DrinkerBiddle&Reath LLP

Christopher M. Arfaa
215-988-2715
christopher.arfaa@dbr.com

Law Offices
One Logan Square
18TH and Cherry Streets
Philadelphia, PA
19103-6996

215-988-2700
215-988-2757 fax
www.drinkerbiddle.com

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March 2, 2004

ORIGINAL

Via Federal Express

DOCUMENT

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

RE: Petition of Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996, Docket No. **A-310489F7004**

Dear Secretary McNulty:

I enclose for filing in the referenced matter the original and nine copies of the Reply Brief of Cellco Partnership d/b/a Verizon Wireless.

Thank you for your assistance. Please do not hesitate to contact me if you have any questions regarding this matter.

Very truly yours,

Christopher M. Arfaa

CMA/cms
Enclosures

cc: ALJ Wayne L. Weismandel *(w/encls. and diskette via federal express and email)*
Attached Certificate of Service *(w/encls.)*

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

Petition of Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with ALLTEL Pennsylvania, Inc.	:	A-310489F7004

DOCKETED
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REPLY BRIEF

OF

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS

DOCUMENT

Of Counsel:
John T. Scott, III
Elaine D. Critides
VERIZON WIRELESS
1300 I Street N.W.
Suite 400
Washington, DC 20005

Christopher M. Arfaa
Susan M. Roach
DRINKER BIDDLE & REATH
One Logan Square
18th & Cherry Streets
Philadelphia, PA
(215) 988-2700

Counsel for Cellco Partnership d/b/a Verizon Wireless

DATED: March 2, 2004

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Pursuant to 52 Pa. Code § 5.501 and the Arbitration Proceeding Order issued January 8, 2004, by Administrative Law Judge Wayne L. Weismandel, Petitioner, Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"), submits this Reply Brief in response to the Main Brief of Respondent, ALLTEL Pennsylvania, Inc. ("ALLTEL") the above-captioned arbitration.

INTRODUCTION

As noted in Verizon Wireless's Main Brief, two overarching questions control the resolution of the most important open issues presented by the parties: whether ALLTEL's obligation and financial responsibility to deliver its own customers' local telephone calls to Verizon Wireless without charge ends at its service area or network boundaries, and what method of setting ALLTEL's reciprocal compensation rates may be used by the Commission based upon the record in this proceeding. An additional question – the relevance of ALLTEL's agreement with a third-party transit provider (the "ITORP" agreement) to ALLTEL's obligations to Verizon Wireless – has arisen due to ALLTEL's persistent citation of the ITORP agreement as a reason to alter, qualify or condition Verizon Wireless's right to a reciprocal compensation arrangement that complies with federal rules.[1]

[1] For example, at page 5 of its Main Brief, ALLTEL insists that it has "no opposition" to following federal law regarding reciprocal compensation and that, "[i]n other words ALLTEL is not seeking to retain the application of its intraLATA access rates" to transiting traffic. ALLTEL Main Brief at 5. However, literally at the same time, ALLTEL states, in a footnote, that the third-party transit provider (Verizon PA) must "acknowledge" or "agree" to a change in ITORP before ALLTEL complies with federal law regarding reciprocal compensation. *See id.* at 5 n.13.

Despite submitting more than 150 pages of argument (a Main Brief of 125 pages[2] plus a Final Best Offer of 26 pages), ALLTEL has failed to provide any legal or factual justification for shifting the cost of delivering local telecommunications traffic originated by ALLTEL's customers to Verizon Wireless. ALLTEL has similarly failed to articulate a coherent theory on which the Commission could condition Verizon Wireless's rights to a reciprocal compensation arrangement upon incorporation, or renegotiation, of the terms of ALLTEL's agreement with a third party transit provider. ALLTEL has also failed to bear its burden of proving that the blended rate set forth in its Final Best Offer does not exceed forward-looking economic cost.

In accordance with the issue-by-issue analytical framework established by the Arbitration Proceeding Order, this Reply Brief addresses these questions in the context of the individual issues to be resolved in this proceeding. With the exception of the matters on which the parties now agree, ALLTEL has failed to support its Final Best Offers on each open issue.[3]

[2] While ALLTEL's Main Brief clearly violates 52 Pa. Code § 5.501(e), Verizon Wireless has not moved to strike it in order to avoid further disruption of this proceeding. However, Verizon Wireless does not accept ALLTEL's view that compliance with the Commission's rules is optional in arbitration proceedings and hereby gives notice that it will insist on ALLTEL's adherence to the page limits applicable to exceptions. *See* 52 Pa. Code § 5.533(c). In addition, space does not permit a response to every unsupported factual assertion set forth in ALLTEL's Main Brief; Verizon Wireless's silence shall not be construed as acquiescence in any of ALLTEL's unsupported assertions.

[3] In its Final Best Offer, Verizon Wireless has acquiesced in ALLTEL's position on Issues 20 (relating to MFN clause) and 32 (relating to definition of Interexchange Carrier). In addition, as set forth below, it appears the parties' positions have converged with respect to Issue 10 (relating to use of traffic factor where traffic data unavailable) and Issues 16 and 17 (relating to *bona fide* disputes).

ARGUMENT

Issue 1: The arbitration process and requirements of Section 252(b) apply to any interconnection disputes between ALLTEL and Verizon Wireless arising under Section 251(a)-(c).

A. Statement of Issue.

Issue 1: Whether rural local exchange carriers are subject to the negotiation and arbitration process set forth in Section 252(b) for disputes under Section 251(b)(5) for traffic indirectly exchanged with CMRS?

B. Discussion and Summary.

Contrary to ALLTEL's assertion, Verizon Wireless has not raised this issue to seek a declaratory ruling for use in any proceeding other than this one. Although ALLTEL has, in its words, "agreed" to submit to arbitration and to pay reciprocal compensation on indirect traffic,[4] it has purported to "reserved the right to assert its rural exemption and to seek a suspension of" the requirements of sections 251(b)(5) and 252(b) of the Telecommunications Act of 1996 (the "1996 Act") and the corresponding FCC rules if it does not like the results of this proceeding.[5] The essence of this position – that ALLTEL's "agreement" to recognize clearly applicable legal requirements is optional and may be withdrawn -- is fundamentally inconsistent with federal law, because an arbitrated agreement *cannot* be approved by this Commission unless the terms of the disputed issues comply with the provisions of Section 251.[6] ALLTEL argues that these

[4] ALLTEL St. No. 1 (Hughes Direct) at 2-3.

[5] Response of ALLTEL Pennsylvania, Inc. to the Petition for Arbitration of Cellco Partnership d/b/a Verizon Wireless (ALLTEL Exh. No. 4), at 12.

[6] 47 U.S.C. § 252(c)(1) provides:

> "STANDARDS FOR ARBITRATION.- In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall-

issues are "moot" because of its "agreement" to submit to arbitration and to pay reciprocal compensation on indirect traffic. But the issues are "moot" only if ALLTEL's "agreement" is irrevocable; ALLTEL's continued "reservation" of its "right" to change its mind calls into question the sincerity of its "agreement" and the degree to which it will consider itself bound to the interconnection agreement produced by this arbitration. Moreover, ALLTEL's legal position on its rural exemption is the justification for its positions on whether it should be required to bear the financial costs of delivery of its traffic beyond it rate center, which is a fundamental issue to be decided in this case. Therefore, resolution of this dispute is necessary in order for the parties to draft an interconnection agreement that is compliant with Section 251(b)(5) and the FCC's rules.[7]

Issue 2: The FCC's reciprocal compensation rules apply to IntraMTA traffic that is exchanged indirectly through a third-party LEC's Tandem facilities.

A. Statement of Issue.

Issue 2: Do the FCC's rules interpreting the scope of an ILEC's reciprocal compensation obligations under 251(b)(5) apply to IntraMTA traffic that is exchanged indirectly through a third-party LEC's Tandem facilities?

B. Discussion and Summary.

As in the case of Issue 1, ALLTEL asserts that its agreement to submit to federal law renders moot the issue of whether the FCC's reciprocal compensation rules apply to indirectly exchanged traffic. However, ALLTEL's Main Brief demonstrates that this issue is very much alive and in need of resolution. The FCC's reciprocal compensation rules do not merely establish reciprocal compensation rates; they also establish that a

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(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251 . . . ."

LEC may not charge an interconnecting carrier for traffic that originates on the LEC's network.[8] Despite ALLTEL's "agreement" to the application of the FCC's rules for the purpose of establishing reciprocal compensation rates for indirect traffic (i.e., traffic exchanged through a third party's facilities), ALLTEL repeatedly asserts that the FCC's rule proscribing the shifting of charges to the terminating carriers does not, or should not, apply to ALLTEL.[9]

Issue 3(a): The obligation of a LEC to pay a CMRS provider reciprocal compensation for the transport and termination of traffic originated on the LEC's network and terminated on the CMRS provider's network is not altered where the traffic transits the network of a third-party LEC.

A. Statement of Issue.

Issue 3(a): Does Section 251(b)(5) impose an obligation on the originating LEC to pay a CMRS provider for its traffic when it transits the network of a third party LEC and terminates on the network of a CMRS provider?

B. Discussion and Summary.

As in the case of Issues 1 and 2, Issue 3(a) is not "moot" as ALLTEL contends because, despite ALLTEL's purported "agreement" to submit to federally-mandated reciprocal compensation requirements, it continually argues that they do not, or should not, apply to ALLTEL. Absent a clear resolution of this issue by the Commission, ALLTEL will continue to interpret FCC reciprocal compensation obligations as matters of election, rather than legal obligation, which will most likely lead to re-litigation of this issues and contract interpretation disputes.

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[7] *See* 47 U.S.C. § 252(c)(1).

[8] 47 CFR § 51.703(b).

[9] *See, e.g.*, ALLTEL Main Brief at 46 ("This agreement . . . does not subject ALLTEL to transit cost responsibility . . . .").

Issues 3(b) and 8: ALLTEL is legally and financially responsible for the delivery of ALLTEL-originated, intra-MTA telecommunications traffic to Verizon Wireless.

A. Statement of Issues:

Issue 3(b): Whether pursuant to Section 251(b)(5), a local exchange carrier is required to pay any transit charges on traffic it originates indirectly to a CMRS provider?

Issue 8: Whether a LEC is required to share in [the] cost of dedicated two-way interconnection facilities between its switch and the CMRS carrier's switch to extend traffic beyond the LEC's local exchange area and network?

B. Discussion.

1. Introduction.

Issues 3(b) and 8 each relate to ALLTEL's obligation to deliver, without charge, telecommunications traffic that originates on its own network to Verizon Wireless at a point within the Major Trading Area ("MTA") where the traffic originates. In its Final Best Offer, ALLTEL refuses to take financial responsibility for the cost of delivering its traffic beyond its service area or network. Specifically, with respect to Issue 3(b), which relates to the cost of delivering traffic indirectly through a third party's facilities, ALLTEL contends that it has no responsibility for the third-party transit charges it incurs.[10] With respect to Issue 8, which relates to the cost of delivering traffic directly through dedicated interconnection facilities, ALLTEL contends that it has no responsibility to share in the cost of any facilities beyond its own network.[11] Neither contention has merit.

[10] ALLTEL Final Best Offer at 8.

[11] ALLTEL Final Best Offer at 10.

As shown in Verizon Wireless's Main Brief, the paradigm established by the 1996 Act and the FCC rules with respect to reciprocal compensation is simple: each carrier bears the cost of delivering "telecommunications traffic" originated on its own network to the terminating carrier's network.[12] In the case of traffic exchanged between a LEC such as ALLTEL and a CMRS provider such as Verizon Wireless, this paradigm extends to all traffic that, at the beginning of the call, originates and terminates in the same MTA.[13] ALLTEL, as a LEC, is expressly prohibited from assessing charges on Verizon Wireless for telecommunications traffic that originates on ALLTEL's network, whether in the form of the third-party transit charges it incurs or in the form of failure to share in the cost of transport facilities used for direct interconnection.[14]

ALLTEL's specific arguments are addressed below. However, throughout its discussion of Issues 3(b) and 8, ALLTEL raises two recurring themes, neither of which withstands scrutiny. First, ALLTEL pretends that Verizon Wireless is forcing ALLTEL to incur third party transit charges in an effort to depict Verizon Wireless as the "cost causer" of the transit charges ALLTEL incurs by delivering ALLTEL-originated traffic indirectly to Verizon Wireless.[15] To the contrary, as Mr. Sterling testified, each party is free to choose to the method by which it delivers traffic originating on its own network to the other carrier, and each party is responsible for the cost of that delivery:

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[12] *See* 47 CFR § 703(b).

[13] 47 CFR § 51.701(b)(2).

[14] 47 CFR § 51.703(b); *see TSR Wireless, LLC v. U.S. West Communications, Inc.*, 15 FCC Rcd 11166, ¶ 31 (2000) ("Section 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated . . . . [A] LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules.").

> Each party is responsible for transporting the traffic it originates to the other party. Verizon Wireless has chosen to interconnect indirectly, so it is responsible for third party transit charges for transiting traffic Verizon Wireless initiates. Similarly, ALLTEL has chosen to maintain indirect interconnection with Verizon Wireless, so it, too, is responsible for third party transit charges for transiting traffic ALLTEL originates. If ALLTEL wishes to avoid third-party transit charges for traffic it originates, ALLTEL is free to choose to connect directly to Verizon Wireless.[16]

Thus, Verizon Wireless's decision to deliver traffic originated on its own network indirectly to ALLTEL has ***no effect*** on ALLTEL's choice between direct and indirect delivery of traffic originated on its own network to Verizon Wireless. The cause of the transit charges incurred by ALLTEL in delivering traffic indirectly to Verizon Wireless is derived from ALLTEL's decision not to establish a direct connection for the purpose of delivering that traffic.

Second, ALLTEL repeatedly asserts that Verizon Wireless is attempting to "force" ALLTEL to provide "service" outside its certificated service areas. This, too, is untrue. As Mr. Sterling explained,

> Verizon Wireless is not suggesting that ALLTEL provide service outside of its service area boundaries. Verizon Wireless is suggesting that ALLTEL be responsible for the cost of the facilities that transport their originated traffic to Verizon Wireless.
>
> * * *
>
> Again, we're not suggesting that ALLTEL serve customers outside of its territory. What we're suggesting is that with calls that originate on ALLTEL's network in accordance with reciprocal compensation regimes, ALLTEL is the cost causer for that traffic, and so it's their obligation to pay to get that traffic to us. They don't have to physically build outside of their territory.

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[15] *See, e.g.*, ALLTEL Main Brief at 38 (Verizon Wireless is "seeking to retain use of the ITORP arrangement for the delivery of its wireless calls to ALLTEL ***and for the termination of ALLTEL-originated calls to Verizon Wireless customers.***") (emphasis added).

[16] Verizon Wireless St. No. 1.1 (Sterling Rebuttal) at 5:1 – 5:7.

They could share in the cost of Verizon Wireless facilities that would be outside their territory coming back to our switch or they could get those facilities from a third-party provider.[17]

2. The scope of ILEC interconnection obligations under Section 251(c) of the 1996 Act does not affect ALLTEL's obligation to deliver, without charge, traffic originated on its network to Verizon Wireless.

ALLTEL invokes statutory provisions and FCC rules relating to physical interconnection to argue that its reciprocal compensation obligation does not extend beyond its own network.[18] This argument fails because it is based on a false premise. Verizon Wireless is not seeking "interconnection"—as ALLTEL points out, the parties are already interconnected—but rather enforcement of its right to have ALLTEL assume financial responsibility for delivery of the traffic originated on ALLTEL's network to Verizon Wireless. Therefore, the "interconnection requirements" of Section 251(c)(2)(B) of the Act and the FCC's corresponding rules are irrelevant.

The fallacy of ALLTEL's argument is illustrated by its assertion that because "an ILEC's interconnection duties are limited to its network," its reciprocal compensation obligations are similarly limited.[19] If this were true, then ALLTEL would have no obligation to interconnect indirectly, nor to pay reciprocal compensation for traffic exchanged indirectly. The first premise is refuted by Section 251(a) of the 1996 Act, which requires indirect as well as direct interconnection. The second is refuted by the FCC's confirmation that the 1996 Act's reciprocal compensation obligations apply to indirectly exchanged traffic. In *Texcom, Inc. v. Bell Atlantic Corp.*, the FCC explained how its reciprocal compensation rules applied to traffic that originates on a LEC's

[17] Transcript of Hearing held Feb. 10, 2004 [hereinafter Tr.] at 137:2 - 137:19 (Sterling).

[18] ALLTEL Main Brief at 39-44.

[19] ALLTEL Main Brief at 42.

network and is delivered to a CMRS provider via a third-party LEC transit provider. First, the FCC confirmed that "[o]ur rules state that a CMRS provider . . . is not required to pay an interconnecting LEC . . . for traffic that terminates on the CMRS provider's network if the traffic originated on the LEC's network."[20] Second, the FCC held that the CMRS provider is entitled to recover any third party transit charges "from originating carriers through reciprocal compensation,"[21] thus expressly applying reciprocal compensation rules to indirectly exchanged traffic. The FCC explained that its reciprocal compensation rules "follow the cost causation principle of allocating the cost of delivering traffic to the carriers responsible for the traffic."[22] The rule advocated by ALLTEL, which would allocate responsibility for the cost of traffic delivery based upon physical network boundaries rather than the origin of the traffic, cannot be reconciled with this principle.

Finally, ALLTEL's reliance on Ms. Hughes's invocations of "long-established regulatory practice" and "EAS" arrangements[23] is misplaced. First, lay testimony as to alleged regulatory practice does not constitute legal support for ALLTEL's position. Second, state-law arrangements that existed before passage of the 1996 Act have no relevance to the obligations imposed by that statute and the rules promulgated by the federal agency charged with its implementation.

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[20] Memorandum Opinion and Order, *Texcom, Inc., d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications*, 16 F.C.C.R. 21493, 21494 ¶ 4 (2001) (citing 47 CFR § 51.703(b) ("A LEC may not assess charges on any other telecommunications carrier for local telecommunications that originates on the LEC's network.")) [hereinafter *Texcom I*].

[21] Order on Reconsideration, *Texcom, Inc., d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications*, 17 FCC Rcd 6275, 6276-77 ¶ 4 (2002) [hereinafter *Texcom II*]; *see also id.* at 6277 n.12 ("the cost of using the facilities at issue [*i.e.*, transit facilities] typically is recovered through reciprocal compensation charges").

[22] *Texcom I, supra* n.20, 16 F.C.C.R. at 21495 ¶ 6; *see also id.* at 21496 ¶ 10 ("Our rules seek to impose the costs attributable to traffic on the carriers responsible for those calls . . . .").

3. The FCC's rules require ALLTEL to assume responsibility for any third-party transit charges it incurs in delivering ALLTEL-originated traffic to Verizon Wireless.

ALLTEL argues that, although it has agreed to pay reciprocal compensation for traffic indirectly delivered to Verizon Wireless, Verizon Wireless is responsible for the third-party transit charges associated with that traffic because: (a) the FCC's reciprocal compensation rules by their terms do not apply to indirectly exchanged traffic, (b) the FCC has "explicitly acknowledged" this, and (c) "third party transit charges are not reciprocal compensation."[24] None of these assertions supports ALLTEL's argument.

First, nothing in the FCC's reciprocal compensation rules suggests that they do not apply when a third party provides transiting services to carriers that exchange traffic via an indirect interconnection. To the contrary, as explained above, the FCC expressly recognized in the *Texcom* case that, consistent with cost causation principles, its reciprocal compensation rules ***do*** apply to indirect interconnection arrangements.[25]

Second, ALLTEL's contrary argument – "The FCC Has Acknowledged That Its Interconnection Rules Do Not Apply To Indirect Three-Party Transit Traffic"[26] – is unsupported and false. The fact that the word "transit" may not appear in the FCC's first report and order implementing the local competition provisions of the 1996 Act[27] does not constitute such an "acknowledgement." ALLTEL's reliance on the FCC's arbitration of CLECs' interconnection agreements with Verizon Virginia, Inc.[28] is similarly

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[23] ALLTEL Main Brief at 42-44.

[24] ALLTEL Main Brief at 45, 47.

[25] *Texcom II, supra* n.21, 17 FCC Rcd at 6276-77 ¶ 4 & n.12.

[26] ALLTEL Main Brief at 46.

[27] *See id.*

[28] ALLTEL Main Brief at 46-47.

misplaced. In that proceeding, the FCC rejected the CLECs' attempt to force the ILEC to provide transit services at TELRIC rates because the agency it was unwilling, in the context of an interconnection arbitration, to hold that provision of such services was required by Section 251(c)(2) of the Act.[29] That determination had nothing to do with the originating carrier's responsibility for transit charges, just as this proceeding has nothing to do with the responsibilities of the third-party transit provider ALLTEL uses to deliver its traffic to Verizon Wireless. The fact that ALLTEL is reduced to relying on the absence of the word "transit" in one FCC order and an entirely irrelevant determination in another underscores the absurdity of its position on this issue.

Third, ALLTEL's assertion that "third-party transit charges cannot be considered reciprocal compensation"[30] answers a question that no one has asked. The issue is not whether the third party transit provider is entitled to recover its costs from ALLTEL as "reciprocal compensation" but whether ALLTEL is responsible for the cost of delivering traffic originated on its network to Verizon Wireless, including transit charges caused by ALLTEL's decision to use a third-party transit provider. As argued above and in Verizon Wirless's Main Brief, Section 703(b) of the FCC's rules and the FCC's decisions in *TSR Wireless*[31] and *Texcom* all place responsibility for those costs squarely on ALLTEL's shoulders. As the FCC has noted, when it comes to traffic costs, the cost causer is the

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[29] *In re 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,* 17 F.C.C.R. 27039, ¶ 117 (2002).

[30] ALLTEL Main Brief at 47.

[31] *TSR Wireless, supra* n.14,15 FCC Rcd 11166, ¶ 31.

carrier originating the traffic, even where the traffic is delivered indirectly via a third party's facilities.[32]

4. ITORP is irrelevant to ALLTEL's responsibility for the cost of delivering traffic it originates to Verizon Wireless.

ALLTEL next argues that "Verizon Wireless and Verizon PA have neither the authority nor the right to unilaterally change the existing ITORP agreements between Verizon PA and ALLTEL by forcing ALLTEL to continue to utilize the ITORP arrangement but now incur transit cost responsibility."[33] Once again, ALLTEL misstates several premises in order to support an untenable position. First, Verizon Wireless is ***not*** seeking to change any agreement between ALLTEL and any transit provider; second, Verizon Wireless is ***not*** "forcing" ALLTEL to continue to utilize the ITORP arrangement to deliver ALLTEL-originated traffic to Verizon Wireless; and, third, Verizon Wireless is ***not*** forcing ALLTEL to "incur transit cost responsibility" for traffic originated by Verizon Wireless and delivered indirectly to ALLTEL. All Verizon Wireless is seeking is enforcement of its right under the 1996 Act and the FCC's rules to be free of any charges, including third party transit charges, for the traffic that originates on ALLTEL's network. While Verizon Wireless has chosen to use third-party transiting for indirect delivery of some of the traffic it originates, ALLTEL is free to use any means it likes to deliver traffic originated on ALLTEL's network.[34]

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[32] *Texcom I, supra* n.20, 16 F.C.C.R. at 21494 ¶ 4.

[33] ALLTEL Main Brief at 50. This is somewhat at odds with ALLTEL's assertion that its ITORP agreement with Verizon Pennsylvania "does not place any responsibility on ALLTEL for transit costs on non-toll traffic being originated by ALLTEL's customers." *Id.* If the ITORP does not require ALLTEL to pay transit charges for intra-MTA traffic to Verizon Wireless, then why would ALLTEL want to change that arrangement?

[34] *See* Verizon Wireless St. No. 1.1 (Sterling Rebuttal) at 5:1 – 5:7; Tr. 137:2 – 137:19 (Sterling).

ALLTEL insist that "[i]f Verizon Wireless seeks to retain use of the ITORP network arrangement, a new process must be put in place to modify ITORP."[35] Once again, ALLTEL's argument rests on a false premise. By using the transit facilities of a third party provider, Verizon Wireless is not seeking to "retain use of ITORP." As Mr. Sterling explained, ITORP is a legal process for the settlement of intercarrier intraLATA toll traffic access charges, not a transit facility.[36] Furthermore, Verizon Wireless is not a party to ITORP, and the reciprocal compensation obligations of ALLTEL and Verizon Wireless are not governed by ITORP but instead by the terms of their interconnection agreement consistent with the requirements of the 1996 Act and the FCC's rules. If ALLTEL wants to modify ITORP, it is free to renegotiate its terms with Verizon Pennsylvania and, if necessary, seek the Commission's assistance in a separate proceeding.[37] What ALLTEL may ***not*** do is hold Verizon Wireless's rights to a reciprocal compensation arrangement that comports with applicable legal requirements hostage to that process.

The fallacy of ALLTEL's position becomes even more apparent when it argues that Verizon Wireless "causes" ALLTEL to incur transit charges because Verizon Wireless "refuses to exercise its right to directly interconnect at any . . . point on the ALLTEL network."[38] Once again, ALLTEL relies on a false premise. It is ***ALLTEL's*** "refus[al] to exercise its right to directly interconnect" with Verizon Wireless that causes ALLTEL to incur transit charges in connection with ALLTEL-originated traffic to

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[35] ALLTEL Main Brief at 50.

[36] Verizon Wireless St. No. 1.1 (Sterling Rebuttal) at 9:21-10:3.

[37] As Ms. Hughes admitted, "it's incumbent upon ALLTEL to negotiate with Verizon Pennsylvania for their services as the third party in this indirect interconnection." Tr. 188:8 – 188:10. The quoted language is taken from ALJ Weismandel's question, to which Ms. Hughes responded: "That's correct." Tr. 188:15.

Verizon Wireless. As the FCC has observed, cost causation – and hence cost responsibility -- lies with the originator of the traffic in question.[39] The transit charges ALLTEL incurs for traffic originated on ALLTEL's network are a direct result of ALLTEL's economic choice not to deliver that traffic via direct interconnections with Verizon Wireless.[40]

5. ALLTEL's proffered regulatory support does not permit it to assess charges on Verizon Wireless for traffic originating on ALLTEL's network.

The regulatory decisions cited by ALLTEL do not permit ALLTEL to shift to Verizon Wireless the transit charges ALLTEL incurs for traffic that originates on ALLTEL's network.

ALLTEL's reliance on the FCC's decisions in *Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Corp. d/b/a Verizon Communications*[41] and *In re TSR Wireless, LLC v. U.S. West Communications, Inc.*,[42] is misplaced. In both of those cases, the FCC held that its rules did not prohibit a ***transit provider*** – the intermediate carrier in an indirect interconnection arrangement – from charging terminating carriers for certain transport costs where the transit provider did not originate the calls.[43] These decisions are of no help to ALLTEL because ALLTEL is not the transit provider in this scenario but the ***originating carrier***. In both *Texcom* and *TSR Wireless*, the FCC emphasized that the

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[38] ALLTEL Main Brief at 51 (emphasis in original).

[39] *Texcom I, supra* n.20, 16 FCC Rcd. at 21495 ¶ 6.

[40] *See id.* To the extent direct interconnection is unattractive due the non-contiguous nature of ALLTEL's service areas, that, too, is a direct result of ALLTEL's choice to acquire its service areas and build its network in that manner.

[41] *Texcom II, supra* n.21, 17 F.C.C.R. 6275.

[42] *TSR Wireless, supra,* n.14, 15 F.C.C.R. 11166.

[43] *Texcom II, supra* n.21., 17 F.C.C.R. at 6276-77 ¶ 4; *TSR Wireless, supra* n.14, 15 F.C.C.R. at 11177 n.70.

originating carrier is responsible for all costs of delivering traffic originating on its network.[44] Moreover, in the *Texcom* order on reconsideration, the FCC noted that where the transit provider charges the terminating carrier for the cost of transport, the terminating carrier is entitled to reimbursement of those costs from the originating carriers through reciprocal compensation.[45]

The only other regulatory authority cited by ALLTEL is a series of related orders of the New York Public Service Commission, which ALLTEL relies upon for the proposition that it is not responsible for the cost of delivering local traffic beyond its own network. Again, ALLTEL's reliance is misplaced. Most of that proceeding dealt with numbering resources, the billing of calls to end users as "local," and the interconnection obligations of landline carriers with small ILECs.[46] The orders do not mention, much less discuss, the FCC's determination that "local traffic" for purposes of reciprocal compensation arrangements comprises calls that originate and terminate within the same MTA or its prohibition against a LEC's assessment of charges for traffic originating on its own network.[47] In fact, the only mention of responsibility for transit charges in the CMRS context comes at the end of the last order on reconsideration. A wireless carrier requested clarification whether the transit provider's shared transport charges apply to

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[44] *Texcom I, supra* n.20, 16 F.C.C.R. at 21494 ¶ 4; *TSR Wireless, supra* n.14, 15 F.C.C.R. at 11184 ¶ 31.

[45] *Texcom II, supra* n.21 17 F.C.C.R. at 6277 ¶ 4; *see also id.* at 6277 n.12 ("the cost of using the facilities at issue typically is recovered through reciprocal compensation charges").

[46] *Proceeding on Motion of the Commission pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies*, Case 00-C-0789, 2000 NY PUC LEXIS 1047 (Dec. 22, 2000); *Proceeding on Motion of the Commission pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies*, Case 00-C-0789, 2001 NY PUC LEXIS 696 (Sept. 7, 2001); *Proceeding on Motion of the Commission pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies*, Case 00-C-0789, 2002 NY PUC LEXIS 390 (Apr. 16, 2002).

[47] 47 CFR §§ 51.701(b)(2), 51.703(b).

wireless carriers, arguing that when traffic volumes do not justify direct interconnection, indirect interconnection via a transit provider is often more efficient. Some small ILECs construed this argument as requiring them to provide service beyond their certificated territory. The New York commission ***did not decide*** this issue, noting that existing interconnection agreements covered the issue and that "[t]hese arrangements remain unaffected by the Orders in this proceeding, making clarification on this issue unnecessary."[48] In any event, a decision by the New York PSC cannot supersede the FCC's interpretation of its own rules.

6. ALLTEL's characterization of the FCC's MTA rule as "preposterous" does not exempt ALLTEL from its application.

ALLTEL next argues that it is "preposterous" to assert that ALLTEL must bear the cost of delivering traffic originating on its network "anywhere within an MTA" without regard to ALLTEL's network.[49] But this is precisely what Sections 51.701(b)(2) and 51.703(b) of the FCC's rules require. In the *TSR Wireless* decision, the FCC expressly acknowledged the fact that "MTAs are large areas that may encompass multiple LATAs, and often cross state boundaries."[50] Yet, in the very next sentence, the FCC confirmed that "Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules [*i.e.*, under 47 CFR 51.701(b)(2)]."[51] ALLTEL's argument to the contrary rests ***solely*** on the

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[48] *Proceeding on Motion of the Commission pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies*, Case 00-C-0789, 2002 NY PUC LEXIS 390, *9 (Apr. 16, 2002).

[49] ALLTEL Main Brief at 57.

[50] *TSR Wireless*, *supra* n.14 15 F.C.C.R. at 11184 ¶ 31.

[51] *Id.*

testimony of Mr. Watkins and Ms. Hughes that this rule is premised on the interconnection point being on the ILEC's network.[52] With all due respect to these lay witnesses, their testimony does not constitute legal authority and does not support a result contrary to the 1996 Act as construed and implemented by the FCC.

ALLTEL insists that the FCC could not have meant what it said when it held that "Section 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated."[53] Thus, ALLTEL argues, if Verizon Wireless's position were adopted, ALLTEL might have to pay to deliver its traffic points in other states, or even other countries.[54] Verizon Wireless maintains that the FCC's rules require precisely that result, since the FCC specifically considered the fact that "MTAs typically are large areas that may encompass multiple LATAs, and often cross state boundaries" when it confirmed that LECs must deliver traffic, without charge, to any point within the MTA.[55] However, ALLTEL's argument is, ultimately, a straw man. This case involves neither international nor even interstate delivery of ALLTEL-originated traffic. With respect to indirect interconnection, the tandems of the transit provider at issue, Verizon Pennsylvania, are located, by definition, in Pennsylvania.[56] With respect to direct connection, Verizon Wireless has a either a switch or existing point of interconnection in each LATA served by ALLTEL, at which ALLTEL may establish direct

[52] *See* ALLTEL Main Brief at 57-59.

[53] *TSR Wireless, supra* n.14, at ¶ 31.

[54] ALLTEL Main Brief at 16, 57-59.

[55] *TSR Wireless, supra* n.14, at ¶ 31.

[56] The Commission may take judicial notice of the fact that Verizon Pennsylvania is certificated to provide service only in Pennsylvania.

interconnection.[57] Therefore, the multistate, multinational interconnection arrangements described by ALLTEL are not, in fact, at issue here.

7. Requiring ALLTEL to comply with the FCC's reciprocal compensation rules will not result in an unconstitutional "taking."

Perhaps recognizing the futility of its other arguments, ALLTEL in the end resorts to the last redoubt of the recalcitrant utility – the Takings Clause, asserting that enforcement of the FCC's rules to require ALLTEL to deliver traffic to Verizon Wireless beyond ALLTEL's network would be unconstitutional and that, therefore, the Section 251(b)(5) should be construed to avoid this constitutional difficulty.[58] This argument fails for several reasons. ***First,*** this is the wrong forum for this challenge. If ALLTEL believes that the FCC's rules are unconstitutional, then it should challenge them directly before that commission and, if necessary, before the proper reviewing courts. ***Second,*** ALLTEL has provided absolutely ***no*** evidence that enforcement of the FCC's interpretation of Section 251(b)(5) will deprive ALLTEL of revenue sufficient to "maintain its financial integrity, to attract capital, and to compensate its investors for the risk [they have] assumed."[59] ***Third,*** under Supreme Court precedent the doctrine of constitutional avoidance does not apply to challenges to rules prescribing methods for setting rates, such as the FCC's rule for apportioning responsibility for transport costs under 47 C.F.R. § 51.703(b) challenged by ALLTEL here. As the Supreme Court observed when rejecting a constitutional challenge to the FCC's TELRIC methodology, "the general rule is that any question about the constitutionality of rate setting is raised by rates, not methods, and this means that the policy of construing a statute to avoid

[57] Verizon Wireless St. No. 1.1 (Sterling Rebuttal) at 6.

[58] ALLTEL Main Brief at 60.

constitutional questions where possible is presumptively out of place when construing statutes prescribing methods."[60]

C. Summary.

With respect to Issue 3(b), the originating LEC is responsible for all costs of delivering traffic to the point of interconnection, including transit charges due third-party carriers for telecommunications traffic where the LEC chooses to deliver the traffic indirectly. With respect to Issue 8, an incumbent LEC's obligation to share the cost of two-way direct facilities does not end at its local exchange area or network boundaries; it ends at the point of interconnection, which can be located anywhere in the MTA. ALLTEL has failed to refute either of these propositions or to show why it is exempt from their application.

Issue 4: A third party transit provider does not "terminate" traffic within the meaning of 47 U.S.C. § 251(b)(5).

A. Statement of Issue:

Issue 4: Does a third party transit provider "terminate" traffic within the meaning of Section 251(b)(5)?

B. Discussion.

ALLTEL appears to admit, as it must, that a transiting carrier is not a "terminating carrier" for the purposes of reciprocal compensation,[61] and that only the originating and terminating carriers pay and receive reciprocal compensation under Section 251(b)(5). However, ALLTEL insists that this issue is "moot" because it has "voluntarily" agreed

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[59] ALLTEL Main Brief at 60 (quoting *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310. 317 (1989)).

[60] *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 525 (2002).

[61] *See Texcom, Inc. v. Bell Atlantic Corp., Order on Reconsideration*, 17 FCC Rcd. 6275, 6276-77, ¶ 4 (2002) (citing 47 U.S.C. § 251(b)(5), 47 C.F.R. § 51.701 *et seq.*).

"to apply Section 251(b)(5) reciprocal compensation in place of the ITORP compensation arrangement (subject to Verizon PA agreeing to modify the Exhibit G Agreement)."[62]

The problem is that ALLTEL asserts that Verizon Pennsylvania functions as an IXC, as opposed to a transiting provider, and that intrastate access charges therefore apply to Verizon Wireless traffic.[63] As argued above, this is untrue. Therefore, Issue 4 will become "moot" only when ALLTEL acknowledges its obligation to apply reciprocal compensation rates to indirect traffic, not withstanding the ITORP arrangement. Further, in the land to mobile direction, ALLTEL's responsibility for delivery costs of traffic it originates does not "terminate" at its service area boundary for purposes of reciprocal compensation where it utilizes the facilities of a third party transit provider.[64]

Issue 5: The terms and conditions of agreements with third Party Transit providers are irrelevant to, and have no place in, the parties' interconnection agreement.

A. Statement of Issue:

Issue 5: Where a third party provider provides indirect interconnection facilities, should the interconnection agreement that establishes the terms and conditions for the exchange of the traffic between the originating and terminating carriers include the terms and conditions on which the originating carrier will pay the third party transiting provider for transiting service?

B. Discussion.

ALLTEL's Best and Final Offer on Issue 5 is that "[t]here must be an 'agreement' in place setting forth the terms and conditions regarding the responsibilities and

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[62] ALLTEL Main Brief at 62.

[63] ALLTEL Main Brief at 62.

[64] *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, at ¶ 1040 (1996) [hereinafter "*Local Competition Order*] ("We define "termination," for the purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's enc office switch or equivalent facility) and delivery of that traffic from that switch to the called party's premises.").

obligations of the third-party transit provider," and that the Parties' interconnection agreement must "identify the responsible party for compensating the transit provider."[65] In its Main Brief, ALLTEL clarifies that the "agreement" that must be "in place" is an agreement between ALLTEL and the transit provider, Verizon Pennsylvania.[66] ALLTEL's positions are meritless and must be rejected.

First, as argued above, each carrier is responsible for the cost of delivering traffic subject to reciprocal compensation to the other carrier's network. As long as the interconnection agreement reflects the law, there is no need to refer to the terms of any agreement that ALLTEL or Verizon Wireless might have with a third party for delivery of that traffic. ALLTEL once again confuses the issue by asserting that Verizon Wireless is somehow the cause of the cost of indirect delivery of traffic originating on ***ALLTEL's*** network. That is not true. Verizon Wireless has chosen to use a third-party transit provider to transit some traffic originated on its own network to ALLTEL, and Verizon Wireless is, of course, responsible for the associated transit charges.[67] However, as argued above, ALLTEL is responsible for the transit charges for the indirect routing of ALLTEL-originated traffic to Verizon Wireless. If ALLTEL wishes to avoid such charges, it may establish a new point of interconnection with Verizon Wireless or route its traffic to one of the three existing points of interconnection between the carriers.

Second, there is simply no basis in law to condition the adoption of a federally-mandated interconnection agreement upon the conclusion of an agreement between one of the parties and a third party. ALLTEL complains that it does not have the ability to

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[65] ALLTEL Final Best Offer at 9.

[66] ALLTEL Main Brief at 64-65.

[67] Verizon Wireless St. No. 1.1 (Sterling Rebuttal) at 5:1 – 5:7.

record traffic exchanged indirectly and that, therefore, this interconnection agreement must be premised on a commitment by the third party transit provider to provide traffic data. However, where traffic data is not available, parties can use traffic factors to calculate compensation.[68] In any event, if ALLTEL wants assurances that the third party transit provider will provide the information ALLTEL desires, it is ALLTEL's responsibility to negotiate those assurances with the third party, seeking the Commission's assistance as and when necessary.

Issue 8: **(See discussion of Issues 3(a) and 8, above.)**

Issue 9: **Since ALLTEL Has Failed to provide a cost study on which the Commission may rely to set permanent rates for transport and termination in this arbitration, Verizon Wireless's default proxy rates should be adopted pending a full investigation of ALLTEL's claimed costs.**

A. Statement of Issue:

Issue 9: What is the appropriate pricing methodology for establishing a reciprocal compensation rate for the exchange of direct and indirect traffic?

B. Discussion.

ALLTEL's discussion of Issue 9 in its Main Brief argues that the rates produced by ALLTEL's second cost study, ALLTEL Exh. CC-2, should be adopted as "permanent" rates in this proceeding.[69] However, ALLTEL's Final Best Offer on this issue is the adoption of a lower, blended rate of $.014 per minute.[70] Therefore, pursuant to the procedure prescribed by the Arbitrator at hearing, the decision to be made is

[68] *Local Competition Order, supra* n.64 at ¶ 1044 ("We conclude that the parties may calculate overall compensation amounts by extrapolating from traffic studies and samples.").

[69] ALLTEL Main Brief at 94-95.

[70] ALLTEL Final Best Offer at 11-14.

between adoption of the latter rate as a permanent rate and the adoption of the default proxy rates proposed by Verizon Wireless.

As argued below, ALLTEL's Final Best Offer on Issue 9 should be rejected because it is impermissibly conditioned on the Commission's acceptance of ALLTEL's positions on all of the other open issues. If it is nevertheless considered, it should be rejected on its merits. Since ALLTEL has proposed its blended rate as a permanent rate, ALLTEL has the burden of showing that it does not exceed the forward-looking economic cost of transport and termination using a cost study that complies with FCC requirements.[71] As shown in detail in Verizon Wireless's Main Brief, ALLTEL has failed to produce such a study. Therefore, the only alternative is to adopt the proxy rates offered by Verizon Wireless, which require only a "reasonable basis" for their selection,[72] pending the completion of an investigation of ALLTEL's costs and proposed permanent rates. Nothing in ALLTEL's Main Brief supports a contrary result.

1. ALLTEL's Final Best Offer is fatally defective.

Consistent with the authority granted by the Commission in its order implementing the 1996 Act,[73] the Arbitrator decided to resolve the open issues in this matter by directing the parties to submit their final best offer with respect to each open issue and then picking one of them.[74] The Arbitrator emphasized that "[e]ach issue is

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[71] 47 CFR § 51.505(e).

[72] 47 CFR 51.707(a)(2). Thus, ALLTEL's assertion that the cost studies it has submitted are "the only evidence that may be considered in establishing reciprocal compensation rates in this proceeding," ALLTEL Main Brief at 72, is wrong, at least with respect to default proxy rates.

[73] *In re: Implementation of the Telecommunications Act of 1996*, Pa. PUC Docket No. M-0096079, slip op. at 28-33 (June 3, 1996).

[74] Tr. at 271:10 – 271:15.

going to be a zero sum game. You're either going to win it or lose it."[75] In almost all cases, the parties have complied with this directive. However, with respect to Issue 9, relating to the reciprocal compensation rates for transport and termination, ALLTEL has attempted to submit not merely a set of rates but a comprehensive "package" final offer which conditions the rate offer on resolution of each and every other issue in a manner proposed by ALLTEL. ALLTEL's submission ignores the Arbitrator's procedures governing final best offers and should be summarily rejected.

