party originating carrier OCN or CIC, as appropriate, to AT&T when AT&T is terminating calls as the unbundled switch user?**

***The ALJ erred in refusing to adopt AT&T's proposed language allowing SBC to be billed when SBC fails to provide the OCN or CIC on third party originated calls.*** This issue involves whether SBC should be required to provide AT&T with the Operating Company Number, or OCN (in the case of a LEC-carried call) or the Carrier Identification Code, or CIC (in the case of a toll call) of the third party carrier originating the call when AT&T terminates calls originating from third party carriers using SBC's unbundled local switching. SBC records the call and knows the identity of the originating carrier in the various circumstances under which AT&T terminates traffic from SBC (e.g., when AT&T terminates a call that originates from (i) a CLEC purchasing SBC's unbundled local switching element or (ii) an IXC or LEC interconnected with SBC). The originating OCN and/or CIC of the third party carrier is a unique identifier, which distinguishes carrier ownership of the call. OCNs and CICs tell AT&T which carriers are originating calls that AT&T terminates and are required to enable AT&T to properly bill the originating company. In the case where AT&T

purchases SBC's unbundled network elements, as in Comprehensive Billing Issues 3(a) and 3(b), AT&T is totally reliant on SBC to record the call and provide the record from which AT&T will bill the originating carrier. As a purchaser of unbundled network elements, AT&T requires this information on all third party traffic.[36] In the event SBC fails to provide the third party carrier's originating OCN and/or CIC consistent with these consensus industry standards, AT&T proposes to bill SBC on a default basis. SBC has this information. If SBC does not provide it to AT&T then AT&T only knows that the call came in on SBC's network. Therefore, it is appropriate to bill SBC.[37]

During the hearing, SBC witness Chris Read confirmed both that SBC is able to identify the IXC that provides the traffic to provide the CIC, and that a CLEC cannot properly bill the call without the CIC:

> MS. BOURIANOFF: You mentioned that for IXC calls, CIC, a C-I-C, carrier identification code, is provided. Do you recall that in responding to Staff questions?
> MR. READ: Yes.
> MS. BOURIANOFF: Is a CIC always provided to a CLEC on every IXC call?
> MR. READ: If it is an access record that would be charged to an IXC, then that -- that is our -- our goal, our anticipation that a CIC would be provided. We -- we've always agreed that we would provide CICs.
> MS. BOURIANOFF: You would agree with me, however, Mr. Read, that a CIC is not always provided in every instance. It's the agreed standard that it should be provided, but there are records passed sometimes that do not have a CIC on them; is that correct?
> MR. READ: Well, you never say never and always. I guess there could be anomalies, but -- that could happen, but I think they are just that. And it is our goal that if it's an IXC-charged call, that the CIC would be provided. Because we could identify the traffic as coming from that IXC, we would know what CIC to provide.
> MS. BOURIANOFF: And is the CLEC able to bill the call correctly if the CIC is not provided on the record?
> MR. READ: Well, it creates a dilemma. As I stated earlier, identification and jurisdiction are two of the top -- the largest issues that have been in the wholesale

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[36] Direct Testimony of Richard Guepe at 25.
[37] Guepe Direct at 28-29.

> world, as -- as you know. And as many, many issues regarding identification and jurisdiction have been -- many discussions have happened in the industry. So it does create a problem. Is it impossible? I wouldn't go there. There may be other methods, there may be other avenues of information, but it does create a problem.[38]

Judge Thompson resolved this issue in SBC's favor, finding that that "SBC should not be responsible as the transiting carrier for traffic that does not have an OCN." (Arbitrators Report, Section XI, page 7). However, Comprehensive Billing Issue 3 does not address transit traffic. The language recommended by the Arbitrator, SBC's language, addresses only situations where the originating carrier utilizes SBC's UNE-P to provide service. SBC is not providing a transit service since the call actually originates on SBC's network and, in fact, terminates on SBC's network since AT&T is utilizing UNE-P to provide service to its customers. The SBC language actually allows it to avoid its responsibility to provide the OCN information through the "technically feasible" loophole in its language. As noted above, AT&T witness Guepe testified SBC is the only carrier that can provide this information and SBC should not be allowed to skirt its responsibility to provide this data.

The Arbitrator also states "default billing is inconsistent with the Multiple Exchange Carrier Access Billing ("MECAB") guidelines. The Commission's new Enhanced Records Exchange Rule also codifies a business relationship under which "the originating carrier, not the transiting carrier, is responsible for payment of call termination." (Arbitrators Report, Section XI, page 6). As explained above, SBC is not a transiting carrier in the circumstances involving Comprehensive Billing Issue 3, so the above referenced rule which states the "transiting carrier" is not responsible for call termination is not relevant here. Additionally, AT&T's proposed language for

[38] Tr. at 1018-1019.

Attachment 28, Section 14.4[39] is entirely consistent with industry practices, and is not contrary to the MECAB guidelines. Specifically, Mr. Guepe testified

> OBF standards, specifically the Multiple Exchange Carrier Access Billing (MECAB) Guidelines, provide for a "default" billing arrangement of charging the originating USP for calls originated by unbundled switch users. AT&T is asking for nothing more than SBC's compliance with these OBF standards.[40]

This statement is corroborated by language in the OBF document that Mr. Guepe attached to his Direct Testimony as Schedule RTG-3:

> The Billing Committee reaffirmed the existing language in MECAB Section 14 (Jointly Provided Service in an Unbundled Environment) that provides a default billing arrangement of charging the originating USP for ULEC-originated traffic.

This shows, contrary to the Judge Thompson's initial conclusion, that the default billing proposed by AT&T is justified, is not contrary to the Commission's new rule on Enhanced Records Exchange and is consistent with industry practices. Accordingly, AT&T requests that the Commission reconsider this issue, and adopt the language proposed by AT&T.

WHEREFORE, PREMISES CONSIDERED, AT&T respectfully requests that the Commission revise the Final Arbitrator's Report consistent with the Comments contained herein.

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[39] SBC MISSOURI will include the OCN identifier for calls originated by local exchange 3rd party carriers and the CIC identifier for calls originated by IXC 3rd party carriers in the usage records it provides for calls originated by such 3rd party carriers. Any records received without the originating OCN or CIC, as appropriate, will be treated as though originated by SBC MISSOURI for purpose of billing under this Agreement. In those situations where the third party carrier who originates the call is using the ULS of another ILEC, SBC shall provide the OCN of the underlying, facilities-based ILEC in the billing records it provides to AT&T.

[40] Guepe Rebuttal at 28.

Respectfully submitted,

Michelle Bourianoff by CAO w/permission

Michelle Bourianoff, TX Bar No. 02925400
Kevin K. Zarling, TX Bar No. 22249300
AT&T COMMUNICATIONS
OF THE SOUTHWEST,Inc.
919 Congress Avenue, Suite 900
Austin, Texas 78701-2444
512-370-1083/2010
512-370-2096 (FAX)
mbourianoff@att.com

Mark W. Comley #28847
Newman, Comley & Ruth P.C.
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102
(573) 634-2266
(573) 636-3306 (FAX)

**ATTORNEYS FOR**
**AT&T COMMUNICATIONS**
**OF THE SOUTHWEST, INC., TCG**
**KANSAS CITY, AND TCG ST. LOUIS**

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this document was served by U.S. mail, electronic transmission and/or facsimile on all parties of record on this the 24th day of June, 2005.

Michelle Bourianoff by CAO w/permission
Michelle Bourianoff