First, the "packaging" of the Final Best Offer on Issue 9 with particular resolutions of all of the other open issues contravenes the issue-by-issue final offer structure set by the Arbitrator and relied upon by Verizon Wireless.[76] ALLTEL's conditioning of a Final Best Offer on one issue on a particular resolution of another – a tactic that presupposes some degree of bargaining power on the behalf of the offeror – reflects a fundamental misunderstanding of the nature of this proceeding, the role of the Arbitrator, and the responsibility of the Commission. This is an arbitration, not a negotiation – ALLTEL is in no position to bargain with the Arbitrator or the Commission. The role of the Arbitrator is to recommend resolutions of the open issues that comply with the requirements of the 1996 Act, and the Commission's responsibility is to adopt or modify that recommendation in a manner that ensures that compliance. There is no place for the kind of negotiator's tactic represented by ALLTEL's "package" offer with respect to Issue 9.

Second, ALLTEL's proposed resolution of Issue 9 is plainly inconsistent with the Arbitrator's repeated instruction to the parties to submit their "***final best offer***" with

[75] *Id.* at 13-14.

respect to each issue.[77] ALLTEL's Main Brief makes no reference to the rates proposed in ALLTEL's Final Best Offer and in fact improperly advocates the adoption of rates different from those set forth in the Final Best Offer.[78] Moreover, the proposed resolutions of several of the issues in the Issue 9 "package" offer are different from ALLTEL's actual Final Best Offer on those issues.[79] Pursuant to the Arbitration Proceeding Order, "[f]inal best offers must separately address each unresolved issue . . . in a document separate from the Main Brief."[80] Therefore, the positions set forth in ALLTEL's separately-filed Final Best Offer with respect to each issue supersede both the rates advocated in its Main Brief and the inconsistent positions set forth in its "package" proposal for resolution of Issue 9.

ALLTEL's Final Best Offer for resolution of Issue 9 should be rejected out of hand. However, even if ALLTEL's "package" offer it is considered, it cannot be adopted according to its terms unless ***all*** of the open issues are decided as dictated by ALLTEL—a condition that cannot be met due to federal statutory and regulatory requirements.[81] In

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[76] *Id.*

[77] Arbitration Proceeding Order at 2 n.2; Tr. 271.

[78] *See* ALLTEL Main Brief at 94-95 ("Summary: If permanent reciprocal compensation rates are to be established, the only Pennsylvania forward-looking cost-based rates of record are the following rates rom [*sic*] ALLTEL Exhibit CC-2: Type 2A - $.01891, Type 2B - $.00942, Type 1 - $.00942, and Indirect - $.01672. These rates would equate to a blended rate of $.0165. ALLTEL, however, respectfully believes that since cost-based rates are available by specific interconnection type, such rates should be employed in lieu of a blended rate.").

[79] It appears that the proposals in the Issue 9 package with respect to Issues 5, 27, and 32 differ from ALLTEL's Final Best Offers on those issues. *Compare* ALLTEL Final Best Offer at 12-13 *with id.* at 9 (Issue 5), 22-23 (Issue 27), 25-26 (Issue 32).

[80] Arbitration Proceeding Order at 2 n.2.

[81] Section 252(c)(1) of the Act requires that the Arbitrator apply the requirements of Section 251 to all disputed issues. *See* 47 U.S.C. § 252(c)(1). Therefore, ALLTEL's all or nothing approach is unsupportable under the Act.

any event, ALLTEL's rate proposal, even if it had been presented as a stand-alone final best offer, could not be adopted for the reasons that follow.

2. ALLTEL's first cost study (ALLTEL Exh. CC-1) does not measure forward-looking costs and thus cannot support ALLTEL's proposed transport and termination rates.

ALLTEL persists in its assertion that its first cost study, ALLTEL Exh. CC-1, produces forward-looking costs as required by FCC rules, even though it is based on embedded investment. This assertion is flatly contradicted by ALLTEL's submission of its second cost study, ALLTEL Exh. CC-2. ALLTEL itself states that it did not complete a cost study "detailing its actual forward-looking investment values specifically for the Pennsylvania study area" until it completed its second study.[82] This confirms the fact that the prior study, ALLTEL Exh. CC-1, did ***not*** use "actual forward-looking investment values." For this reason, as well as for the numerous other reasons detailed by Mr. Wood,[83] ALLTEL's first study, ALLTEL Exh. CC-1, does not comport with FCC requirements and cannot be used to support ALLTEL's permanent rate proposal.

3. ALLTEL's second cost study, ALLTEL Exh. CC-2, cannot be used to set permanent rates for transport and termination at this time.

ALLTEL's second cost study, ALLTEL Exhibit CC-2, fails to comply with the FCC's requirements, but for different reasons.[84] Section 51.505(e) of the FCC's rules requires an incumbent LEC to *prove* to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in sections

[82] ALLTEL Main Brief at 77.

[83] Verizon Wireless St. No. 2.0 (Wood Direct) at 9-13; Verizon Wireless St. No. 2.1 (Wood Rebuttal) at 2-5.

[84] Verizon Wireless Main Brief at 19-25.

51.505 and 51.511.[85] Obviously, to meet this standard of proof any such cost study would need to be open to inspection and its inputs fully explained.

The FCC also created specific requirements regarding the information that must be made available in a proceeding such as this one. Section 51.505(e)(2) provides:

> [A]ny state proceeding conducted pursuant to this section shall provide notice and an opportunity for comment to affected parties and shall result in the creation of a written factual record that is sufficient for purposes of review. The record of any state proceeding in which a state commission considers a cost study for purposes of establishing rates under this section shall include any such cost study.

47 C.F.R. § 51.505(e)(2). "Notice and an opportunity to comment," requires, at a minimum, the provision of the proffered cost study to affected parties in a suitable format in sufficient time to permit meaningful review. As Mr. Wood testified, these requirements have produced an industry standard as to how cost models are constructed and presented: "the models are presented in fully-functioning form, to the extent possible, the models are presented in a format that permits review and manipulation, the operation of the model is fully described and documented, and all inputs and assumptions are explained and their source documented."[86]

As demonstrated in Verizon Wireless's Main Brief, the timing and manner in which ALLTEL submitted its new cost study (ALLTEL Exh. CC-2) in this proceeding precludes a finding that Verizon Wireless has had "notice and an opportunity for comment" on the cost study, the cost models used, or the underlying inputs and assumptions. Specifically: (1) the submission of the cost study with Mr. Caballero's rebuttal testimony mere days before hearings simply did not afford sufficient notice and

[85] *See* 47 C.F.R. § 51.505(e).

opportunity for review; (2) the computer cost models used to generate the most important part of the study, the investment inputs, ***were not provided at all***; and (3) the computer cost model that was provided was produced in a manner that, in ALLTEL's own witness's words, made verification of the model "***impossible***."[87] ALLTEL thus has not only deprived Verizon Wireless of notice and a meaningful opportunity to comment on ALLTEL's new cost study, it has deprived the Commission of the basis on which it could adopt ALLTEL's proposed permanent rate. ALLTEL's arguments to the contrary are unconvincing.

ALLTEL first attempts to shift blame for the lack of opportunity to review and comment on ALLTEL Exh. CC-2 onto Verizon Wireless, noting that Verizon Wireless's efforts to review the study were limited to a single telephone call and a single interrogatory.[88] This argument stretches ALLTEL's credibility to the breaking point. Although ALLTEL now admits that it began work on the study admitted as ALLTEL Exh. CC-2 "early in 2003,"[89] it did not reveal the existence of the second study until February 4, 2004.[90] Verizon Wireless was entitled to rely on ALLTEL's assertion in its response to Verizon Wireless's interrogatories that the cost study on which ALLTEL intended to rely was the cost study "already provided" on December 22, 2003 (*i.e.*, ALLTEL Exh. CC-1).[91] For ALLTEL to fault Verizon Wireless for failure to investigate a study that ALLTEL did not disclose until the eve of hearings defies comprehension.

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[86] Verizon Wireless St. 2.0 (Wood Direct) at 8:8 – 9:7.

[87] Verizon Wireless Main Brief at 21-25.

[88] ALLTEL Main Brief at 80-81.

[89] ALLTEL Main Brief at 77.

[90] Tr. 135:24 – 136:22 (Sterling).

[91] Tr. 245:11 – 245:18.

ALLTEL tries to excuse its failure to provide the electronic cost models used to calculate the investment inputs used in ALLTEL Exh. CC-2 by asserting that it does not have the ability to do so and suggesting that Verizon Wireless should have reviewed the models at ALLTEL's facilities.[92] Whatever the truth of ALLTEL's assertion, the fact is that the models used to calculate an essential part of ALLTEL's claimed costs were not, in fact, made available for review. If the only means of making those models available was through site visits, then it was incumbent upon ALLTEL to present the study in time for such visits to occur. ALLTEL did not do so.[93]

ALLTEL defends its planting of disabling macros in the model that ***was*** produced on the ground that they were not intended to inhibit Verizon Wireless's review but rather to protect the models from ALLTEL's own employees.[94] But ALLTEL's "intent" is irrelevant, since, as both Messrs. Caballero and Wood agreed, the macros in fact rendered the model "impossible" to verify.[95]

Finally, ALLTEL asserts that the mathematical error relating to projected growth found by Mr. Wood was in fact a documentation error.[96] As argued at length in Verizon

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[92] ALLTEL Main Brief at 81-82.

[93] ALLTEL also suggests that Verizon Wireless did not take advantage of a purported "open offer" from ALLTEL to review and discuss the contents of the "studies" with ALLTEL "directly." There is no evidence of such an "offer" in the record. Moreover, this assertion is so misleading that it borders on the absurd. There was no "offer" for Verizon Wireless experts to contact ALLTEL experts directly until February 5, 2004, five days before hearing, at time when Mr. Wood was testifying in another state. In fact, Verizon Wireless repeatedly requested permission for Mr. Wood to discuss the first cost study with ALLTEL's experts in the weeks prior to hearing, only to have ALLTEL refuse. (These requests are documented in the e-mails attached to Verizon Wireless's motion to compel discovery responses.) Having caused Verizon Wireless to believe that the first cost study (ALLTEL Exh. CC-1) was the only cost study at issue in this proceeding from at least December 22, 2003 until the evening of February 4, 2004, less than six days before hearing, ALLTEL cannot credibly assert that Verizon Wireless was at fault for failing to review ALLTEL's last minute submission (ALLTEL Exh. CC-2) in Arkansas or elsewhere.

[94] ALLTEL Main Brief at 82-83.

[95] TR. at 122:20 – 122:22 (Wood); Tr. at 257:17 – 258:1 (Caballero).

[96] ALLTEL Main Brief at 84-89.

Wireless's Main Brief, Mr. Caballero's explanation, which is predicated on an assumption that ALLTEL will experience negative local traffic growth over the next five years, was unconvincing.[97] However, the more important point is that a major error (whether in documentation or in calculation) was found despite the limited review and closed nature of ALLTEL's revised study, thus raising the question of how many other errors are lurking behind the "hidden macros" and in the missing investment models. Mr. Caballero's attempt to explain away the error discovered by Mr. Wood merely underscores the need for a full and comprehensive review of ALLTEL Exh. CC-2 before it is used to set permanent reciprocal compensation rates.

Whether ALLTEL Exh. CC-2 accurately measures ALLTEL's forward-looking costs of providing local transport and termination is thus unclear. What is clear is that ALLTEL Exh. CC-2 cannot provide a basis for the adoption of permanent reciprocal compensation rates in this proceeding. Therefore, the Commission should direct the parties to incorporate the default proxy rates proposed by Verizon Wireless into their interconnection agreement and initiate an investigation for the purpose of reviewing ALLTEL's claimed costs and setting ALLTEL's permanent rates.

4. There is no reasonable basis for the adoption of ALLTEL's Final Best Offer as a default proxy.

ALLTEL's Final Best Offer is a blended rate of $.014. As shown above and in Verizon Wireless's Main Brief, there is no basis in the record for the adoption of "permanent" rates in the context of this arbitration. Although ALLTEL proposed its Final Best Offer rate as a permanent rate, Verizon Wireless anticipates that ALLTEL may attempt to change its offer and urge the Commission to adopt this rate as a default proxy

[97] Verizon Wireless Main Brief at 28-29.

rate. Any such attempt should rejected for two reasons. First, it is contrary to the "final best offer" procedure set by the Arbitrator at the hearing of this matter. Second, the only basis available in the record for the adoption of ALLTEL's proposed rate would be ALLTEL's cost studies. As noted above, ALLTEL has failed to show that ALLTEL Exh. CC-1 is a forward-looking cost study, and it has deprived Verizon Wireless and the Commission of the ability to verify ALLTEL Exh. CC-2. Therefore, the record does not contain the "reasonable basis" required by the FCC's regulations for adoption of ALLTEL's proposed rates as a default proxy.[98]

5. Verizon Wireless has provided as "reasonable basis" for the adoption of its proposed proxy rates.

Verizon Wireless's final best offer is that the rates calculated by Mr. Wood based upon his correction of the mathematical error in ALLTEL Exh. CC-2 be adopted as default proxy rates pending a complete investigation of ALLTEL's cost study. All that is required for the adoption of default proxies is a "reasonable basis" in the record.[99] As set forth in Verizon Wireless's Main Brief, the recalculated rates fall within the "range of reasonableness," and the evidence introduced to support Verizon Wireless's initially proposed blended rate of $.0078 per minute also provides a "reasonable basis" for adoption of the recalculated rates.[100]

ALLTEL's argument boils down to the following assertions: that Verizon Wireless's blended rate proposal was inappropriately based on a rate charged by a non-rural ILEC, Verizon North (formerly GTE North); and that Verizon Wireless's proposal is unreasonable in light of the negotiated rates of two rural ILECs -- North Pittsburgh and

[98] *See* 47 CFR § 51.707(a)(2).

[99] 47 CFR § 51.707(a)(2).

Commonwealth.[101] These criticisms are unsupported by the record. ***First,*** Mr. Wood did not use the Verizon North/GTE North rate as a "proxy" for establishing ALLTEL's rates[102] -- it was one of a number of benchmark data he considered.[103] ***Second***, as Mr. Wood clearly testified, the North Pittsburgh and Commonwealth rates were not valid benchmarks. With respect to the negotiated Commonwealth rates, there was no basis for concluding that the negotiated Commonwealth rates were reflective of cost,[104] and the network functionality involved was different from the functionality at issue here.[105] In addition, North Pittsburgh's relevant cost characteristics are very different from ALLTEL's.[106] As Mr. Wood explained, in terms of relevant characteristics, "ALLTEL is much closer to Verizon [North] than it would be to North Pittsburgh."[107]

C. Summary.

ALLTEL's "package" Final Best Offer should be summarily rejected. If it is considered, it should be rejected on its merits. ALLTEL has provided no basis for the adoption of the blended rate set forth in its Final Best Offer as a permanent rate, and there is no "reasonable basis" in the record for its adoption as a proxy rate. There is, however, a reasonable basis for the adoption of Verizon Wireless's proffered rates as reasonable proxies. Therefore, the Commission should adopt the following rates as default proxies

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[100] Verizon Wireless Main Brief at 30-31.

[101] ALLTEL Main Brief at 89-94.

[102] ALLTEL Main Brief at 89.

[103] Tr. 88:13 – 88:22.

[104] Tr. 96:4 – 96:18.

[105] Tr. 103:3 – 103:9.

[106] Tr. 96:22 – 97:6.

[107] Tr. 108:5 – 108:7.

pending the completion of a comprehensive, public investigation of ALLTEL's claimed costs and proposed permanent rates:

Type 2A (tandem)	**$0.00896**
Type 2B and Type 1 (end office)	**$0.00446**
Indirect	**$0.00792**

Issue 10: The Parties Agree That Traffic Factors Can And Should Be Used When Actual Data Is Unavailable.

A. Statement of Issue:

Issue 10: Can the Parties implement a traffic factor to use as a proxy for the mobile-to-land and land-to-mobile traffic balance if the CMRS provider does not measure traffic?

B. Discussion and Summary.

It appears that the parties agree that the use of traffic factors is appropriate when actual traffic data is not available.[108] Verizon Wireless has no objection to ALLTEL's use of actual data, so long as it is documented appropriately. Consistent with each party's Final Best Offer, the Commission should order that traffic factors can and should be used for billing to the extent that actual traffic data is unavailable.

Issue 11: Verizon Wireless is entitled under the FCC's rules to charge ALLTEL's tandem interconnection rate for all traffic originated by ALLTEL.

A. Statement of Issue:

Issue 11: Where a CMRS provider's switch serves the geographically comparable area of the LEC tandem, can it charge a termination rate equivalent to a tandem rate for traffic terminated in the Land to Mobile direction?

[108] *See* Verizon Wireless Final Best Offers at 3; ALLTEL Final Best Offer at 14.

B. Discussion.

As set forth in Verizon Wireless's Main Brief and the FCC's rules, since Verizon Wireless's switches serve geographic areas comparable to those served by ALLTEL's tandem switches, Verizon Wireless, as a telecommunications carriers other than an incumbent LEC, is entitled to charge ALLTEL's tandem rate for transport and termination of traffic originated by ALLTEL.[109] ALLTEL does not deny that the areas served by its tandem switches and Verizon Wireless's switches are comparable. Instead, ALLTEL argues that the FCC's rules should not apply in areas where ALLTEL has chosen to "subtend" another ILEC's tandem switch rather than its own.

According to ALLTEL, allowing Verizon Wireless to charge ALLTEL's tandem rate in areas where ALLTEL's end-office switches subtend another carrier's tandems would result in "asymmetrical" rates. ALLTEL's position is meritless. The source of the symmetrical rate requirement is Section 51.711(a) of the FCC's rules. That rule clearly 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.[110]

This rule "requires only that the comparable geographic area test be met before carriers are entitled to the tandem interconnection rate for local call termination."[111] A proposal

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[109] Verizon Wireless Main Brief at 32-33; *see* 47 CFR § 51.711(a)(3).

[110] 47 C.F.R. 51.711(a)(3).

[111] Notice of Proposed Rulemaking, *In re Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9648 ¶ 105 (2001) (footnote omitted).

that follows the precise requirements of the FCC's rule relating to symmetrical rates cannot be said to violate that rule.[112]

ALLTEL also argues that where it subtends a Verizon Pennsylvania tandem, the "comparable" switch is the Verizon Pennsylvania switch and the relevant rate should be Verizon Pennsylvania's tandem rate.[113] ALLTEL provides absolutely no factual or legal support for either of these contentions. The requirements of 47 CFR § 51.711(a)(3) clearly refer to the tandem switch and rate of the interconnecting incumbent LEC.[114]

Furthermore, enforcing the rule according to its terms is entirely equitable in this case. As Mr. Sterling testified, Verizon Wireless's costs remain the same whether ALLTEL uses an end office switch or a tandem switch to originate traffic to Verizon Wireless.[115] The rationale behind 47 CFR 51.711(a)(3) – that the ILEC's tandem rate reasonably approximates the non-ILEC's switching costs where the switches serve comparable geographical areas – does not change where an ILEC such as ALLTEL chooses to originate traffic indirectly rather than directly.[116]

C. Summary.

Since it is uncontested that Verizon Wireless's switches serve geographic areas comparable to those served by ALLTEL's tandem switches, Verizon Wireless is entitled

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[112] ALLTEL also argues that "the geographic comparability test is inapplicable [where] the interconnection is indirect, not direct." ALLTEL Main Brief at 98. However, ALLTEL provides no legal authority for that proposition, and Verizon Wireless is aware of none.

[113] ALLTEL Main Brief at 97-99.

[114] *See* 47 C.F.R. 51.711(a)(3).

[115] Verizon Wireless St. No. 1.0 at 15.

[116] ALLTEL's final argument, that the arrangement in the Verizon Wireless – Sprint/United Telephone interconnection agreement provides support for ignoring 47 CFR 51.711(a)(3), is meritless. That agreement was a negotiated agreement and thus was exempt from the pricing requirements of the 1996 Act and the FCC's implementing rules.

by law to charge ALLTEL's tandem rate for the transport and termination of traffic originated by ALLTEL.

Issue 13: *Verizon Pennsylvania's Commission-Approved Rates Should Be Adopted As Interim Rates Pending The Effective Date Of The Agreement Adopted Pursuant To This Arbitration.*

A. Statement of Issue:

Issue 13: After a requesting carrier sends a formal request for interconnection under Section 252 (b) of the Act, what interim reciprocal compensation terms apply to the parties until an agreement has been negotiated and arbitrated by the Commission?

B. Discussion.

Section 51.715 of the FCC's rules provides that an incumbent LEC "shall" use Commission-approved transport and termination rates as interim rates pending the approval of an interconnection agreement with the requesting carrier.[117]

ALLTEL first contends that it is entitled to ITORP rates for indirect traffic until the resolution of the complaint proceeding at Docket No. C-20039321. This is flatly inconsistent with the FCC's interpretation of the Act. If Congress and the FCC intended access charges to apply to the transport and termination of local telecommunications traffic, they would have said so. They did not. Instead, as the FCC's rule makes clear, where a state commission has approved cost-based rates for transport and termination, those rates "***shall***" be adopted as interim rates pending the approval of an interconnection agreement. ALLTEL cannot shield itself from this clear application of federal authority merely by filing a complaint with the Commission.

With respect to direct traffic, ALLTEL only offers that there is "no reason" not to require Verizon Wireless to pay the rates set forth in the parties' prior interconnection

[117] 47 CFR § 51.715(b)(1); *see* Verizon Wireless Main Brief at 33-34.

agreement.[118] To the contrary, there are two such reasons: the fact that ALLTEL terminated that prior agreement, and the plain language of 47 CFR § 51.715(a)(3).

C. Summary.

ALLTEL has failed to show why Verizon Pennsylvania's Commission-approved reciprocal compensation rates should not be adopted as interim rates as provided by 47 CFR § 51.715(a)(3).

Issue 15: Payment Due Date.

A. Statement of Issue:

Issue 15: Whether the payment due date for invoices rendered under the agreement should be determined from the date of the invoice or the date of receipt of the invoice and whether the allotted time should be 30 or 45 days thereafter?

B. Discussion.

As argued in Verizon Wireless's Main Brief, Verizon Wireless should not be required to bear the entire risk of mail delays or delays between the time invoices are printed and when they are mailed.[119] ALLTEL contends that a period of 30 days from invoice date is appropriate because it is an "industry standard," because that period is built into ALLTEL's billing systems, and because prior Verizon Wireless agreements contain similar terms.[120] This argument is countered by Mr. Sterling's testimony that throughout the United States and in Pennsylvania Verizon Wireless has negotiated payment terms of greater than 30 days from invoice date.[121] Therefore, Verizon Wireless's Final Best Offer on this issue is that unless ALLTEL commits to placing

[118] ALLTEL Main Brief at 102-03.

[119] Verizon Wireless Main Brief at 35-36.

[120] ALLTEL Main Brief at 103-105.

[121] Verizon Wireless St. No. 1.1 (Sterling Rebuttal) at 13:3 – 13:9.

invoices in the mail on the date of invoice, the contract should provide "Payment for all undisputed charges is due within thirty (30) days of receipt of the invoice" as opposed to thirty days from "invoice date."

C. Summary.

The Commission can accommodate the concerns of both parties by adopting Verizon Wireless's proposal that ALLTEL's date-of-invoice term together with a requirement that invoices be placed in the mail on the date of invoice.

Issues 16 and 17: Bona Fide Dispute.

A. Statement of Issue:

Issues No. 16 & 17: Bona Fide Dispute, General Terms and Conditions, paragraph 9.1.1.3 and 9.1.1.4. Whether the agreement should include the following: "A Bona Fide dispute does not include the refusal to pay all or part of a bill or bills when no written documentation is provided to support the dispute, or should a Bona Fide dispute include the refusal to pay other amounts owed by the disputing Party pending resolution of the dispute. Claims by the disputing Party for damages of any kind should not be considered a Bona Fide dispute." And, therefore, whether once a Bona Fide dispute has been processed in accordance with this subsection 9.1.1, the disputing party must make payment on any of the disputed amount owed to the billing party by the next billing due date, or the billing party must have the right to pursue normal treatment procedures. Any credits due to the disputing party resulting from the Bona Fide dispute process would be applied to the disputing party's account by the billing party by the next billing cycle upon resolution of the dispute.

B. Discussion and Summary.

Verizon Wireless agrees to the language set forth in ALLTEL's Final Best Offer, which should be incorporated into the parties' agreement.

Issue 20: Most Favored Nation ("MFN")

A. Statement of Issue:

Issue 20: Whether, as Verizon Wireless proposes in Petition Exhibit 1 section entitled "Most Favored Nation, General Terms and Conditions," paragraph 31.1, Verizon Wireless should have the right to opt out of this agreement during its terms and into any other agreement that ALLTEL may execute with another carrier.

B. Discussion and Summary.

Verizon Wireless's Final Best Offer on this issue is that the "Most Favored Nation" ("MFN") provision be eliminated from the agreement, since the parties have not agreed on language and the MFN provision of the 1996 Act, 47 U.S.C. § 252(i), speaks for itself. This appears to be consistent with ALLTEL's Final Best Offer. The MFN provision therefore should be omitted from the parties' agreement.

Issue 24: Since ALLTEL is obligated to deliver traffic originated on its network to any point within the MTA, the parties' agreement should not limit ALLTEL's reciprocal compensation obligations to areas where it is authorized to provide service.

A. Statement of Issue:

Issue 24: Whether agreement section referred to as "Incumbent Local Exchange Carrier Requirement," Attachment 2, paragraph 1.4.2 of Verizon's Exhibit 1, should specify that ALLTEL's obligations to provide service under the agreement is with respect to that service are where [sic] ALLTEL is authorized to provide service?

B. Discussion.

The parties' disagreement on this issue stems from their fundamental disagreement as to ALLTEL's responsibility for delivery of ALLTEL-originated traffic to Verizon Wireless. ALLTEL's Main Brief leaves no doubt that ALLTEL wishes to avoid responsibility for delivering such traffic:

> Because ALLTEL's territory is disjointed across the state, . . . if Verizon Wireless chooses to establish a direct facility to an

> ALLTEL end office that is not connected to the ALLTEL network through ALLTEL-owned facilities then Verizon Wireless would only receive calls from ALLTEL end users or send calls to ALLTEL end users located in that specific end office
>
> * * *
>
> Without the language specifying that the terms for the provision of direct interconnection do not apply to the provision of services or facilities by ALLTEL where it is not the ILEC, the contract . . . could impose additional costs upon ALLTEL for transporting traffic outside the ALLTEL network using a third-party provider.[122]

Thus, ALLTEL disavows responsibility for (1) delivering ALLTEL-originated calls across non-contiguous parts of its network, and (2) sharing in the cost of transport between its switches and Verizon Wireless's switches. These positions fly in the face of ALLTEL's obligation to deliver, without charge, traffic originating on its network to Verizon Wireless at any point within the MTA.[123] This obligation is not changed by the fact that ALLTEL has chosen to operate a non-contiguous network, nor by the fact that Verizon Wireless's switches are not located in ALLTEL's service areas. ALLTEL's obdurate refusal to accept its legal responsibilities is addressed at length in Verizon Wireless's discussion of Issues 3(b) and 8, which are incorporated by this reference.

C. Summary.

Since ALLTEL is obligated to deliver traffic originated on its network to any point within the MTA, the parties' agreement should not limit ALLTEL's reciprocal compensation obligations to areas where it is authorized to provide service.

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[122] ALLTEL Main Brief at 113.

[123] 47 CFR §§ 51.701(b)(2), 51.703(b): *see TSR Wireless, supra* n.14, 15 F.C.C.R. at 11184 ¶ 31.

Issue 25: Since ALLTEL is obligated to deliver traffic originated on its network to any point with the MTA, the phrase "within ALLTEL's interconnected network" should not be inserted into the agreement.

A. Statement of Issue:

Issue 25: Whether the phrase "within ALLTEL's interconnected network" should be inserted in the agreement section entitled "Direct Routed Traffic Mobile to Land Traffic," Attachment 2, paragraph 2.1.1.1, paragraph 2.1.1.2, paragraph 2.1.2.1, and paragraph 2.1.2.2 of Verizon's Exhibit 1, to clearly indicate that when Verizon Wireless connects to one of ALLTEL's separate segregated networks, it is able to exchange traffic and is achieving interconnection, only with that individual segregated ALLTEL network.

B. Discussion.

ALLTEL's Final Best Offer on this issue again seeks to insert language in the parties' interconnection agreement that would limit ALLTEL's obligation to deliver ALLTEL-originated traffic to points on ALLTEL's network. As stated above, this cannot be reconciled with ALLTEL's obligation to deliver, without charge, traffic originating on its network to Verizon Wireless at any point within the MTA.[124] ALLTEL's discussion of Issue 25 offers no additional reasons to ignore the FCC's rules, and Verizon Wireless therefore relies on its discussion of Issues 3(b), 8, and 24, which are incorporated by this reference.

C. Summary.

Since ALLTEL is obligated to deliver traffic originated on its network to any point with the MTA, the phrase "within ALLTEL's interconnected network" should not be inserted into the agreement.

[124] 47 CFR §§ 51.701(b)(2), 51.703(b); *see TSR Wireless, supra* n.14, 15 F.C.C.R. at 11184 ¶ 31.

Issue 27: The Commission should adopt Verizon Wireless's Proposed Direct Interconnection Traffic Thresholds.

A. Statement of Issue:

Issue 27: Whether the agreement section entitled "Indirect Network Interconnection," Attachment 2, paragraph 2.1.5 of Verizon Wireless's Exhibit 1 should require the establishment of a direct interconnection facility when the capacity of the indirect traffic reaches a DS1 level?

B. Discussion.

Verizon Wireless's Final Best Offer on this issue is that the 257,000 combined MOU threshold ALLTEL has proposed should be implemented only to the extent the end office traffic is exchanged at ALLTEL's tandem locations, and, to the extent Verizon Wireless must establish facilities physically connecting to ALLTEL's end offices, the threshold should be 500,000 MOUs in the mobile-to-land direction. This proposal should be adopted for the reasons stated in Verizon Wireless's Main Brief.[125]

In response, ALLTEL offers several reasons to adopt the lower threshold for direct interconnection at all locations. The only ***evidence*** it cites in support is (1) an assertion that the DS1 level is an "industry standard," and (2) Ms. Hughes's speculation that absent the lower threshold, "the Verizon Wireless customer could receive an intercept message."[126] Neither of these "facts" is persuasive.

First, as Mr. Sterling explained, the DS1 level is only considered a "standard" where the cost of the facility is shared.[127] ALLTEL's position, of course, is that it has no obligation to share in the cost of transporting traffic beyond its own network.

[125] Verizon Wireless Main Brief at 39-40.

[126] ALLTEL Main Br. at 118 (quoting Tr. 164-65).

[127] Verizon Wireless St. No. 1.1 (Sterling Rebuttal) at 2:20 – 2:21.

Furthermore, Ms. Hughes's assertion is refuted by the 600,000 MOU threshold set forth in Verizon Wireless's interconnection agreement with Commonwealth Telephone.[128]

Second, while Ms. Hughes's concern for Verizon Wireless's customers is appreciated, they will receive an intercept message or fast busy signal only if ALLTEL does not maintain sufficient facilities between its end offices and its transit provider's tandem. ALLTEL's demand for a low direct interconnection threshold, coupled with its refusal to share in the cost of facilities beyond its network, amounts to an attempt by ALLTEL to shift its network costs onto Verizon Wireless. ALLTEL has provided no basis for doing so.

C. Summary.

The 257,000 combined MOU threshold ALLTEL has proposed should be implemented only to the extent the end office traffic is exchanged at ALLTEL's tandem locations, and, to the extent Verizon Wireless must establish facilities physically connecting to ALLTEL's end offices, the threshold should be 500,000 MOUs in the mobile-to-land direction.

Issue 28: Verizon Wireless is entitled to establish NPA-NXXs associated with ALLTEL rate centers regardless of the actual delivery point of the associated calls without any impact on ALLTEL's obligation to bear the costs of delivering traffic it originates to Verizon Wireless.

A. Statement of Issue:

Issue 28: Whether Verizon Wireless may establish NPA-NXX's in ALLTEL rate centers, regardless of actual delivery point of the associated calls, and require ALLTEL to bear all transport costs to the point of delivery?

[128] *See* Verizon Wireless St. No. 1.1 (Sterling Rebuttal) at 3:11 - 3:13.

B. Discussion.

As argued at length above, the FCC's rules obligate the originating carrier to bear all costs, including transit charges due third-party carriers, for delivering intraMTA telecommunications traffic terminated on a CMRS provider's network.[129] The obligation is determined by the originating and terminating locations at the beginning of the call;[130] NPA-NXX assignments are irrelevant.

ALLTEL argues that Verizon Wireless is using "virtual" NPA-NNXs in order to receive "local" calling from ALLTEL customers and that, therefore, Verizon Wireless has "caused" the cost of transporting ALLTEL-originated traffic to Verizon Wireless.[131] This is incorrect. The cost of delivering traffic is caused by the carrier that originates the traffic. Thus, by prohibiting LECs from imposing charges on carriers for telecommunications traffic originating on the LEC's network, the FCC's rules "follow the cost causation principle of allocating the cost of delivering traffic to the carriers responsible for the traffic."[132] For this reason, and as argued at length in Verizon Wireless's discussion of Issues 3(b) and 8, which are incorporated by this reference, ALLTEL's repeated attempts to charge Verizon Wireless for the delivery of ALLTEL-originated traffic should be rejected.[133]

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[129] *See* 47 C.F.R.§ 51.703(b); *TSR Wireless, supra* n.14 15 F.C.C.R. at 11184 ¶ 31 ("Section 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated . . . . [A] LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules.").

[130] *See* 47 C.F.R. § 51.703(b).

[131] ALLTEL Main Brief at 119-20.

[132] *Texcom I, supra* n.20, 16 F.C.C.R. at 21495, ¶ 6.

[133] ALLTEL's argument with respect to Issue 28 is shot through with allegations of fact unsupported by record citations. These allegations do not support adoption of ALLTEL's position on this issue.

C. **Summary.**

Verizon Wireless is entitled to establish NPA-NXXs associated with ALLTEL rate centers regardless of the actual delivery point of the associated calls without any impact on ALLTEL's obligation to bear the costs of delivering traffic it originates to Verizon Wireless.

Issue 30: The Land To Mobile Factor should be 40% Land-Originated, 60% Mobile-Originated.

A. Statement of Issue:

Issue 30: Whether a 60/40 land to mobile traffic factor must be used by both Parties when either Party cannot record the terminating minutes originating from the other Party routed over a direct interconnection facility, even though ALLTEL has the ability to record all terminating traffic originating from Verizon Wireless over direct interconnection facilities and even though Verizon's proposed factor of 60/40 land to mobile is inconsistent with the shared facilities factor of 70/30 land to mobile proposed by Verizon Wireless?

B. Discussion.

Verizon Wireless has proposed a land to mobile factor of 40% land-originated, 60% mobile-originated for billing when a party does not have access to actual traffic data. Mr. Sterling supported this factor with the evidence that at the only interconnection point where both parties are directly exchanging traffic, the ratio is 44% land-originated and 56% mobile-originated.[134] No other evidence of actual traffic ratios was introduced by either party.

ALLTEL attacks Verizon Wireless's proposal on two grounds. First, it asserts that the parties "agreed" to ALLTEL's proposed ratio of 30% land-originated and 70%

[134] Verizon Wireless St. No. 1.0 (Sterling Direct) at 28:17 – 28:18.

mobile-originated.[135] However, as Mr. Sterling explained, this ratio was offered by Verizon Wireless during negotiations as part of larger counter-proposal to many terms in ALLTEL's draft agreement. ALLTEL did not accept a number of those terms, so there was, in effect, no meeting of the minds on this issue.[136]

ALLTEL's second basis for rejection of Verizon Wireless's proposal is Ms. Hughes's attempt to discredit Mr. Sterling's traffic study by asserting that it is not "representative" of the entire traffic flow between the companies, that Verizon Wireless "could be" transporting traffic indirectly as well as directly at the Meadville interconnection point, that its results are contrary to "generally accepted" traffic factors.[137] However, Ms. Hughes provided no evidence to support ***any*** of these assertions, or refute the data provided by Mr. Sterling. The FCC specifically authorized the use of "samples" and "traffic studies" where the parties cannot measure actual traffic flows.[138] Verizon Wireless requested data from ALLTEL on indirect land-to-mobile traffic volumes, however ALLTEL provided no such data, so a similar calculations could not be made at other points of interconnection.[139] Therefore, the only data in the record supports adoption of Verizon Wireless's proposed traffic factor.

C. Summary.

The agreement should provide a land to mobile factor of 40% land-originated, 60% mobile-originated for billing when a party does not have access to actual traffic data.

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[135] ALLTEL Main Brief at 121.

[136] Tr. 132:20 – 133:12.

[137] ALLTEL Main Brief at 122-23 (quoting ALLTEL St. 2R at 25-27).

[138] *Local Competition Order, supra* n.64, at ¶ 1044.

[139] Verizon Wireless St. No. 1.0 (Sterling Direct) at 28-29.

Issue 31: The definition of "Interconnection Point" should appropriately consider ALLTEL's responsibility to deliver traffic to Verizon Wireless to any point within the MTA.

A. Statement of Issue:

Issue 31: Whether the agreement's definition of "Interconnection Point," Attachment 8 of Verizon Wireless Exhibit 1, should be clear in appropriately defining the parties' responsibilities of network between the parties, which in ALLTEL's case will be on its network.

B. Discussion.

Once again, ALLTEL seeks to use contract definitions to shift the cost of delivery of ALLTEL-originated traffic to Verizon Wireless. As argued in Verizon Wireless's discussion of Issues 3(a) and 8, which is incorporated by reference, federal law requires ALLTEL to deliver, without charge, all traffic that originates on its network to any point within the MTA.

C. Summary.

The definition of "interconnection point" should appropriately consider ALLTEL's responsibility to deliver traffic to Verizon Wireless to any point within the MTA.

Issue 32: Verizon Wireless agrees to omit the definition of "Interexchange Carrier" in the Agreement.

A. Statement of Issue:

Issue 32: Whether the agreement should include a definition of "Interexchange Carrier," a term not used in the agreement.

B. Discussion.

Verizon Wireless stands by its Final Best Offer to omit this definition from the parties' interconnection agreement. Verizon Wireless notes, however, that ALLTEL's persistent assertion that the third-party transit provider is functioning as an interexchange

carrier when it transits ALLTEL's indirect traffic[140] validates Verizon Wireless's original determination that such a definition is needed.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in its Main Brief, Verizon Wireless respectfully requests that the Commission adopt Verizon Wireless's final best offer with respect to each open issue in this proceeding.

Respectfully submitted,

Of Counsel:
John T. Scott, III
Elaine D. Critides
VERIZON WIRELESS
1300 I Street N.W.
Suite 400
Washington, DC 20005

Christopher M. Arfaa
Susan M. Roach
DRINKER BIDDLE & REATH
One Logan Square
18th & Cherry Streets
Philadelphia, PA
(215) 988-2700

Counsel for Cellco Partnership d/b/a Verizon Wireless

DATED: March 2, 2004

[140] *See* ALLTEL Main Brief at 62.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing document upon the persons listed below by the means indicated in accordance with the requirements of 52 Pa. Code § 1.54:

Via Federal Express – Over Night Delivery and E-mail

D. Mark Thomas, Esq.
Patricia Armstrong, Esq.
Thomas Thomas Armstrong & Niesen
212 Locust Street
Harrisburg, PA 17108-9500

dmthomas@ttanlaw.com
parmstrong@ttanlaw.com

Hon. Wayne L. Weismandel
Office of the Administrative Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

wweismande@state.pa.us

Via First Class Mail

Charles F. Hoffman, Esq.
Office of Trial Staff
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105

Irwin A. Popowsky, Esq.
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Forum Place
Harrisburg, PA 17101-1923

Carol Pennington, Esq.
Office of Small Business Advocate
1102 Commerce Building
300 North Second Street
Harrisburg, PA 17101

Dated: March 2, 2004

Christopher M. Arfaa
Drinker Biddle & Reath LLP
18th and Cherry Streets
One Logan Square
Philadelphia, PA 19103-60996
(215) 988-2700

Counsel for Cellco Partnership
d/b/a Verizon Wireless

Thomas, Thomas, Armstrong & Niesen
Attorneys and Counsellors at Law
SUITE 500
212 LOCUST STREET
P. O. BOX 9500
HARRISBURG, PA 17108-9500

www.ttanlaw.com

FIRM (717) 255-7600
FAX (717) 236-8278

PATRICIA ARMSTRONG

Direct Dial: (717) 255-7627
E-Mail: parmstrong@ttanlaw.com

CHARLES E. THOMAS
(1913 - 1998)

ORIGINAL

March 2, 2004

DOCUMENT

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

In re: Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With ALLTEL Pennsylvania, Inc.
Docket No. A-310489F7004

Dear Secretary McNulty:

Enclosed for filing are an original and nine (9) copies of the Reply Brief of ALLTEL Pennsylvania, Inc. in the above referenced proceeding.

Copies of the Reply Brief have been served in accordance with the attached Certificate of Service.

Very truly yours,

THOMAS, THOMAS, ARMSTRONG & NIESEN

By Patricia Armstrong
Patricia Armstrong

Enclosures
cc: Certificate of Service
Stephen B. Rowell, Esquire (w/encl.)
Lynn Hughes (w/encl.)

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Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Cellco Partnership d/b/a Verizon Wireless :
For Arbitration Pursuant to Section 252 of :
the Telecommunications Act of 1996 to : Docket No. A-310489F7004
Establish an Interconnection Agreement :
With ALLTEL Pennsylvania, Inc. :

ORIGINAL

REPLY BRIEF
OF
ALLTEL PENNSYLVANIA, INC.

Patricia Armstrong
Regina L. Matz
D. Mark Thomas
Stephen B. Rowell

Attorneys for
ALLTEL PENNSYLVANIA, INC.

THOMAS, THOMAS, ARMSTRONG & NIESEN
212 Locust Street
P.O. Box 9500
Harrisburg, PA 17108-9500
(717) 255-7600

ALLTEL Corporation
One Allied Drive
Little Rock, AR 72202
(501) 905-8460

Dated: March 2, 2004

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I. INTRODUCTION

This Reply Brief is filed by ALLTEL Pennsylvania, Inc. ("ALLTEL"), in response to the Main Brief of Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"). The proceeding is an arbitration addressing Verizon Wireless's request to ALLTEL to negotiate prices, terms, and conditions of an interconnection agreement regarding both direct and indirect traffic. This arbitration presents significant and complex issues of first impression never before addressed by the FCC or courts, such as an incumbent LEC's obligations to incur costs outside its network and service territory, which have the potential for enormous repercussions on rural ILECs operating in Pennsylvania and elsewhere.

Section 252(b)(4) of the Telecommunications Act of 1996 ("TCA-96"), 47 U.S.C. §252(b)(4), defines this Commission's arbitration role as follows:

> (4) ACTION BY STATE COMMISSION.--
>
> > (A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).
> >
> > (B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.
> >
> > (C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date

on which the local exchange carrier received the request under this section.

ALLTEL respectfully submits that the best information provided and available is that set forth in ALLTEL's Final and Best Offer and Main Brief. ALLTEL respectfully submits that the "package" offer set forth in its Final and Best Offer offers the most practical and reasonable resolution of all the outstanding issues. This offer represents significant compromise on ALLTEL's part, but such compromise is offered as a means to resolve the proceeding. If this package is not adopted, ALLTEL stands in full support on the issues as addressed in its Main Brief.

In contrast thereto, ALLTEL believes that the Verizon Wireless Main Brief is misleading in its misrepresentation of the facts of record and applicable law. The positions expressed by Verizon Wireless have no support and should not be adopted by the Administrative Law Judge ("ALJ"). ALLTEL also notes that Verizon Wireless, in its Final and Best Offer, is unwilling to make any movement on the issue of rates. Instead, its argument that RBOC rates, i.e. either Verizon PA or Verizon North, should be applied to ALLTEL remains cast in stone.

In this Reply Brief, ALLTEL will not again address each and every outstanding issue. Instead, it will only address those issues raised in the Verizon Main Brief that warrant further comment.

II. REPLY ARGUMENT

Issue 1: Applicability of Arbitration to this Petition

A. Issue:

Whether rural local exchange carriers are subject to the negotiation and *arbitration process set forth in Section 252 (b) for disputes under Section 251* (b)(5) for traffic indirectly exchanged with CMRS?

B. Discussion:

Verizon Wireless asserts that ALLTEL's rural exemption under Section 251(f)(1) of TCA-96 does not exempt ALLTEL from the requirement that it submit to arbitration of a disputed interconnection request under Section 252(b). Verizon Wireless further argues that ALLTEL has waived its rural exemption.[1]

There is no question that ALLTEL has voluntarily agreed to the application of Section 252(b) arbitration before this Commission for the purpose of resolving the outstanding issues. Therefore, the issue of whether the Section 252(b) process should apply is moot and need not be addressed. ALLTEL, however, has not waived any of its rights. A waiver is the voluntary and intentional relinquishment of a known right, claim or privilege.[2] Statutory rights, specifically, are ordinarily waived only by clear affirmative words or actions.[3] As stated by this Commission:

> A waiver is defined as, "the act of intentionally relinquishing or *abandoning some known right, claim or privilege," and will not be* presumed or implied unless by [his] conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was *intended or consented to.*

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[1]Verizon Wireless Main Brief (M.B.) at 6.

[2]Barker v. Wingo, 407 U.S. 514 (1972).

[3]In re Appraisal of Ford Holdings, 698 A.2d 973 (Del. Ch. 1997).

Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations, 2000 Pa. PUC LEXIS 55 (Slip Opinion 23-24) (citations omitted).

ALLTEL's actions and statements clearly preserved its statutory rights under Section 251(f).[4] ALLTEL's rural exemption may be terminated by the Commission only after a competing carrier submits a bona fide request for interconnection with a request to terminate ALLTEL's rural exemption.[5] The requesting carrier has the burden of proving that ALLTEL's provision of the requested interconnection service is not unduly economically burdensome, is technically feasible, and comports with universal service principles and objectives.[6] Verizon Wireless has satisfied none of these requirements. ALLTEL has done no more than to voluntarily agree to negotiate with Verizon Wireless and have the Commission arbitrate the outstanding issues. Further, as this arbitration concerns Verizon Wireless' request for reciprocal compensation under Section 251(b)(5), ALLTEL's rural exemption is not even called into play, let alone waived or terminated.

C. Summary:

Issue 1 is moot and need not be addressed in this arbitration proceeding.

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[4]ALLTEL St. 2 at 7; ALLTEL St. 1R at 16.

[5]See 47 U.S.C. §251(f)(1)(A) and (B).

[6]"The plain meaning of [section 251(f)(1)] requires the party making the request [to terminate an exemption] to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption." Iowa Utilities Board, et al. v. FCC, 219 F.3d 744, 762 (8th Cir.1999) ("Iowa Utilities Board II"), aff'd in part, rev'd in part, and remanded on other grounds in Verizon Communications Inc. v. FCC, 434 U.S. 467 (2002). ALLTEL M.B. 27-29, 33.

Issues 3(b) and 8: An ILEC Has No Responsibility For Costs in Connection with Services and Facilities Outside Its Network

A. Issue 3(b):

Whether pursuant to Section 251(b)(5), a local exchange carrier is required to pay any transit charges on traffic it originates indirectly to a CMRS provider?

Issue 8:

Whether a LEC is required to share in cost of dedicated two-way interconnection facilities between its switch and the CMRS carrier's switch to extend traffic beyond the LEC's local exchange area and network?

B. Discussion:

Verizon Wireless cavalierly states that "[t]here is no question that federal law requires ALLTEL to deliver the traffic it originates to Verizon Wireless, without charge, anywhere within the MTA in which the call originated, irrespective of local exchange or service area boundaries."[7] ALLTEL submits that federal law is 180 degrees to the contrary. ALLTEL further questions why, if Verizon Wireless' assertion is correct, there are no other ILECs that have agreed or been required to bear transit or facilities costs outside their service territories. As Verizon Wireless admitted in its discovery response:

> I-23. Identify all local exchange carriers [in Pennsylvania, California, Oklahoma, New York, New Jersey, Ohio, Delaware, Virginia and West Virginia] that have agreed or have been required to provide facilities or bear the cost of transport or facilities that are located outside the local exchange carriers service territory.
>
> Supplemental Response. None.

See ALLTEL Exhibit 5. The answer is that incumbent LECs have no obligations under TCA-96, the FCC's rules, or case law, to assume cost obligations beyond

[7]Verizon Wireless M.B. at 3 (emphasis added).

their own networks and outside their service territories for purposes of interconnecting, directly or indirectly, with any requesting carrier.

The appropriate statement of the issue in this proceeding is not whether a LEC is required to pay for originating traffic. The simplicity of that statement makes it too susceptible to the erroneous disposition Verizon Wireless contends is mandated under Section 51.703 of the FCC's local competition rules. Casting the issue as one of originating carrier responsibility misses the question. The issue is what are the indirect interconnection cost responsibilities of an incumbent LEC with its own existing network if a requesting carrier chooses to place the interconnection point OUTSIDE the ILEC's existing network and service territory.

Verizon Wireless relies foremost on Section 51.703(b) of the Commission's Subpart H rules.[8] This and other Subpart H rules, however, address only interconnection costs as between two carriers on their respective interconnecting networks. At pages 8-9 and 13-15 of its Main Brief, Verizon Wireless also relies on TSR Wireless[9] and both the original and reconsideration orders in Texcom.[10] This reliance is misplaced. TSR Wireless addressed the issue of cost recovery within the context of a two party direct interconnection and therefore is inapplicable. Texcom stands for the proposition that in three-party agreements, the parties may negotiate responsibility for the payment of third-party transit charges. Further, Texcom

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[8]See e.g. Verizon Wireless M. B. at 8-9.

[9]TSR Wireless, LLC v. U.S. West Communications, Inc., 15 FCC Rcd 11166 (2000), aff'd sub. nom., Quest Corp. v. FCC, 252 F.3d 462 (D.C. Cir. 2001) ("TSR Wireless").

[10]Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a/ Verizon Communications, Memorandum Opinion and Order, File No. EB-00-MD-14 (Released November 28, 2001) ("Texcom Memorandum Opinion and Order"); Texcom Inc. v. Bell Atlantic Corp., Order on Reconsideration, 17 FCC Rcd 6275 (2002) ("Texcom Reconsideration Order").

involved the indirect exchange of traffic between two non-incumbent LECs, and therefore did not address the propriety of mandating that an incumbent LEC with an existing network incur costs to carry traffic beyond its network to a third-party location. Those cases, consequently, not only fail to lend support to Verizon Wireless' position, but also the FCC's holdings therein actually support ALLTEL. Finally, at pages 9-10 of its Main Brief, Verizon Wireless claims that the resolution of indirect rural ILEC interconnection in New York should have no application to Pennsylvania because the resulting New York rural agreement was negotiated. Ironically, when finally presented a relevant standard by which to compare its advocacy herein, Verizon Wireless chooses to ignore it because the ultimate agreement was negotiated, even if, as ALLTEL submits, the end was compelled by means of preceding New York Public Service Commission ("NY PSC") rulings that ILECs' cost responsibilities terminate at their borders.

ALLTEL submits that as an ILEC with an existing network, its obligations exist with respect to its network only. While it can be compelled to meet Verizon Wireless anywhere in the MTA, that must be within the confines of ALLTEL's existing network.[11] Section 251 of TCA-96 appropriately makes distinctions between telecommunications carriers, LECs and ILECs[12] and addresses the rights and obligations of each of those carriers depending on its status. Section 251(c) applies to ILECs only. ILECs are the only "telecommunications carriers" with existing networks. The most onerous interconnection requirements were thus set forth in Section 251(c), which requires ILECs essentially to make their networks

[11]T. at 198-90.

[12]Sections 251(a), (b) and (c), respectively.

"interconnectible," through UNEs, collocation, etc., with requesting carriers so that these carriers can enter ILECs' territories and use the ILECs' networks to compete on a local basis.

The initial controversies before the FCC were all determined within the context of RBOC territories and involved disputes as between two parties to an interconnection agreement directly competing with each other in the RBOC's service territory. Early issues included determining where a requesting carrier could choose to locate its point of interconnection within an RBOC's service area. At the time, RBOCs did not have "interLATA" authority, and therefore for purposes of reciprocal compensation for the exchange of local traffic, an RBOC's transfer of calls between LATAs was restricted. CLECs were thus allowed to locate their switches at any point in a LATA. With respect to CMRS carriers, Section 51.701(b)(2) of the FCC's two party reciprocal compensation rules defines local traffic for reciprocal compensation purposes as traffic between a LEC and a CMRS provider that at the beginning of the call originates and terminates within the same MTA. Thus, within the context of these two party rules for determining to which "local" traffic reciprocal compensation applies, CMRS carriers were allowed to locate their switches anywhere in an MTA. However, in all situations, whether anywhere in the LATA or MTA, the interconnection point was always on the ILEC's network.

As the major purpose of TCA-96 was to address local competition (local being "head to head" competition within an ILEC's former monopoly territory), questions also arose over what costs could be imposed as between two connecting carriers if the CLEC's or CMRS provider's chosen interconnection point was outside a local exchange area. In other words, as between the CMRS provider which could

locate a switch anywhere in the MTA, and an RBOC which had a clearly defined local exchange area, the question was which party had responsibility for the costs associated with transporting a call from the point within the RBOC's local exchange area where the call originated to the interconnection point somewhere else still in the LATA or MTA and on the RBOC's network but outside the RBOC's local exchange area.

In this context, and only in this context, the FCC has held that Section 51.703(b) prohibits an RBOC from charging the interconnecting CMRS provider for costs associated with the RBOC's use of its own facilities to deliver RBOC traffic to the CMRS provider. Thus, the RBOC, as the originating carrier, could not assess the interconnecting carrier charges for facilities within its own network that the RBOC used to transport the call from point A on the RBOC's network to point B, the interconnection point being anywhere in the MTA that is still on the RBOC's network but is outside the RBOC's local exchange.[13] In this context, where the traffic was exchanged between two parties and the costs disputed were those incurred by the RBOC for the RBOC's use of its own network, the originating carrier responsibility rule was applied by the FCC. The issues were all determined within the context of two party direct interconnections and the costs involved were all for the ILEC's own use of its own network.

Verizon Wireless takes these two party rules and cases and blindly applies them to an entirely different situation. No longer does the cost dispute involve an

[13]In these situations, while the FCC has held that the originating ILEC carrier cannot impose facilities' costs for use of its own network on the terminating carrier, nothing in the FCC's rules prohibit the ILEC from assessing service charges if the equivalent of toll service is provided. See TSR Wireless, infra herein and in response to Issue 28.

RBOC seeking to recover from the terminating carrier facilities costs associated with the use of its own network to get the traffic from point A in its local exchange to point B out of the local exchange but still on its network. Now the ILEC is ALLTEL, and Verizon Wireless is not seeking to compel ALLTEL to incur the cost of getting its originated traffic from point A to point B on ALLTEL's own network. Instead, Verizon Wireless is seeking to hold ALLTEL responsible for costs outside its network, in this case potentially moving traffic within a ten state area.

Because Verizon Wireless does not wish to establish an interconnection point anywhere on ALLTEL's network, there is a new point B. This new point B is Verizon Wireless' chosen interconnection point on an RBOC network. Verizon Wireless maintains that because Section 51.703(b) was interpreted as prohibiting the originating carrier (when it was an RBOC in a two-party dispute) from assessing facilities' costs to deliver traffic anywhere on its network within the MTA, ALLTEL, as the originating carrier in this three-party arrangement, has to assume the responsibility and cost of delivering traffic anywhere in the MTA without regard to the location of its network or service territory. However, unlike the two-party disputes involving RBOCs, ALLTEL's termination point is not just outside ALLTEL's local exchange, it is off ALLTEL's network entirely.

The originating carrier responsibility rule in Section 51.703(b) has never been *applied to require an incumbent LEC with an established network to interconnect* indirectly with a requesting carrier and bear costs off its network and outside its service territory. Verizon Wireless' position (never imposed on an RBOC) is the result of Verizon Wireless' own economic analysis that it is more efficient for Verizon Wireless to use its existing interconnection point with its affiliate Verizon PA and not

have to connect directly with ALLTEL. Consequently, the issue is not a typical Section 51.703(b) issue as to whether an RBOC may assess an interconnecting carrier facilities' charges for the RBOC's own use of its own network - in other words to transport CMRS traffic from point A to point B on the RBOC's network without a facilities charge. Verizon Wireless has ALLTEL incurring all costs associated with its network plus the added increment to get the traffic across a third-party's network as well! That is unprecedented and unsupportable.

1. No Authority Supports the Imposition on ALLTEL of Third-Party Transit Costs Resulting from Verizon Wireless' Choice to Employ Indirect Interconnection

TCA-96 opened non-rural ILEC networks to local competition. It did this by compelling non-rural ILECs, under Section 251(c), to make their networks available to competing carriers.[14] The FCC's seminal case on setting rules for local competition, the First Report and Order,[15] interpreted ILEC obligations with respect to making their networks available to competing carriers. The FCC's rules established thereunder arose out of the FCC's attempts to interpret and implement local competition through the definition of obligations and responsibilities of two parties to a direct interconnection under Section 251(c). These cases have addressed issues with respect to an RBOC's responsibility to make its network available to competitors. Under no circumstance has an RBOC ever been required to use the network or transit services of a third-party carrier as a means of indirectly

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[14]Section 251(f) of TCA-96 protects rural ILECs from opening their networks to local competition until universal service and other matters are adequately addressed. ALLTEL M.B. at 27-29.

[15]In the Matter of Implementation of the Local Competition Provisions in The Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996).

interconnecting with a requesting carrier. Under no circumstance or legal requirement can ALLTEL be compelled to do so.

As Verizon Wireless recognizes, TCA-96 does not confer upon ILECs the right to request interconnection. The right under Section 251 to request interconnection belongs to carriers seeking interconnection with an ILEC in order to compete with that ILEC. Verizon Wireless suggests that once it has requested indirect interconnection, ALLTEL can turn the request into one for direct interconnection simply by agreeing or being compelled to deploy facilities outside its territory and off its network to any point in a ten state area where Verizon Wireless may choose to locate its switch.[16] ALLTEL cannot do this because the option under TCA-96 to interconnect directly or indirectly belongs to Verizon Wireless. If Verizon Wireless chooses the less capital intensive and more economically efficient indirect traffic exchange arrangement to interconnect indirectly with ALLTEL, that is Verizon Wireless' choice. However, the responsibilities to arrange and implement that choice also belong to Verizon Wireless.

a. The FCC's Subchapter H Rules Do Not Address Transit Carrier Cost Responsibility

Verizon Wireless and ALLTEL agree that the FCC's local interconnection rules established "a system for two carriers to establish arrangements and bill each other for traffic originating and terminating on their respective networks."[17] Nevertheless, Verizon Wireless relentlessly cites obligations established by the FCC in the context of two carrier arrangements and misuses them to improperly impose

[16]Verizon Wireless M.B. at 13.

[17]Verizon Wireless M.B. at 11 (emphasis added). See also Verizon Wireless St. 1.0 at 18-19; ALLTEL St. 3R at 11-15.

cost responsibility on ALLTEL for indirect three party interconnections. No ILEC has ever been compelled to negotiate with and pay a third-party to interconnect indirectly with a requesting carrier at a point off the ILEC's network and outside its service territory. An originating ILEC is only responsible for delivering traffic and incurring costs for such delivery to any technically feasible point on its network and in its service territory. The rules and legal decisions cited by Verizon Wireless applied to two party interconnections involving RBOCs. They do not extend, have never been interpreted, and have never been applied, to compel an ILEC to negotiate with and pay a third-party to use the third-party's network or services to meet a requesting carrier at an indirect interconnection point that is at some distant point on the third-party's network.

As ALLTEL witness Watkins stated, "Mr. Sterling improperly, in several instances, attempts to confuse the statutory and regulatory interconnection requirements, stretches them beyond their context, or simply omits relevant and contrary statements by the FCC and the courts."[18] Verizon Wireless takes the obligations as set forth by the FCC as between two parties - originating and terminating carriers - in the Subpart H rules and applies them to three party arrangements where the existence of a third-party and the costs associated with use of its separate network are not addressed. The FCC's Subpart H rules set forth the applicable regulatory framework for the payment of reciprocal compensation between two parties.[19] The FCC's discussion in adopting Section 51.703(b) and other Subpart H rules clearly described the reciprocal compensation framework as

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[18]ALLTEL St. 3R at 4.

[19]See ALLTEL St. 3R at 11-15; ALLTEL M.B. at 36-48.

two carriers collaborating to complete a local call through an interconnection point between the two carriers. These rules apply to Verizon Wireless' request for a direct interconnection on ALLTEL's network. Verizon Wireless may use its facilities to establish this interconnection point and these rules apply. Or, Verizon Wireless may use the services of another carrier. Once Verizon Wireless chooses to use the services of a third-party carrier, however, Verizon Wireless has taken the transaction outside the confines of the FCC's rules and has involved a third-party to which it must be responsible.

The FCC has already confirmed that three party transit arrangements are not addressed in its rules or orders in a case involving a dispute involving AT&T and MCI as complainants against Verizon Virginia. In that dispute, the two CLECs, which used Verizon Virginia's transit service to exchange traffic with each other, challenged Verizon Virginia's proposal to assess additional charges on transit traffic that exceeded a DS-1 level. In declining to find these Verizon additional charges unreasonable, the FCC simply noted that there was "an absence of Commission rules specifically governing transit service[.]"[20] Verizon Virginia had also contended before the FCC that it provided transit service to facilitate indirect interconnections purely on a voluntary basis and had no obligation under TCA-96 to provide transit service as "there is no requirement that incumbent LECs help competitive LECs satisfy their own interconnection obligations, including the obligation to interconnect 'indirectly' with other carriers."[21] Since Verizon Virginia had agreed to provide the

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[20] In the Matter of Petition of WorldCom, Inc. Regarding Interconnection Disputes with Verizon Virginia Inc., 17 FCC Rcd 27039, 27100, para. 115 (2002) ("In the Matter of Petition of WorldCom").

[21] Id. at 27098, para. 113.

service, the FCC declined to rule on the issue whether Verizon Virginia was obligated to provide transit service, again noting a lack of "clear Commission precedent or rules declaring such a duty."[22] If the FCC declined to obligate a Verizon ILEC to provide transit service to facilitate indirect interconnection, ALLTEL is at a loss to see how it can be obligated to purchase such transit service.

Verizon Wireless not only interprets the FCC's rules differently than did the FCC by failing to acknowledge that the rules do not address transit services, it also argues that a rule addressing an originating carrier's cost responsibility in a two carrier arrangement applies unconditionally to an originating ILEC sending traffic to a third-party transit provider solely due to the requesting carrier's decision to use the third-party transit provider rather than interconnect directly with the ILEC. As the FCC itself found, there is an absence of clear direction about transit service responsibilities in either the FCC's own prior orders or its rules. Therefore, the FCC restrained from imposing obligations in those arrangements under purported authority of its Subpart H rules. This Commission is constrained to do the same.

The FCC's rules have to be read in their context. In context, they address cost responsibility only with respect to originating and terminating carriers in two party direct interconnections. TCA-96 and the FCC's Subpart H rules enacted under it require ALLTEL only to establish an interconnection point with another carrier within ALLTEL's incumbent LEC service territory and at a technically feasible point on ALLTEL's existing network.[23] Indeed, in its extended investigation into ILEC interconnection agreements with CLECs, CMRS and other carriers, the NY PSC

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[22]Id. at 27101, para. 117, also cited in footnote 63 of ALLTEL's Main Brief.

[23]ALLTEL St. 3R at 12; 47 U.S.C. §251(c)(2).

noted that transit traffic, traffic sent via a third-party, was not even local for purposes of reciprocal compensation because it terminated outside the local calling area.[24]

The "originating carrier responsibility rule" in Section 51.703(b) relied on by Verizon Wireless does not require ALLTEL to negotiate with Verizon PA to purchase its transit service or in the alternative build facilities out to Verizon Wireless to meet on a third-party's network. Section 51.703(b) only precludes ALLTEL in a direct interconnection with Verizon Wireless from assessing Verizon Wireless facilities charges for ALLTEL's use of its own network to transport traffic from point A to point B on ALLTEL's network.

b. Case Law Does Not Require ALLTEL to Incur Costs Off its Network and Outside its Territory

Verizon cites TSR Wireless and the Texcom Memorandum Opinion and Order and Texcom Reconsideration Order as support for its proposition that as an originating carrier ALLTEL must incur all costs to deliver its traffic to Verizon Wireless irrespective of the location of its network or service area boundaries. None of these decisions supports that proposition.

i. The TSR Wireless Decision

Verizon Wireless relies extensively on TSR Wireless. This decision, however, has no applicability to the three party indirect interconnection request made by Verizon Wireless to ALLTEL and offers no support for Verizon Wireless'

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[24] Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Telephone Companies, Case 00-C-0789, 2001 N.Y. PUC LEXIS 696 (""the calls at issue do not appear to terminate for reciprocal compensation purposes until they reach the carrier's switch, which is outside the local calling area.") (slip opinion at 10). See also ALLTEL M. B. at 52-56.

contention that as the originating carrier, ALLTEL is required to be responsible for costs incurred in delivering traffic off its network.

In TSR Wireless, five CMRS paging carriers filed complaints against four RBOCs challenging the RBOCs' imposition of charges on those carriers for the delivery of RBOC-originated traffic on the RBOCs' networks. The pagers contested the RBOCs' assessment of two types of charges: (1) Those associated with the RBOCs use of their own facilities to deliver their originated traffic;[25] and (2) Those related to the RBOCs' assessment of Direct Inward Dialing, or DID, charges associated with "wide area calling." Among other defenses to imposition of the charges, the RBOCs challenged the applicability of Section 51.703(b) of the FCC's reciprocal compensation rules to one-way pager traffic.

Addressing first the facilities charges related to the RBOCs' use of their own network facilities to deliver their originated traffic to the pagers, the FCC held that Section 51.703(b) prohibited the RBOCs from imposing upon the paging carriers charges for the RBOCs' own network facilities that the RBOCs used to deliver RBOC originated traffic. Citing its First Report and Order, the FCC found that "LECs are obligated, pursuant to section 251(b)(5) . . . to enter into reciprocal compensation arrangements with all CMRS providers, *including paging providers*, for the transport and termination of traffic on each other's networks[.]"[26] No third-party transit service was involved, nor were the RBOCs required to incur any costs

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[25]The facilities costs the RBOCs sought to impose were "LEC transmission facilities," "charges for dedicated T-1 circuits necessary to connect U S West offices to the TSR network" and RBOC facilities "used for local transport[.]" TSR Wireless, 15 FCC Rcd at 1169 ¶ 6, 1170 ¶ 8, and 11171 ¶11, respectively.

[26]Id. at 11176, ¶ 19 (italics in original; underlining added).

outside of their existing networks. The point of interconnection was on the RBOC's network!

The FCC's holding with respect to the second set of charges, those imposed by the RBOCs for wide area calling services associated with delivery of their originated traffic, was significantly different. Relying on section 51.703(b), the pagers contended that the RBOCs were prohibited from charging for wide area calling service. The FCC disagreed. Agreeing with the RBOCs with respect to the imposition of these type of charges, the FCC found as follows:

> "[W]ide area calling" services are not necessary for interconnection or for the provision of TSR's service to its customers. We conclude, therefore, that Section 51.703(b) does not compel a LEC to offer wide area calling or similar services without charge. Indeed, LECs are not obligated under our rules to provide such services at all; accordingly, *it would seem incongruous for LECs who choose to offer these* services not to be able to charge for them.

TSR Wireless, 15 FCC Rcd at 11183-84, ¶ 30.

Ironically, it is the FCC's discussion of the RBOCs' imposition of wide area calling service charges, charges that the FCC allowed, that Verizon Wireless quotes and relies on in its Main Brief.[27] However, that particular passage as quoted by Verizon Wireless is truncated and taken out of context. When not viewed in its entirety and in context the passage appears to support Verizon Wireless' position that ALLTEL can be compelled to deliver traffic at its own cost anywhere in a ten state area where Verizon Wireless chooses to locate its switch. That is not the case. In its entirety, the FCC stated as follows:

> Section 51.703(b) concerns how carriers must compensate each other for the transport and termination of calls. It does not address the charges that carriers may impose upon their end users.

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[27]Verizon Wireless M.B. at 8.

> Section 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated, with the exception of RBOCs, which are generally prohibited from delivering traffic across LATA boundaries. MTAs typically are large areas that may encompass multiple LATAs, and often cross state boundaries. Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules. Such traffic falls under our reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier. This may result in the same call being viewed as a local call by the carriers and a toll call by the end-user. For example, to the extent the Yuma-Flagstaff T-1 is situated entirely within an MTA, does not cross a LATA boundary, and is used solely to carry U S. West-originated traffic, U S West must deliver the traffic to TSR's network without charge. However, nothing prevents U S West from charging its end users for toll calls completed over the Yuma-Flagstaff T-1. Similarly, section 51.703(b) does not preclude TSR and U S West from entering into wide area calling or reverse billing arrangements whereby TSR can "buy down" the cost of such toll calls to make it appear to end users that they have made a local call rather than a toll call. Should paging providers and LECs decide to enter into wide area calling or reverse billing arrangements, nothing in the Commission's rules prohibits a LEC from charging the paging carrier for those services.

TSR Wireless, 15 FCC Rcd at 11185-86 ¶ 31 (footnotes and citations omitted). The discussion about MTAs being large areas that crossed state borders was made within the context of the FCC's deciding that RBOCs were not required to provide long distance calling at no charge. There was certainly no suggestion that the RBOCs had to purchase third-party facilities or services to meet another carrier's distant interconnection point.

The FCC's holdings in TSR Wireless are entirely consistent with ALLTEL's positions in this case. ALLTEL may not assess charges on Verizon Wireless related to ALLTEL's use of ALLTEL's own network to deliver ALLTEL-originated traffic. However, if ALLTEL is required to deliver calls to what would otherwise be a toll

area (which *a fortiori* is the case with Verizon Wireless' proposed indirect interconnection that would result in ALLTEL delivering traffic off its network and outside its service territory), nothing in the FCC's rules require ALLTEL to assume those costs or responsibilities. The responsibilities to take ALLTEL's traffic from any point in the MTA on ALLTEL's network belong to Verizon Wireless if it chooses not to connect directly. If ALLTEL is required to incur any costs to deliver calls outside a local exchange, ALLTEL must be able to recover those costs from its customers.

ALLTEL's position that third-party transit charges and/or Verizon Wireless' capital costs to reach ALLTEL's network are not ALLTEL's responsibility is further reinforced by the FCC's discussion in TSR Wireless addressing the RBOCs' constitutional arguments. As stated by the FCC:

> The Local Competition Order requires a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of its co-carrier, who then terminates that traffic and bills the originating carrier for termination compensations. In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call. Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.

TSR Wireless, 15 FCC Rcd at 11186 ¶ 34 (emphasis added). As testified to by ALLTEL witness Hughes, in its provision of local exchange service ALLTEL does not send traffic off its network, so ALLTEL is not currently recovering the type of third-party or extra-network costs Verizon Wireless seeks to impose on ALLTEL from

ALLTEL's own customers.[28] Presumably if the RBOCs were precluded from recovering these costs from their customers, the FCC would have decided differently with respect to the RBOCs' constitutional issues.[29]

At pages 13-15 of its Main Brief Verizon Wireless also relies on TSR Wireless for the premise that ALLTEL must share in the cost of building facilities to exchange traffic between any of ALLTEL's fragmented service areas in its highly discontiguous network. Again, as a ruling from the FCC deciding issues between two parties to a direct connection and addressing not at all an ILEC's obligation to incur costs to deliver traffic off its network to meet at an interconnection point on a third-party's network, that decision is inapplicable to Verizon Wireless' demands on ALLTEL in this proceeding. As ALLTEL asserted in its Main Brief, ALLTEL is under no obligation to provide a superior form of interconnection for Verizon Wireless traffic that ALLTEL does not provide for itself.[30]

ALLTEL currently does not deliver local exchange traffic to points well beyond its network (or from one of its island operations to another) as part of a local exchange call. To transport such calls implicates ALLTEL's assessment of toll charges on its customers and access charges on interconnecting carriers. Where ALLTEL's discontiguous territories are not interconnected, if Verizon Wireless requires the services of a third-party to complete its traffic exchange, Verizon Wireless must be responsible for payment for those services. Verizon Wireless can

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[28]T. 171-72; ALLTEL St. 1R at 12.

[29]Because the RBOCs possess options other than charging requesting, directly interconnecting, carriers charges for use of the RBOCs' own networks, such as recovering them from the RBOCs' own end users, the FCC's denial of RBOC cost recovery from the requesting carrier was not unconstitutional. TSR Wireless, 15 FCC Rcd at 11186 ¶ 35.

[30]ALLTEL M.B. at 41-44.

invoke no superior arrangement for calls to its customers. As the 8th Circuit held, "Subsection 251(c)(2)(C) requires the incumbent LECs to provide interconnection 'that is at least equal in quality to that provided by the local exchange carrier to itself . . . .'"[31] Nothing in the statute requires the ILECs to provide superior quality interconnection to its competitors.

Further, as ALLTEL witness Hughes noted, ALLTEL's network is the result of the merger and acquisition of many smaller companies throughout the state. Verizon Wireless contends that because any third-party or extra-network/service area costs incurred to transit traffic between ALLTEL's separate service territories are "the direct result of ALLTEL's own business decisions, it is entirely appropriate to hold ALLTEL responsible for the cost" of transporting this traffic between discontiguous networks.[32] ALLTEL disagrees.

In approving these mergers, this Commission was obliged under Chapter 11 of the Public Utility Code to find that the merger was in the public interest. The Commission often approves mergers because the net effect is a stronger company with better customer services.[33] Thus, the public interest, and not solely ALLTEL's private interest, was invoked in Commission-approved mergers and acquisitions. For this Commission now to compel ALLTEL to provide Verizon Wireless a superior form of interconnection than what ALLTEL provides itself on the basis that it is "the

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[31] Iowa Utilities Board v. FCC, 120 F.3d 753, 812 (8th Cir. 1997), aff'd in part, rev'd in part, and remanded in AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999).

[32] Verizon Wireless M.B. at 15.

[33] For example, the Commission noted the savings in duplication of costs that occur when ALLTEL acquired the Brookville and Murraysville Telephone Companies. See Application of ALLTEL Pennsylvania, Inc., Brookville Telephone Company and The Murraysville Telephone Company for approval of the acquisition by merger, Docket No. A-3102050 F0002 (Order entered June 3, 1993) slip opinion at 2.

direct result of ALLTEL's own business decisions" would in essence penalize ALLTEL for these acquisitions. Without doubt such a mandate would send a chilling effect throughout the utility industry, discouraging utility acquisitions of non-contiguous companies for fear of future network obligations that may be imposed and strangling any further development in Pennsylvania of larger, stronger utilities.

ii. The Texcom Decisions

Verizon Wireless also cites the Texcom Memorandum Opinion and Order to support its theory that as the "cost causer" for its originated traffic, ALLTEL must be compelled to assume extra-network costs.[34] That case, however, does not support Verizon Wireless' positions in this arbitration proceeding.

One has to read both Texcom decisions in order to understand fully what the FCC required, or more accurately, did not require. In that case, a CMRS carrier and a non-incumbent, a CLEC,[35] negotiated to exchange traffic with each other using the network and transit services of the incumbent RBOC. The CMRS carrier filed a complaint against the RBOC because the RBOC charged the CMRS carrier for the transit service it employed to receive traffic from the originating CLEC. In upholding the RBOC's assessment of that charge to the terminating CMRS carrier, the FCC found that since the RBOC was acting as a third-party transit carrier between the CMRS carrier and the CLEC, the FCC's two-party reciprocal compensation rules, *including the originating carrier responsibility rule, did not apply.*[36]

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[34]Verizon Wireless M.B. at 12, note 30, responding to Issue 5.

[35]Texcom Memorandum Opinion and Order at ¶ 6 (allowing Verizon to charge the terminating carrier a transit charge because Verizon's customers should not bear the cost of delivering traffic from a CLEC to a CMRS carrier).

[36]Texcom Reconsideration Order, 17 FCC Rcd 6276 ¶4.

The FCC suggested that the terminating CMRS carrier "may seek reimbursement of these costs" from the CLEC through the negotiated process that set up this three party arrangement, but mandated nothing.[37] As a matter of negotiation, carriers are free to negotiate interconnection terms that use the intermediary transit facilities and services of a third-party, and to determine as between them in that negotiation process how the costs associated with the use of that third-party will be assigned. However, the FCC neither required nor found, based upon the "principle of cost causation," that it could mandate cost responsibility for third-party transit costs. To suggest that in an arbitration proceeding with an ILEC, the Texcom decisions stand for the premise that the originating ILEC has extra-network cost obligations in such a three party arrangement is wholly unsupportable. In fact the FCC's Texcom rulings, when read in conjunction with TSR Wireless, stand for just the opposite.

While the FCC acknowledged the general principle of allocating the cost of originating traffic to the originating carrier as the cause of the cost, it found that the principle of cost causation is implicated in a two party situation. In a two party arrangement, the originating party's customers are already paying that carrier for the cost associated with its network through the rates it recovers from its customers.[38] Thus, the originating carrier should not also be able to assess the terminating carrier charges for use of the same network. The FCC best explained this principle in TSR Wireless, where the FCC precluded RBOCs from assessing terminating carriers for the RBOCs' use of their own networks. As the FCC stated in TSR Wireless, "the

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[37] Id. (emphasis added).

[38] Texcom Memorandum Opinion and Order at ¶ 6.

cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network [and t]he originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls."[39] As previously stated, in Verizon Wireless' proposed three party scheme involving ALLTEL, ALLTEL's customers are not already paying ALLTEL for any extra-network costs involved in meeting Verizon Wireless at a distant interconnection point on a third-party's network because ALLTEL has never been required to incur costs off its network as Verizon Wireless suggests. Thus, the Commission cannot mandate ALLTEL in this arbitration proceeding to assume responsibility for and costs associated with Verizon Wireless' indirect interconnection choice.

ALLTEL submits that as it did in In the Matter of Petition of WorldCom, in the Texcom decisions the FCC recognized the "voluntary" nature of transit service and indirect three-party agreements. Given the absence of guidance in its rules on indirect transit cost issues, the FCC avoided mandating precisely the overly broad interpretation Verizon Wireless seeks herein. Further, ALLTEL submits that three party indirect interconnection involving two competing carriers (a pager and a CLEC), neither with its own incumbent networks but each interconnecting with the other through a mutual interconnection arrangement with the third-party transit provider, is the classic intended use of Section 251(a) indirect interconnections.[40] Thus, neither TSR Wireless nor the Texcom decisions stand for the proposition that

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[39] TSR Wireless, 15 FCC Rcd at 11186, ¶34 (emphasis added).

[40] Indirect interconnection is an economically efficient means for two non-incumbents to exchange traffic with each other by using the direct connections each had or arranged with an incumbent RBOC. See ALLTEL M. B. at 51-52 and note 71.

ALLTEL must bear all costs associated with the indirect delivery of its traffic anywhere in the MTA when that indirect interconnection by Verizon Wireless' choice necessitates that ALLTEL's traffic leave its network and service area in order to meet Verizon Wireless' interconnection point on a third-party's network.

2. The New York Public Service Commission's Rulings Regarding ILECs' Responsibilities to Deliver Traffic to Their Borders and the Verizon Wireless/NY Rural ILECs Negotiated Interconnection Agreement Stand as Beacons of Reason by Comparison to Verizon Wireless' Positions in this Proceeding

Verizon Wireless miscomprehends, or more likely chooses to ignore, the significance of its own interconnection agreement with rural ILECs in New York. Verizon Wireless believes that ALLTEL "suggested that it should not be required to pay any transit charges on traffic it originates indirectly to Verizon Wireless because Verizon Wireless signed agreements in New York agreeing to pay transit charges on land-to-mobile traffic."[41] What ALLTEL suggests with respect to the New York agreements is that Verizon Wireless was much more reasonable in New York, and did not pursue positions that were out of line with established legal requirements.

Two very simple points of comparison need to be made to the Verizon Wireless/Rural ILEC interconnection agreement in New York: (1) Verizon Wireless agreed to reciprocal compensation rates of $0.02 for both direct and indirect traffic; and (2) this rate was ON TOP OF Verizon Wireless assuming ALL third-party transit costs for all land-to-mobile traffic sent over an indirect interconnection. NO third-party transit, no outside network/territory cost obligations and a $0.02 rate. In comparison, in this proceeding Verizon Wireless seeks a rate of $0.0078 cents AND

[41] Verizon Wireless M.B. at 9.

in addition seeks to have ALLTEL pay third-party transit costs and incur extra network/territory capital costs to extend the Verizon Wireless system to the ALLTEL service territory.

What's the difference? The FCC's rules and the TSR Wireless and Texcom decisions have as much precedential value in New York as they have in Pennsylvania. The only difference is that in New York, the NY PSC made clear with respect to its investigation into interconnection requirements what is understood elsewhere: An ILEC's obligations to deliver traffic ends at its borders.[42]

At page 9 of its Main Brief, Verizon Wireless attempts to neutralize its actions in New York, citing the Texcom Reconsideration Order for the proposition that parties to "***negotiated*** agreements may agree to interconnection on any terms they like, including terms that vary from those required by the 1996 Act, provided the resulting agreement is not discriminatory and is in the public interest."[43]

That case certainly stands for the proposition that carriers are free to negotiate terms that otherwise may not be required. ALLTEL clearly understands and takes no issue with Verizon Wireless' rights to negotiate terms freely under Section 252(a)(1) of TCA-96. Indeed, in this negotiation process ALLTEL has negotiated to provide Verizon Wireless interconnection terms notwithstanding that Verizon Wireless' rights to lay claim to those terms are less than clear.[44] ALLTEL believes, however, that the contrast between Verizon Wireless' negotiated position

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[42]See ALLTEL M.B. at 53-55.

[43]Verizon Wireless M.B. at 9 (emphasis in original).

[44]For example, ALLTEL has agreed to reciprocally compensate Verizon Wireless for indirectly exchanged traffic when the FCC's reciprocal compensation rules only apply to two party traffic.

in New York compared to its arbitrated positions with respect to ALLTEL in Pennsylvania are so extreme as to be discriminatory, and thus effectively in violation of Section 252(a)(1). If this Commission is unwilling to find those terms discriminatory per se, ALLTEL submits that at the very least Verizon Wireless' $0.02 rate with no responsibility for extra-network transit costs for ALLTEL in New York compared to a $0.0078 cent rate plus responsibility for full extra-network transit and capital costs for ALLTEL in Pennsylvania reflects Verizon Wireless' arbitrary, capricious and unreasonable negotiations and arbitration position in Pennsylvania.

3. Verizon Wireless' Position Runs Counter to the Intent of TCA-96

Requesting carriers' preference for indirect interconnection under Section 251(a) is an issue with non-RBOC companies, since virtually all CLECs, CMRS and other telecommunications carriers have for the past eight years fought with RBOC companies over terms and conditions of direct interconnections. As recognized by the 8th Circuit Court of Appeals when that court was given an opportunity directly to address issues specific to rural carriers,[45] Congress has specifically sought to protect rural carriers from technically infeasible or unduly economically burdensome interconnection requests. In voiding the rules established in the FCC's First Report and Order regarding rural carriers, the Court held as follows:

> In the Act, Congress sought both to promote competition and to protect rural telephone companies as evidenced by the congressional debates. . . . There can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed it to provide to new competitors in § 251(b) and § 251(c). ... The FCC's elimination from [the assessment of competitive entry] of the "economic burden that is typically associated with efficient competitive entry" substantially alters

[45]Not all non-RBOCs are rural carriers. However, for ALLTEL and other carriers deemed rural by the Commission, the decision of the 8th Circuit looms large in what is otherwise a vacuum of applicable rural ILEC case law under TCA-96.

> the requirement Congress established. By limiting the phrase "unduly economically burdensome" to exclude economic burdens ordinarily associated with competitive entry, the FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies. We have found no indication that Congress intended such a cramped reading of the phrase.

Iowa Utilities Board II, 219 F.3d at 761 (emphasis added).[46]

Given the 8th Circuit's interpretation of the rural protections intended with respect to direct interconnection requirements in Sections 251(b) and (c), Verizon Wireless' contention that ALLTEL, in an indirect interconnection request, can be compelled to do more than any ILEC or RBOC has been compelled to do under Sections 251(b) or (c) creates an absurd construction of TCA-96 that Congress never intended and ALLTEL submits the FCC never required.

Legislative intent controls a statute's interpretation.[47] In ascertaining legislative intent, it must be presumed that the legislature did not intend a result (1) that is "absurd, impossible of execution or unreasonable"; (2) that fails to give effect to the entire statute; or (3) that violates the United States Constitution.[48] A construction that fails to give effect to all provisions of a statute or which achieves an absurd or unreasonable result must be avoided.[49] In making decisions under

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[46]While the FCC's TELRIC pricing rules see-sawed back and forth between the FCC, the U.S. Supreme Court and the 8th Circuit, the 8th Circuit's rulings on rural companies have never been challenged.

[47]Section 3 of the Statutory Construction Act of 1972, Act of December 6, 1972, 1 Pa.C.S. §1921.

[48]1 Pa.C.S. §1922(1), (2) and (3).

[49]Wilson v. Central Penn Industries, Inc., 452 A.2d 257 (Pa. Super. 1982).

TCA-96, a court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[50]

Verizon Wireless may request ALLTEL to indirectly interconnect with it if that presents a more economically efficient option for Verizon Wireless, but the costs associated with that choice belong to Verizon Wireless. This Commission may not impose greater responsibilities and obligations on ALLTEL, as an incumbent LEC with an existing network, under ostensible authority of Section 251(a) than Congress intended be imposed under Sections 251(b) and (c). Section 251(a) simply identifies the general duty of carriers to interconnect directly and indirectly with other carriers via the public switched network and to use standard equipment and technical approaches that are compatible with other network participants.[51]

Requiring ALLTEL to incur greater burdens through a Section 251(a) indirect interconnection than Congress intended ALLTEL be required to incur with respect to direct interconnection creates an impermissible loophole around the rural protections of Sections 251(f)(1) and (f)(2) that would effectively void those protections. If Verizon Wireless chooses an indirect form of interconnection because the amount of traffic it anticipates exchanging with ALLTEL does not justify Verizon Wireless placing facilities to directly interconnect with ALLTEL's network, Verizon Wireless must make alternative means available to deliver and receive traffic indirectly. Consistent with the TSR Wireless and Texcom decisions, Verizon Wireless must bear the costs associated with the transit of that traffic. ALLTEL's cost obligations for the delivery of its traffic end at its borders within its network.

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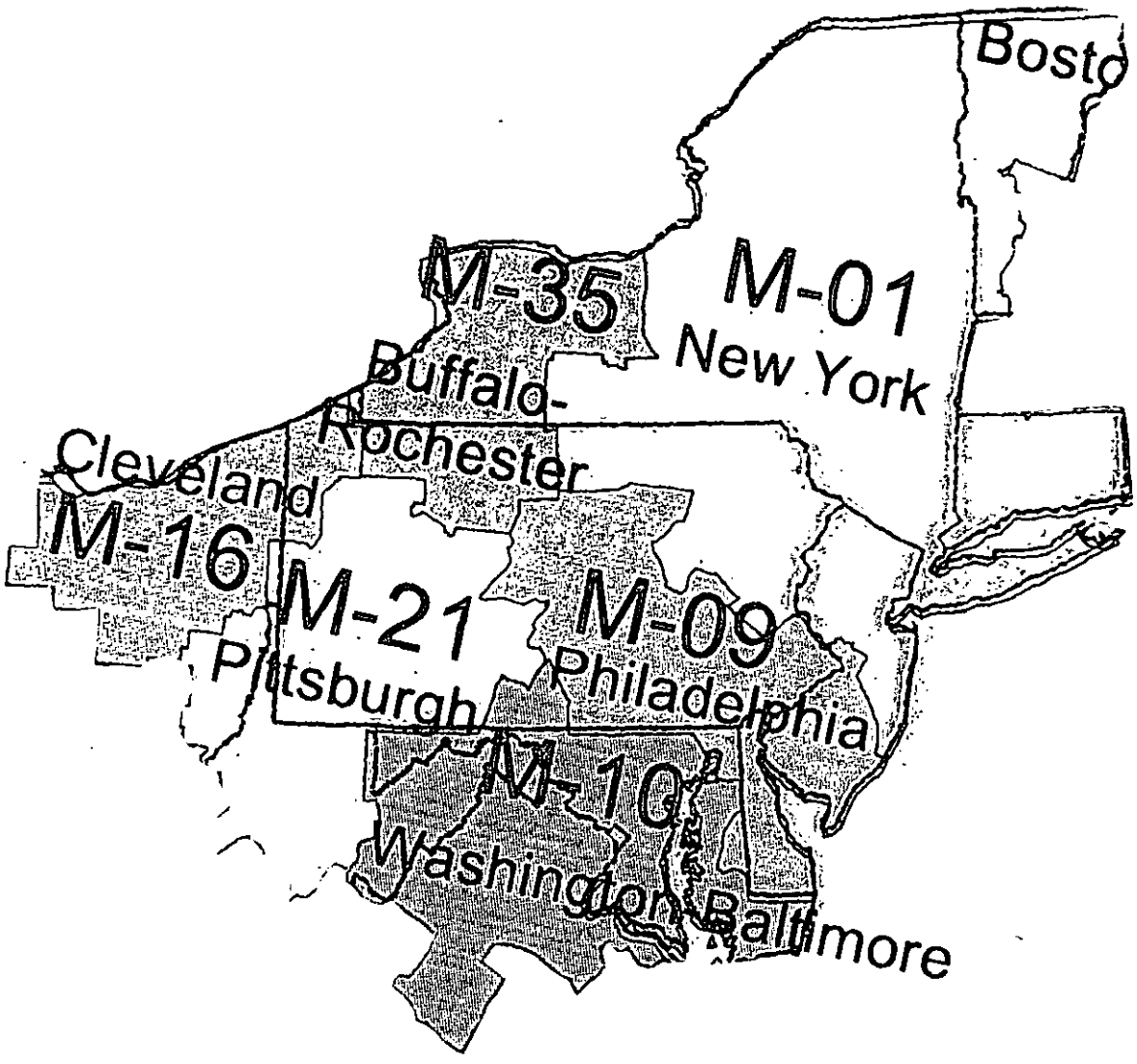
[50] Iowa Utilities Board II, 219 F. 3rd at 765 (citations omitted).

[51] ALLTEL St. 3R at 5.



Verizon Wireless' conclusion that existing FCC rules and orders require ALLTEL to bear all cost responsibility to meet Verizon Wireless at any point in the MTA off ALLTEL's network and outside its service territory presents an unprecedented absurd result. As demonstrated in ALLTEL Exhibit 3C, replicated above, Verizon Wireless' position would obligate ALLTEL to purchase transit service from an RBOC in any part of a ten state area where Verizon Wireless has chosen to place a switch. Such a result is not warranted by any rule, as the FCC has acknowledged. Such a result would never withstand appellate scrutiny, given the

8th Circuit's interpretation of rural interconnection requirements under Sections 251(b) and (c).

C. Summary:

It is Verizon Wireless' responsibility, as the requesting carrier choosing indirect interconnection, to negotiate and pay for services and/or facilities necessary to receive and deliver traffic from ALLTEL's network; as an incumbent ILEC with an existing network, ALLTEL's obligations to incur costs to deliver traffic to Verizon Wireless and/or share in the cost of two-way direct facilities end in its territory on its network.

Issue 5: Terms and Conditions of Third-Party Provider

A. Issue:

Where a third-party provider provides indirect interconnection facilities, should the interconnection agreement that establishes the terms and conditions for the exchange of the traffic between the originating and terminating carriers include the terms and conditions on which the originating carrier will pay the third-party transiting provider for transiting service?

B. Discussion:

As discussed in response to Issues 3(b) and 8 incorporated herein, ALLTEL has no obligations to incur cost obligations off its network and outside its service territory for purposes of interconnecting, directly or indirectly, with Verizon Wireless. Verizon Wireless, however, in its zeal to make the FCC's two party obligations applicable unconditionally to indirect interconnections involving the system and services of a third-party, has turned a blind eye to the existence of that third-party and the rights or obligations it may have or seek to assert. ALLTEL does not wish to enter an indirect interconnection blindly. Accordingly, because by definition the network and services - and therefore rights and obligations - of a third-party are

necessarily implicated by Verizon Wireless' decision not to interconnect directly with ALLTEL, the role of that third-party must be clear as between ALLTEL and Verizon Wireless.

Verizon Wireless, on pages 11-13 of its Main Brief, mischaracterizes ALLTEL's position on this issue. ALLTEL does not believe that its indirect interconnection agreement with Verizon Wireless must include any terms ALLTEL may negotiate with Verizon PA.[52] As ALLTEL witness Hughes stated, "ALLTEL thus needs an interconnection or other agreement with Verizon ILEC to assure the call record detail and to establish other required terms and conditions."[53] As further clarified by ALLTEL witness Hughes:

> [T]he Act clearly defines the responsibilities for reciprocal compensation between the two parties that are entering into the interconnection agreement. In fact, by definition, reciprocal compensation means the parties are reciprocally compensating each other. The Act never defines – although it outlays indirect interconnection is allowed, it never outlays how that third party that's involved, that has true network expense, should be compensated. . . . [T]hat's why we're in this position we are today, because the parties could not reach an agreement on that, on whose responsibility it was.

T. 187. Thus, two sets of circumstances must be addressed: (1) The first must address transit cost responsibility as between ALLTEL and Verizon Wireless; (2) The second must address technical call transfer issues as between ALLTEL and Verizon PA.

With regard to transit cost responsibility, ALLTEL believes that in order for its indirect interconnection agreement with Verizon Wireless to be clear from ambiguity, the cost responsibility for the use of the third-party transit services must be made

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[52]See Verizon Wireless M.B. at 12, mischaracterizing ALLTEL St. 1R at 19.

[53]ALLTEL St. 1R at 19.

clear in the Verizon Wireless/ALLTEL agreement. As a potentially significant cost element whose responsibility is strongly disputed between the parties, making it a clear contract term as between the parties is prudent transactional law. This is the only obligation related to Verizon Wireless' choice of an indirect interconnection that must be addressed in the ALLTEL/Verizon Wireless agreement. ALLTEL is not willing to modify the terms of the indirect interconnection that it has with Verizon PA under ITORP to provide for reciprocal compensation without express terms in its new agreement with Verizon Wireless assigning the transit cost responsibility to Verizon Wireless. ALLTEL believes that it has every right to make this demand.

With regard to the actual services Verizon PA is to provide Verizon Wireless and ALLTEL, each party must have an agreement in place with Verizon PA so that rights and obligations regarding the use of the third-party's services and facilities to complete the call transfer will be clear. As set forth in detail in ALLTEL's Main Brief at 64-67, ALLTEL will need call and other details from Verizon PA to assure that the calls are accurately transferred and recorded and billing information provided. In essence, ALLTEL needs to be as clear with Verizon PA that indirectly transferred calls are completed and billing information provided as ALLTEL needs to be in its own agreement with Verizon Wireless. While neither the third-party agreement nor its terms must be "incorporated" into ALLTEL's indirect interconnection agreement with Verizon Wireless, those terms will have to be established prior to or simultaneous with that indirect interconnection. Otherwise, there is no assurance that the three pieces of the puzzle necessary to complete an indirect interconnection will be in place and that information necessary to complete the third-party transfer of calls will be provided. Verizon Wireless has had an opportunity to put an

agreement in place with its affiliate Verizon PA. ALLTEL must be afforded the same opportunity with Verizon PA. A three party traffic arrangement cannot occur without regard to the rights and obligations of the third-party to the transaction. If Verizon Wireless wants to retain use of the facilities already established in the ITORP indirect interconnection, but change the existing contract terms between Verizon PA and ALLTEL, Verizon Wireless must afford ALLTEL and Verizon PA an opportunity to enter new contract terms before any reciprocal compensation arrangement between Verizon Wireless and ALLTEL can become effective.

C. Summary:

Verizon Wireless' request to interconnect with ALLTEL indirectly using the services and facilities of Verizon PA require that Verizon Wireless' responsibility for negotiating and paying for Verizon PA's transit service be set forth in the ALLTEL/Verizon Wireless interconnection agreement and ALLTEL must be afforded an opportunity to negotiate separate contract terms with Verizon PA to replace the current ancillary services language provided by Verizon PA under ITORP, which new contract terms need not be included in the ALLTEL/Verizon Wireless interconnection agreement but which must be effective prior to or simultaneous with the effective date of the ALLTEL/Verizon Wireless interconnection agreement.

Issue 9: Establishment of Reciprocal Compensation Rates

A. Issue:

What is the appropriate pricing methodology for establishing a reciprocal compensation rate for the exchange of direct and indirect traffic?

B. *Discussion:*

While Verizon Wireless attempts to make TELRIC models a black and white simple issue, ALLTEL respectfully submits that the establishment of TELRIC rates throughout the country has taken a tortuous path. There have been countless disagreements as to how TELRIC should be applied and disagreement with respect to virtually all of the inputs. In fact, the FCC TELRIC models including the hybrid cost proxy model have been revised countless times from 1997 through 2003. No TELRIC model will ever reflect either absolute certainty or perfect agreement between the parties.

Contrary to Verizon Wireless's argument, ALLTEL submitted two acceptable cost studies based upon forward-looking costs. Verizon Wireless in its Main Brief renews its criticisms of the ALLTEL TELRIC studies. These criticisms are, for the most part, specifically refuted in ALLTEL's Main Brief at 69-89. Verizon Wireless, however, citing the FCC rules at Section 51.505(e)(2) claims that it will be denied "notice and opportunity for comment" if the ALLTEL CC-2 study is given consideration.[54] ALLTEL submits that Verizon Wireless is manipulating the time parameters in Section 252 in an effort to discredit and deny consideration of this ALLTEL cost study.

The primary reason Verizon Wireless claims that the CC-2 study should be denied consideration is because the study was not completed until early February and, therefore, Verizon Wireless claims it lacked adequate time to analyze the study.

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[54]Verizon Wireless M.B. at 20-25.

While the arbitration time frames set out in TCA-96 are very tight to begin with, throughout this process Verizon Wireless has taken every opportunity to waste precious time and set as narrow a time frame for arbitration as possible. In response to Verizon Wireless's interconnection request, ALLTEL provided Verizon Wireless a proposed interconnection agreement on November 25, 2002. It took Verizon Wireless 131 days, until April 4, 2003, to respond.[55] ALLTEL attempted to schedule a conference call in May to address Verizon Wireless' response, but negotiations did not commence until October 16, 2003.[56] Verizon Wireless then waited until the 160th day to file its arbitration petition, when it had the right to file the petition as early as the 135th day, wasting an entire month that could have been used in arbitration.[57] In addition, Verizon Wireless had every opportunity to extend the nine (9) month consideration period in Section 252(b)(5) to give itself time to analyze the study. That deadline was already extended slightly; a further minimal extension sufficient to allow Verizon Wireless time to understand ALLTEL's study would have been harmless. However, Verizon Wireless refused to further extend the Commission's consideration period and instead simply seeks to have this Commission disregard in its entirety ALLTEL's case with respect to rates. Obviously, Verizon Wireless in claiming that it has been denied an opportunity to analyze the CC-2 study is attempting to use the Section 252 time limitations to its advantage. Instead of granting a reasonable waiver of the 9 month rule, Verizon Wireless appears to be holding a gun to the Commission's head in hopes of getting

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[55]ALLTEL Ex. 4, p. 6.

[56]Id.

[57]See Section 252(b)(1).

the CC-2 study rates thrown out and in their place to have extremely low proxy rates with no established relevance to ALLTEL *accepted* in its place.

Both of ALLTEL's studies are in accord with the TELRIC rules and ALLTEL *has satisfied its burden of proof under* 47 C.F.R. §51.505. *Verizon Wireless, in its* Main Brief, continues to argue that any use of embedded costs invalidates the ALLTEL CC-1 TELRIC study. This argument was specifically rejected by the New York Public Service Commission. In a case involving a Verizon study, the New York Public Service Commission found the study was not disqualified by reason of using historical costs as a starting point for setting TELRIC rates. [58] *In rejecting the HAI* model (a successor to the Hatfield model) Judge Linsider noted:

> [I]n its effort to avoid reliance on Verizon's historical costs, it ("HAI") makes all manner of subjective assumptions. If TELRIC required avoiding reference to historical costs even as a starting point, there might be no alternative to a method like HAI's. But if TELRIC permits–as the Commission found it does–initial reliance on historical costs as long as they are severely examined and modified as needed in light of forward-looking analysis, that sort of company-specific analysis seems more like to achieve a reasonable result than one that makes extensive use of algorithms based on subjective assumptions.

2001 NY PUC Lexis 293 at 59-60.

As stated by ALLTEL witness Caballero, "The ALLTEL model uses embedded investment and costs only as a starting point for developing carrying charges and network requirements. Forward looking factors take into account expected future network efficiencies."[59] Thus, Verizon Wireless' demand that the ALLTEL Exhibit CC-1 study be rejected due to its use of embedded costs as a starting point is

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[58] See Proceeding on Motion of the Commission to Examine New York Telephone Company's Rate for Unbundled Network Elements, (Recommended Decision adopted May 16, 2001 at Case 98-C-1357) (2001 NY PUC Lexis 293), as affirmed by Commission Order (2002 NY PUC LEXIS 15).

[59] ALLTEL St. 2 at 2.

inappropriate and erroneous. There is no justification for ignoring the study's results. Other than a request for passwords, and with the recognition that none of the inputs were ever password protected, Verizon Wireless never made a single inquiry of ALLTEL concerning the CC-1 study or the model related thereto.

In an effort to support the rejection of the ALLTEL CC-2 study, Verizon Wireless cites the FCC rule at Section 51.505(e)(2).[60] This rule merely requires notice and an opportunity for comment and the creation of a written factual record. ALLTEL submitted its CC-1 study to Verizon Wireless on December 22, 2003, almost six weeks before hearings and almost a month before testimony was actually due.[61] Then using the very same model but with exclusively Pennsylvania specific inputs ALLTEL finalized and served its CC-2 study six days prior to hearing. Verizon Wireless was afforded an informal opportunity to discuss the study with ALLTEL's witness before hearings, a formal opportunity to cross ALLTEL's witness, to submit testimony in rebuttal to Exhibit CC-2, and to fully brief the issues and file final offers. Certainly, consistent with this rule, Verizon Wireless has been afforded its rights with respect to the ALLTEL TELRIC studies.

Verizon Wireless, in its Main Brief at 27, continues to contend that there is an arithmetic error in ALLTEL's Exhibit CC-2. Mr. Caballero clearly testified that there was no arithmetic error and Mr. Wood's assumption that traffic volumes are

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[60] See Verizon Wireless M.B. at 20.

[61] There was no password protection on the inputs in ALLTEL Exhibit CC-1. Moreover, there is no legal requirement that studies be submitted in fully electronic format.

increasing by an annual 17% growth rate on the ALLTEL network is contrary to actual facts.[62]

Verizon Wireless argues that in lieu of giving any consideration to ALLTEL's TELRIC studies this Commission should adopt the Verizon-North (GTE) rates as a proxy for establishing interim rates for ALLTEL "pending the completion of a rulemaking to set permanent rates for ALLTEL after a thorough examination of its revised cost study[.]"[63]

ALLTEL submits that the Commission has access to two valid TELRIC studies[64] prepared consistent with the format recently relied upon in New York for setting reciprocal compensation rates for ALLTEL New York. These studies present valid representations of ALLTEL's forward-looking costs consistent with the Section 252(d)(2) pricing standard and should be employed in developing reciprocal compensation rates for ALLTEL in this proceeding.[65] Certainly, as addressed in detail in ALLTEL's Main Brief, there is no need to rely on a proxy when valid cost-based rates are available. ALLTEL further notes that while Verizon Wireless witness Wood believes there is some cost support for the Verizon-North rates,[66] Verizon

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[62]See ALLTEL M.B. at 84-89.

[63]Verizon Wireless M.B. at 24-25. ALLTEL notes that this position appears to be in conflict with Verizon Wireless' position on Issue 13, where it seeks to have the Verizon PA rates implemented as interim rates. Apparently, so long as the rates are extremely low, Verizon Wireless does not care if they are the Verizon PA or Verizon-North rates.

[64]Assuming arguendo that this Commission for some reason rejects the TELRIC study in ALLTEL Exhibit CC-2, then we respectfully submit that the study submitted in ALLTEL Exhibit CC-1 is a TELRIC study and ALLTEL has satisfied fully the applicable FCC regulation.

[65]*Since the cost-based rates in the CC-1 and CC-2 studies reflect no transit costs on indirect* traffic and no cost responsibility for construction of Verizon Wireless facilities outside the ALLTEL existing network, if ALLTEL would be assigned responsibility for any of these costs, the studies would have to be revised as would the aforesaid reciprocal compensation rates.

[66]T. 90, 101.

Wireless never reviewed any cost studies for these rates but accepted the rates as part of a negotiated contract.[67] Further, not only did Verizon Wireless never review and critique any cost studies purportedly underlying these negotiated rates, there was never any Commission order establishing such rates as cost-based rates consistent with the Section 252(d)(2) pricing standard. Obviously, these so-called proxy rates were chosen by the Verizon Wireless witness for one reason – they are low in comparison to the reciprocal compensation rates being implemented by the rural ILECs in Pennsylvania.

ALLTEL understands that in an arbitration proceeding such as this proceeding, the time limitations are not really practical for permitting a thorough detailed review of a TELRIC study. ALLTEL witness Caballero, therefore, suggested that if the Commission is reluctant to set permanent rates at this time, that a reasonable course of action would be to set the CC-2 rates, which are based upon a detailed TELRIC study of record, as interim rates on a going forward basis and afford Verizon Wireless additional time to review the study. Mr. Caballero even stated ALLTEL would be willing to provide a workshop to assist Verizon Wireless in a review of the study.[68] If such a procedure would be employed, ALLTEL respectfully believes that the reciprocal compensation rates developed in its CC-2 study would be the appropriate permanent rates. Regardless of the procedure employed, however, there is no justification for setting ALLTEL's reciprocal compensation rates, permanent or interim, at the same rates being charged by

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[67] See ALLTEL Ex. 5, Response to I-7.

[68] T. 217.

Verizon Wireless's affiliate Verizon-North and wholesale ignoring the cost-based reciprocal compensation rates established in ALLTEL's studies CC-1 and CC-2.

C. Summary:

If permanent or interim reciprocal compensation rates are to be established, the only forward-looking cost-based rates of record are those submitted by ALLTEL: The rates in the CC-1 study: Type 2A - $.02505, Type 2B - $.01263, Type 1 - $.01263, and Indirect - $.02243; The rates in the CC-2 study: Type 2A - $.01891, Type 2B - $.00942, Type 1 - $.00942, and Indirect - $.01672.

Issue 10: Propriety of Using a Traffic Factor When Actual Traffic Can Be Measured

A. Issue:

Can the parties implement a traffic factor to use as a proxy for the mobile-to-land and land-to-mobile traffic balance if the CMRS provider does not measure traffic.

B. Discussion:

In its discussion on Issue 10, Verizon Wireless' Main Brief appears to recognize that a traffic factor on indirect traffic is only necessary on the traffic ALLTEL originates, i.e. land-to-mobile. Verizon Wireless recognizes that ALLTEL can measure the traffic it terminates and, therefore, a factor is not necessary, i.e. mobile-to-land.[69] Yet, Verizon Wireless in its Summary turns around and advocates the use of a factor in both directions.[70]

Contrary to Verizon Wireless' recommendation in its Main Brief, ALLTEL does not need a factor for billing Verizon Wireless for either direct or indirect traffic

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[69]Verizon Wireless M.B. at 31-32.

[70]Id. at 32.

terminated to ALLTEL, i.e. mobile-to-land. As to direct traffic ALLTEL can bill traffic originating from Verizon Wireless and terminating to ALLTEL through actual call detail records recorded in an ALLTEL end office with an ALLTEL tandem whether Verizon Wireless' traffic comes through an ALLTEL tandem or comes to an ALLTEL end-office via a Verizon PA tandem. As to indirect traffic ALLTEL can bill the traffic originating from Verizon Wireless and terminating to ALLTEL via the meet point billing records that it receives from Verizon PA, provided it has an effective agreement with Verizon PA to provide these records. As to indirect traffic ALLTEL originates that terminates to Verizon Wireless (land-to-mobile), ALLTEL has agreed to the use of a reasonable factor (Issue 30) if and only if actual data is not available.[71]

C. Summary:

A traffic factor should not be used for mobile-to-land traffic because actual traffic detail is available; however, a 70/30 factor may be used for land-to-mobile traffic.

Issue 13: Interim Terms Pending Final Agreement

A. Issue:

After a requesting carrier sends a formal request for interconnection under Section 252 (b) of the Act, what interim reciprocal compensation terms apply to the parties until an agreement has been negotiated and arbitrated by the Commission?

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[71]Verizon Wireless, in footnote 91 of its Main Brief, confuses this issue. The discussion in this footnote deals with land-to-mobile traffic that ALLTEL does not measure and appears to actually address Issue 30 regarding the appropriate factor to be employed. As discussed in ALLTEL's Main Brief, ALLTEL believed a 70/30 traffic factor was agreed upon and is consistent with industry experience. ALLTEL M.B. at 121-23.

B. Discussion:

Citing the FCC's rules at 47 C.F.R. §51.715, Verizon Wireless contends that the Commission must set interim rates from the date of termination of the prior agreement. In this regard we would point out that Verizon Wireless' formal request to negotiate a successor interconnection agreement was dated June 23, 2003, but not filed with the Commission until August 4, 2003. The issue as phrased by Verizon Wireless refers to the filing of a "formal request" not the date of termination of a prior agreement. Verizon Wireless then argues that Verizon PA's transportation and transit rates be set as interim rates for ALLTEL presumably subject to true-up when final rates are established.[72] As ALLTEL addressed in it Main Brief, Verizon Wireless' proposed use of Verizon PA rates as interim rates is without support and ignores the existence of the complaint currently pending before the Commission at Docket No. C-20039321.

With respect to indirect traffic, which is not addressed in the subpart H rules in §51.700 et seq., an interim rate cannot be established until the complaint proceeding is resolved. That complaint case resolution will determine whether the indirect traffic exchanged between Verizon Wireless and ALLTEL under that prior contract was intended to be compensated at ITORP rates, or at the rates set forth in that contract for the direct exchange of traffic only, which is what ALLTEL maintains.[73] What ever rate is determined there will be the appropriate interim rate pending the establishment of a new agreement in this proceeding. To provide

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[72]See Verizon Wireless Petition at 28 and its Initial Offer at 6.

[73]It is ALLTEL's position that its rates for its prior interconnection agreements covered direct traffic only because indirect traffic was exchanged through ITORP at a 3 cent rate. See ALLTEL St. 1 at 6.

otherwise would unconstitutionally deny ALLTEL its due process rights to have its complaint addressed on the merits

With respect to the direct traffic, ALLTEL opposes the application of the Verizon PA rates as interim rates since cost-based rates have been submitted by ALLTEL and are available to the Commission.[74] Further, the Verizon PA rates are in no way an appropriate proxy for ALLTEL. ALLTEL has submitted TELRIC based rates which clearly demonstrate the unreasonableness of employing Verizon PA rates for ALLTEL's rural operations.

C. Summary:

As to indirect traffic, the ITORP compensation is applicable until the pending complaint proceeding at Docket No. C-20039321 is resolved, a new agreement is established in this proceeding establishing reciprocal compensation and a new agreement addressing the ITORP traffic is executed between ALLTEL and Verizon PA. As to direct traffic, ALLTEL believes the rates developed in its CC-1 and CC-2 studies should be the foundation for setting either permanent or interim rates in this arbitration proceeding.

Issue 15: Payment Due Date

A. Issue:

Whether the payment due date for invoices rendered under the agreement should be determined from the date of the invoice or the date of receipt of the invoice and whether the allotted time should be 30 or 45 days thereafter?

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[74]As stated in footnote 61, Verizon PA's contention in Issue 13 that the Verizon PA rates be adopted as interim rates is contrary to its contention in Issue 9 that the Verizon-North rates be adopted as interim rates.

B. Discussion:

Verizon Wireless does not seem to contradict ALLTEL's position that the payment due date for all undisputed charges, 30 days after the date of the invoice is the industry standard.[75] What Verizon Wireless seems to contend is that its position that payment is due 30 days after receipt of the invoice is required by some shortcoming of Verizon Wireless's centralized payment system. However, as explained in ALLTEL' s Main Brief and as testified to by Ms. Hughes given the use of an industry standard CABs billing system, any delay between ALLTEL's bill date and its receipt date by Verizon Wireless should be minimal at most. ALLTEL St. 1R at 24. ALLTEL would never know the date from which to determine when payment was due and when late payment charges should be applied because it would never know the date Verizon Wireless actually received the invoice. ALLTEL's billing system calculates the payment due date of 30 days from the invoice date for all carriers and it is not reasonably possible to administer a billing system upon some unknown date for one isolated carrier.

Verizon Wireless also brushes aside the fact that in executed interconnection agreements between Verizon Wireless and at least 5 other companies in Pennsylvania, including those with its affiliates Verizon PA and Verizon-North, the interconnection agreements require payment of billed amounts to be due within 30 days of the date of the bill statement because these are not recent agreements. However, a review of ALLTEL Exhibit 6 in connection with transcript pages 152-53 indicates that 75% of Verizon Wireless interconnection agreements in Pennsylvania have a due date of 30 days from the date of the invoice. In fact, the recent

[75]Verizon Wireless M.B. at 35.

agreement in New York provides "All bills will be due when rendered and will be considered past due thirty (30) days after the bill date."[76]

C. Summary:

A payment due date 30 days after the date on the bill is reasonable, practicable, consistent with industry standards and in accord with all ALLTEL interconnection agreements and the vast majority of Verizon Wireless' interconnection agreements.

Issues 16 and 17: Bona Fide Dispute

A. Issue:

> Bona Fide Dispute, General Terms and Conditions, paragraph 9.1.1.3. and 9.1.1.4. Whether the agreement should include the following: "A Bona Fide dispute does not include the refusal to pay all or part of a bill or bills when no written documentation is provided to support the dispute, or should a Bona Fide dispute include the refusal to pay other amounts owed by the disputing Party pending resolution of the dispute. Claims by the disputing Party for damages of any kind should not be considered a Bona Fide dispute." And, therefore, whether once a Bona Fide dispute has been processed in *accordance with this subsection* 9.1.1, *the disputing party must make* payment on any of the disputed amount owed to the billing party by the next billing due date, or the billing party must have the right to pursue normal treatment procedures. Any credits due to the disputing party resulting from the Bona Fide dispute process would be applied to the disputing party's account by the billing party by the next billing cycle upon resolution of the dispute.

B. Discussion:

ALLTEL accepts the changes noted in bold and strikeout as set forth by Verizon Wireless in its Main Brief.[77] Those changes are (1) to insert "**undisputed**" between "other" and "amounts" in the first quoted sentence of Section 9.1.1.3 (originally noted in Verizon Wireless's initial offer); (2) to insert "**shall**" and strike out

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[76] See ALLTEL Ex. 6, Section 5.1.2 (page 9 of 22).

[77] See Verizon Wireless M.B. at 36-37.

"~~must~~" in the next to last sentence (not originally noted in Verizon Wireless's initial offer; however "shall" is ALLTEL's original language - See ALLTEL Ex. 4); and (3) to insert "**any remedy applicable at law or equity**" and strike out "~~normal treatment procedures~~" in the next to last sentence (originally noted in Verizon Wireless's initial offer).

However, as ALLTEL noted in its Main Brief, while Verizon Wireless offered changes that it highlighted, and which ALLTEL could accept, Verizon Wireless also changed other language in its proposal that it did not highlight and that ALLTEL specifically did not accept. ALLTEL previously accepted revisions (1) and (3) above. Revision (2) appears to revise ALLTEL's language; however "shall" was ALLTEL's original proposal, and therefore ALLTEL does not object to it. Accordingly, so that there is no misunderstanding between the parties, since there continue to be other revisions in Verizon Wireless' proposed revisions to ALLTEL's language that Verizon Wireless has not highlighted, ALLTEL is willing to accept what Verizon Wireless proposes as revisions to ALLTEL's original language, as indicated by **bold** and ~~strikeout~~ formatting in its Main Brief, and the final language that should be adopted as agreed upon between the parties is as follows:

9.1.1.3 For purposes of this subsection 9.1.1. "Bona Fide Dispute" means a dispute of a specific amount of money actually billed by a Party. A Bona Fide Dispute does not include the refusal to pay all or part of a bill or bills when no written documentation is provided to support the dispute, nor shall a Bona Fide Dispute include the refusal to pay other undisputed amounts owed by the disputing Party pending resolution of the dispute. Claims by the disputing Party for damages of any kind will not be considered a Bona Fide Dispute for purposes of this subsection 9.1.1.

9.1.1.4 Once the Bona Fide Dispute has been processed in accordance with this subsection 9.1.1, the disputing Party will make payment on any of the disputed amount owed to the billing Party by the next billing due date, or the billing Party shall have the right to pursue any remedy applicable at law or equity. Any credits due to the disputing Party resulting from the Bona Fide Dispute process will be applied to the Disputing Party's account by the billing Party by the next billing cycle upon resolution of the dispute.

C. Summary:

ALLTEL believes that by accepting the changes shown in bold and strike out in Verizon Wireless' Main Brief, the language proposed by Verizon Wireless agrees with the language set forth in ALLTEL's Main Brief, and that such language as set forth above should be adopted to resolve Issues 16 and 17.

Issue 20: Most Favored Nation ("MFN")

A. Issue:

Whether, as Verizon Wireless proposes in Petition Exhibit 1 section entitled "Most Favored Nation, General Terms and Conditions," paragraph 31.1, Verizon Wireless should have the right to opt out of this agreement during its terms and into any other agreement that ALLTEL may execute with another carrier.

B. Discussion:

In Verizon Wireless' Final Best Offer filed February 24, 2004, and in its Main Brief at 37, Verizon Wireless proposes that section 31.0 of the draft agreement, the Most Favored Nation provision, be omitted. ALLTEL concurs in this position.

C. Summary:

This issue is now resolved.

Issue 28: NPA-NXXs with Different Rating and Routing Points

A. Issue:

Whether Verizon Wireless may establish NPA-NXXs in ALLTEL rate centers, regardless of actual delivery point of the associated calls, and require ALLTEL to bear all transport costs to the point of delivery?

B. Discussion:

Verizon Wireless confuses the import of Issue 28 in its Main Brief. At page 40, Verizon Wireless states that as a CMRS carrier its use of NPA-NXXs can never be "constrained" because a wireless customer's location changes with the subscriber's location. However, the issue is not the delivery of the call ultimately to the end user, who as a mobile user can be anywhere. Delivery of the call from Verizon Wireless' interconnection point to its customer is Verizon Wireless' obligation. The issue is the delivery of the call from ALLTEL's customer to Verizon Wireless' interconnection point. With respect to Issue 28, there are two potential cost elements implicated, neither of which is ALLTEL's responsibility.

First, ALLTEL cannot be required to incur costs associated with delivery of traffic to a distant Verizon Wireless interconnection point that is off ALLTEL's network. Those "extra network" costs are not ALLTEL's responsibility for reasons stated in response to Issues 3b and 8, which are incorporated herein. However, Issue 28 also raises the issue of how to handle what are essentially long distance calling charges associated with Verizon Wireless' providing its subscribers NPA NXXs that are rated to a local rate center, but are not delivered anywhere within a local calling area. ALLTEL likewise cannot be required to offer its customers toll free calling.

This issue was squarely addressed by the FCC in TSR Wireless, when the FCC stated that the equivalent of toll calling services are not necessary for interconnection or for the provision of a wireless carrier's service to its customers,

and therefore a LEC does not have to provide that service and not be able to charge for it.

> Section 703(b) concerns how carriers must compensate each other for the transport and termination of calls. It does not address the charges that carriers may impose upon their end users. ...TSR can "buy down" the cost of such toll calls to make it appear to end users that they have made a local call rather than a toll call.

See TSR Wireless, 15 FCC Rcd 11185-85, ¶¶ 30 and 31. Moreover, as Verizon Wireless admitted in its response to ALLTEL Interrogatory 24, no local exchange carriers have agreed to let Verizon Wireless establish NPA-NXXs in their local rate center, regardless of the actual delivery point of the associated calls, and have agreed to bear all transport costs to the point of deliver. ALLTEL Ex. 5.

ALLTEL is willing to treat its customers' calls to Verizon Wireless' virtual NXXs as local calls for ALLTEL's customers only to the extent it is not responsible for incurring any transit or third-party facility costs to deliver the call off its network or any charges on its own network for facilities used to take the call outside the local exchange. Otherwise, ALLTEL is entitled to treat these calls as toll calls to its own end users, or Verizon Wireless may enter into a wide area calling or reverse billing arrangement with ALLTEL so that Verizon Wireless can "buy down" the cost of such toll calls and make the toll nature of the call transparent to end users.

C. Summary:

Verizon Wireless may establish NPA-NXXs in ALLTEL rate centers, regardless of actual delivery point of the associated calls, but Verizon Wireless may not require ALLTEL to provide toll free calling to ALLTEL's own customers or to bear third-party transit or facilities' costs when Verizon Wireless' rating points for an NPA-NXX are different than the call's actual routing points and the call is routed outside

an ALLTEL local exchange and indirectly over a third-party's facilities to a distant switch located off of ALLTEL's network and outside its service territory.

Issue 32: Definition of Interexchange Carrier

A. Issue:

Whether the agreement should include a definition of Interexchange Carrier, a term not used in the agreement.

B. Discussion:

Verizon Wireless in its Final Best Offer filed February 24, 2004, and its Main Brief at 43, agrees to omit this language from the agreement.

C. Summary:

This issue is now resolved.

III. CONCLUSION

For the foregoing reasons, ALLTEL respectfully submits that its positions on the unresolved issues are supported both in law and fact and urges the Commission to approve an interconnection agreement with Verizon Wireless consistent therewith.

Respectfully submitted,

ALLTEL PENNSYLVANIA, INC.

D. Mark Thomas
Patricia Armstrong
Regina L. Matz
Stephen B. Rowell

Attorneys for
ALLTEL Pennsylvania, Inc.

THOMAS, THOMAS, ARMSTRONG & NIESEN
212 Locust Street
P.O. Box 9500
Harrisburg, PA 17108-9500
(717) 255-7600

ALLTEL Pennsylvania, Inc.
One Allied Drive
Little Rock, AR 72202
(501) 905-8460

Dated: March 2, 2004

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Re: Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996	: Docket No.	A-310489F7004

CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of March, 2004, served a true and correct copy of the foregoing Reply Brief on behalf of ALLTEL Pennsylvania, Inc. upon the persons and in the manner indicated below:

HAND DELIVERY

Honorable Wayne L. Weismandel
Administrative Law Judge
Pennsylvania Public Utility Commission
2nd Floor West
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265
(including diskette)

VIA E-MAIL AND FEDERAL EXPRESS

Christopher M. Arfaa
Drinker Biddle & Reath LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103

Elaine D. Critides, Esquire
Associate Director, Regulatory
Verizon Wireless
Suite 400 West
1300 Eye Street, N.W.
Washington, DC 20005

Patricia Armstrong

DrinkerBiddle&Reath LLP

ORIGINAL

Christopher M. Arfaa
215-988-2715
christopher.arfaa@dbr.com

Law Offices
One Logan Square
18TH and Cherry Streets
Philadelphia, PA
19103-6996

215-988-2700
215-988-2757 fax
www.drinkerbiddle.com

NEW YORK
WASHINGTON
LOS ANGELES
SAN FRANCISCO
PRINCETON
FLORHAM PARK
BERWYN
WILMINGTON

April 6, 2004

Via Federal Express

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

RE: Petition of Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996, Docket No. **A-310489F7004**

Dear Secretary McNulty:

I enclose for filing in the referenced matter the original and four copies of the Notice of Supplemental Authority of Cellco Partnership d/b/a Verizon Wireless.

Thank you for your assistance. Please do not hesitate to contact me if you have any questions regarding this matter.

Very truly yours,

Christopher M. Arfaa

CMA/cms
Enclosures

cc: ALJ Wayne L. Weismandel *(w/encl. via First Class Mail)*
D. Mark Thomas, Esq. *(w/encl. via Federal Express)*

Established
1849

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 Of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With ALLTEL Pennsylvania, Inc.	:	A-310489F7004

NOTICE OF SUPPLEMENTAL AUTHORITY

Petitioner, Cellco Partnership d/b/a Verizon Wireless, hereby notifies the Commission of the existence of supplemental authority relevant to the issues to be resolved in this matter.

The decision of the United States District Court for the Western District of Oklahoma in *Atlas Telephone Co. v. Corporation Commission of Oklahoma*, No. CIV-03-0347-F, 2004 WL 541879 (W.D. Okla. Mar. 5, 2004), was issued on March 5, 2004, after briefing in this matter was completed. The undersigned became aware of the decision on March 25, 2004, the day after ALJ Weismandel's Recommended Decision in this matter ("R.D.") was issued by the Secretary. A copy of the decision is attached for the Commission's convenience.

The *Atlas Telephone* decision is relevant to Issues No. 2, 3(a), 3(b), 4, 5, 8, 24, 28, and 31 in this proceeding (*see* R.D. at 11-19, 25-26, 28-30) because it addresses the applicability of reciprocal compensation obligations to all calls between incumbent local exchange carriers ("LECs") and wireless carriers originating and terminating within the same major trading area ("MTA"), even when such intra-MTA land-to-wireless calls are carried by intermediate, third-party carriers.

In addition, the *Atlas Telephone* decision is relevant to Issue No. 9 (*see* R.D. at 19-22) because it addresses the propriety of a state commission's adoption of "bill and keep" as a means

of reciprocal compensation between incumbent LECs and wireless carriers after rejection of the incumbent LECs' cost study and proposed reciprocal compensation rate.

Respectfully submitted,

Christopher M. Arfaa
Drinker Biddle & Reath
One Logan Square
18th & Cherry Streets
Philadelphia, PA 19103
(215) 988-2700

Counsel for Cellco Partnership d/b/a
Verizon Wireless

DATED: April 6, 2004

H
Only the Westlaw *citation is* currently available.

United States District Court,
W.D. Oklahoma.

ATLAS TELEPHONE COMPANY, et al., Plaintiffs,
v.
CORPORATION COMMISSION OF OKLAHOMA, et al., Defendants.

No. CIV-03-0347-F, CIV-03-0348-F, CIV-03-0349-F, CIV-03-0350-F.

March 5, 2004.

Background: Rural telephone companies brought actions challenging orders of the Oklahoma Corporation Commission, establishing interconnection obligations under the Telecommunications Act between the RTCs and wireless telecommunications carriers.

Holdings: The District Court, Friot, J., held that:
(1) Commission's final orders did not impermissibly require RTCs to waive recovery of costs associated with the transport and termination of telecommunications;
(2) Federal Communications Commission (FCC) regulations permitted Commission to apply reciprocal compensation obligations to all calls originated by an RTC and terminated by a wireless provider within the same major trading area; and
(3) evidence was sufficient to support the Commission's rejection of the RTCs' cost study as flawed, and its rejection of the rate or rates proposed by the RTCs.

Interconnection agreements affirmed.

[1] Telecommunications 0

372k0 k.

When an aggrieved party brings a cause of action under Telecommunications Act provision governing judicial review of interconnection obligations determined by state agency, a federal district court will consider de novo whether interconnection *agreements* are in compliance with the Act and implementing Federal Communications Commission (FCC) regulations; all other issues, including state law determinations, are reviewed under an arbitrary and capricious standard. 42 U.S.C.A. § 252(e)(6).

[2] Telecommunications 0

372k0 k.

Oklahoma Corporation Commission's final orders requiring interconnection agreements between rural telephone companies (RTC) and wireless telecommunications carriers did not impermissibly require RTCs to waive recovery of costs associated with the transport and termination of telecommunications; Commission's orders provided for compensation through a bill and keep arrangement specifically allowed by Federal Communication Commission (FCC) rules, and were supported by evidence that no forward-looking rate was established and by RTCs' failure to rebut presumption of "roughly balanced" traffic. 47 C.F.R. § 51.713(b),(c).

[3] Telecommunications 0

372k0 k.

Federal Communications Commission (FCC) regulations permitted Oklahoma Corporation Commission to apply reciprocal compensation obligations to all calls originated by a rural telephone company (RTC) and terminated by a wireless provider within the same major trading area, without regard to whether those calls were delivered via an intermediate carrier. 47 U.S.C.A. § 251(b)(5); 47 C.F.R. § 51.701(b)(1),(2).

[4] Telecommunications 0

372k0 k.

Evidence at hearing before Oklahoma Corporation Commission regarding interconnection obligations between rural telephone companies (RTC) and wireless telecommunications carriers was sufficient to support the Commission's rejection of the RTCs' cost study as flawed, and its rejection of the rate or rates proposed by the RTCs; RTCs' proposed rates were based on an average cost study that *did not* establish a forward-looking rate representative of all

the RTCs. 47 U.S.C.A. § 251(b)(5); 47 C.F.R. § 51.701(b)(1),(2).

[5] **Telecommunications** 0
372k0 k.

Rural telephone companies (RTC) did not exhaust administrative remedies with respect to arbitrator's ruling regarding historical compensation claimed to be due to the RTCs for prior traffic terminated by the RTCs, precluding judicial review of Oklahoma Corporation Commission's failure to resolve the issue at a proceeding to establish interconnection obligations between the RTCs and wireless telecommunication carriers; RTCs did not raise the arbitrator's ruling in any documents filed with the Commission at any time, including in their formal appeal of the arbitrator's report.

Ambre C. Gooch, David W. Lee, Kendall W. Parrish, Mary K. Kunc, Ronald Comingdeer, Comingdeer Lee & Gooch, Kimberly K. Brown, Williams, Box, Forshee & Bullard PC, Oklahoma City, OK, for Plaintiffs.

Chanda R. Graham, Charles W. Wright, Rachel Lawrence Mor, Oklahoma Corporation Commission, Office of General Counsel, Jennifer H. Kirkpatrick, Marc Edwards, Phillips, McFall, McCaffrey, McVay, Murrah, Oklahoma City, OK, Lawrence S. Smith, Smith, Majcher & Mudge LLP, Austin, TX, John P. Walters, The Walters Law Firm, Edmond, OK, Mark Joseph Ayotte, Philip R. Schenkenberg, Briggs & Morgan, St Paul, MN, Michael G. Harris, William H. Hickman, Moricoli, Harris & Cottingham, Nancy M. Thompson, Oklahoma City, OK, Brett D. Leopold, Overland Park, KS, for Defendants.

ORDER

FRIOT, District J.

*1 These cases appeal orders of the Oklahoma Corporation Commission [FN1] establishing interconnection obligations under the Telecommunications Act of 1996, between traditional landline telephone companies and wireless telecommunications carriers. Each of these four actions seeks determination of the same issues, except that CIV-03-0349 also raises an additional issue unique to that action. The instant order determines the common issues among all four actions and is therefore entered in each of those actions. A separate order addressing only the additional issue unique to CIV-03-0349-F is also entered in that action today. (Docket entry no. 57 in -0349).

I. Preliminary Matters
A. The Parties

The plaintiffs in each of these actions are traditional landline rural telephone companies, referred to by the parties in their briefs [FN2] and by the court in this order as rural telephone companies or RTCs. [FN3] The rural telephone companies bring these actions to challenge the Commission's orders entered in the proceedings below and the interconnection agreements implementing those orders. The RTCs contend the orders and agreements are based on erroneous interpretations of law and unsupported evidentiary findings. The RTCs describe the nature of the dispute as generally concerning "(1) which telecommunications traffic is subject to the reciprocal compensation requirements of the Telecommunications Act of 1996 and (2) the rate of compensation to be paid for the transport and termination of such telecommunications." (Briefs in chief, p.1.) Stated more precisely, the RTCs appeal four distinct aspects of the Commission's orders. These four issues are set out with specificity in the "Statement of the Issues" portion of this order. The RTCs seek declaratory and injunctive relief from the Commission's Final Orders determining these issues [FN4] and from the interconnection agreements implementing these determinations.

Defendants in all four related actions include the Oklahoma Corporation Commission, and Commissioners Denise A. Bode, Bob Anthony, and Jeff Cloud. The commissioners are sued in their official capacities only. A different wireless telecommunications carrier, [FN5] referred to as a wireless carrier or provider in this order, is also a defendant in each action. [FN6] The defendants jointly defend the Commission's Final Orders and the associated interconnection agreements. They ask the court to affirm those orders and the agreements in all respects.

B. Procedural Background

The undisputed allegations in the pleadings and undisputed statements in the briefs, the statements made by the Commission in its orders, and the documents included in the jointly designated record (JDR), establish that the procedural background of these actions is as follows.

This dispute originally arose from negotiations for interconnection agreements between the wireless

carriers and the rural telephone companies. The parties conducted group negotiations and resolved many issues but were unable to resolve all issues. Most significantly, negotiations broke down over reciprocal compensation arrangements for the transport and termination of interconnecting telecommunications, and over the rate for such telecommunications transport and termination.

*2 To resolve the open issues, each of the wireless carriers which is now a defendant in these actions filed a petition with the Oklahoma Corporation Commission, seeking arbitration under the 1996 Telecommunications Act, 47 U.S.C. § § 151 *et seq.* (the Telecommunications Act or the Act). The Commission consolidated the causes and assigned an arbitrator. The parties engaged in discovery, submitted written direct and rebuttal testimony, and tried the case before the arbitrator in a three-day hearing. The arbitrator took the issues under advisement and ultimately authored the Report and Recommendations of the Arbitrator (the Arbitrator's Report or the Report).

The Arbitrator's Report included fifteen numbered paragraphs under the heading, "Findings of Fact, Conclusions of Law and Recommendations." The Report also included a single-spaced, 51-page summary of witness testimony (attached to the report as Exhibit "A"), and a single-spaced, three-page issues matrix describing the issues submitted, the relevant contract (or interconnection agreement) sections, and the arbitrator's decision with respect to each of those issues (attached to the report as Exhibit "B"). The Arbitrator's Report, with exhibits, was adopted by the Commission in its Interlocutory Order and in the Commission's Final Orders. The entire Report, with exhibits, was attached to each of these orders.

The RTCs appealed the Commission's Final Orders to the Oklahoma Supreme Court. The Oklahoma Supreme Court, however, dismissed the appeals for lack of jurisdiction.

On March 13, 2003, the RTCs filed the instant actions. First Amended Complaints were filed in each of these actions on July 10, 2003. Other than the additional issue unique to CIV-03-0349, the issues raised by the pleadings in each of these actions are identical. Therefore, the court held a joint status and scheduling conference, at which time, with the agreement of the parties, one briefing schedule was established to govern all four actions. The actions were not consolidated, but pursuant to the joint schedule, the parties filed one joint designation of record (with one supplement to the JDR). The plaintiff RTCs then submitted joint briefs in chief (entitled "initial" briefs), the defendant wireless carriers submitted joint response briefs (with an appendix), and the RTCs submitted a joint reply brief (also with an appendix). The Commission and commissioners relied on the wireless providers' briefing and did not otherwise participate in the argument.

Although a variety of issues (such as certain affirmative defenses) were raised in the pleadings, the court finds that all issues other than those briefed by the plaintiffs have been abandoned.

The court commends the parties and their counsel for the highly professional manner in which they have conducted themselves in these proceedings. The parties have cooperated admirably as to all procedural matters requisite to the effective, orderly and reasonably expeditious presentation of issues to the court for determination. This high level of professionalism has, to put it mildly, been most helpful.

C. Jurisdiction

*3 The RTCs bring these actions under 42 U.S.C. § 252(e)(6) of the Telecommunications Act. That statute provides as follows.

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the [interconnection] agreement or statement [of the Commission determining interconnection obligations under the Act] meets the requirements of section 251 of this title and this section.

Based on this provision and the procedural history of this dispute, the court finds and concludes that it has jurisdiction.

D. Standard of Review

[1] Both the RTCs and the wireless carriers rely on *Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493 (10th Cir.2000) as stating the applicable standard of review to be exercised by this court. (Briefs in chief, p. 19, n.1; response briefs, p. 8, n.29.) As stated by the Tenth Circuit in *Southwestern Bell,* when an aggrieved party brings a cause of action under § 252(e)(6), a federal district court will consider *de*

novo whether interconnection agreements are in compliance with the Act and implementing Federal Communications Commission regulations. *Id.* at 498. All other issues, including state law determinations, are reviewed under an arbitrary and capricious standard. *Id.* Thus, in these actions, the Oklahoma Corporation Commission's findings of fact, and its application of the law to those facts, are reviewed under an arbitrary and capricious standard. As observed by the Supreme Court, *Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974), "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

These standards of review are the ones which this court applies in this order. Review of the Commission's evidentiary findings is also limited, of course, to the record developed during the administrative proceeding. *See, e.g., United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15, 83 S.Ct. 1409, 10 L.Ed.2d 652 (1963) ("the reviewing function is one ordinarily limited to consideration of the decision of the agency or court below and of the evidence on which it was based").

E. Statement of the Issues

As already stated, in each of these related actions, the rural telephone companies appeal four common aspects of the Commission's rulings. [FN7]

1. The RTCs' first point of error [FN8] is: "The OCC Arbitration Orders and the Agreements Impermissibly Require the RTCs to Waive recovery of Costs associated with the Transport and Termination of Telecommunications." (This is the proposition as it appears in the text of the briefs in chief at p. 20; in the index to those briefs it is worded slightly differently.) Explaining this contention in the text of their briefs, the RTCs state that "Neither the OCC's Arbitration Orders nor the Agreements contain provisions for compensation. Therefore, the Agreements are contrary to federal law and FCC regulations." (Briefs in chief, p. 20.) The wireless carriers articulate this first issue as: "Did the OCC act in an arbitrary and capricious manner in imposing a 'bill-and-keep' [FN9] mechanism for implementing reciprocal compensation between each RTC and each Wireless Carrier?" (Response briefs, p. 1.)

**4 After studying the plaintiffs' first point of error as developed in the text of the plaintiffs' own briefs, the court articulates the first issue before it as follows: Do the Commission's orders impermissibly require the RTCs to waive recovery of costs associated with the transport and termination of telecommunications because the orders improperly impose a system of bill and keep? (This issue is addressed in Part A of the Discussion portion of this order.)

2. The second point of error [FN10] raised by the RTCs is that "The OCC Arbitration Order and the Agreements Impermissibly Require the RTCs to compensate the CMRS providers for Traffic originated by other carriers." (Briefs in chief, p. 23.) The wireless carriers [FN11] articulate this issue as: "Do principles of reciprocal compensation apply on all calls between a Wireless Carrier and an RTC that originate and terminate in the same Major Trading Area, or MTA?" (Response briefs, p. 1.)

After studying the plaintiffs' second point of error as developed in the text of the plaintiffs' own briefs, the court articulates the second issue before it as follows: Do the Commission's orders impermissibly apply reciprocal compensation obligations to all calls originating and terminating within the same major trading area, even when such intra-MTA land-to-wireless calls (that is, from the RTCs to the wireless providers) are carried by intermediate carriers? (This issue is addressed in Part B of the Discussion portion of this order.)

3. The RTCs' third point of error [FN12] is that "The OCC Order and the Agreements are Contrary to the Federal Act because they do not contain a rate for terminating CMRS provider traffic." (Briefs in chief, p. 30.) The wireless carriers articulate this issue as: "Did the OCC err in rejecting the RTCs' proposed cost study?" (Response briefs, p. 1). The pertinent portion of the plaintiffs' reply brief is entitled: "The OCC's Rejection of the RTCs' Traffic Study and the Forward-Looking Cost it Produced was Arbitrary and Capricious." (Reply brief, p. 19.)

After studying the plaintiffs' third point of error as developed in the text of the plaintiffs' own briefs, the court articulates the third issue before it as follows: Did the Commission err in rejecting the RTCs' cost study and their proposed forward-looking rate? (This issue is addressed in Part C of the Discussion portion of this order.)

4. The RTCs' fourth point of error [FN13] is that "The OCC's refusal to arbitrate the unresolved issue of compensation to the RTCs for traffic terminated prior to the effective date of the agreements is

contrary to federal law." (Briefs in chief, p. 32.) The wireless carriers articulate this issue as: "Did the OCC err in refusing to consider the RTCs' request for compensation prior to the effective date of the final agreements approved by the OCC?" (Response briefs, p. 1.)

After studying the plaintiffs' fourth point of error as developed in the text of the plaintiffs' own briefs, the court articulates the fourth issue before it as follows: Was the refusal to determine a historical compensation issue regarding compensation claimed due to the RTCs for their termination of traffic prior to the effective date of the agreements, contrary to federal law? (This issue is addressed in Part D of the Discussion portion of this order.)

II. Discussion
A. Do the Commission's Orders Impermissibly Require the RTCs to Waive Recovery of Costs Associated with the Transport and Termination of Telecommunications Because the Orders Improperly Impose A System of Bill and Keep?

*5 [2] The RTCs argue that the Commission's imposition of bill and keep is erroneous because the "the OCC provided no substantive findings supporting either its rejection of the RTCs' evidence of traffic imbalance or its reliance on a presumption of balanced traffic." (Briefs in chief, p. 21.) "As such," the RTCs go on to state, "the OCC's decision to reject the RTC's [sic] evidence rebutting a presumption of balanced traffic was arbitrary and capricious and is contrary to the Act and the FCC's regulations." (Briefs in chief, p. 21.)

FCC Rule 51.713(b) [FN14] provides that a state commission may impose bill and keep as the method for reciprocal compensation if that commission determines that the amount of traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction. Subsection (c) of the same rule provides that nothing in § 51.713 precludes a state commission from presuming that the amount of telecommunications traffic "from one network to another is roughly balanced with the amount of traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption." [FN15]

Clearly, these rules allow a state commission to place the burden of proof on carriers asserting that traffic is not in balance--here, the RTCs. It is also clear that they authorize commissions to invoke a presumption of roughly balanced traffic unless the commission finds that such a presumption has been adequately rebutted. Invoking this presumption is exactly what the Oklahoma Corporation Commission did when it stated in its Interlocutory Order (reaffirmed at p. 3 of the Commission's Final Orders), that "there is a presumption of 'balanced traffic.' " [FN16] Moreover, the Commission expressly adopted the Arbitrator's Report in each of the individual Final Orders (at p.3 of each of those Final Orders), and attached a complete copy of that Report, with exhibits, to each of those individual Final Orders. That Report found that, "*Because* no forward-looking rate was established, and traffic is roughly balanced, bill-and-keep should be adopted as the appropriate mechanism for providing reciprocal compensation." [FN17] (Emphasis added.) When it adopted the Arbitrator's Report (at p. 3 of the Commission's *Final* Orders), the Commission also adopted the arbitrator's rationale and his findings in support of bill and keep.

For these reasons, the court disagrees with the RTCs' contention that the Commission's ruling regarding bill and keep is in error because it "provided no substantive findings supporting either its rejection of the RTCs' evidence of traffic imbalance or its reliance on a presumption of balanced traffic." (Briefs in chief, p. 21.) The court finds that the Commission adequately supported its rulings with substantive findings that no forward-looking rate was established and that the presumption of roughly balanced traffic had not been rebutted.

*6 The RTCs also argue the related but somewhat different contention that the Commission's findings regarding bill and keep are in error because the evidence is not sufficient to support those findings. The RTCs state: "the OCC disregarded substantial evidence in the record presented by the RTCs and arbitrarily presumed traffic was balanced. Such finding by the OCC is devoid of any evidentiary support in the record and is thus, arbitrary and capricious." (Briefs in chief, p. 23.) To support this conclusion, the RTCs argue that they "presented sufficient evidence in support of their claim that they incur costs in terminating the additional calls delivered by CMRS providers," that "such costs are positive due to the significant imbalance of traffic," and that they "presented the only traffic study in evidence and such study demonstrated a significant imbalance of traffic terminated by the RTCs." (Briefs in chief, pp. 20-21.)

The question at this stage is whether the record evidence, *when taken as a whole*, is sufficient to support what the Commission found when it adopted the Arbitrator's Report, *i.e.* that "no forward-looking rate was established" and that the RTCs had not rebutted the presumption of "roughly balanced" traffic. (Arbitrator's Report, p. 4, ¶ 13.) The RTCs presented a traffic study sponsored by RTC witness McBride, which purported to show that the traffic flowing to and from the parties was not roughly balanced. (Rebuttal testimony of William McBride on behalf of RTCs, p. 14, found in the JDR at Bates Stamp 1484.) The RTCs' study, however, did not analyze traffic between any individual RTC and any individual wireless carrier. (Transcript of proceedings June 17, 2002, pp. cb66, 67, found in the JDR at Bates Stamp 3672-73.) Several witnesses testified to problems with the RTCs' study, and limitations were acknowledged by the study's sponsoring witness. (Transcript of proceedings June 17, 2002, pp. cb- 62-86 found in the JDR at Bates Stamp 3668-92; Transcript of proceedings June 18, 2002, pp. rdh-140-147, found in the JDR at Bates Stamp 3930-37.) Even the RTCs have admitted certain "errors" with their traffic study results, although they argue these errors are "minor" and "not fatal." (Briefs in chief, p. 23.)

After thorough consideration of the briefs and the substantial administrative record, the court rejects the RTCs' contention that the Commission's ruling is "devoid of any evidentiary support in the record and is thus, arbitrary and capricious." (Briefs in chief, p. 23.) To the contrary, the court finds and concludes *that there is* adequate evidentiary support for the Commission's underlying findings supporting its imposition of bill and keep, which include its findings that the RTCs' cost study should be rejected and that no forward- looking rate was established.

Finally, in response to the RTCs' arguments regarding the incorrectness of bill and keep, the wireless carriers argue that there is no prejudicial effect to the RTCs from the Commission's determinations because those determinations are limited by the following statement in the Arbitrator's Report as adopted by the Commission.

> *7 The Arbitrator concurs with Staff's recommendation that transport and termination be provided on a bill and keep basis until an individual study shows that it is more economically and justifiably appropriate to do otherwise. The bill and keep arrangement shall continue until the Commission has determined that an imbalance in the exchange of telecommunication traffic exists, at which time a forward-looking cost study is to be utilized to establish the rate. [FN18]

The court finds and concludes that there is some prejudice to the RTCs from the Commission's adverse ruling imposing bill and keep, but it also finds and concludes that such prejudice is expressly limited by the above-quoted statement.

In summary, the RTCs have not shown that the Commission's Final Orders or the interconnection agreements required by those orders impermissibly require the RTCS to waive recovery of costs associated with the transport and termination of telecommunications. The Commission's Final Orders provide for compensation through a bill and keep arrangement specifically allowed by FCC rules, an arrangement which provides for recovery of such costs. The Commission adequately supports its determinations imposing bill and keep with findings, and those findings are, in turn, adequately supported by the record evidence. The court concludes that the Commission did not err when it imposed bill and keep as a mechanism for implementing reciprocal compensation between each RTC and each wireless carrier until such time as an individual study is presented which adequately rebuts the presumption of roughly balanced traffic.

B. Do the Commission's Orders Impermissibly Apply Reciprocal Compensation Obligations To All Calls Originating and Terminating Within the Same Major Trading Area, Even When Such Intra-MTA Land-to-Wireless Calls are Carried by Intermediate Carriers?

[3] The RTCs' second point of error is that the Commission incorrectly ruled that reciprocal compensation applies to all calls originating and terminating within the same major trading area (MTA), even when such land-to- wireless intra-MTA calls (from the RTCs to the wireless providers) are carried by intermediate carriers, thereby improperly requiring the RTCs to compensate the wireless providers for such calls. [FN19]

The Telecommunications Act imposes upon all local telephone exchange carriers (LECs), including the RTCs *in this action*, the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). For calls between "a LEC and a telecommunications carrier other than a CMRS [or wireless] provider," the FCC has defined the telecommunications to which reciprocal

compensation applies as "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." 47 C.F.R. § 51.701(b)(1) (emphasis added). This order refers to the excepted calls as "access calls." By excluding such access calls from the definition of telecommunications to which reciprocal compensation applies, the FCC has expressly limited LEC-toLEC reciprocal compensation obligations to calls within landline local calling areas.

*8 By contrast, for calls between a local exchange carrier and a CMRS provider such as the RTC-to-wireless calls in issue here, the FCC has adopted a different definition of telecommunications as to which reciprocal compensation applies. For *this type* of call, the FCC has defined telecommunications traffic as "Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined [by the regulations]." 47 C.F.R. § 51.701(b)(2). The definition includes no exception for access calls carried by an intermediary carrier.

Thus, although the FCC was clearly aware of the issues created when access calls are exchanged, as evidenced by the exemption from reciprocal compensation obligations for LEC-to-LEC access calls under § 51.701(b)(1), the FCC did not create a similar exception for LEC-to-CMRS access calls *which originate* and terminate within the same major trading area. 47 C.F.R. § 51.701(b)(2).

The court agrees with the wireless carriers' characterization of the RTCs' contentions regarding this issue, which is that, "At bottom, the RTCs argue that...since all of the land to mobile intraMTA traffic they [the RTCs] send to the Wireless Carriers is 'toll telephone service,' they [the RTCs] are not required to make reciprocal compensation payments to the CMRS providers." The court also agrees with the wireless providers that "[This] argument is directly contradictory to FCC Rule 51.701(b)." (Response briefs, p. 19.) [FN20]

The court concludes that the Oklahoma Corporation Commission did not err when it ruled [FN21] that reciprocal compensation obligations apply to all calls originated by an RTC and terminated by a wireless provider within the same major trading area, without regard to whether those calls are delivered via an intermediate carrier. In so ruling, the Oklahoma Corporation Commission merely applied federal regulatory definitions to the dispute before it.

C. Did the Commission Err when it Rejected the RTCs' Cost Study and Their Proposed Forward-Looking Rate?

[4] Defendants' response briefs (at pp. 24-36) summarize the evidence supporting the Commission's rejection of the RTCs' cost study and its rejection of the rate proposed by the RTCs. The court finds those arguments well taken and further finds that no purpose would be served in restating them here, especially given the overlap of these evidentiary issues with the evidentiary issues already covered in Part A of the Discussion portion of this order. The court does, however, touch briefly on the following points which are not covered elsewhere.

First, as pointed out by the wireless carriers (response briefs, pp. 26-27), the burden of proof is on the RTCs to show that a proposed rate meets the required standards, a contention which the RTCs do not dispute in their reply brief.

Second, it is also undisputed that even the RTCs did not propose that the Commission adopt the rate generated by their cost study. (*See,* direct testimony of Jonathan P. Harris, on behalf of the RTCs at pp.11-12, found in the JDR at Bates Stamp page 675-76.)

*9 Third, in the text of their briefs pertaining to this point of error, the RTCs state repeatedly that the arbitrator improperly based his findings upon his opinion that the model employed by the plaintiffs had already been found to be "suspect by the Arbitrator in at least one previous, unrelated hearing due to the ability of the persons using it to manipulate the results" (briefs in chief, p. 31; Arbitrator's Report quoted in reply brief at p. 20 at n. 97 and at p.21 at n. 101). Because of the emphasis the RTCs place on this argument, the court addresses it in more detail.

The RTCs are correct that in his findings, the arbitrator refers to his previous experience evaluating "the Hatfield model," which was the model used by the RTCs to try to establish forward-looking costs in this case. (Arbitrator's Report, p. 3 at ¶ 11.) *Immediately* following that statement regarding his prior experience with the Hatfield model, however, the arbitrator goes on to make findings regarding the results of the plaintiffs' model as they obtain "[I]n *this* case...." (Arbitrator's findings, p. 3 at ¶ 11.

emphasis added.) The arbitrator's findings then detail: problems with the RTCs' proposed rate, based, as it was, on "an average cost study"; and the arbitrator's conclusion that "it seems to be impossible for an average cost study to be representative of all those varied companies." The Report further states that "[i]t doesn't really matter whether 1994 data or the 2000 data, which was not allowed, is used" because "the results are still questionable." (Arbitrator's Report, p.4 at ¶ 12.) It was for these reasons that the arbitrator went on to find, as discussed earlier in this order, that: "Because no forward-looking rate was established, and traffic is roughly balanced, bill-and-keep should be adopted as the appropriate mechanism for providing reciprocal compensation" and that "[a]ny party [who contends otherwise] must present an individual cost study that complies with the Act, and must show that establishing rates and rendering bills is more economically appropriate than bill and keep." (Arbitrator's Report, p. 4 at ¶ 13.) Moreover, all of the arbitrator's findings and recommendations are supported with 51 single-spaced pages which summarize the evidence in *this* case, some of it in exhaustive detail, and much of it bearing on the weight to be given--or not given--to the RTCs' cost study. (The evidentiary summary is attached as Exhibit "A" to the Arbitrator's Report.) Thus, the court finds and concludes that the arbitrator did not improperly base his determinations on evidence taken in another case, but that he properly based his determinations on evidence taken in this case.

In summary, consistent with other findings already stated in this order, the court finds that the record evidence is sufficient to support the Commission's rejection of the RTCs' cost study as flawed, and its rejection of the rate or rates proposed by the RTCs in the proceedings below. The court concludes that the Commission did not err in adopting the arbitrator's findings rejecting the plaintiffs' cost study model and RTCs' proposed rate or rates.

D. Was the Refusal To Determine a Historical Compensation Issue Regarding Compensation Claimed to be Due to the RTCs For their Termination of Traffic Prior to the Effective Date of the Agreements, Contrary to Federal Law?

*10 [5] In their fourth proposition the RTCs argue that the Commission erred in not resolving a disputed issue regarding compensation claimed to be due to the RTCs for prior traffic terminated by the RTCs, referred to in this order as the historical compensation issue.

There is a fundamental problem with the RTCs' attempt to have this court resolve the correctness of the ruling which struck this compensation issue from the proceedings below. Although the RTCs' briefs state that *the OCC* erred by failing to resolve this issue (plaintiffs' reply brief, p. 21), the RTCs have identified no *Commission* decision determining that this historical compensation issue would not be considered. The ruling about which plaintiffs complain (at reply brief, p. 21 at n.104) is merely a ruling by the arbitrator stating that he would not hear evidence on this historical compensation issue because it was unrelated to the matter assigned to him. [FN22] Furthermore, in stating his ruling on this issue, the arbitrator suggested that the RTCs could pursue the merits of this issue in a separate cause. The RTCs do not contend that they have pursued this issue in a separate proceeding before the Commission. There also appears to be no dispute that the RTCs did not raise the arbitrator's ruling in any *documents* filed with the Commission at any time, including in their formal appeal of the Arbitrator's Report. [FN23]

This court reaches no conclusion as to whether the historical compensation issue identified by the RTCs has been waived, or as to whether, at this late date, the RTCs could somehow pursue that issue before the Commission. This court does conclude, however, that it has no jurisdiction to review the propriety of an arbitrator's ruling stated orally during the hearings which was not reviewed or ruled upon by the Commission; the RTCs did not exhaust their administrative remedies with respect to the arbitrator's ruling and as a result, there is no Commission ruling for this court to review. Accordingly, the court finds and concludes that the RTCs' fourth point of error should be denied without prejudice because the court does not have jurisdiction to determine the merits of the contested arbitrator's ruling.

Conclusion

After thorough study of the parties' submissions, the record, and the relevant arguments and authorities, the court orders as follows with respect to the common points of appeal raised in each of the above-styled actions.

The RTCs' first, second, and third points of error challenging aspects of the Oklahoma Corporation Commission's Final Orders entered in the proceedings below and challenging associated

aspects of the interconnection agreements required by those orders, are each DENIED. The RTCs' fourth point of error is also DENIED, but not on the merits, as the court finds and concludes that it does not have jurisdiction to determine the merits of that issue. Consistent with these rulings, the declaratory and injunctive relief requested by the RTCs in their First Amended Complaints filed in each of the above-styled actions is DENIED, and the Commission's Final Orders and the interconnection agreements required by those orders are AFFIRMED in all respects.

FN1. *In the Matter of the Application of [Certain Wireless Carriers] for Arbitration Under the Telecommunications Act of 1996,* Corporation Commission of the State of Oklahoma, Cause Nos. PUD 200200149, PUD 200200150, PUD200200151, and PUD200200153, and the final orders entered in those matters. Respectively, those orders are Final Order No. 468958 found in the Joint Designation of Record (JDR) at Bates Stamp 50, Final Order No. 468959 found in the JDR at Bates Stamp 3342, Final Order No. 468960 found in the JDR at Bates Stamp 209, and Final Order No. 468961 found in the JDR at Bates Stamp 348. Each of these individual final orders was entered on October 22, 2002. In both of the court's orders entered today, these individual final orders are referred to collectively as "the Commission's Final Orders."

FN2. All of the initial briefs of the plaintiffs filed in these actions are referred to together in this order as the briefs in chief. All of the response briefs filed in these actions are referred to together in this order as the response briefs. Page references are to the briefs filed in CIV-03-0347, -0348 and -0350, because the briefs filed in -0349 have a different pagination due to the extra issue briefed in that case. The same reply brief was filed in each of these four actions, so this order only refers to reply brief, singular, and the pagination of that brief does not change depending upon the case in which it was filed.

FN3. As identified in the court's docket sheet, the plaintiffs are: Atlas Telephone Company; Beggs Telephone Company; Bixby Telephone Company; Canadian Valley Telephone Company; Carnegie Telephone Company; Central Oklahoma Telephone Company; Cherokee Telephone Company; Chickasaw Telephone Company; Chouteau Telephone Company; Cimarron Telephone Company; Cross Telephone Company; Dobson Telephone Company; Grand Telephone Company; Hinton Telephone Company; KanOkla Telephone Association; McCloud Telephone Company; Medicine Park Telephone Company; Oklahoma Telephone & Telegraph; Oklahoma Western Telephone Company; Panhandle Telephone Cooperative, Inc.; Pine Telephone Company; Pinnacle Communications; Pioneer Telephone Cooperative, Inc.; Pottawatomie Telephone Company; Salina-Spavinaw Telephone Company; Santa Rosa Telephone Cooperative, Inc.; Shidler Telephone Company; South Central Telephone Association; Southwest Oklahoma Telephone Company; Terral Telephone Company; Totah Telephone Company, Inc., and Valliant Telephone Company.
The court observes that neither the Commission's Interlocutory Order No. 46613 (Bates Stamp 2721 in the jointly designated record, see p.2., n.2 of that order) nor the Commission 's Final Orders, list Carnegie Telephone Company as a plaintiff in the proceedings below. However, Carnegie appears elsewhere in the record of the proceedings below, and no issue has been taken with respect to Carnegie's standing before this court. Accordingly, the court presumes that Carnegie's omission from the Commission's list of plaintiffs is a typographical error, and the court finds that Carnegie is a proper plaintiff before this court. If this finding is incorrect, then the parties shall so advise the court in a motion to modify this court order to delete Carnegie as a plaintiff, to be filed within three business days of today's date.
The RTCs state that they operate pursuant to certificates of convenience and necessity granted by the Commission, (briefs in chief, p. 2), and that they are "common carriers subject to the regulation of the [Federal Communications Commission] for the interstate services they provide and [to] the [Oklahoma Corporation Commission] for

the intrastate services they provide." (Briefs in chief, p.9.)

FN4. The RTCs' briefs in chief (at pp. 1-2, and see p. 37) state that they seek "declaratory relief invalidating the *Arbitration Order* and certain provisions of the Agreements and permanent injunctive relief preventing enforcement of the *Arbitration Order* and the provisions of the Agreements." (Emphasis added.) It is more accurate to state that the RTCs seek declaratory and injunctive relief from the Commission's Final Orders. Those Final Orders adopt findings and conclusions as stated in the Arbitrator's Report and Recommendations, however, so the distinction is mostly one of semantics. The "Relief Requested" portions of the First Amended Complaints filed in these actions correctly state they the RTCs seek declaratory and injunctive relief from the Commission's Final Orders.

FN5. Wireless telecommunications carriers are companies which provide commercial mobile radio service, referred to by the RTCs in their briefs (and in the regulations) as CMRS providers.

FN6. As identified by the defendants in their response briefs (p. 1 at n.1), the defendant wireless carriers in each of the four actions are AT & T Wireless Services, Inc. (AT & T Wireless), the private defendant in CIV-03-0347; Southwestern Bell Wireless LLC d/b/a Cingular Wireless (Cingular), the private defendant in CIV-03-0348; WWC License L.L.C. (Western Wireless), the private defendant in CIV-03-0349, an action which, as already mentioned, is determined by this order and also by a separate order entered today; and Sprint Spectrum, L.P. d/b/a Sprint PCS (Sprint PCS), the private defendant in CIV-03-0350.
The wireless carriers state that "Unlike landline companies providing service regulated by a state commission, CMRS providers are creatures of and governed by federal law. Because radio waves do not recognize state boundaries, Congress has used its power under the Interstate Commerce Clause to implement a 'unified and comprehensive regulatory system' for radio transmissions under 47 U.S.C. § 201(a)." (Response briefs, pp.3- 4.) As recognized by the RTCs (briefs in chief, p. 3), the wireless carriers' licenses are issued by the Federal Communications Commission (FCC) and cover geographic areas that do not coincide with pre-existing telephone exchange boundaries approved by the Oklahoma Corporation Commission, but which instead encompass different areas, the largest of which is a metropolitan trading area, or MTA. (The quoted passage in the RTCs' briefs in chief refers to a *metropolitan* trading area but the regulation cited by the RTCs for this proposition, refers to *major* trading area. 47 C.F.R. § 24.202. The court, therefore, finds that "major trading area" is the proper term. A major trading area has been defined by the FCC as the local service area for wireless providers. As stated in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC 15499, FCC 96-325 (1996) at ¶ 1036:
"[I]n light of [the FCC's] *exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under Section 251(b)(5).* Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA). Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (i.e., MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. *Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.*" (Emphasis added; footnotes deleted.)
Understood in the broadest possible terms, it is the lack of continuity between the area of

operation of the state regulated rural telephone companies and the federally regulated wireless carriers, which gives rise to this dispute.

FN7. In CIV-03-0349, instead of simply re-urging their four common points of error and then adding a fifth point of error to cover the extra issue in that action, the RTCs insert the unique issue as their fourth point of error in -0349 and re-number their common fourth point of error as their fifth point of error in -0349. Thus, although four of the five points of error raised in each of these actions are identical, the issues are numbered and briefed in a different order depending upon which set of briefs the reader is using. The instant order refers to the RTCs' points of error as they are numbered in their briefs filed in -0347, -0348 and -0350.

FN8. This issue corresponds to issue no. 4 on the joint issues matrix (the matrix).
As previously stated, the matrix is attached as Exhibit "B" to the Arbitrator's Report, and the Arbitrator's Report, with exhibits, was adopted by the Commission as a part of the Commission's Final Orders. Accordingly, the matrix is not "merely a tool used by the arbitrator [which] has no procedural or legal significance" as the RTCs contend (at p. 2 of the reply brief). Rather, it is an integral part of the Commission's Final Orders now on appeal, and it contains, in many instances, the specifics of the rulings to which the RTCs object. Thus, the matrix rulings are crucial to an understanding of what the Commission ruled, and therefore, to the RTCs' challenges to those rulings. It is for this reason that the court cross-references the plaintiffs' issues as briefed with those issues as referenced in the matrix.

FN9. Bill and keep is a compensation arrangement whereby interconnecting carriers do not charge each other for the termination of telecommunications traffic which originates on the other carrier's network. *See,* 47 C.F.R. § 51.713(a). In other words, each company terminates the other's traffic without charge and receives in-kind termination services back.

FN10. This issue corresponds to issues 1 and 2 on the matrix.

FN11. Defendant Cingular does not take a position or participate in the discussion concerning plaintiffs' second point of error. (Response briefs, p. 16, n. 64.)

FN12. This issue corresponds to issues 5 and 6 on the matrix.

FN13. This issue is not included on the matrix.

FN14. 47 C.F.R. § 51.713(b)

FN15. 47 C.F.R. § 51.713(c).

FN16. Interlocutory Order No. 466613 (at p.9), authored by the Commission and *entered in* PUD Nos. 200200149, 200200150, 200200151, and 200200153. The Interlocutory Order is found in the JDR at Bates Stamp 2721, and is Attachment B to the Commission's Final Orders. The Commission's Final Orders state "that Interlocutory Order No. 466613 continues to reflect the position of the Commission *en banc* regarding the above-entitled Cause[s]." (Commission's Final Orders at p. 3).

FN17. Finding of Fact No. 13 at p.4 of the Arbitrator's Report (emphasis added).

FN18. From the "Arbitrator's Decisions" at p. 1, ¶ 4 of the issues matrix attached as Exhibit B to the Arbitrator's Report.

FN19. Because the boundaries for determining what calls are local calls for wireless traffic are not necessarily the same as the boundaries which determine what calls are local calls for landline traffic, see

n.6, *infra*., calls which originate with landline telephone companies such as the RTCs, may be required by law to be carried by an intermediate carrier before they are delivered to a terminating wireless services provider, even though such calls originate and terminate within the same MTA.

FN20. With regard to the *TSR Wireless* decision which both sets of parties argue supports their positions, the court concludes that the language in question from that decision is ambiguous as best, that the wireless carriers appear to have the better side of the argument concerning the proper interpretation of that language (as stated in the response briefs at pp. 22-23), and that the decision is not determinative of the issues before this court in any event. *In the Matter of TSR Wireless L.L.C. et al. v. U.S. West Communications, Inc. et al*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, 15 FCC Rcd 11166 (June 21, 2000), affirmed, *Owest Corporation v. FCC*, 252 F.3d 462 (D.C.Cir.2001).

FN21. Page 3 of the Arbitrator's Report, Findings and Fact Nos. 6 and 7; and "Arbitrator's Decisions" as stated in ¶ ¶ 1 and 2 of the issues matrix.

FN22. The arbitrator struck this issue from the matters before him, stating that "it does not belong in an arbitration, [and that] it's a separate cause before the Commission and the Commission does have the power to make that determination." (Transcript of proceedings before the arbitrator on April 25, 2002, p. 28 found in the JDR at Bates Stamp p. 3547.)

FN23. Although the reply brief cites one page of argument from proceedings on August 1, 2002 before the Commission *en banc* (*see* reply brief, p. 22 at n.107, citing p. 10 of proceedings before the Commission *en banc*, at Bates Stamp 4087 of the JDR) as pertaining to this issue, this citation is only to oral argument. That argument does not even mention the arbitrator's refusal to hear or determine the historical compensation issue.

2004 WL 541879, 2004 WL 541879 (W.D.Okla.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I, Christopher M. Arfaa, hereby certify that I have this day caused to be served a copy of: the foregoing document in Docket No. A-310489F7004 upon the persons listed below by the means indicated in accordance with the requirements of 52 Pa. Code § 1.54:

Via Federal Express - Overnight Delivery

D. Mark Thomas, Esq.
Patricia Armstrong, Esq.
Thomas Thomas Armstrong & Niesen
212 Locust Street
Harrisburg, PA 17108-9500
dmthomas@ttanlaw.com
parmstrong@ttanlaw.com

Via First Class Mail

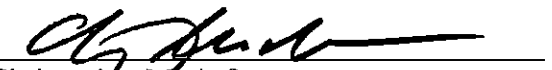
Charles F. Hoffman, Esq.
Office of Trial Staff
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105

Irwin A. Popowsky, Esq.
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Forum Place
Harrisburg, PA 17101-1923

Carol Pennington, Esq.
Office of Small Business Advocate
1102 Commerce Building
300 North Second Street
Harrisburg, PA 17101

Administrative Law Judge Wayne L. Weismandel
Second Floor
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
wweismande@state.pa.us

Dated: April 6, 2004



Christopher M. Arfaa
Drinker Biddle & Reath
One Logan Square
18th & Cherry Streets
Philadelphia, PA 19103
(215) 988-2700

Counsel for
Cellco Partnership d/b/a Verizon Wireless

NS

DrinkerBiddle&Reath LLP

Christopher M. Arfaa
215-988-2715
christopher.arfaa@dbr.com

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Law Offices
One Logan Square
18TH and Cherry Streets
Philadelphia, PA
19103-6996

215-988-2700
215-988-2757 fax
www.drinkerbiddle.com

NEW YORK
WASHINGTON
LOS ANGELES
SAN FRANCISCO
PRINCETON
FLORHAM PARK
BERWYN
WILMINGTON

April 7, 2004

Via Federal Express

James J. McNulty
Secretary of the Commission
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

RE: Petition of Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996, Docket No. **A-310489F7004**

Dear Secretary McNulty:

I enclose for filing in the referenced matter the original and nine copies of the Exceptions of Petitioner Cellco Partnership d/b/a Verizon Wireless.

Thank you for your assistance. Please do not hesitate to contact me if you have any questions regarding this matter.

Very truly yours,

DOCUMENT
FOLDER

Christopher M. Arfaa

CMA/cms
Enclosures

cc: Office of Special Assistants *(w/encl.- diskette, via federal express)*
Attached Certificate of Service *(w/encl. via federal express)*

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

Petition of Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 Of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With ALLTEL Pennsylvania, Inc.	:	A-310489F7004

EXCEPTIONS OF PETITIONER

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS

Of Counsel:
John T. Scott, III
Elaine D. Critides
VERIZON WIRELESS
1300 I Street N.W.
Suite 400
Washington, DC 20005

Christopher M. Arfaa
Susan M. Roach
DRINKER BIDDLE & REATH
One Logan Square
18th & Cherry Streets
Philadelphia, PA
(215) 988-2700

Counsel for Cellco Partnership d/b/a Verizon Wireless

Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless" or "Cellco") hereby takes limited exception to the Recommended Decision of Administrative Law Judge Wayne L. Weismandel, dated March 22, 2004 and issued by the Secretary on March 24, 2004, arbitrating the Unresolved Issues between Verizon Wireless and Respondent ALLTEL Pennsylvania, Inc. ("ALLTEL") pursuant to the Telecommunications Act of 1996 (the "1996 Act").

Introduction

1. ALJ Weismandel's thorough and well-reasoned Recommended Decision easily meets the requirements of the 1996 Act as implemented by the Federal Communications Commission ("FCC"). Verizon Wireless takes exception only to a single finding of fact that, although not necessary to the resolutions recommended by ALJ Weismandel, may become relevant if the Commission or a reviewing court were to reject certain other aspects of the Recommended Decision.

2. ALJ Weismandel correctly held that a state commission may establish an incumbent LEC's reciprocal compensation rates on the basis of a bill-and-keep arrangement where, as in this case, a presumption that the amount of traffic between the carriers is roughly balanced is not rebutted.[1] While ALJ Weismandel correctly found that no credible evidence was adduced sufficient to

[1] *See* Recommended Decision [hereinafter "R.D."] at 20-21 (recommended resolution of Issue No. 9).

overcome such a presumption, Verizon Wireless respectfully submits that he erred in finding that Verizon Wireless did not introduce ***any*** credible evidence regarding the balance of traffic.[2] To the contrary, Verizon Wireless introduced unrebutted evidence showing that the traffic between the parties is, in fact, roughly balanced. While this evidence is unnecessary to support ALJ Weismandel's proposed resolution of this issue in view of his finding with respect to ALLTEL's complete failure to overcome the presumption of balanced traffic, it would become relevant to the extent the Commission or a reviewing court were to reject or modify that factual finding. Therefore, the Recommended Decision should be adopted in all respects ***except*** for the finding that Verizon Wireless failed to adduce credible evidence regarding the balance of traffic between the parties.

Exception

Exception No. 1: Verizon Wireless Introduced Credible, Unrebutted Evidence that the Traffic Between the Parties Is Roughly Balanced.

3. Issue No. 9 requires the Commission to determine "the appropriate pricing methodology for establishing a reciprocal compensation rate for the exchange of direct and indirect traffic."[3] With respect to reciprocal compensation rates, section 252(d)(2) of the 1996 Act provides:

> (A) IN GENERAL.--For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a

[2] *See* R.D. at 21.

[3] R.D. at 19.

State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) RULES OF CONSTRUCTION.--This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements) . . . .[4]

Section 51.705 of the FCC's rules implementing this provision provides, in pertinent part:

(a) An incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of :

(1) The forward-looking economic costs of such offerings, using a cost study pursuant to §§ 51.505 and 51.511;

(2) Default proxies, as provided in § 51.707; or

[4] 47 U.S.C. § 252(d)(2).

(3) A bill-and-keep arrangement, as provided in § 51.713.[5]

4. ALLTEL had the burden of proving that its proposed reciprocal compensation rates are based on the "forward-looking economic costs of such offerings" demonstrated by a cost study that complies with the FCC's rules.[6] As ALJ Weismandel correctly found, ALLTEL failed to carry this burden because neither of the two cost studies it presented was acceptable for establishing rates.[7] The record amply supports these findings.[8]

5. Bill and keep may be imposed if a state commission determines that the amount of traffic between the carriers is roughly balanced and is expected to remain so[9]; moreover, a state commission may "presum[e] that the amount of telecommunications traffic from one network to another is roughly balanced with the amount of traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption."[10] As a United States District Court recently held in analogous case:

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[5] 47 C.F.R. § 51.705(a); *see also* 47 C.F.R. §§ 20.11(b)(1), (c).

[6] 47 C.F.R. § 51.505(e).

[7] *See* R.D. at 20.

[8] *See* Main Brief of Cellco Partnership d/b/a Verizon Wireless, filed Feb. 24, 2004, at 19-25; Reply Brief of Cellco Partnership d/b/a Verizon Wireless, filed March 2, 2004, at 27-31.

[9] 47 CFR § 51.713(b).

[10] *Id.* § 51.713(c).

> Clearly, these rules allow a state commission to place the burden of proof on carriers asserting that the traffic is not in balance . . . . It is also clear that they authorize commissions to invoke a presumption of roughly balanced traffic unless the commission finds that such a presumption has been adequately rebutted.[11]

6. ALJ Weismandel found that no party had adduced evidence sufficient to rebut a presumption that the traffic between them is roughly balanced.[12] The record amply supports this finding. As Verizon Wireless witness Marc Sterling testified, ALLTEL failed, both during discovery and at hearing, to produce "any actual factual evidence to rebut the presumption that the traffic between the carriers is roughly balanced."[13]

7. The only "fact" adduced by ALLTEL relating to traffic ratios was that during negotiations Verizon Wireless had proposed a 70%/30% ratio as a method of estimating traffic flows for purposes of calculating reciprocal

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[11] *Atlas Tel. Co. v. Corporation Commission of Oklahoma*, No. CIV-03-0348-F, 2004 WL 541879, at *5 (W.D. Ok. Mar. 5, 2004) (copy attached hereto as Appendix I). In addition to supporting ALJ Weismandel's recommended resolution of Issue No. 9, the *Atlas Telephone* decision, which involved the arbitration of reciprocal compensation arrangements between wireless carriers and rural telephone companies, also supports his recommended resolutions of Issues No. 2, 3(a), 3(b), 4, 5, 8, 24, 28, and 31 in this proceeding (*see* R.D. at 11-19, 25-26, 28-30) because it confirms the applicability of reciprocal compensation obligations to all calls between incumbent local exchange carriers and wireless carriers originating and terminating within the same major trading area ("MTA"), even when such intra-MTA land-to-wireless calls are carried by intermediate, third-party carriers.

[12] R.D. at 12.

[13] Verizon Wireless St. No. 1.0 (Sterling Direct) at 8:12 – 8:13; *see* Transcript at 133:13 – 135:20 (oral surrebuttal of Marc Sterling).

compensation.[14] As Mr. Sterling explained at hearing, the 70/30 "split" was offered in the context of negotiations as part of a counter-proposal relating to a number of terms and was not based on actual data.[15] As ALJ Weismandel held, neither this nor any other evidence adduced by ALLTEL constituted "credible evidence sufficient to overcome a presumption that the traffic between [the parties] is roughly balanced."[16]

8. If the Commission or a reviewing court somehow were to find that ALLTEL did introduce credible evidence of a traffic imbalance, which it clearly did not, the record nevertheless would support adoption of ALJ Weismandel's recommended resolution of Issue No. 9. The ***only*** actual traffic flow data in evidence shows that traffic between the parties is, in fact "roughly balanced." In the context of supporting Verizon Wireless's proposed traffic factor, Mr. Sterling testified that that at the only interconnection point where both parties are directly exchanging traffic, the balance is 44% land-originated and 56% mobile-originated.[17] No other evidence of actual traffic ratios was introduced by either

[14] *See* ALLTEL St. No. 1R (Hughes Rebuttal) at 7-9.

[15] *See* Transcript at 132:25 – 133:10 (oral surrebuttal of Marc Sterling).

[16] R.D. at 21.

[17] Verizon Wireless St. No. 1.0 (Sterling Direct) at 28:17 – 28:18.

party, due to ALLTEL's failure to produce data regarding traffic originated on its network and indirectly terminated on Verizon Wireless's network.[18]

9. ALLTEL failed to rebut or discredit the traffic data presented by Mr. Sterling.[19] Therefore, although ALJ Weismandel correctly found that ALLTEL had failed to adduce credible evidence regarding traffic flows, Verizon Wireless respectfully submits that he erred when he found a similar failure on the part of Verizon Wireless.[20] Thus, even if the Commission somehow were to find that ALLTEL introduced credible evidence tending to rebut the presumption that the traffic flows between the parties are roughly balanced (which it did not), such evidence would be amply rebutted in turn by Verizon Wireless's showing that, where data is available, the traffic exchanged by the parties is a "roughly balanced" 56%-to-44%, thus supporting the adoption of bill and keep for purposes of reciprocal compensation in this proceeding.

Conclusion

For all of the foregoing reasons, Verizon Wireless respectfully requests that the Commission grant its limited exception to ALJ Weismandel's recommended finding of fact relating to the traffic balance evidence presented by Verizon

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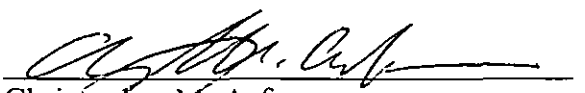
[18] *See* Transcript at 133:13 – 135:20 (oral surrebuttal of Marc Sterling).

[19] *See* Reply Brief of Cellco Partnership d/b/a Verizon Wireless, filed March 2, 2004, at 46-47.

[20] R.D. at 21.

Wireless, modify the Recommended Decision solely to that extent, and adopt ALJ Weismandel's proposed Order as set forth in the Recommended Decision.

Respectfully submitted,



Christopher M. Arfaa
Susan M. Roach
DRINKER BIDDLE & REATH
One Logan Square
18th & Cherry Streets
Philadelphia, PA
(215) 988-2700

Counsel for Cellco Partnership d/b/a Verizon Wireless

Of Counsel:
John T. Scott, III
Elaine D. Critides
VERIZON WIRELESS
1300 I Street N.W.
Suite 400
Washington, DC 20005

DATED: April 7, 2004

APPENDIX I

H
Only the Westlaw citation is currently available.

United States District Court,
W.D. Oklahoma.

ATLAS TELEPHONE COMPANY, et al., Plaintiffs,
v.
CORPORATION COMMISSION OF OKLAHOMA, et al., Defendants.

No. CIV-03-0347-F, CIV-03-0348-F, CIV-03-0349-F, CIV-03-0350-F.

March 5, 2004.

Background: Rural telephone companies brought actions challenging orders of the Oklahoma Corporation Commission, establishing interconnection obligations under the Telecommunications Act between the RTCs and wireless telecommunications carriers.

Holdings: The District Court, Friot, J., held that:
(1) Commission's final orders did not impermissibly require RTCs to waive recovery of costs associated with the transport and termination of telecommunications;
(2) Federal Communications Commission (FCC) regulations permitted Commission to apply reciprocal compensation obligations to all calls originated by an RTC and terminated by a wireless provider within the same major trading area; and
(3) evidence was sufficient to support the Commission's rejection of the RTCs' cost study as flawed, and its rejection of the rate or rates proposed by the RTCs.

Interconnection agreements affirmed.

[1] **Telecommunications** 263

372k263 Most Cited Cases

When an aggrieved party brings a cause of action under Telecommunications Act provision governing judicial review of interconnection obligations determined by state agency, a federal district court will consider de novo whether interconnection agreements are in compliance with the Act and implementing Federal Communications Commission (FCC) regulations; all other issues, including state law determinations, are reviewed under an arbitrary and capricious standard. 42 U.S.C.A. § 252(e)(6).

[2] **Telecommunications** 267
372k267 Most Cited Cases

Oklahoma Corporation Commission's final orders requiring interconnection agreements between rural telephone companies (RTC) and wireless telecommunications carriers did not impermissibly require RTCs to waive recovery of costs associated with the transport and termination of telecommunications; Commission's orders provided for compensation through a bill and keep arrangement specifically allowed by Federal Communication Commission (FCC) rules, and were supported by evidence that no forward-looking rate was established and by RTCs' failure to rebut presumption of "roughly balanced" traffic. 47 C.F.R. § 51.713(b),(c).

[3] **Telecommunications** 323
372k323 Most Cited Cases

Federal Communications Commission (FCC) regulations permitted Oklahoma Corporation Commission to apply reciprocal compensation obligations to all calls originated by a rural telephone company (RTC) and terminated by a wireless provider within the same major trading area, without regard to whether those calls were delivered via an intermediate carrier. 47 U.S.C.A. § 251(b)(5); 47 C.F.R. § 51.701(b)(1),(2).

[4] **Telecommunications** 323
372k323 Most Cited Cases

Evidence at hearing before Oklahoma Corporation Commission regarding interconnection obligations between rural telephone companies (RTC) and wireless telecommunications carriers was sufficient to support the Commission's rejection of the RTCs' cost study as flawed, and its rejection of the rate or rates proposed by the RTCs; RTCs' proposed rates were based on an average cost study that did not establish a forward-looking rate representative of all

the RTCs. 47 U.S.C.A. § 251(b)(5); 47 C.F.R. § 51.701(b)(1),(2).

[5] Telecommunications 263
372k263 Most Cited Cases

Rural telephone companies (RTC) did not exhaust administrative remedies with respect to arbitrator's ruling regarding historical compensation claimed to be due to the RTCs for prior traffic terminated by the RTCs, precluding judicial review of Oklahoma Corporation Commission's failure to resolve the issue at a proceeding to establish interconnection obligations between the RTCs and wireless telecommunication carriers; RTCs did not raise the arbitrator's ruling in any documents filed with the Commission at any time, including in their formal appeal of the arbitrator's report.

Ambre C. Gooch, David W. Lee, Kendall W. Parrish, Mary K. Kunc, Ronald Comingdeer, Comingdeer Lee & Gooch, Kimberly K. Brown, Williams, Box, Forshee & Bullard PC, Oklahoma City, OK, for Plaintiffs.

Chanda R. Graham, Charles W. Wright, Rachel Lawrence Mor, Oklahoma Corporation Commission, Office of General Counsel, Jennifer H. Kirkpatrick, Marc Edwards, Phillips, McFall, McCaffrey, McVay, Murrah, Oklahoma City, OK, Lawrence S. Smith, Smith, Majcher & Mudge LLP, Austin, TX, John P. Walters, The Walters Law Firm, Edmond, OK, Mark Joseph Ayotte, Philip R. Schenkenberg, Briggs & Morgan, St Paul, MN, Michael G. Harris, William H. Hickman, Moricoli, Harris & Cottingham, Nancy M. Thompson, Oklahoma City, OK, Brett D. Leopold, Overland Park, KS, for Defendants.

ORDER

FRIOT, District J.

*1 These cases appeal orders of the Oklahoma Corporation Commission [FN1] establishing interconnection obligations under the Telecommunications Act of 1996, between traditional landline telephone companies and wireless telecommunications carriers. Each of these four actions seeks determination of the same issues, except that CIV-03-0349 also raises an additional issue unique to that action. The instant order determines the common issues among all four actions and is therefore entered in each of those actions. A separate order addressing only the additional issue unique to CIV-03-0349-F is also entered in that action today. (Docket entry no. 57 in -0349).

I. Preliminary Matters
A. The Parties

The plaintiffs in each of these actions are traditional landline rural telephone companies, referred to by the parties in their briefs [FN2] and by the court in this order as rural telephone companies or RTCs. [FN3] The rural telephone companies bring these actions to challenge the Commission's orders entered in the proceedings below and the interconnection agreements implementing those orders. The RTCs contend the orders and agreements are based on erroneous interpretations of law and unsupported evidentiary findings. The RTCs describe the nature of the dispute as generally concerning "(1) which telecommunications traffic is subject to the reciprocal compensation requirements of the Telecommunications Act of 1996 and (2) the rate of compensation to be paid for the transport and termination of such telecommunications." (Briefs in chief, p.1.) Stated more precisely, the RTCs appeal four distinct aspects of the Commission's orders. These four issues are set out with specificity in the "Statement of the Issues" portion of this order. The RTCs seek declaratory and injunctive relief from the Commission's Final Orders determining these issues [FN4] and from the interconnection agreements implementing these determinations.

Defendants in all four related actions include the Oklahoma Corporation Commission, and Commissioners Denise A. Bode, Bob Anthony, and Jeff Cloud. The commissioners are sued in their official capacities only. A different wireless telecommunications carrier, [FN5] referred to as a wireless carrier or provider in this order, is also a defendant in each action. [FN6] The defendants jointly defend the Commission's Final Orders and the associated interconnection agreements. They ask the court to affirm those orders and the agreements in all respects.

B. Procedural Background

The undisputed allegations in the pleadings and undisputed statements in the briefs, the statements made by the Commission in its orders, and the documents included in the jointly designated record (JDR), establish that the procedural background of these actions is as follows.

This dispute originally arose from negotiations for interconnection agreements between the wireless

carriers and the rural telephone companies. The parties conducted group negotiations and resolved many issues but were unable to resolve all issues. Most significantly, negotiations broke down over reciprocal compensation arrangements for the transport and termination of interconnecting telecommunications, and over the rate for such telecommunications transport and termination.

*2 To resolve the open issues, each of the wireless carriers which is now a defendant in these actions filed a petition with the Oklahoma Corporation Commission, seeking arbitration under the 1996 Telecommunications Act, 47 U.S.C. § § 151 *et seq.* (the Telecommunications Act or the Act). The Commission consolidated the causes and assigned an arbitrator. The parties engaged in discovery, submitted written direct and rebuttal testimony, and tried the case before the arbitrator in a three-day hearing. The arbitrator took the issues under advisement and ultimately authored the Report and Recommendations of the Arbitrator (the Arbitrator's Report or the Report).

The Arbitrator's Report included fifteen numbered paragraphs under the heading, "Findings of Fact, Conclusions of Law and Recommendations." The Report also included a single-spaced, 51-page summary of witness testimony (attached to the report as Exhibit "A"), and a single-spaced, three-page issues matrix describing the issues submitted, the relevant contract (or interconnection agreement) sections, and the arbitrator's decision with respect to each of those issues (attached to the report as Exhibit "B"). The Arbitrator's Report, with exhibits, was adopted by the Commission in its Interlocutory Order and in the Commission's Final Orders. The entire Report, with exhibits, was attached to each of these orders.

The RTCs appealed the Commission's Final Orders to the Oklahoma Supreme Court. The Oklahoma Supreme Court, however, dismissed the appeals for lack of jurisdiction.

On March 13, 2003, the RTCs filed the instant actions. First Amended Complaints were filed in each of these actions on July 10, 2003. Other than the additional issue unique to CIV-03-0349, the issues raised by the pleadings in each of these actions are identical. Therefore, the court held a joint status and scheduling conference, at which time, with the agreement of the parties, one briefing schedule was established to govern all four actions. The actions were not consolidated, but pursuant to the joint schedule, the parties filed one joint designation of record (with one supplement to the JDR). The plaintiff RTCs then submitted joint briefs in chief (entitled "initial" briefs), the defendant wireless carriers submitted joint response briefs (with an appendix), and the RTCs submitted a joint reply brief (also with an appendix). The Commission and commissioners relied on the wireless providers' briefing and did not otherwise participate in the argument.

Although a variety of issues (such as certain affirmative defenses) were raised in the pleadings, the court finds that all issues other than those briefed by the plaintiffs have been abandoned.

The court commends the parties and their counsel for the highly professional manner in which they have conducted themselves in these proceedings. The parties have cooperated admirably as to all procedural matters requisite to the effective, orderly and reasonably expeditious presentation of issues to the court for determination. This high level of professionalism has, to put it mildly, been most helpful.

C. Jurisdiction

*3 The RTCs bring these actions under 42 U.S.C. § 252(e)(6) of the Telecommunications Act. That statute provides as follows.

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the [interconnection] agreement or statement [of the Commission determining interconnection obligations under the Act] meets the requirements of section 251 of this title and this section.

Based on this provision and the procedural history of this dispute, the court finds and concludes that it has jurisdiction.

D. Standard of Review

[1] Both the RTCs and the wireless carriers rely on *Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493 (10th Cir.2000) as stating the applicable standard of review to be exercised by this court. (Briefs in chief, p. 19, n.1; response briefs, p. 8, n.29.) As stated by the Tenth Circuit in *Southwestern Bell,* when an aggrieved party brings a cause of action under § 252(e)(6), a federal district court will consider *de*

novo whether interconnection agreements are in compliance with the Act and implementing Federal Communications Commission regulations. *Id.* at 498. All other issues, including state law determinations, are reviewed under an arbitrary and capricious standard. *Id.* Thus, in these actions, the Oklahoma Corporation Commission's findings of fact, and its application of the law to those facts, are reviewed under an arbitrary and capricious standard. As observed by the Supreme Court, *Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974), "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

These standards of review are the ones which this court applies in this order. Review of the Commission's evidentiary findings is also limited, of course, to the record developed during the administrative proceeding. *See, e.g., United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15, 83 S.Ct. 1409, 10 L.Ed.2d 652 (1963) ("the reviewing function is one ordinarily limited to consideration of the decision of the agency or court below and of the evidence on which it was based").

E. Statement of the Issues

As already stated, in each of these related actions, the rural telephone companies appeal four common aspects of the Commission's rulings. [FN7]

1. The RTCs' first point of error [FN8] is: "The OCC Arbitration Orders and the Agreements Impermissibly Require the RTCs to Waive recovery of Costs associated with the Transport and Termination of Telecommunications." (This is the proposition as it appears in the text of the briefs in chief at p. 20; in the index to those briefs it is worded slightly differently.) Explaining this contention in the text of their briefs, the RTCs state that "Neither the OCC's Arbitration Orders nor the Agreements contain provisions for compensation. Therefore, the Agreements are contrary to federal law and FCC regulations." (Briefs in chief, p. 20.) The wireless carriers articulate this first issue as: "Did the OCC act in an arbitrary and capricious manner in imposing a 'bill-and-keep' [FN9] mechanism for implementing reciprocal compensation between each RTC and each Wireless Carrier?" (Response briefs, p. 1.)

*4 After studying the plaintiffs' first point of error as developed in the text of the plaintiffs' own briefs, the court articulates the first issue before it as follows: Do the Commission's orders impermissibly require the RTCs to waive recovery of costs associated with the transport and termination of telecommunications because the orders improperly impose a system of bill and keep? (This issue is addressed in Part A of the Discussion portion of this order.)

2. The second point of error [FN10] raised by the RTCs is that "The OCC Arbitration Order and the Agreements Impermissibly Require the RTCs to compensate the CMRS providers for Traffic originated by other carriers." (Briefs in chief, p. 23.) The wireless carriers [FN11] articulate this issue as: "Do principles of reciprocal compensation apply on all calls between a Wireless Carrier and an RTC that originate and terminate in the same Major Trading Area, or MTA?" (Response briefs, p. 1.)

After studying the plaintiffs' second point of error as developed in the text of the plaintiffs' own briefs, the court articulates the second issue before it as follows: Do the Commission's orders impermissibly apply reciprocal compensation obligations to all calls originating and terminating within the same major trading area, even when such intra-MTA land-to-wireless calls (that is, from the RTCs to the wireless providers) are carried by intermediate carriers? (This issue is addressed in Part B of the Discussion portion of this order.)

3. The RTCs' third point of error [FN12] is that "The OCC Order and the Agreements are Contrary to the Federal Act because they do not contain a rate for terminating CMRS provider traffic." (Briefs in chief, p. 30.) The wireless carriers articulate this issue as: "Did the OCC err in rejecting the RTCs' proposed cost study?" (Response briefs, p. 1). The pertinent portion of the plaintiffs' reply brief is entitled: "The OCC's Rejection of the RTCs' Traffic Study and the Forward-Looking Cost it Produced was Arbitrary and Capricious." (Reply brief, p. 19.)

After studying the plaintiffs' third point of error as developed in the text of the plaintiffs' own briefs, the court articulates the third issue before it as follows: Did the Commission err in rejecting the RTCs' cost study and their proposed forward-looking rate? (This issue is addressed in Part C of the Discussion portion of this order.)

4. The RTCs' fourth point of error [FN13] is that "The OCC's refusal to arbitrate the unresolved issue of compensation to the RTCs for traffic terminated prior to the effective date of the agreements is

contrary to federal law." (Briefs in chief, p. 32.) The wireless carriers articulate this issue as: "Did the OCC err in refusing to consider the RTCs' request for compensation prior to the effective date of the final agreements approved by the OCC?" (Response briefs, p. 1.)

After studying the plaintiffs' fourth point of error as developed in the text of the plaintiffs' own briefs, the court articulates the fourth issue before it as follows: Was the refusal to determine a historical compensation issue regarding compensation claimed due to the RTCs for their termination of traffic prior to the effective date of the agreements, contrary to federal law? (This issue is addressed in Part D of the Discussion portion of this order.)

II. Discussion
A. Do the Commission's Orders Impermissibly Require the RTCs to Waive Recovery of Costs Associated with the Transport and Termination of Telecommunications Because the Orders Improperly Impose A System of Bill and Keep?

*5 [2] The RTCs argue that the Commission's imposition of bill and keep is erroneous because the "the OCC provided no substantive findings supporting either its rejection of the RTCs' evidence of traffic imbalance or its reliance on a presumption of balanced traffic." (Briefs in chief, p. 21.) "As such," the RTCs go on to state, "the OCC's decision to reject the RTC's [sic] evidence rebutting a presumption of balanced traffic was arbitrary and capricious and is contrary to the Act and the FCC's regulations." (Briefs in chief, p. 21.)

FCC Rule 51.713(b) [FN14] provides that a state commission may impose bill and keep as the method for reciprocal compensation if that commission determines that the amount of traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction. Subsection (c) of the same rule provides that nothing in § 51.713 precludes a state commission from presuming that the amount of telecommunications traffic "from one network to another is roughly balanced with the amount of traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption." [FN15]

Clearly, these rules allow a state commission to place the burden of proof on carriers asserting that traffic is not in balance--here, the RTCs. It is also clear that they authorize commissions to invoke a presumption of roughly balanced traffic unless the commission finds that such a presumption has been adequately rebutted. Invoking this presumption is exactly what the Oklahoma Corporation Commission did when it stated in its Interlocutory Order (reaffirmed at p. 3 of the Commission's Final Orders), that "there is a presumption of 'balanced traffic." ' [FN16] Moreover, the Commission expressly adopted the Arbitrator's Report in each of the individual Final Orders (at p.3 of each of those Final Orders), and attached a complete copy of that Report, with exhibits, to each of those individual Final Orders. That Report found that, "*Because* no forward-looking rate was established, and traffic is roughly balanced, bill-and-keep should be adopted as the appropriate mechanism for providing reciprocal compensation." [FN17] (Emphasis added.) When it adopted the Arbitrator's Report (at p. 3 of the Commission's Final Orders), the Commission also adopted the arbitrator's rationale and his findings in support of bill and keep.

For these reasons, the court disagrees with the RTCs' contention that the Commission's ruling regarding bill and keep is in error because it "provided no substantive findings supporting either its rejection of the RTCs' evidence of traffic imbalance or its reliance on a presumption of balanced traffic." (Briefs in chief, p. 21.) The court finds that the Commission adequately supported its rulings with substantive findings that no forward-looking rate was established and that the presumption of roughly balanced traffic had not been rebutted.

*6 The RTCs also argue the related but somewhat different contention that the Commission's findings regarding bill and keep are in error because the evidence is not sufficient to support those findings. The RTCs state: "the OCC disregarded substantial evidence in the record presented by the RTCs and arbitrarily presumed traffic was balanced. Such finding by the OCC is devoid of any evidentiary support in the record and is thus, arbitrary and capricious." (Briefs in chief, p. 23.) To support this conclusion, the RTCs argue that they "presented sufficient evidence in support of their claim that they incur costs in terminating the additional calls delivered by CMRS providers," that "such costs are positive due to the significant imbalance of traffic," and that they "presented the only traffic study in evidence and such study demonstrated a significant imbalance of traffic terminated by the RTCs." (Briefs in chief, pp. 20-21.)

The question at this stage is whether the record evidence, when taken as a whole, is sufficient to support what the Commission found when it adopted the Arbitrator's Report, *i.e.* that "no forward-looking rate was established" and that the RTCs had not rebutted the presumption of "roughly balanced" traffic. (Arbitrator's Report, p. 4, ¶ 13.) The RTCs presented a traffic study sponsored by RTC witness McBride, which purported to show that the traffic flowing to and from the parties was not roughly balanced. (Rebuttal testimony of William McBride on behalf of RTCs, p. 14, found in the JDR at Bates Stamp 1484.) The RTCs' study, however, did not analyze traffic between any individual RTC and any individual wireless carrier. (Transcript of proceedings June 17, 2002, pp. cb66, 67, found in the JDR at Bates Stamp 3672-73.) Several witnesses testified to problems with the RTCs' study, and limitations were acknowledged by the study's sponsoring witness. (Transcript of proceedings June 17, 2002, pp. cb- 62-86 found in the JDR at Bates Stamp 3668-92; Transcript of proceedings June 18, 2002, pp. rdh-140-147, found in the JDR at Bates Stamp 3930-37.) Even the RTCs have admitted certain "errors" with their traffic study results, although they argue these errors are "minor" and "not fatal." (Briefs in chief, p. 23.)

After thorough consideration of the briefs and the substantial administrative record, the court rejects the RTCs' contention that the Commission's ruling is "devoid of any evidentiary support in the record and is thus, arbitrary and capricious." (Briefs in chief, p. 23.) To the contrary, the court finds and concludes that there is adequate evidentiary support for the Commission's underlying findings supporting its imposition of bill and keep, which include its findings that the RTCs' cost study should be rejected and that no forward- looking rate was established.

Finally, in response to the RTCs' arguments regarding the incorrectness of bill and keep, the wireless carriers argue that there is no prejudicial effect to the RTCs from the Commission's determinations because those determinations are limited by the following statement in the Arbitrator's Report as adopted by the Commission.

> *7 The Arbitrator concurs with Staff's recommendation that transport and termination be provided on a bill and keep basis until an individual study shows that it is more economically and justifiably appropriate to do otherwise. The bill and keep arrangement shall continue until the Commission has determined that an imbalance in the exchange of telecommunication traffic exists, at which time a forward-looking cost study is to be utilized to establish the rate. [FN18]

The court finds and concludes that there is some prejudice to the RTCs from the Commission's adverse ruling imposing bill and keep, but it also finds and concludes that such prejudice is expressly limited by the above-quoted statement.

In summary, the RTCs have not shown that the Commission's Final Orders or the interconnection agreements required by those orders impermissibly require the RTCS to waive recovery of costs associated with the transport and termination of telecommunications. The Commission's Final Orders provide for compensation through a bill and keep arrangement specifically allowed by FCC rules, an arrangement which provides for recovery of such costs. The Commission adequately supports its determinations imposing bill and keep with findings, and those findings are, in turn, adequately supported by the record evidence. The court concludes that the Commission did not err when it imposed bill and keep as a mechanism for implementing reciprocal compensation between each RTC and each wireless carrier until such time as an individual study is presented which adequately rebuts the presumption of roughly balanced traffic.

B. Do the Commission's Orders Impermissibly Apply Reciprocal Compensation Obligations To All Calls Originating and Terminating Within the Same Major Trading Area, Even When Such Intra-MTA Land-to-Wireless Calls are Carried by Intermediate Carriers?

[3] The RTCs' second point of error is that the Commission incorrectly ruled that reciprocal compensation applies to all calls originating and terminating within the same major trading area (MTA), even when such land-to- wireless intra-MTA calls (from the RTCs to the wireless providers) are carried by intermediate carriers, thereby improperly requiring the RTCs to compensate the wireless providers for such calls. [FN19]

The Telecommunications Act imposes upon all local telephone exchange carriers (LECs), including the RTCs in this action, the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). For calls between "a LEC and a telecommunications carrier other than a CMRS [or wireless] provider," the FCC has defined the telecommunications to which reciprocal

compensation applies as "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." 47 C.F.R. § 51.701(b)(1) (emphasis added). This order refers to the excepted calls as "access calls." By excluding such access calls from the definition of telecommunications to which reciprocal compensation applies, the FCC has expressly limited LEC-toLEC reciprocal compensation obligations to calls within landline local calling areas.

*8 By contrast, for calls between a local exchange carrier and a CMRS provider such as the RTC-to-wireless calls in issue here, the FCC has adopted a different definition of telecommunications as to which reciprocal compensation applies. For this type of call, the FCC has defined telecommunications traffic as "Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined [by the regulations]." 47 C.F.R. § 51.701(b)(2). The definition includes no exception for access calls carried by an intermediary carrier.

Thus, although the FCC was clearly aware of the issues created when access calls are exchanged, as evidenced by the exemption from reciprocal compensation obligations for LEC-to-LEC access calls under § 51.701(b)(1), the FCC did not create a similar exception for LEC-to-CMRS access calls which originate and terminate within the same major trading area. 47 C.F.R. § 51.701(b)(2).

The court agrees with the wireless carriers' characterization of the RTCs' contentions regarding this issue, which is that, "At bottom, the RTCs argue that...since all of the land to mobile intraMTA traffic they [the RTCs] send to the Wireless Carriers is 'toll telephone service,' they [the RTCs] are not required to make reciprocal compensation payments to the CMRS providers." The court also agrees with the wireless providers that "[This] argument is directly contradictory to FCC Rule 51.701(b)." (Response briefs, p. 19.) [FN20]

The court concludes that the Oklahoma Corporation Commission did not err when it ruled [FN21] that reciprocal compensation obligations apply to all calls originated by an RTC and terminated by a wireless provider within the same major trading area, without regard to whether those calls are delivered via an intermediate carrier. In so ruling, the Oklahoma Corporation Commission merely applied federal regulatory definitions to the dispute before it.

C. Did the Commission Err when it Rejected the RTCs' Cost Study and Their Proposed Forward-Looking Rate?

[4] Defendants' response briefs (at pp. 24-36) summarize the evidence supporting the Commission's rejection of the RTCs' cost study and its rejection of the rate proposed by the RTCs. The court finds those arguments well taken and further finds that no purpose would be served in restating them here, especially given the overlap of these evidentiary issues with the evidentiary issues already covered in Part A of the Discussion portion of this order. The court does, however, touch briefly on the following points which are not covered elsewhere.

First, as pointed out by the wireless carriers (response briefs, pp. 26-27), the burden of proof is on the RTCs to show that a proposed rate meets the required standards, a contention which the RTCs do not dispute in their reply brief.

Second, it is also undisputed that even the RTCs did not propose that the Commission adopt the rate generated by their cost study. (*See,* direct testimony of Jonathan P. Harris, on behalf of the RTCs at pp.11-12, found in the JDR at Bates Stamp page 675-76.)

*9 Third, in the text of their briefs pertaining to this point of error, the RTCs state repeatedly that the arbitrator improperly based his findings upon his opinion that the model employed by the plaintiffs had already been found to be "suspect by the Arbitrator in at least one previous, unrelated hearing due to the ability of the persons using it to manipulate the results" (briefs in chief, p. 31; Arbitrator's Report quoted in reply brief at p. 20 at n. 97 and at p.21 at n. 101). Because of the emphasis the RTCs place on this argument, the court addresses it in more detail.

The RTCs are correct that in his findings, the arbitrator refers to his previous experience evaluating "the Hatfield model," which was the model used by the RTCs to try to establish forward-looking costs in this case. (Arbitrator's Report, p. 3 at ¶ 11.) *Immediately* following that statement regarding his prior experience with the Hatfield model, however, the arbitrator goes on to make findings regarding the results of the plaintiffs' model as they obtain "[I]n *this* case...." (Arbitrator's findings, p. 3 at ¶ 11,

emphasis added.) The arbitrator's findings then detail: problems with the RTCs' proposed rate, based, as it was, on "an average cost study"; and the arbitrator's conclusion that "it seems to be impossible for an average cost study to be representative of all those varied companies." The Report further states that "[i]t doesn't really matter whether 1994 data or the 2000 data, which was not allowed, is used" because "the results are still questionable." (Arbitrator's Report, p.4 at ¶ 12.) It was for these reasons that the arbitrator went on to find, as discussed earlier in this order, that: "Because no forward-looking rate was established, and traffic is roughly balanced, bill-and-keep should be adopted as the appropriate mechanism for providing reciprocal compensation" and that "[a]ny party [who contends otherwise] must present an individual cost study that complies with the Act, and must show that establishing rates and rendering bills is more economically appropriate than bill and keep." (Arbitrator's Report, p. 4 at ¶ 13.) Moreover, all of the arbitrator's findings and recommendations are supported with 51 single-spaced pages which summarize the evidence in *this* case, some of it in exhaustive detail, and much of it bearing on the weight to be given--or not given--to the RTCs' cost study. (The evidentiary summary is attached as Exhibit "A" to the Arbitrator's Report.) Thus, the court finds and concludes that the arbitrator did not improperly base his determinations on evidence taken in another case, but that he properly based his determinations on evidence taken in this case.

In summary, consistent with other findings already stated in this order, the court finds that the record evidence is sufficient to support the Commission's rejection of the RTCs' cost study as flawed, and its rejection of the rate or rates proposed by the RTCs in the proceedings below. The court concludes that the Commission did not err in adopting the arbitrator's findings rejecting the plaintiffs' cost study model and RTCs' proposed rate or rates.

D. Was the Refusal To Determine a Historical Compensation Issue Regarding Compensation Claimed to be Due to the RTCs For their Termination of Traffic Prior to the Effective Date of the Agreements, Contrary to Federal Law?

*10 [5] In their fourth proposition the RTCs argue that the Commission erred in not resolving a disputed issue regarding compensation claimed to be due to the RTCs for prior traffic terminated by the RTCs, referred to in this order as the historical compensation issue.

There is a fundamental problem with the RTCs' attempt to have this court resolve the correctness of the ruling which struck this compensation issue from the proceedings below. Although the RTCs' briefs state that *the OCC* erred by failing to resolve this issue (plaintiffs' reply brief, p. 21), the RTCs have identified no *Commission* decision determining that this historical compensation issue would not be considered. The ruling about which plaintiffs complain (at reply brief, p. 21 at n.104) is merely a ruling by the arbitrator stating that he would not hear evidence on this historical compensation issue because it was unrelated to the matter assigned to him. [FN22] Furthermore, in stating his ruling on this issue, the arbitrator suggested that the RTCs could pursue the merits of this issue in a separate cause. The RTCs do not contend that they have pursued this issue in a separate proceeding before the Commission. There also appears to be no dispute that the RTCs did not raise the arbitrator's ruling in any *documents* filed with the Commission at any time, including in their formal appeal of the Arbitrator's Report. [FN23]

This court reaches no conclusion as to whether the historical compensation issue identified by the RTCs has been waived, or as to whether, at this late date, the RTCs could somehow pursue that issue before the Commission. This court does conclude, however, that it has no jurisdiction to review the propriety of an arbitrator's ruling stated orally during the hearings which was not reviewed or ruled upon by the Commission; the RTCs did not exhaust their administrative remedies with respect to the arbitrator's ruling and as a result, there is no Commission ruling for this court to review. Accordingly, the court finds and concludes that the RTCs' fourth point of error should be denied without prejudice because the court does not have jurisdiction to determine the merits of the contested arbitrator's ruling.

Conclusion

After thorough study of the parties' submissions, the record, and the relevant arguments and authorities, the court orders as follows with respect to the common points of appeal raised in each of the above-styled actions.

The RTCs' first, second, and third points of error challenging aspects of the Oklahoma Corporation Commission's Final Orders entered in the proceedings below and challenging associated

aspects of the interconnection agreements required by those orders, are each DENIED. The RTCs' fourth point of error is also DENIED, but not on the merits, as the court finds and concludes that it does not have jurisdiction to determine the merits of that issue. Consistent with these rulings, the declaratory and injunctive relief requested by the RTCs in their First Amended Complaints filed in each of the above-styled actions is DENIED, and the Commission's Final Orders and the interconnection agreements required by those orders are AFFIRMED in all respects.

FN1. *In the Matter of the Application of [Certain Wireless Carriers] for Arbitration Under the Telecommunications Act of 1996,* Corporation Commission of the State of Oklahoma, Cause Nos. PUD 200200149, PUD 200200150, PUD200200151, and PUD200200153, and the final orders entered in those matters. Respectively, those orders are Final Order No. 468958 found in the Joint Designation of Record (JDR) at Bates Stamp 50, Final Order No. 468959 found in the JDR at Bates Stamp 3342, Final Order No. 468960 found in the JDR at Bates Stamp 209, and Final Order No. 468961 found in the JDR at Bates Stamp 348. Each of these individual final orders was entered on October 22, 2002. In both of the court's orders entered today, these individual final orders are referred to collectively as "the Commission's Final Orders."

FN2. All of the initial briefs of the plaintiffs filed in these actions are referred to together in this order as the briefs in chief. All of the response briefs filed in these actions are referred to together in this order as the response briefs. Page references are to the briefs filed in CIV-03-0347, -0348 and -0350, because the briefs filed in -0349 have a different pagination due to the extra issue briefed in that case. The same reply brief was filed in each of these four actions, so this order only refers to reply brief, singular, and the pagination of that brief does not change depending upon the case in which it was filed.

FN3. As identified in the court's docket sheet, the plaintiffs are: Atlas Telephone Company; Beggs Telephone Company; Bixby Telephone Company; Canadian Valley Telephone Company; Carnegie Telephone Company; Central Oklahoma Telephone Company; Cherokee Telephone Company; Chickasaw Telephone Company; Chouteau Telephone Company; Cimarron Telephone Company; Cross Telephone Company; Dobson Telephone Company; Grand Telephone Company; Hinton Telephone Company; KanOkla Telephone Association; McCloud Telephone Company; Medicine Park Telephone Company; Oklahoma Telephone & Telegraph; Oklahoma Western Telephone Company; Panhandle Telephone Cooperative, Inc.; Pine Telephone Company; Pinnacle Communications; Pioneer Telephone Cooperative, Inc.; Pottawatomie Telephone Company; Salina-Spavinaw Telephone Company; Santa Rosa Telephone Cooperative, Inc.; Shidler Telephone Company; South Central Telephone Association; Southwest Oklahoma Telephone Company; Terral Telephone Company; Totah Telephone Company, Inc., and Valliant Telephone Company.
The court observes that neither the Commission's Interlocutory Order No. 46613 (Bates Stamp 2721 in the jointly designated record, see p.2., n.2 of that order) nor the Commission 's Final Orders, list Carnegie Telephone Company as a plaintiff in the proceedings below. However, Carnegie appears elsewhere in the record of the proceedings below, and no issue has been taken with respect to Carnegie's standing before this court. Accordingly, the court presumes that Carnegie's omission from the Commission's list of plaintiffs is a typographical error, and the court finds that Carnegie is a proper plaintiff before this court. If this finding is incorrect, then the parties shall so advise the court in a motion to modify this court order to delete Carnegie as a plaintiff, to be filed within three business days of today's date.
The RTCs state that they operate pursuant to certificates of convenience and necessity granted by the Commission, (briefs in chief, p. 2), and that they are "common carriers subject to the regulation of the [Federal Communications Commission] for the interstate services they provide and [to] the [Oklahoma Corporation Commission] for

the intrastate services they provide." (Briefs in chief, p.9.)

FN4. The RTCs' briefs in chief (at pp. 1-2, and see p. 37) state that they seek "declaratory relief invalidating the *Arbitration Order* and certain provisions of the Agreements and permanent injunctive relief preventing enforcement of the *Arbitration Order* and the provisions of the Agreements." (Emphasis added.) It is more accurate to state that the RTCs seek declaratory and injunctive relief from the Commission's Final Orders. Those Final Orders adopt findings and conclusions as stated in the Arbitrator's Report and Recommendations, however, so the distinction is mostly one of semantics. The "Relief Requested" portions of the First Amended Complaints filed in these actions correctly state they the RTCs seek declaratory and injunctive relief from the Commission's Final Orders.

FN5. Wireless telecommunications carriers are companies which provide commercial mobile radio service, referred to by the RTCs in their briefs (and in the regulations) as CMRS providers.

FN6. As identified by the defendants in their response briefs (p. 1 at n.1), the defendant wireless carriers in each of the four actions are AT & T Wireless Services, Inc. (AT & T Wireless), the private defendant in CIV-03-0347; Southwestern Bell Wireless LLC d/b/a Cingular Wireless (Cingular), the private defendant in CIV-03-0348; WWC License L.L.C. (Western Wireless), the private defendant in CIV-03-0349, an action which, as already mentioned, is determined by this order and also by a separate order entered today; and Sprint Spectrum, L.P. d/b/a Sprint PCS (Sprint PCS), the private defendant in CIV-03-0350. The wireless carriers state that "Unlike landline companies providing service regulated by a state commission, CMRS providers are creatures of and governed by federal law. Because radio waves do not recognize state boundaries, Congress has used its power under the Interstate Commerce Clause to implement a 'unified and comprehensive regulatory system' for radio transmissions under 47 U.S.C. § 201(a)." (Response briefs, pp.3- 4.) As recognized by the RTCs (briefs in chief, p. 3), the wireless carriers' licenses are issued by the Federal Communications Commission (FCC) and cover geographic areas that do not coincide with pre-existing telephone exchange boundaries approved by the Oklahoma Corporation Commission, but which instead encompass different areas, the largest of which is a metropolitan trading area, or MTA. (The quoted passage in the RTCs' briefs in chief refers to a *metropolitan* trading area but the regulation cited by the RTCs for this proposition, refers to *major* trading area. 47 C.F.R. § 24.202. The court, therefore, finds that "major trading area" is the proper term. A major trading area has been defined by the FCC as the local service area for wireless providers. As stated in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC 15499, FCC 96-325 (1996) at ¶ 1036:

"[I]n light of [the FCC's] *exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under Section 251(b)(5).* Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA). Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (i.e., MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. *Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.*" (Emphasis added; footnotes deleted.)

Understood in the broadest possible terms, it is the lack of continuity between the area of

operation of the state regulated rural telephone companies and the federally regulated wireless carriers, which gives rise to this dispute.

FN7. In CIV-03-0349, instead of simply re-urging their four common points of error and then adding a fifth point of error to cover the extra issue in that action, the RTCs insert the unique issue as their fourth point of error in -0349 and re-number their common fourth point of error as their fifth point of error in -0349. Thus, although four of the five points of error raised in each of these actions are identical, the issues are numbered and briefed in a different order depending upon which set of briefs the reader is using. The instant order refers to the RTCs' points of error as they are numbered in their briefs filed in -0347, -0348 and -0350.

FN8. This issue corresponds to issue no. 4 on the joint issues matrix (the matrix).
As previously stated, the matrix is attached as Exhibit "B" to the Arbitrator's Report, and the Arbitrator's Report, with exhibits, was adopted by the Commission as a part of the Commission's Final Orders. Accordingly, the matrix is not "merely a tool used by the arbitrator [which] has no procedural or legal significance" as the RTCs contend (at p. 2 of the reply brief). Rather, it is an integral part of the Commission's Final Orders now on appeal, and it contains, in many instances, the specifics of the rulings to which the RTCs object. Thus, the matrix rulings are crucial to an understanding of what the Commission ruled, and therefore, to the RTCs' challenges to those rulings. It is for this reason that the court cross-references the plaintiffs' issues as briefed with those issues as referenced in the matrix.

FN9. Bill and keep is a compensation arrangement whereby interconnecting carriers do not charge each other for the termination of telecommunications traffic which originates on the other carrier's network. *See,* 47 C.F.R. § 51.713(a). In other words, each company terminates the other's traffic without charge and receives in-kind termination services back.

FN10. This issue corresponds to issues 1 and 2 on the matrix.

FN11. Defendant Cingular does not take a position or participate in the discussion concerning plaintiffs' second point of error. (Response briefs, p. 16, n. 64.)

FN12. This issue corresponds to issues 5 and 6 on the matrix.

FN13. This issue is not included on the matrix.

FN14. 47 C.F.R. § 51.713(b)

FN15. 47 C.F.R. § 51.713(c).

FN16. Interlocutory Order No. 466613 (at p.9), authored by the Commission and entered in PUD Nos. 200200149, 200200150, 200200151, and 200200153. The Interlocutory Order is found in the JDR at Bates Stamp 2721, and is Attachment B to the Commission's Final Orders. The Commission's Final Orders state "that Interlocutory Order No. 466613 continues to reflect the position of the Commission *en banc* regarding the above-entitled Cause[s]." (Commission's Final Orders at p. 3).

FN17. Finding of Fact No. 13 at p.4 of the Arbitrator's Report (emphasis added).

FN18. From the "Arbitrator's Decisions" at p. 1, ¶ 4 of the issues matrix attached as Exhibit B to the Arbitrator's Report.

FN19. Because the boundaries for determining what calls are local calls for wireless traffic are not necessarily the same as the boundaries which determine what calls are local calls for landline traffic, see

n.6, *infra.*, calls which originate with landline telephone companies such as the RTCs, may be required by law to be carried by an intermediate carrier before they are delivered to a terminating wireless services provider, even though such calls originate and terminate within the same MTA.

FN20. With regard to the *TSR Wireless* decision which both sets of parties argue supports their positions, the court concludes that the language in question from that decision is ambiguous as best, that the wireless carriers appear to have the better side of the argument concerning the proper interpretation of that language (as stated in the response briefs at pp. 22-23), and that the decision is not determinative of the issues before this court in any event. *In the Matter of TSR Wireless L.L.C. et al. v. U.S. West Communications, Inc. et al,* File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, 15 FCC Rcd 11166 (June 21, 2000), affirmed, *Owest Corporation v. FCC,* 252 F.3d 462 (D.C.Cir.2001).

FN21. Page 3 of the Arbitrator's Report, Findings and Fact Nos. 6 and 7; and "Arbitrator's Decisions" as stated in ¶ ¶ 1 and 2 of the issues matrix.

FN22. The arbitrator struck this issue from the matters before him, stating that "it does not belong in an arbitration, [and that] it's a separate cause before the Commission and the Commission does have the power to make that determination." (Transcript of proceedings before the arbitrator on April 25, 2002, p. 28 found in the JDR at Bates Stamp p. 3547.)

FN23. Although the reply brief cites one page of argument from proceedings on August 1, 2002 before the Commission *en banc* (*see* reply brief, p. 22 at n.107, citing p. 10 of proceedings before the Commission *en banc,* at Bates Stamp 4087 of the JDR) as pertaining to this issue, this citation is only to oral argument. That argument does not even mention the arbitrator's refusal to hear or determine the historical compensation issue.

2004 WL 541879, 2004 WL 541879 (W.D.Okla.)

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing document upon the persons listed below by the means indicated in accordance with the requirements of 52 Pa. Code § 1.54:

Via Federal Express – Over Night Delivery

D. Mark Thomas, Esq.
Patricia Armstrong, Esq.
Thomas Thomas Armstrong & Niesen
212 Locust Street
Harrisburg, PA 17108-9500

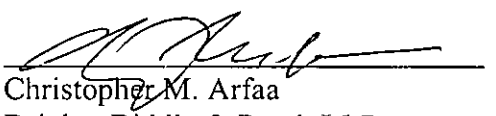
Charles F. Hoffman, Esq.
Office of Trial Staff
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105

Carol Pennington, Esq.
Office of Small Business Advocate
1102 Commerce Building
300 North Second Street
Harrisburg, PA 17101

Office of Special Assistants
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 3rd Floor
Harrisburg, PA 17120

Irwin A. Popowsky, Esq.
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Forum Place
Harrisburg, PA 17101-1923

Dated: April 7, 2004



Christopher M. Arfaa
Drinker Biddle & Reath LLP
18th and Cherry Streets
One Logan Square
Philadelphia, PA 19103-6996
(215) 988-2700

Counsel for Cellco Partnership
d/b/a Verizon Wireless

Thomas, Thomas, Armstrong & Niesen
Attorneys and Counsellors at Law
SUITE 500
212 LOCUST STREET
P. O. BOX 9500
HARRISBURG, PA 17108-9500

www.ttanlaw.com

FIRM (717) 255-7600
FAX (717) 236-8278

PATRICIA ARMSTRONG

Direct Dial: (717) 255-7627
E-Mail: parmstrong@ttanlaw.com

CHARLES E. THOMAS
(1913 - 1998)

April 8, 2004

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

In re: Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With ALLTEL Pennsylvania, Inc.
Docket No. A-310489F7004

Dear Secretary McNulty:

Enclosed for filing are an original and nine (9) copies of the Exceptions of ALLTEL Pennsylvania, Inc. in the above referenced proceeding. Also enclosed is a computer disk with an electronic copy of these Exceptions.

Copies of the Exceptions have been served in accordance with the attached Certificate of Service.

Very truly yours,

THOMAS, THOMAS, ARMSTRONG & NIESEN

By Patricia Armstrong
Patricia Armstrong

Enclosures
cc: Certificate of Service
Stephen B. Rowell, Esquire (w/encl.)
Lynn Hughes (w/encl.)

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Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With ALLTEL Pennsylvania, Inc.	:	Docket No. A-310489F7004

EXCEPTIONS
OF
ALLTEL PENNSYLVANIA, INC.

Patricia Armstrong
Regina L. Matz
D. Mark Thomas
Stephen B. Rowell

Attorneys for
ALLTEL PENNSYLVANIA, INC.

THOMAS, THOMAS, ARMSTRONG & NIESEN
212 Locust Street
P.O. Box 9500
Harrisburg, PA 17108-9500
(717) 255-7600

ALLTEL Corporation
One Allied Drive
Little Rock, AR 72202
(501) 905-8460

Dated: April 8, 2004

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I. INTRODUCTION

ALLTEL Pennsylvania, Inc. ("ALLTEL")[1] files these Exceptions to the March 24, 2004 Recommended Decision ("R.D.") of Administrative Law Judge ("ALJ") Wayne L. Weismandel. The proceeding involves the Petition for Arbitration filed by Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") on November 26, 2003, seeking arbitration of its request to ALLTEL to negotiate prices, terms, and conditions of an interconnection agreement for both direct and indirect CMRS-ILEC traffic.

This arbitration is a unique case raising many issues of first impression. This Commission has never arbitrated issues relating to the interconnection responsibilities of a rural incumbent local exchange carrier ("rural ILEC"), including determining whether a rural ILEC has any obligation to extend the delivery of its local traffic beyond its existing network and service area boundaries, nor has it arbitrated TELRIC rates for a rural ILEC. The resolution of these issues will have enormous financial and operational repercussions not only on ALLTEL, but also on every other rural ILEC in Pennsylvania. Further, the resolution could have a substantial impact on Pennsylvania's long-standing IntraLATA Toll Originating Responsibility Plan ("ITORP").

ALLTEL respectfully submits that the R.D. does not give justice to these complex issues of first impression, nor does it provide this Honorable Commission an in-depth analysis of the issues. Erroneously relying on inapplicable FCC standards, the R.D. adopts without analysis almost every position advocated by Verizon Wireless and largely ignores or misstates ALLTEL's positions and arguments. Even worse, the R.D. goes beyond Verizon Wireless' proposal to adopt a blended reciprocal compensation rate of $0.0078 with a mobile-to-land traffic factor of 60/40 and recommends bill-and-keep whereby ALLTEL would receive no compensation in its exchange of traffic with Verizon Wireless. This Commission has approved many interconnection agreements

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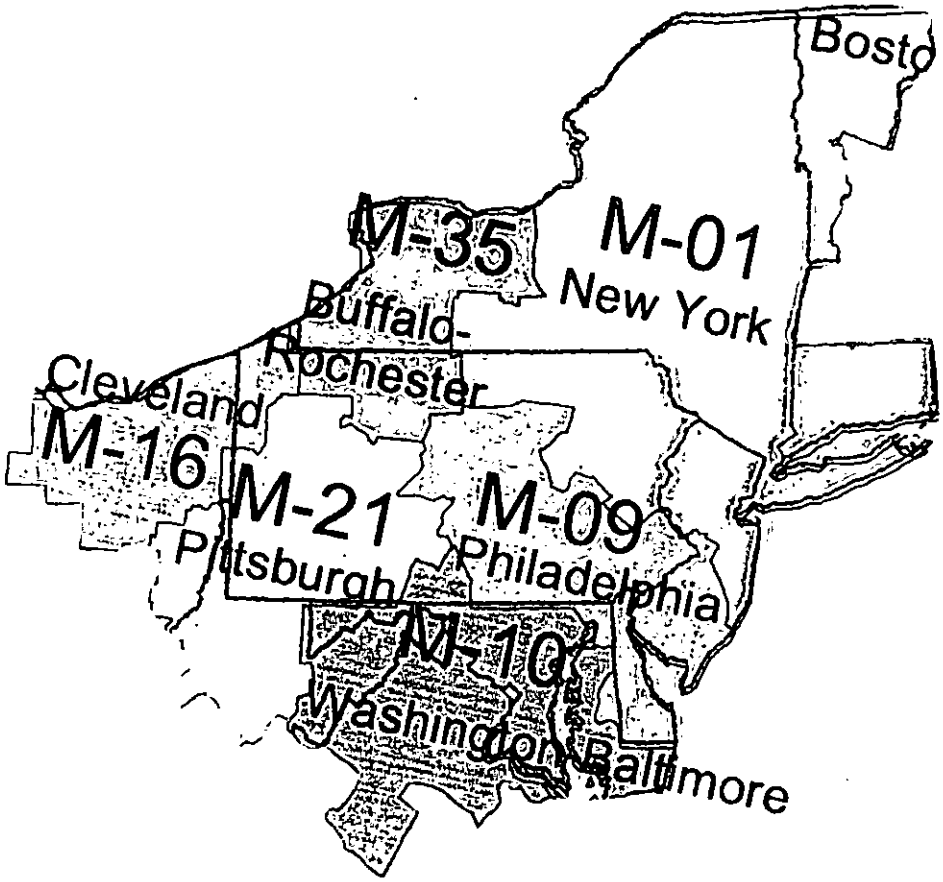
[1]ALLTEL is a rural local exchange carrier serving within 29 counties of Pennsylvania. Vast portions of its service territory are extremely rural. Consequently, ALLTEL has been declared a rural telephone company. See Order entered October 19, 1999, Docket No. P-00971177, Petition of ALLTEL Pennsylvania, Inc.; Petition of Rural and Small Incumbent Local Exchange Carriers for Commission Action Pursuant to Section 251(f)(2) and Section 253(b) of the Telecommunications Act of 1996; ALLTEL Main Brief at 6-8.

between rural ILECs and wireless carriers generally using a mobile-to-land traffic factor of 70/30. Never once has a rural ILEC-CMRS interconnection agreement been adopted in Pennsylvania on the basis of bill-and-keep.

Besides recommending adoption of a worst-case resolution for ALLTEL, the R.D. misrepresents ALLTEL's position, repeatedly insisting that ALLTEL is demanding access charges on indirect traffic. At no time has ALLTEL advocated the application of access charges as compensation under a new interconnection agreement with Verizon Wireless. In this proceeding ALLTEL has consistently advocated reciprocal compensation at TELRIC based rates.

The R.D. also recommends that ALLTEL be required to incur all costs to meet Verizon Wireless at any third-party tandem location in an MTA, regardless of the location of ALLTEL's network and service area. As ALLTEL demonstrated in hearing, and as replicated below, given its highly discontiguous service area, ALLTEL provides local exchange service in 5 of the 6 MTAs throughout Pennsylvania.



If adopted, the ALJ's recommendation would require ALLTEL to extend delivery of its traffic off its network and outside its service area to anywhere in a 10 state area from Ohio to Virginia to New Jersey and to Vermont, and to any point in between, all as a result of Verizon Wireless' choice not to interconnect directly with ALLTEL.[2] Such a radical requirement has never been imposed on any Regional Bell Operating Company ("RBOC") let alone a rural carrier.

The R.D. goes to further extremes when it recommends that ALLTEL must share in Verizon Wireless' network costs to construct dedicated two-way facilities outside ALLTEL's network and borders to extend Verizon Wireless' network to interconnect with the ALLTEL network. If adopted, ALLTEL could be forced to bear network costs of all wireless carriers to extend facilities to locations anywhere in 5 MTAs. Also, the R.D. wholly ignores the ITORP mechanism in Pennsylvania, the agreements upon which it is based, this Commission's orders with respect thereto and the fact that Verizon Wireless itself has proposed to retain the ITORP facilities to indirectly exchange traffic with ALLTEL.

ALLTEL submits that the Recommended Decision is so onerous, overreaching, and unsupportable as to be viewed as nothing short of arbitrary and capricious. Due to the serious consequences the recommended resolution of this arbitration will have on ALLTEL and the rural telephone company industry in Pennsylvania, we respectfully urge this Honorable Commission to undertake a de novo review of each issue in order to fully protect the public interest. FURTHER, SINCE THE BILL AND KEEP AND TRANSIT/FACILITY COST RECOMMENDATIONS WITH RESPECT TO ISSUES 9, 3(b) AND 8[3] HEREIN WOULD HAVE A DEVASTATING FINANCIAL IMPACT ON ALLTEL, ALLTEL IS ADDRESSING THESE ISSUES FIRST SINCE THEY ARE THE PRIMARY FOCUS OF THESE EXCEPTIONS.

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[2]See ALLTEL St. 3R at 26-30 and Exhibits C, D and E.

[3]A list of all unresolved issues addressed in the R.D. is attached hereto as Appendix A.

II. EXCEPTIONS

A. ALLTEL's Position Regarding Access Charges

1. Exception 1 - The R.D. Is Premised on the Mistaken Belief that ALLTEL Is Insisting on the Imposition of Access Charges (R.D. at 12)

This arbitration proceeding addresses Verizon Wireless' request relative to both its existing direct and indirect interconnections with ALLTEL. Verizon Wireless currently has three direct interconnections with ALLTEL. Also, Verizon Wireless currently exchanges traffic indirectly with ALLTEL through ITORP using Verizon Pennsylvania, Inc. ("Verizon PA") tandems.

In addressing indirect interconnection, the ALJ portrays ALLTEL as insisting on the payment of access charges for its termination of wireless traffic. The R.D. reads as follows:

> ALLTEL essentially insists that the indirect interconnection the parties will be using (traffic will transit a Verizon Pennsylvania Inc. tandem switch) is governed by the IntraLATA Toll Originating Responsibility Plan (ITORP), which requires the originating carrier to pay access charges to the terminating carrier.

R.D. at 12. The ALJ repeats this statement on pages 13-14 of the R.D.

There is no basis in the record for the ALJ to draw this conclusion as it is incorrect. Throughout this proceeding, ALLTEL has consistently agreed to the application of Section 251(b)(5) reciprocal compensation at Section 252(d)(2) TELRIC based rates under the Telecommunications Act of 1996 ("TCA-96").[4] ALLTEL never contended that access charges should be applied on indirect traffic under the arbitrated interconnection agreement. In fact, ALLTEL's witness Cesar Caballero on direct examination made it perfectly clear that ALLTEL is advocating the application of reciprocal compensation rates based upon a TELRIC pricing standard.[5] Likewise, ALLTEL's witness Lynn Hughes on examination by the ALJ left no question that ALLTEL is not seeking the application of access charges:

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[4]For example, see ALLTEL Ex. 4 - ALLTEL Response to Verizon Wireless' Petition for Arbitration at 12 and 24-25; ALLTEL St. 1 at 2-3; ALLTEL St. 1R at 2; ALLTEL St. 2 at 2-3; and ALLTEL Main Brief at 34-36.

[5]See ALLTEL St. 2 at 2-3.

JUDGE WEISMANDEL: And would you agree with me that probably the biggest sticking points are the problems over whether the access charge higher rates or the reciprocal compensation lower rates are going to apply? That's certainly one of them?

THE WITNESS: Well, I'm really not clear on that, Your Honor, because that was really never discussed in the negotiations. We have stated with Verizon Wireless, and it's evident in our [proposed] contract, that we were going to provide reciprocal compensation at TELRIC-based pricing and that when they terminated a call to ALLTEL indirectly, that ALLTEL was going to assess them a recip. comp rate and not an access rate. I believe the biggest issue here involved is who pays that third party involved when the traffic is indirectly routed.

T. 186 (emphasis added).

Obviously, the ALJ's understanding of ALLTEL's position is clearly in error. ALLTEL submits this error contributed to the ALJ's many other erroneous conclusions and clearly colored the R.D.'s disposition of numerous issues.

B. ALLTEL's TELRIC Studies Satisfy Applicable Requirements

1. The R.D. Erroneously Resolves Issue 9 by Rejecting ALLTEL's TELRIC Studies and Ordering Bill and Keep

The first issue of paramount importance in this arbitration proceeding concerns the determination of reciprocal compensation rates to be used by the parties in their direct and indirect exchange of traffic. As posed by Verizon Wireless, Issue 9 addressed the appropriate pricing methodology for establishing reciprocal compensation rates for the exchange of direct and indirect traffic. This issue, however, was not in dispute since both parties agreed to the application of TELRIC pricing as set forth in Section 252(d)(2) of the Act. The real issue concerns the appropriate reciprocal compensation rates to be established in this proceeding.

The R.D. disposes of Issue 9 after citing 47 C.F.R. §51.705(a) and concludes that ALLTEL had not submitted an adequate TELRIC cost study. The ALJ recommends that bill and keep should be imposed. This recommendation runs counter to the evidence of record and afoul of applicable law and should not be adopted.

a. **Exception 2 - The R.D. Improperly Rejected Both ALLTEL TELRIC Studies (Issue 9 - R.D. at 19-22)**

Contrary to the R.D., ALLTEL did, in fact, submit two adequate cost studies in this arbitration. As to ALLTEL's first cost study, ALLTEL Exhibit CC-1, the ALJ erroneously finds that "by ALLTEL's own admission," this study is not a TELRIC-based cost study.[6] This statement is not accurate. ALLTEL never admitted that its CC-1 study was not a TELRIC study. In fact, ALLTEL made it very clear that the CC-1 study was a TELRIC study:

> Exhibit CC-1 was predicated upon forward-looking TELRIC cost models and ratios that the ALLTEL system had actually completed in other states. These ratios correlated TELRIC costs compared to embedded costs to develop percentage factors. ALLTEL took these factors and applied them to the historic ALLTEL PA Investment to produce the (TELRIC) cost of service results in Exhibit CC-1.

ALLTEL Main Brief at 73 (footnotes omitted).

In ALLTEL's Reply Brief at 36, ALLTEL further stated it had "submitted two acceptable cost studies based upon forward looking costs" and that the study submitted in ALLTEL Exhibit CC-1 was a TELRIC study which fully satisfied the applicable FCC regulations. In response to Verizon Wireless' contention that CC-1 be rejected, ALLTEL also noted that, "Other than a request for passwords, and with recognition that none of the inputs were ever password protected, Verizon Wireless never made a single inquiry of ALLTEL concerning the CC-1 study or the model related thereto."[7]

The R.D.'s perfunctory rejection of CC-1, predicated upon a non-existent "admission," is without any support and cites none. Contrary to the ALJ, ALLTEL's evidence and arguments in briefs clearly showed it to be a TELRIC study. ALLTEL respectfully submits that the ALJ's recommendation must be rejected.[8]

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[6]R.D. at 20.

[7]ALLTEL Reply Brief at 39; see also ALLTEL Reply Brief at 36-39; ALLTEL Main Brief at 73-76.

[8]ALLTEL has clearly submitted a TELRIC study in Exhibit CC-1 upon which reciprocal compensation rates can be set. The use of historical costs as a starting point in developing TELRIC rates does not invalidate the study. See In the Matter of U S West Communications, Inc.'s Statement of Generally Available Terms and Conditions, Docket No. 99-A-577T, 2001 Colo. PUC Lexis 1140. See also Proceeding on Motion of the

Following the presentation of the CC-1 study in December 2003, ALLTEL completed a second TELRIC cost study, ALLTEL Exhibit CC-2, which eliminated the use of factors and developed the forward looking investment from specific inputs relative to Pennsylvania. The CC-2 study was developed using the exact same TELRIC model as CC-1, but did not use factors in developing the TELRIC costs. These TELRIC studies utilized the same model submitted by ALLTEL in other states and which was adopted by other state commissions, including the New York Public Service Commission ("PSC") as an acceptable TELRIC study.[9] The R.D., however, summarily rejects the CC-2 study for two stated reasons.[10] The first reason is that there was a single formula (out of numerous formulas contained in all the detailed supporting information) which was incorrectly labeled as "one plus line 22 times line 43." The label should have merely read "line 22 times line 43." Notwithstanding the incorrect label, as recognized at hearing, the calculation in the formula was done correctly. This label was corrected at the hearing in Exhibit CC-2 immediately upon being pointed out and the same formula was correctly labeled in Exhibit CC-1.[11] Based upon this criticism of a single mislabeled formula, the R.D. concludes that the study is "facially misleading." There was no other substantive challenge to the contents of the CC-2 study. In light of the actual circumstances, such a conclusion is ludicrous.

The only other reason identified by the ALJ for rejecting ALLTEL Exhibit CC-2 is that it was not presented in "sufficient time nor in a format allowing it to be examined and tested by Cellco."[12] As to the timing of its submission, CC-2 used the exact same model as CC-1 that had been presented 6 weeks earlier and was given to Verizon Wireless on the date set for responsive testimony.

Commission to Examine New York Telephone Company's Rate for Unbundled Network Elements, (Recommended Decision adopted May 16, 2001 at Case 98 - C-1357) (2001 NY PUC Lexis 293), as affirmed by Commission Order (2002 NY PUC LEXIS 15). The study in CC-1 fully complies with the FCC's requirements.

[9]See ALLTEL Reply Brief at 40.

[10]R.D. at 20.

[11]See T. 218-20.

[12]R.D. at 20.

CC-2 responded directly to Verizon Wireless' criticisms of CC-1. It was submitted in hard copy and as much as was available in electronic form was also provided. Except for a single interrogatory and a single phone call, at no time did Verizon Wireless ever attempt to review either of the two studies with ALLTEL. As noted by ALLTEL in its Reply Brief at 37, while the arbitration time frames set out in TCA-96 are very tight to begin with, Verizon Wireless took every opportunity to set as narrow a time frame for arbitration as possible and did not offer to extend the consideration period to provide additional time for review of the cost studies. As ALLTEL further noted, a minimal extension sufficient to allow Verizon Wireless the additional time it needed to review CC-2 would have been harmless. However, Verizon Wireless refused to further extend the Commission's consideration period and instead simply sought to have the ALJ disregard in their entirety the ALLTEL cost studies *in hopes of getting the CC-2 study rates thrown out and in their place to have extremely low proxy* rates be established. The tactic worked from the standpoint of the ALJ. Not only did the ALJ throw out ALLTEL's TELRIC studies, but he rejected the proxy rates advocated by Verizon Wireless in its Final & Best Offer and instead recommended bill and keep, a recommendation wholly unsupported by the record, the law and with catastrophic financial ramifications on ALLTEL.

b. Exception 3 - The R.D. Improperly Orders Bill and Keep (Issue 9 - R.D. at 21-22)

No party in this arbitration advocated the adoption of bill and keep. Instead, both parties advocated reciprocal compensation rates based upon specific mobile-to-land traffic factors. In recognition of his role as an arbitrator, the ALJ at the hearing made it clear he was going to pick one of the two final best offers.[13] ALLTEL's Final and Best Offer reflected reciprocal compensation rates of Type 2A - $0.01891, Type 2B - $0.00942, Type 1 - $0.0094 and Indirect - $0.01642.[14] Whereas, Verizon Wireless' Final and Best Offer reflected rates of Type 2A - $0.0896, Type 2B and Type 1 -

[13]T. 274.

[14]ALLTEL noted that its rates did not include any costs related to extending delivery of its local traffic beyond its network and boundaries, and that if such costs were imposed, the rates would have to be adjusted upwards. ALLTEL Reply Brief at 40.

$0.00446 and Indirect - $0.00792. The ALJ, however, did not accept either position. Rather, the ALJ recommends bill and keep, which is the worst case scenario for ALLTEL. ALLTEL thoroughly addressed the cost study and reciprocal compensation rate issues in its Main Brief at 68-95 and Reply Brief at 35-42,[15] and respectfully submits that the R.D.'s rejection of the ALLTEL cost studies and adoption of bill and keep should be rejected.

The ALJ recommends bill and keep by rejecting both of ALLTEL's cost studies, rejecting proxy rates including the proxy rates advocated by Verizon Wireless, and concluding that there was no credible evidence overcoming the presumption that the traffic between Verizon Wireless and ALLTEL "is roughly balanced."[16] The ALJ's conclusion is in error. There was and could be no such presumption in this proceeding.

No other Verizon Wireless interconnection agreements in Pennsylvania, not even the agreement with its affiliate Verizon PA, are based upon bill-and-keep.[17] In fact, other than negotiations with Allegiance in a few other states, Verizon Wireless has no bill and keep arrangement in any of the 8 states for which Verizon Wireless provided information in discovery.[18] Notwithstanding that both Verizon Wireless and ALLTEL advocated traffic factors, each of which depicted imbalanced traffic flow, the ALJ arbitrarily penalizes ALLTEL with an outlandish and unsupportable holding that assumes balanced traffic.

Specifically, 47 C.F.R. §51.713(b) and (c), cited in the R.D. at 21, as the basis for the ALJ's bill and keep recommendation, read as follows:

> (b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications

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[15]Since Verizon Wireless never advocated bill and keep, ALLTEL did not brief the issue. The ALJ's surprise recommendation therefore denies ALLTEL its due process rights to address this most important issue.

[16]R.D. at 21.

[17]ALLTEL Ex. 5, Exhibit II.

[18]Id.

traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to §51.711(b).

(c) Nothing in this section precludes a state commission from presuming that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.

As to subpart (b), there is absolutely no basis in the record for this Commission to find that the traffic is roughly balanced and is expected to remain so. ALLTEL witness Hughes testified at length, as discussed in ALLTEL's Main Brief at 121 et seq., that while ALLTEL had initially proposed an 80/20 mobile-to-land traffic factor, it ultimately accepted Verizon Wireless' counter-offer of a 70/30 factor on this issue, and believed the issue was closed.[19] Verizon Wireless then reneged on its 70/30 offer by placing this in issue in its arbitration petition. The parties in their Best and Final Offers on Issue 30 submitted the following mobile-to-land factors: Verizon Wireless 60/40 and ALLTEL 70/30.[20] In other words, while the parties disagreed regarding the degree of imbalance, they both agreed it was not 50/50. At worst, the decision must conclude 60/40, but cannot ignore the evidence of both parties that there is an imbalance.[21] Based upon these positions, there is no basis whatsoever for concluding that the traffic is roughly balanced or recommending that it is expected to remain so. And the evidence submitted by each party clearly rebuts any presumption the

[19]The NY rural ILEC proceeding, relied on in the R.D. with respect to Issue 27, resulted in an agreement with a 70/30 traffic split (see ALLTEL Ex. 6), which comports with industry standards.

[20]The R.D. failed to resolve Issues 10, 11 and 30 based upon its recommendation in Issue 9. Accordingly, ALLTEL excepts to the R.D. with respect to Issues 10, 11 and 30 for the reasons set forth herein and in ALLTEL's Main Brief at 95-101, 121-23 and ALLTEL Reply Brief at 42-43. If ALLTEL's exception as to Issue 9 is adopted, the PUC should find the 70/30 factor that Verizon Wireless had proposed and ALLTEL had accepted as the appropriate resolution for Issues 10 and 30 (except where actual data is available) pending further review if necessary, and should find under Issue 11 that the comparable LEC tandem at issue is that of Verizon PA, not ALLTEL, and therefore Verizon Wireless' proposed rate is asymmetrical and must be rejected.

[21]Only at the rebuttal phase did Verizon Wireless offer any evidence of traffic flow which was a one time short term measure of traffic at only the Meadville interconnection point. As rebutted by ALLTEL witness Lynn Hughes, this measurement was not reliable as it was based on an isolated suspect measurement which was not representative of the overall traffic exchanged nor consistent with generally accepted mobile-to-land traffic factors. See ALLTEL St. 1R at 7-9 and 25-27.

Commission may be entitled to make under §51.713(c) that it is balanced and expected to remain so.[22]

Instead of basing the finding on the positions of the parties, the R.D. takes the unprecedented step of ordering bill and keep, a finding which is arbitrary, has never been ordered under similar circumstances and is at odds with virtually every other CMRS-ILEC Pennsylvania interconnection agreement. Adoption of this totally arbitrary bill-and-keep recommendation would not only deprive ALLTEL of significant termination revenues, but also depending upon the Commission's disposition of Issues 3(b) and 8, may actually result in ALLTEL incurring substantial additional expenses relative to delivering its originated traffic to an interconnection point well off of ALLTEL's network and outside its borders. The financial repercussions will be exponential once other wireless carriers opt into this agreement.

The R.D. is also contrary to the FCC's First Report and Order,[23] which found that if a Commission presumes traffic is roughly in balance and bill and keep is appropriate, the parties always retain the right to reopen the agreement at any time.[24] The R.D. fails to even acknowledge this right. Accordingly, there is no justification for the R.D.'s recommended resolution of Issue 9. ALLTEL respectfully submits that it placed into evidence two TELRIC-based cost studies with appropriate traffic factors. The reciprocal compensation rates derived from the CC-2 study and included in ALLTEL's Final and Best Offer using a 70/30 mobile-to-land traffic factor are definitely supported in fact and law in this arbitration.

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[22]Verizon Wireless cites the case of Atlas Telephone Co. v. Corporation Commission of Oklahoma, No. CIV-03-0347-F, 2004 WL 541879 (W.D. Okla. Mar. 5, 2004). However, none of the dispositions of the 4 issues made by the Atlas Court are relevant to the instant case. As to Issue A in Atlas, there was a prior Oklahoma Commission Order finding a presumption of a balance of traffic and no TELRIC rate submitted. In the instant case the PUC has not issued such a prior Order and there were TELRIC rates submitted. As to Issue B, ALLTEL has agreed to reciprocal compensation for all intra-MTA traffic. Issue C was resolved in *Atlas* because there were no forward looking cost studies for the respective companies, while in the instant case, ALLTEL submitted TELRIC based rates and studies. Issue D is not an issue here.

[23]In the Matter of Implementation of the Local Competition Provisions in The Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) ("First Report and Order").

[24]See First Report and Order, 11 FCC Rcd at 16055-56 ¶¶ 1113-15.

C. ALLTEL Has No Obligation For Costs In Connection With Services Or Facilities Outside Its Network And Service Territory

The second issue of paramount importance in this arbitration concerns cost responsibilities for services and facilities outside ALLTEL's network and service territory, by compulsory purchase of a third party's transit service or building facilities outside its borders, to extend delivery of traffic beyond its network and borders to meet Verizon Wireless' distant interconnection point.

1. Exception 4 - The R.D. Erroneously Concludes that ALLTEL Must Purchase Transit Service from a Third-Party Tandem Provider to Extend Delivery of ALLTEL's Traffic Outside Its Network and Service Territory (Issue 3(b) - R.D. at 15-16)

Issue 3(b) concerns which party is responsible for purchasing a third-party tandem provider's transit service when Verizon Wireless, for economic reasons, elects not to directly interconnect with the ALLTEL network. Citing the FCC's TSR Wireless and Texcom decisions,[25] the ALJ found "in favor of Cellco" and recommends "ALLTEL is responsible for the third-party's transiting cost" to extend delivery of ALLTEL's traffic beyond ALLTEL's network and borders to anywhere in an MTA.

2. Exception 5 - The R.D. Erroneously Concludes That ALLTEL Must Share Verizon Wireless' Capital Costs of Dedicated Two-Way Interconnection Facilities Outside Its Network and Service Territory to Interconnect with ALLTEL (Issue 8 - R.D. at 18-19)

Issue 8 in this matter addressed Verizon Wireless' claim that ALLTEL must share in Verizon Wireless' capital costs to construct facilities from Verizon Wireless' switch anywhere in an MTA to interconnect with ALLTEL's network. Citing TSR Wireless, the ALJ again erroneously decides in favor of Verizon Wireless.

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[25] TSR Wireless, LLC v. U.S. West Communications, Inc., 15 FCC Rcd 11166 (2000), aff'd sub. nom., Quest Corp. v. FCC, 252 F.3d 462 (D.C. Cir. 2001) ("TSR Wireless"); Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications, Memorandum Opinion and Order, 16 FCC Rcd 21493 (2001) ("Texcom Memorandum Opinion") and Texcom Inc. V. Bell Atlantic Corp., Reconsideration Order, 17 FCC Rcd 6275 (2002) ("Texcom Reconsideration Order") (collectively referred to as "the Texcom decisions").

3. Discussion of Exceptions 4 and 5

The ALJ finds under Issue 3(b) that ALLTEL must be required to purchase Verizon PA's transit service to extend delivery of traffic beyond ALLTEL's existing network and borders, concluding that "[t]he FCC has clearly answered this question in interpreting its regulations dealing with compensation for the transport and termination of traffic between a LEC (such as ALLTEL) and a CMRS provider (such as Cellco)."[26] The ALJ also finds, without citation to authority, that "[t]he rule [51.703(b)] that calls originating on the LEC (ALLTEL) network are paid for by the LEC, or its customers, applies in instances of indirect connection as well."[27] Finally, the ALJ finds that as the originating carrier of an intra-MTA call (regardless whether delivery of that call has to be extended off ALLTEL's network and outside its borders in order to be delivered to Verizon Wireless' interconnection point on Verizon PA's network), "ALLTEL is responsible for the third party's transiting cost."[28]

In reaching his recommendation under Issue 8 that ALLTEL is also required to incur capital costs to construct facilities beyond its existing network and service area, the ALJ finds that "ALLTEL once again refuses to recognize or accept FCC decisions and regulations that clearly control."[29] According to the ALJ, "ALLTEL's arguments conveniently ignore the facts that in TSR

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[26]R.D. at 15 (*emphasis added*). As discussed in greater detail below, no "transport and termination" costs are involved in "transit" service. Transport moves traffic from one point on ALLTEL's network to a requesting carrier's interconnection point at another point on ALLTEL's same network where the traffic is terminated. Transit, on the other hand, does not involve ALLTEL's network at all, but rather is a service provided by a third party, in this case Verizon PA, chosen by Verizon Wireless in indirectly exchanging CMRS-ILEC traffic with ALLTEL thereby avoiding the capital costs to directly interconnect its network with the ALLTEL network.

[27]Id.

[28]R.D. at 16, citing paragraph 4 of the Texcom Memorandum Opinion and paragraph 4 of the Texcom Reconsideration Order.

[29]R.D. at 18, citing and quoting TSR Wireless for the proposition that Section 51.703(b) of the FCC's rules prohibits a LEC from charging CMRS providers "for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA[.]" (Emphasis added.) As discussed in detail infra, and in ALLTEL's Reply Brief at 16, et seq., it is the LEC's use of the LEC's own facilities for which the LEC may not assess charges. Section 51.703(b) does not address the assignment of transit charges imposed by a third party for the use of the third-party's facilities.

Wireless RBOCs were involved and that ALLTEL is not an RBOC."[30] Also according to the ALJ, "[a]s to ALLTEL, TSR Wireless stands for the proposition that a non-RBOC LEC is required to deliver, without charge, traffic to CMRS providers anywhere within the MTA" although the ALJ noted "the exception of RBOCs, which are generally prohibited from delivering traffic across LATA boundaries."[31]

As demonstrated in the Introduction to these Exceptions, because ALLTEL provides service in portions of 5 of the 6 MTAs in Pennsylvania, the ALJ's recommendations with regard to Issues 3(b) and 8 would obligate ALLTEL and its wireline customers to bear the costs to extend ALLTEL's delivery of traffic to anywhere in 5 MTAs that encompass a 10-state area.[32] ALLTEL submits that this recommendation has no basis in the FCC's rules and is clearly in error.

Verizon Wireless presented its interconnection request to ALLTEL, including its choice of locations to exchange traffic - either through direct interconnections on ALLTEL's system or indirectly using a third party's tandem.[33] Verizon Wireless determined that unless traffic exchanged with ALLTEL reached a certain level (Issue 27), it is economically more efficient to remain indirectly interconnected with ALLTEL. As a determination by Verizon Wireless that it is more economically efficient for it to continue to exchange traffic indirectly with ALLTEL through the ITORP facilities, rather than to incur capital costs to directly interconnect on ALLTEL's network, ALLTEL submits that it is the responsibility of Verizon Wireless to incur the third-party transit costs arising from its decision. ALLTEL's responsibilities to deliver local traffic end at its borders. No

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[30]R.D. at 19.

[31]R.D. at 19, quoting TSR Wireless (emphasis in R.D.).

[32]See ALLTEL Main Brief at 57-59; ALLTEL Reply Brief at 31-32.

[33]It is important to recognize that Verizon Wireless in this arbitration is not seeking a new indirect interconnection with ALLTEL from a facilities standpoint. Instead, Verizon Wireless seeks to retain its ITORP indirect interconnection with ALLTEL. See Verizon Wireless Reply Brief at 9 ("Verizon Wireless is not seeking 'interconnection' - as ALLTEL points out, the parties are already interconnected[.]") ITORP was premised upon the express agreement that each party was required only to provide services and facilities in its operating area. ALLTEL St. 1 at 12. See Verizon Wireless Reply Brief at 9 ("Verizon Wireless is not seeking 'interconnection' - as ALLTEL points out, the parties are already interconnected[.]").

ILEC, not even an RBOC, has ever been mandated to purchase third-party transit service or to share in the cost of constructing CMRS facilities outside the ILEC's service territory. Yet, this is what the R.D. erroneously recommends.[34]

ALLTEL submits that this recommendation produces an absurd result that clearly was neither intended by Congress nor is supported by the FCC's rules and decisional law, and rests on an erroneous understanding and application of the TSR Wireless and Texcom decisions. Further, the recommendation is in direct conflict with the Coserv[35] decision, discussed infra.

a. Neither TSR Wireless nor the Texcom Decisions Support the ALJ's Recommendation

i. The TSR Wireless Decision

The R.D. at 19 provides that, as to ALLTEL, "TSR Wireless stands for the for the proposition that a non-RBOC LEC is required to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated. Likewise, TSR Wireless prohibits a non-RBOC LEC (such as ALLTEL) from charging a CMRS provider (such as Cellco) for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA."

The interconnection at issue in TSR Wireless was a direct, two-party interconnection. Thus, this language, so heavily relied upon by the ALJ for his recommendations with respect to a three-party indirect interconnection, does not apply. The holding was made in the context of a two-party direct interconnection between RBOCs and paging companies where the traffic at issue never left the RBOCs' networks and third-party transit charges were never at issue. The pagers filed complaints against the RBOCs after the RBOCs charged the pagers for the RBOCs' use of their own network facilities to deliver RBOC originated traffic from one exchange to the pagers' interconnection point in a distant exchange on the same RBOC network. In other words, no third-party transit service was

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[34]As the ALJ noted, an RBOC's "MTA-wide" duties end at a LATA. Incongruously, however, he finds that ALLTEL may be compelled to deliver traffic across 10 states.

[35]Coserv Limited Liability Corporation; Multitechnology Services LP v. Southwestern Bell Telephone Company, 350 F.3d 482 (5th Cir. 2003) ("Coserv"). A copy of the Coserv opinion, which is addressed fully in Section H of these Exceptions, infra, is attached hereto as Appendix B.

involved for the RBOCs to deliver their traffic to the pagers, nor was there any issue concerning the construction of facilities to extend the delivery of RBOC originated traffic beyond their existing networks and borders.

The FCC held that the RBOCs could not charge the pagers for an RBOC's use of its own network facilities to transport the RBOCs' own traffic from one exchange to another exchange on the RBOCs' network.[36] The RBOCs were not required to incur additional costs, either to construct facilities or to purchase a third-party's transit services, in order to complete delivery of their traffic to the pagers. They were simply precluded from assessing charges associated with the use of their own facilities to deliver their traffic to the pagers' interconnection points on the RBOCs' networks. The R.D.'s reliance, in this indirect interconnection request, on language from the TSR Wireless decision that was applicable to a two-party direct interconnection, is in clear error.

In fact, the FCC's findings in TSR Wireless are entirely consistent with ALLTEL's position herein. ALLTEL is not proposing to assess Verizon Wireless charges associated with ALLTEL's use of its own network to deliver traffic to Verizon Wireless. In the context of the direct interconnection at issue in TSR Wireless, "anywhere in the MTA" clearly refers to anywhere in the MTA on the ILEC's network. In fact, while disallowing the "facilities charges," the FCC did allow the RBOCs to assess charges associated with the provision of "wide area calling" if the interconnecting carrier's interconnection point required the RBOC to deliver traffic beyond an RBOC local exchange to a distant exchange on the RBOCs' networks. "'Wide area calling' services are not necessary for interconnection[.] Section 51.703(b) does not compel a LEC to offer wide area calling or similar services without charge. Indeed, LECs are not obligated under our rules to provide such services at all; accordingly it would seem incongruous for LECs who choose to offer these services

[36]The principle behind this, as explained by the FCC, was that the RBOCs are already compensated by their ratepayers for their facilities, and therefore, to use the same facilities to carry calls to another interconnecting carrier, the RBOCs could not again charge for the use of the same facilities. Obviously, ALLTEL is not currently being paid by its ratepayers to carry local traffic off its network, thus justifying the ALJ's determination that ALLTEL could recover from its ratepayers the additional costs associated with his recommendations regarding ALLTEL's obligations under Section 251(a) to incur extra-network facilities and transit costs to extend the delivery of its traffic beyond its borders. ALLTEL R.B. at 20-21.

not to be able to charge for them."[37] Therefore, the case does not stand for the proposition, as the ALJ recommends, that ALLTEL has an obligation to incur additional facilities or service costs not associated with the use of its own network to accommodate Verizon Wireless' choice of interconnection off ALLTEL's network and outside its boundaries.[38]

ii. The Texcom Decisions

The ALJ cites to both the Texcom Memorandum Opinion and the Texcom Reconsideration Order for the premise that ALLTEL must purchase transit service from Verizon PA to extend the delivery of traffic from ALLTEL's borders to Verizon Wireless' distant interconnection point on Verizon PA's network.[39] Again, the ALJ is in error.[40]

In the Texcom Memorandum Order, the FCC actually stated that "a CMRS carrier is not required to pay an interconnecting LEC for traffic that terminates on the CMRS provider's network if the traffic originated on the LEC's network [i.e., if the CMRS provider directly interconnected with the LEC's network and the traffic traveled over just that one network to the terminating carrier's interconnection point.]"[41] Citing its TSR Wireless decision for the premise that a LEC could not assess charges related to the LEC's use of its own facilities to deliver traffic to a terminating carrier, the FCC found that a LEC could charge a terminating CMRS carrier for transiting services associated with another carrier's originating traffic that "traversed the LEC's network on its way to the CMRS

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[37]TSR Wireless, 15 FCC Rcd at 11183-84 ¶ 30 (emphasis added); See also ALLTEL Reply Brief at 18-21.

[38]ALLTEL also notes that the ALJ's comment that ALLTEL "conveniently ignores" the fact that TSR Wireless involved RBOCs is wholly inaccurate. R.D. at 19. In briefs before the ALJ, ALLTEL noted extensively the involvement of the RBOCs and their direct interconnection obligations under that case and the FCC's rules. See e.g. ALLTEL Reply Brief at 16-23. ALLTEL finds it both surprising and ironic, however, that while the ALJ noted that under TSR Wireless the RBOC's direct interconnection obligations extended to anywhere in the MTA within a LATA, thus never off their network, the ALJ had no problem requiring ALLTEL's obligations to extend into a 10 state area, imposing upon ALLTEL greater obligations for an indirect interconnection than were ever imposed upon the RBOCs for a direct interconnection.

[39]R.D. at 16.

[40]See ALLTEL R.B. at 23-26.

[41]Texcom Memorandum Order, 16 FCC Rcd at 21494 ¶ 4.

carrier's network."[42] Referring to both TSR Wireless and the First Report and Order, the FCC noted that it had previously required pagers to "pay for 'transiting traffic,' that is, traffic that originated from another carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the paging carrier's network."[43]

The ALJ overlooks the fact that the FCC likewise affirmed, in the Texcom Reconsideration Order, that terminating carriers can be assessed charges for transit services used to transit the originating carrier's traffic to the terminating carrier.[44] The FCC suggested that the terminating carrier could seek to address the cost responsibility for transit services in its negotiations of an indirect interconnection with the originating carrier under Section 252(a). However, the FCC refused to mandate that the originating carrier was responsible for a third party's transit service under its two-party rules applicable to direct interconnection.[45] As the FCC has repeatedly recognized, issues related to indirect interconnection, such as the use of a third party's transit service to indirectly exchange traffic, are properly the subject of voluntary negotiations between the parties, and are not subject to the FCC's local interconnection rules.

Consistent therewith, the R.D. is in error in mandating that ALLTEL, as the originating carrier, must be compelled to extend the delivery of traffic off its network and outside its borders by compulsory purchase of a third party's transit service or construction of extra-network facilities. The ALJ's reliance on the TSR Wireless and Texcom decisions is totally misplaced.

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[42]Id.

[43]Id.

[44]Texcom Reconsideration Order, 17 FCC Rcd at 6275 ¶ 1 (affirming the assessment on the terminating carrier transit charges associated with the originating carriers traffic).

[45]Texcom Reconsideration Order, 17 FCC Rcd at 6276-77 ¶ 4. This comports with the FCC's consistent view of "indirect interconnections" under Section 251(a) as voluntary, negotiated accommodations of traffic exchanged between non-dominant (non-incumbent) LECs, both of which lack existing networks and thus find it more economically efficient to interconnect with each other indirectly through the existing network of an ILEC. Never, however, has the FCC required or declared, under purported authority of Section 251(a) of TCA-96 or its rules promulgated thereunder, that an ILEC must incur additional transit service or facility costs in order to extend the delivery of its traffic beyond its network or borders to satisfy a requesting carrier's demand for indirect interconnection. See ALLTEL Main Brief at 51-52, and footnote 71; ALLTEL Reply Brief at 25.

b. The FCC's Rules Regarding Compensation for Transport and Termination of Traffic Have Nothing to Do with the Transit of Indirectly Exchanged Traffic

The ALJ also failed to understand the difference between ALLTEL's network elements that would be involved in its "transport and termination" of traffic on its own network in a direct interconnection, and the Verizon PA network elements that would be involved to "transit" traffic off ALLTEL's network and over the network of Verizon PA to meet Verizon Wireless in an indirect interconnection. Without recognizing the distinction between "transport" costs and "transit" costs, the R.D. concludes that the FCC's rules for the "transport and termination" of traffic require ALLTEL to incur additional transit costs to extend the delivery of its traffic beyond its network and borders.[46]

As before discussed, ALLTEL has not proposed to charge Verizon Wireless for the use of ALLTEL's own facilities to "transport and terminate" traffic to Verizon Wireless. Such proposal would be prohibited under Section 51.703(b) of the FCC's rules and cases like TSR Wireless. However, once ALLTEL delivers traffic to its border, in order to be terminated at Verizon Wireless' indirect interconnection site that traffic must be transited across Verizon PA's network facilities. ALLTEL's duties to transport its traffic end at its network boundaries, and no further "transport and termination" of ALLTEL's traffic is involved. Rules addressing the costs related to the transport and termination of traffic on ALLTEL's network have nothing to do with the costs associated with transit of that traffic through Verizon PA that is necessitated by Verizon Wireless' choice of a distant interconnection point off ALLTEL's network. Thus, the ALJ's reasoning that the FCC's rules regarding the "transport and termination" of traffic compel ALLTEL to incur a third-party's costs to "transit" that traffic outside its network across a third-party's network is patently wrong.[47]

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[46]R.D. at 15.

[47]In the First Report and Order, the FCC repeatedly recognized in regard to its interconnection rules that "certain small incumbent LECs [rural ILECs] are not subject to our rules under section 251(f)(1) of the 1996 Act . . . and certain other small incumbent LECs [rural ILECs] may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act." First Report and Order, 11 FCC Rcd at 16056 ¶ 1115. See also id. at ¶¶ 1059, 1068 and 1088. If by the FCC's own recognition these rules for direct

The FCC's rules require an interconnecting ILEC to bear its own transport and termination costs. For traffic indirectly exchanged, the FCC's rules do not require the purchase of a third-party's intermediary transit services or the construction of facilities outside the ILEC's existing network to extend delivery of an ILEC's traffic beyond its networks and borders.

This is evident from the FCC's discussion of the transport and termination functions. With respect to ILECs making their networks available to CMRS carriers, the FCC stated:

> LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, pursuant to the rules governing reciprocal compensation set forth in Section XI.B., below.

First Report and Order, 11 FCC Rcd at 15997 ¶1008 (emphasis added). The words "on each other's networks" clearly refer to a direct interconnection of two parties' facilities.

The FCC's discussion of "transport and termination" in the First Report and Order clearly addresses the movement of traffic between two-parties that are directly interconnected on one party's network. As the FCC stated, "transport and termination of traffic, whether it originates locally or from a distant exchange [i.e., outside the local exchange] involves the same network functions."[48] Those network functions involved an ILEC's transport of traffic from one exchange on its network where the call originated to a distant exchange still on its network where the call was terminated. In indirect interconnections, the "same network functions" are not involved because in fact two different networks are involved, ALLTEL's and Verizon PA's. ALLTEL will transport and terminate its originated traffic to any point on its network to exchange traffic with Verizon Wireless. The FCC's rules require ALLTEL to transport its originated traffic across its network; they do not require ALLTEL to purchase Verizon PA's transit service to extend delivery of that traffic off ALLTEL's

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two-party interconnections do not apply to rural ILECs until the Commission removes the standing rural exemption under Section 251(f)(1), it is inconceivable that these same rules could be interpreted to apply to *indirect, three-party interconnections where the elements, transport and termination as opposed to transit, are* not even at issue.

[48] Id. at 16012 ¶ 1033 (emphasis added).

network to meet Verizon Wireless at some distant location anywhere in a 10-state area covered in the five MTAs in Pennsylvania in which ALLTEL provides local service.

Contrary to the ALJ's cursory and unsupported conclusion that the FCC's rules apply to indirectly exchanged traffic, the FCC itself has already determined that its rules do not address three-party transit service. In affirming Verizon Virginia's assessment of transit charges on competitive carriers, the FCC found "an absence of Commission rules specifically governing transit service."[49] The FCC declined to rule that Verizon VA was obligated to provide transit service, noting lack of "clear Commission precedent or rules declaring such a duty."[50] If the FCC declined to obligate an RBOC to provide transit service under its rules to facilitate indirect interconnection, ALLTEL is at a loss to see how it can be obligated under those same rules to purchase such transit service to extend the delivery of its traffic beyond its network and borders.

Finally, the New York PSC addressed the issue of intercarrier interconnections, and concluded that an originating ILEC is only responsible for delivering traffic and incurring costs for such delivery to its borders.[51] *While the R.D. followed these New York PSC decisions in resolving* Issue 27, on Issues 3(b) and 8, the R.D. is inexplicably silent.

c. The ALJ's Interpretation of Section 251(a) Is Erroneous

The ALJ's recommendations that ALLTEL may be required to incur costs to deliver traffic off its network and beyond its borders rest, in part, upon the ALJ's interpretation of Section 251(a) of TCA-96. The ALJ states on page 10 of the R.D. that "[t]he obligations included in TRA (sic) §251(a)(1) include the duty 'to interconnect directly or indirectly with the facilities and equipment

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[49]In the Matter of Petition of WorldCom, Inc. Regarding Interconnection Disputes with Verizon Virginia Inc., 17 FCC Rcd 27039, 27100 ¶ 115 (2002) ("In the Matter of Petition of WorldCom").

[50]Id. at 27101 ¶ 117; see also ALLTEL M.B. at 47, note 63.

[51]Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Telephone Companies, Case 00-C-0789, 2000 N.Y. PUC LEXIS 1047 (Order Effective December 22, 2000) at 9, Ordering Paragraph 1, specifically made applicable to CMRS carriers in Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Telephone Companies, Case 00-C-0789, 2001 N.Y. PUC LEXIS 696 (Order Effective September 7, 2001) at 7, 11. See ALLTEL Main Brief at 52-57.

of other telecommunications carriers.' TRA (sic) §251(a)(1) (emphasis added). Cellco's Petition is clearly one for interconnection with ALLTEL under the duty each has pursuant to TRA (sic) §251(a)(1)." The ALJ fails to recognize the Coserv and Texcom decisions, which together clearly provide that an ILEC's negotiation duties under Section 252(a) are limited to the Section 251(b) and (c) interconnection obligations, and that an ILEC's duties and negotiations as to three-party agreements under Section 251(a) are purely voluntary.[52]

The 8th Circuit Court of Appeals further recognized that the direct interconnection obligations in Sections 251(b) and (c) pose an economic burden from which Congress provided rural protections:

> In the Act, Congress sought both to promote competition and to protect rural telephone companies as evidenced by the congressional debates. It is clear that Congress intended that all Americans, including those in sparsely settled areas served by small telephone companies, should share the benefit of the lower cost of competitive telephone service and the benefits of new telephone technologies, which the Act was designed to provide. It is also clear that Congress exempted the rural ILECs from the interconnection, unbundled access to network elements, and resale obligations imposed by § 251(c), unless and until a state commission found that a request by a new entrant that the ILEC furnish it any of § 251(c)'s methods to compete in the rural ILEC's market is (1) not unduly economically burdensome, (2) technically feasible, and (3) consistent with § 254. Likewise, Congress provided for the granting of a petition for suspension or modification of the application of the requirements of § 251(b) or (c) if a state commission determined that such suspension or modification is necessary to avoid (1) a significant adverse economic impact, (2) imposing a requirement that is unduly economically burdensome, and (3) imposing a requirement that is technically infeasible; and is consistent with the public interest, convenience, and necessity.

Iowa Utilities Board, et al. v. FCC, 219 F.3d 744, 761 (8th Cir.1999) ("Iowa Utilities Board II"), aff'd in part, rev'd in part, and remanded on other grounds in Verizon Communications Inc. v. FCC, 434 U.S. 467 (2002) (emphasis added; citations omitted).

While Congress sought to place limitations on the Section 251(b) and (c) interconnection requirements imposed on rural ILECs, the R.D. would place more burdensome interconnection obligations on ALLTEL under purported authority of Section 251(a) than Congress intended be required under Sections 251(b) and (c). Such a result does not make any sense. ALLTEL submits that the ALJ's interpretation of Section 251(a) subverts the intent of the local competition

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[52]See also ALLTEL St. 3R at 5-6, 19.

interconnection requirements of TCA-96, improperly eliminates the Section 251(f)(1) and (2) protections against interconnection requirements that are technically infeasible, economically burdensome and that threaten universal service, and presents an absurd construction of TCA-96.[53] The absurdity of the R.D.'s recommended conclusion is further illustrated by the maps presented and discussed in ALLTEL's Statement 3R, part of which are replicated in the Introduction herein.

As stated by the 8th Circuit, in interpreting TCA-96, a court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[54] The R.D. relies upon a single sentence in Section 251(a) – which simply identifies the general duty of carriers to interconnect directly and indirectly with other carriers via the public switched network and to use standard equipment and technical approaches that are compatible – and a single phrase – "anywhere in the MTA" in TSR Wireless – which is taken out of the context of a direct interconnection and hence refers to a point in the MTA on the ILEC's network – to impose the unprecedented obligation on ALLTEL to extend the delivery of its service outside its network and borders to meet Verizon Wireless at some distant location off ALLTEL's network. The R.D. is clearly erroneous and cannot withstand appellate scrutiny.

d. Conclusion

ALLTEL's Exceptions 4 and 5 should be granted. The ALJ's recommendation that TCA-96 and existing FCC rules and orders require ALLTEL to incur costs to extend delivery of its local traffic to meet Verizon Wireless at any point in an MTA off ALLTEL's network and outside its service territory is unprecedented, unsupportable, contrary to law and should not be adopted by this Commission.

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[53] See also ALLTEL Reply Brief at 28-32.

[54] Iowa Utilities Board II, 219 F. 3rd at 765 (citations omitted).

D. NPA-NXXs With Different Rating And Routing Points

1. Exception 6 - The R.D. Erroneously Attributes Transit Costs Associated with Verizon Wireless' Use of VNXXs to ALLTEL (Issue 28 - R.D. at 28-29)

With respect to Issue 28 and Verizon Wireless' proposed use of virtual NXXs to require ALLTEL to extend delivery of its traffic to a distant indirect interconnection point off ALLTEL's network and outside its borders, the ALJ relied upon Southwestern Bell Telephone Co. v. Public Utilities Commission of Texas for the proposition that "transport costs are controlled by the FCC's regulation at 47 C.F.R. § 51.703."[55] For the reasons stated above in response to Exceptions 4 and 5, the R.D. erroneously confuses the FCC's rule regarding "transport" costs with the "transit" costs at issue in this indirect interconnection proceeding. In Southwestern Bell, as in TSR Wireless, the case involved a two party direct interconnection and addressed the LEC's assessment of costs to use its own network in a direct interconnection to "transport" traffic from a local exchange on the LEC's network to some point outside the LEC's local exchange but still on the LEC's network. Unlike those cases, at issue in this proceeding are the costs involved in the use of a third-party's network to transit traffic across Verizon PA's network to Verizon Wireless' distant indirect interconnection point off ALLTEL's network. Rules and case law prohibiting a LEC from imposing charges on a terminating carrier for the LEC's use of its own facilities to transport its own originated traffic from its own local exchange to another of its own exchanges outside the local exchange but still on its network have nothing to do with a third party's transit charges. The ALJ's recommendation is erroneous.[56]

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[55]R.D. at 28, citing Southwestern Bell Telephone Co. v. Public Utilities Commission of Texan, 2003 U.S. App. LEXIS 21298 (5th Cir. 2003), reh'g denied per curiam, 2003 U.S. App. LEXIS 23766 (2003) ("Southwestern Bell") (emphasis added).

[56]See also ALLTEL Main Brief at 119-20 and ALLTEL Reply Brief at 50-52, and ALLTEL's rights to impose toll costs on customers if Verizon Wireless' use of VNXXs results in ALLTEL providing the equivalent of toll service.

E. *ALLTEL's Obligations As An ILEC For Direct Routed Mobile To Land Traffic*

1. Exception 7 - The R.D. Erroneously Recommends that ALLTEL Should Not *Be Permitted to Define Its Network for Purposes of Direct Routed Traffic* (Issue 24 - R.D. at 25-26)

With respect to the direct interconnection of the ALLTEL and Verizon Wireless networks, ALLTEL in Issue 24 proposed inclusion of language in paragraph 1.4.2. of its proposed contract to define its network. As stated in its Main Brief at 112, "ALLTEL's proposed language should not be controversial." Citing his resolution of Issues 3(b) and 8,[57] however, the ALJ erroneously concludes that this proposed language "would only serve to muddy the waters and create ambiguity." This characterization demonstrates the ALJ's confusion on the issue. The ALJ fails to understand that the sole purpose of the language is to define ALLTEL's network in establishing direct interconnection with Verizon Wireless and, therefore, is necessary.[58] Issues 3(b) and 8 addressing the indirect exchange of traffic are wholly irrelevant.

F. In Direct Interconnections ALLTEL Is Required Only To Exchange Traffic Within Its Interconnected Network

1. Exception 8 - The R.D. Erroneously Converts a Direct Interconnection to an Indirect Interconnection (Issue 25 - R.D. at 26-27)

The R.D. correctly notes that Sections 2.1.1 and 2.1.2 of Attachment 2 all address direct routed traffic. As direct routed traffic, there should be no question that the interconnection point must be "within ALLTEL's interconnected network." The R.D. correctly recommends maintaining that language in paragraphs 2.1.1.1 and 2.1.1.2. Illogically, however, the R.D. recommends striking the language "within ALLTEL's interconnected network" for paragraphs 2.1.2.1. and 2.1.2.2, which addresses direct routed land to mobile traffic. The import of the R.D. is to convert ALLTEL's direct interconnection for its land to mobile traffic to an indirect interconnection. Because the objective

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[57]R.D. at 26.

[58]See ALLTEL Main Brief at 111-15.

of the paragraphs at issue is to address direct routed traffic, the R.D.'s recommendation, which appears to recognize but then fails to achieve that objective, is illogical and erroneous.[59]

G. The Definition Of "Interconnection Point"

1. Exception 9 - The R.D. Erroneously Recommends Rejection of the Definition of Interconnection Point (Issue 31 - R.D. at 29-30)

Based upon the ALJ's erroneous interpretation of ALLTEL's indirect interconnection obligations, the R.D. rejects ALLTEL's definition of "Interconnection Point" as a location on ALLTEL's network. As even the Court in Southwestern Bell recognized, "A point of interconnection, or POI, is a point designated for the exchange of traffic between two telephone carriers. It is also the point where a carrier's financial responsibility for providing facilities ends and reciprocal compensation for completing the other carrier's traffic begins."[60] The definition of interconnection point must clearly divide the network responsibilities of the parties, which with respect to ALLTEL, can only be on ALLTEL's network.[61] Accordingly, there must be a definition of the Interconnection Point.

H. The R.D. Erroneously Addresses Issues That Are Moot

The outlandishness of the recommendation is further illustrated in the ALJ's treatment of Issues 1, 2 and 3(a). There were not or should not have been issues in this proceeding because ALLTEL had agreed to the result that Verizon Wireless wanted. The R.D., however, draws legal conclusions on Issues 1, 2 and 3(a), even though they are moot. These issues should not have been addressed since ALLTEL stipulated to the application of Section 251(b)(5) reciprocal compensation and Section 252 arbitration on traffic exchanged indirectly with Verizon Wireless.

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[59]As this Commission has previously recognized, ALLTEL's service territory across Pennsylvania is "highly discontiguous" and, therefore, Verizon Wireless' direct interconnections in one segregated service area can only be afforded the same inter-network interconnections that ALLTEL currently provides itself. See ALLTEL Main Brief at 6-8 and Reply Brief at 21-22.

[60]Southwestern Bell, 2003 U.S. App. LEXIS 21298, note 1 (emphasis added).

[61]See also ALLTEL Main Brief at 123-24.

1. **Exception 10 - The R.D. Erroneously Addresses Whether Rural ILECs Are Subject to the Section 252(b) Negotiation and Arbitration Process on Disputes under Section 251(b)(5) Reciprocal Compensation on Indirect Traffic (Issue 1 - R.D. at 10-11)**

2. **Exception 11 - The R.D. Erroneously Addresses Whether the FCC's Reciprocal Compensation Rules Apply to Indirectly Exchanged Traffic (Issue 2 - R.D. at 11-13)**

3. **Exception 12 - The R.D. Erroneously Addresses Whether Section 251(b)(5) Mandates Reciprocal Compensation on Indirectly Exchanged Traffic (Issue 3a - R.D. at 13-15)**

After stating that he did not believe "the drafters of either TRA (sic) or the Commission's Implementation Order contemplated" Issue 1, for example, being addressed in arbitration,[62] the ALJ turned around and not only addressed the issue, but also rendered an erroneous legal conclusion that compulsory arbitration under Section 252 is mandatory on requests to exchange traffic indirectly.[63]

The ALJ's legal conclusion on Issue 1 is directly contrary to the recent decision in Coserv.[64] In this decision, the Court concluded that an ILEC's negotiation and arbitration obligations under TCA-96 are limited to its Section 251(b) and (c) duties. The Coserv decision reads as follows:

> Thus, compulsory arbitration under § 252 begins with a request by a CLEC to negotiate with an ILEC regarding its obligations under § 251. An ILEC is required by the Act to negotiate about those duties listed in § 251(b) and (c).

Coserv, 350 F.3d at 487 (emphasis added; Appendix A at 7). The Court went on to conclude that an ILEC is free to "voluntarily" negotiate non-Section 251(b) and (c) issues, which would include any issue purportedly raised under Section 251(a), but was not mandated to do so under TCA-96.

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[62]R.D. at 10.

[63]R.D. at 10-11.

[64]The R.D. at 10 also discusses the status of ALLTEL's Section 251(f)(1) rural exemption and its suspension rights under Section 251(f)(2). ALLTEL respectfully submits that its rural exemption and suspension rights are of no relevancy whatsoever to the question of whether compulsory arbitration is mandated for a non-Section 251(b) and (c) request. The Coserv decision disposes of this issue. See also ALLTEL Main Brief at 31-34; ALLTEL Reply Brief at 3-4.

In order for an issue to be justiciable, and not an impermissible request for an advisory opinion, there must be an actual dispute between the adverse litigants.[65] The general rule is that to be justiciable, an actual case or controversy must exist at all stages of the process.[66] Here, the parties at the commencement of the proceeding agreed to arbitration under Section 252(b) and agreed to reciprocal compensation based on TELRIC studies. Thus, there is no issue that will affect or determine the resolution of this arbitration.[67] Accordingly, this Honorable Commission should reject the ALJ's recommendation on Issues 1, 2 and 3(a) as advisory legal opinions.[68]

I. Application of ITORP

1. Exception 13 - The R.D. Erroneously Determines an Issue Not Presented in this Arbitration, i.e. the Continued Application of ITORP in the Absence of Either a Negotiated or Arbitrated Interconnection Agreement (R.D. at 11-12; 17-18)

Although not requested here because the parties agreed to negotiate reciprocal compensation rates, the R.D. rejects out-of-hand the ITORP process and the agreements. The fact is that certain CMRS-ILEC indirect traffic is still carried over the common trunk groups established pursuant to the ITORP Agreements by wireline carriers to transit traffic. The basis for the ALJ's conclusion reads, as follows:

> [Verizon Wireless] also is correct as to FCC regulations and reciprocal compensation controlling, as opposed to ITORP and access charges . . . . With the 1996 enactment of TRA and the rise of commercial mobile radio service (CMRS) providers such as Cellco [Verizon Wireless], the FCC has developed regulations that completely alter the payment scheme between a LEC, such as ALLTEL, and a CMRS provider, such as Cellco.

R.D. at 12.

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[65] See Grays Ferry Cogeneration Partnership v. PECO Energy Co., 998 F. Supp. 542 (E.D. Pa. 1998). Also see ALLTEL Main Brief at 31-34; ALLTEL Reply Brief at 3-4.

[66] Petition of Global NAPS South, Inc. for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief, 1999 Pa. PUC LEXIS 58.

[67] See ALLTEL Main Brief at 31-36 and ALLTEL Reply Brief at 7-8.

[68] It is important to recognize that this legal question is presently pending before this Honorable Commission in the remand proceeding involving eighteen (18) small rural ILECs captioned as Petition of Cellco Partnership d/b/a Verizon Wireless, Bentleyville Communications Corporation d/b/a Bentleyville Telephone Company, Docket Nos. P-00021995, et al. ("Remand Proceeding"). ALLTEL respectfully submits that this question should be addressed and resolved in that proceeding where the parties have not stipulated to the application of the FCC's two-party rules to indirectly exchanged traffic.

ALLTEL respectfully submits that the ALJ is very much mistaken. First, this issue was not presented for arbitration. ALLTEL and Verizon have agreed to put in place an agreement to replace ITORP with respect to the direct and indirect traffic that they exchange. The only issues for arbitration concern the terms of that new agreement. Second, TCA-96 and the FCC rules applicable thereto did not void the ITORP agreements to the extent that other carriers continue to utilize ITORP.[69] Further, this Commission, after the enactment of TCA-96, reviewed ITORP, including its application to wireless traffic, and confirmed the process and its continuation.[70]

Section 252 sets forth the procedures for negotiations, arbitration and obtaining state regulatory approval of interconnection agreements. The 8th Circuit in Iowa Utilities Board II concluded that the TCA-96 was intended to address agreements that were the result of both a request and a negotiation under provisions of Section 251 of the Act. With respect to agreements (such as the ITORP agreements), that were the product of voluntary arrangements between carriers prior to the passage of TCA-96, the Court held that such agreements were not subject to the Section 252 negotiations process and subsequent regulatory approval. The Iowa Utilities Board II decision reads, as follows:

> Across the country there were thousands of interconnection agreements existing between and among ILECs before the Act was passed. . . . Many of those agreements were between neighboring noncompeting ILECs for the exchange of features and functions. There is no indication that Congress intended the state commissions to go back through years of agreements and approve or disapprove them. We conclude that Congress knew it was already giving the state commissions a huge amount of new work to do in arbitrating and approving the new agreements that would quickly be coming into being by virtue of the substantive provisions of the Act, and that it did not intend to add an even heavier burden by forcing the state commissions to replow old ground. The FCC's construction of the statute is unreasonable.
>
> * * *

[69]As ALLTEL discussed in its Main Brief and Reply Brief, the continued use of ITORP for indirect traffic exchanged under ITORP prior to this arbitration request is at issue in a separate pending complaint proceeding at Docket No. C-20039321.

[70]See ALLTEL Main Brief at 16, et seq. and ALLTEL Reply Brief at 44, et seq.

> We hold that § 252(a)(1) applies to any agreement which was either (1) both negotiated and entered into pursuant to § 251 after the Act went into effect or (2) is an interconnection agreement that was negotiated before, but not yet entered into when, the Act went into effect.

Iowa Utilities Board II, 219 F.3d at 765.

Although not required under Iowa Utilities Board II to undertake a review of the ITORP agreements following TCA-96, this Commission did in fact conduct such review. Following the adoption of the Act, the Commission by Order entered February 14, 1997, In Re: Generic Investigation of Intrastate Access Charge Reform, Docket No. I-00960066, opened a generic investigation into intrastate access charge reform, including the application of access charges to wireless carriers.[71] This investigation was subsequently consolidated with the Global proceeding at Docket Nos. P-00991648 and P-00991649. The Commission, in the Global Order entered September 30, 1999, closed this investigation without making any changes in ITORP agreements applicable to the wireless traffic.[72] Thus, ITORP as it applies to wireless traffic has been reviewed and approved by this Commission since TCA-96. Accordingly, the ITORP agreements, including the Exhibit G Agreement applicable to the CMRS-ILEC indirect traffic between Verizon Wireless and ALLTEL, which were negotiated and entered prior to TCA-96, and reviewed and continued by the Commission after the adoption of the Act, remain valid and lawful agreements. The R.D.'s failure to recognize the role of ITORP is directly contrary thereto.

Further, the ALJ's legal conclusion that ITORP's access based charges automatically have been voided by TCA-96 and the FCC rules in an indirect three-party exchange of traffic is likewise erroneous. The application of intrastate access charges to wireless traffic under ITORP has not been

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[71]See Order entered February 14, 1997, paragraph 4.b.

[72]See Re Nextlink Pennsylvania, Inc., 196 PUR4th 172, 292 (1999) ("Global Order").

voided with the enactment of TCA-96. In fact, as the FCC has acknowledged, preservation of existing access charge regimes was specifically recognized in TCA-96.[73]

ALLTEL has stipulated in this arbitration to the application of Section 251(b)(5) reciprocal compensation with Verizon Wireless on the ITORP CMRS-ILEC traffic for the purpose of replacing the Exhibit G compensation process. However, this will necessitate a new agreement be put in place between ALLTEL and Verizon PA to replace the ITORP Exhibit G Agreement.[74] The R.D. erroneously fails to recognize that if parts of the ITORP agreement are eliminated, a new agreement must be reached with Verizon PA.[75] Under the R.D., ALLTEL would be left hanging without a valid agreement with the party that actually has the direct interconnection to its network and the only party that can identify the traffic, i.e. Verizon PA.

J. ALLTEL'S Proposed Alternative Resolution

1. Exception 14 - ALLTEL's Alternative to the Recommendation Set Forth in Exceptions 2 and 3

Clearly, based upon the discussion set forth in these Exceptions, the R.D. consists of numerous misunderstandings, misstatements, inaccurate findings and erroneous legal conclusions. Accordingly, if the Commission determines that ALLTEL's reciprocal compensation rates developed from ALLTEL study CC-2 require further review before adoption, ALLTEL recommends as an

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[73]In concluding that TCA-96 does not compel disruption of existing access charge mechanisms, the FCC specifically stated that "it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms." In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151, 9168 ¶ 37, quoting the FCC's First Report and Order. See also 47 U.S.C. §251(d)(3).

[74]See ALLTEL Main Brief at 64-67.

[75]Several terms and conditions must be addressed in the agreement between ALLTEL and Verizon PA: (1) responsibility for payment to the third party for use of its transit service; (2) establishment of trunking facilities and a physical interconnection point; (3) responsibility to establish proper authority for Verizon PA to deliver traffic of third parties; (4) responsibility not to abuse the scope of traffic authorized by the arrangement (i.e., the transmission of unauthorized or commingled traffic); (5) the provision of complete and accurate usage records; (6) coordination of billing, collection and compensation; (7) responsibility to resolve disputes that will necessarily involve issues where the factual information is in the possession of Verizon PA (e.g., how much traffic was transmitted, and which carrier originated the traffic); (8) responsibility to act to implement network changes which alter or terminate the voluntary arrangement; and (9) responsibilities to coordinate appropriate actions in the event of default and nonpayment by a carrier transiting traffic.

alternative to the rates recommended in Section B of these Exceptions that the Commission adopt the following procedure for the protection of the public interest and ALLTEL's rights under TCA-96:

1. Establish on an interim basis a composite reciprocal compensation rate of $0.014 for application to both existing direct and indirect interconnections between the parties based on a mobile-to-land traffic factor of 65/35, and maintain Verizon PA's ITORP Exhibit G record keeping responsibilities;

2. Establish a procedure to further review ALLTEL's TELRIC studies and balance of traffic;

3. Open a generic investigation to address possible modifications to the ITORP process in order to provide for reciprocal compensation between CMRS providers and the applicable ILECs with all ILECs and CMRS providers having the opportunity to participate;

4. Include in the generic ITORP investigation a question as to what contract modifications are necessary between Verizon PA and the independent ILECs to permit the adoption of reciprocal compensation with CMRS providers.

5. Include in the generic ITORP investigation the question as to which carriers should be responsible for third-party transit costs arising from a CMRS carrier's economic decision not to establish a direct interconnection with an ILEC's network;

6. Include in the generic ITORP investigation the question as to whether an ILEC has any responsibility to share in a CMRS carrier's cost to construct facilities outside the ILEC's network to establish a direct interconnection therewith; and

7. Following conclusion of the generic ITORP investigation, the TELRIC cost study review and development of the mobile-to-land traffic factors, reopen this arbitration for the purpose of finalizing reciprocal compensation rates and a valid interconnection agreement between Verizon Wireless and ALLTEL.

Given that the ALJ's primary criticisms of the CC-2 cost study was that Verizon Wireless did not have sufficient time to examine and test the study, ALLTEL respectfully submits that this procedure would be fair to Verizon Wireless, ALLTEL and the public.[76] At the same time, it would avoid the establishment of an interconnection agreement based upon the faulty conclusions in the

[76]This procedure is consistent with the Verizon Wireless Final and Best Offer on Issue 9, wherein it suggests a subsequent investigation of ALLTEL's cost study and with the establishment of interim rates and is consistent with the Commission's establishment of interim rates for Verizon PA pending further review of cost studies.

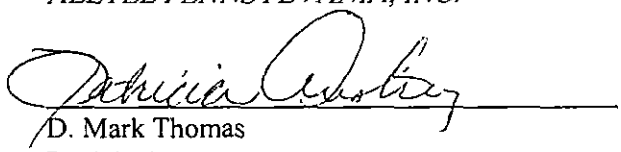
R.D., the adoption of which could lead to the financial destruction of ALLTEL and possibly every other rural ILEC in Pennsylvania. It would also provide continuity and uniformity across the State. Finally, it would be consistent with the FCC's First Report and Order, which requires that ALLTEL be provided an opportunity during the term of the agreement to reopen the matter to demonstrate that the traffic is not "roughly balanced."

III. CONCLUSION

ALLTEL respectfully submits that the recommendations placed before the Commission in the Recommended Decision are seriously flawed and cannot be supported. The issues unresolved by the parties and submitted for arbitration presented questions of first impression involving the indirect exchange of traffic with a rural ILEC, but were erroneously decided by the ALJ based upon application of FCC rules and decisional law relevant to two-party direct interconnections with an RBOC. ALLTEL urges the Commission to reject the Recommended Decision.

Respectfully submitted,

ALLTEL PENNSYLVANIA, INC.



D. Mark Thomas
Patricia Armstrong
Regina L. Matz
Stephen B. Rowell

Attorneys for
ALLTEL Pennsylvania, Inc.

THOMAS, THOMAS, ARMSTRONG & NIESEN
212 Locust Street
P.O. Box 9500
Harrisburg, PA 17108-9500
(717) 255-7600

ALLTEL Pennsylvania, Inc.
One Allied Drive
Little Rock, AR 72202
(501) 905-8460

Dated: April 8, 2004

APPENDIX A

UNRESOLVED ISSUES

ISSUE NO. 1: Whether rural local exchange carriers are subject to the *negotiation and arbitration process set forth in Section 252(b) for disputes under Section* 251(b)(5) for traffic indirectly exchanged with CMRS?

ISSUE NO. 2: Do the FCC's rules interpreting the scope of an ILEC's reciprocal compensation obligations under 251(b)(5) apply to IntraMTA traffic that is exchanged indirectly through a third-party LEC's Tandem facilities?

ISSUE NO. 3(a): Does Section 251(b)(5) impose an obligation on the originating LEC to pay a CMRS provider for its traffic when it transits the network of a third party LEC and terminates on the network of a CMRS provider?

ISSUE NO. 3(b): Whether pursuant to Section 251(b)(5), a local exchange carrier is required to pay any transit charges on traffic it originates indirectly to a CMRS provider?

ISSUE NO. 4: Does a third party transit provider "terminate" traffic within the meaning of Section 251(b)(5)?

ISSUE NO. 5: Where a third party provider provides indirect interconnection facilities, should the interconnection agreement that establishes the terms and conditions for the exchange of the traffic between the originating and terminating carriers include the terms and conditions on which the originating carrier will pay the third party transiting provider for transiting service?

ISSUE NO. 8: Whether a LEC is required to share in cost of dedicated two-way interconnection facilities between its switch and the CMRS carrier's switch to extend traffic beyond the LEC's local exchange area and network?

ISSUE NO. 9: What is the appropriate pricing methodology for establishing a reciprocal compensation rate for the exchange of direct and indirect traffic?

ISSUE NO. 10: Can the Parties implement a traffic factor to use as a proxy for the mobile-to-land and land-to-mobile traffic balance if the CMRS provider does not measure traffic? VZW believes this is related to issue 30, except issue 10 relates to indirect and direct traffic.

ISSUE NO. 11: Where a CMRS provider's switch serves the geographically comparable area of LEC tandem, can it charge a termination rate equivalent to a tandem rate for traffic terminated in the Land to Mobile direction?

ISSUE NO. 13: After a requesting carrier sends a formal request for interconnection under Section 252(b)of the Act, what interim reciprocal compensation terms apply to the parties until an agreement has been negotiated and arbitrated by the Commission? Refers to Verizon's Issue 13 in its Petition for Arbitration.

ISSUE NO. 15: Whether the payment due date for invoices rendered under the agreement should be determined from the date of the invoice or the date of receipt of the invoice and whether the allotted time should 30 or 45 days thereafter?

ISSUES NO. 16 & 17: Bona Fide Dispute, General Terms and Conditions, paragraph 9.1.1.3. and 9.1.1.4. Whether the agreement should include the following: "A Bona Fide dispute does not include the refusal to pay all or part of a bill or bills when no written documentation is provided to support the dispute, or should a Bona Fide dispute include the refusal to pay other amounts owed by the disputing Party pending resolution of the dispute. Claims by the disputing Party for damages of any kind should not be considered a Bona Fide dispute." And, therefore, whether once a Bona Fide dispute has been processed in accordance with this subsection 9.1.1, the disputing party must make payment on any of the disputed amount owed to the billing party by the next billing due date, or the billing party must have the right to pursue normal treatment procedures. Any credits due to the disputing party resulting from the Bona Fide dispute process would be applied to the disputing party's account by the billing party by the next billing cycle upon resolution of the dispute.

ISSUE NO. 20: Whether, as Verizon Wireless proposes in Petition Exhibit 1 section entitled, "Most Favored Nation, General Terms and Conditions," paragraph 31.1, Verizon Wireless should have the right to opt out of this agreement during its terms and into any other agreement that ALLTEL may execute with another carrier.

ISSUE NO. 24: Whether agreement section referred to as "Incumbent Local Exchange Carrier Requirement," Attachment 2, paragraph 1.4.2 of Verizon's Exhibit 1, should specify that ALLTEL's obligations to provide service under the agreement is with respect to that service are where ALLTEL is authorized to provide service?

ISSUE NO. 25: Whether the phrase "within ALLTEL's interconnected network" should be inserted in the agreement section entitled "Direct Routed Traffic Mobile to Land Traffic," Attachment 2, paragraph 2.1.1.1, paragraph 2.1.1.2, paragraph 2.1.2.1, and paragraph 2.1.2.2 of Verizon's Exhibit 1, to clearly indicate that when Verizon Wireless connects to one of ALLTEL's separate segregated networks, it is able to exchange traffic and is achieving interconnection, only with that individual segregated ALLTEL network.

ISSUE NO. 27: Whether the agreement section entitled "Indirect Network Interconnection," Attachment 2, paragraph 2.1.5 of Verizon Wireless' Exhibit 1, should require the establishment of a direct interconnection facility when the capacity of the indirect traffic reaches a DS 1 level?

ISSUE NO. 28: Whether Verizon Wireless may establish NPA-NXXs in ALLTEL rate centers, regardless of actual delivery point of the associated calls, and require ALLTEL to bear all transport costs to the point of delivery?

ISSUE NO. 30: Whether a 60/40 land to mobile traffic factor must be used by both Parties when either Party cannot record the terminating minutes originating from the other Party routed over a direct interconnection facility, even though ALLTEL has the ability to record all terminating traffic originating from Verizon Wireless over direct interconnection facilities and even though Verizon's proposed factor of 60/40 land to mobile is inconsistent with the shared facilities factor of 70/30 land to mobile proposed by Verizon Wireless?

ISSUE NO. 31: Whether the agreements definition of "Interconnection Point," Attachment 8 of Verizon Wireless Exhibit 1 should be clear in appropriately defining the parties' responsibilities of network between the parties, which in ALLTEL's case will be on its network.

ISSUE NO. 32: Whether the agreement should include a definition of Interexchange Carrier, a term not used in the agreement.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-51065

COSERV LIMITED LIABILITY CORPORATION;
MULTITECHNOLOGY SERVICES LP,

Plaintiffs-Appellants,

versus

SOUTHWESTERN BELL TELEPHONE COMPANY;
PUBLIC UTILITY COMMISSION OF TEXAS;
REBECCA KLEIN; PAUL HUDSON; JULIE PARSLEY,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

Before JOLLY, HIGGINBOTHAM, and STEWART, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this case of first impression in this Circuit we interpret the compulsory arbitration provision of the Telecommunications Act of 1996 ("Telecom Act" or "Act") set forth at 47 U.S.C. § 252(b)(1). We hold that only issues voluntarily negotiated by the parties pursuant to § 252(a) are subject to the compulsory arbitration provision. In so holding, we affirm on alternative grounds the district court's grant of summary judgment.

I

Southwestern Bell Telephone Company ("SWBT") and Coserv Limited Liability Corporation ("Coserv") are local exchange carriers subject to the Telecom Act. SWBT is an incumbent local exchange carrier (ILEC) that provides telecommunications services and operates telecommunications equipment throughout Texas. Coserv is a competitive local exchange carrier (CLEC) that provides telecommunications services and operates telecommunications facilities located at approximately fifty-eight apartment complexes in Texas. At each of the apartment complexes, Coserv's facilities include telecommunications equipment in a central telephone equipment room as well as equipment and wires running to multiple buildings and individual apartments. In order to allow tenants to select telephone service from other telecommunications providers, Coserv allows other providers to bring a network connection to a single point in the central telephone equipment room. Coserv typically charges these other providers a one-time connection fee and a monthly service fee for the connection and use of its facilities. Coserv terms this practice "compensated access".

The obligations of SWBT, Coserv, and all other local exchange carriers, both incumbents as well as competitors, are listed in Section 251(b) of the Act. These obligations relate to: resale of telecommunications services; number portability; dialing parity;

access to right-of-ways; and reciprocal compensation.[1] In addition, § 251(c) places six specific duties on ILECs, which relate to: the duty to negotiate; interconnection; unbundled access; resale; notice of changes; and collocation.[2] An ILEC's § 251(c)(1) duty to negotiate is limited in scope to "the particular terms and conditions of agreements to fulfill the duties described in [§ 251(b) and (c)]."[3]

In § 252, the Act specifies the procedures for an ILEC to fulfill its duty to negotiate. Upon receiving a request for an agreement pursuant to the duties listed in § 251, an agreement can be reached through voluntary negotiations or through compulsory arbitration.[4] Under the provision for voluntary negotiations, the parties are free to reach any agreement, without regard to the duties set forth in § 251.[5] However, any voluntary agreement must

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[1] 47 U.S.C. § 251(b).

[2] 47 U.S.C. § 251(c).

[3] 47 U.S.C. § 251(c)(1). The section reads in its entirety:

> The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

[4] 47 U.S.C. § 252(a) & (b).

[5] 47 U.S.C. § 252(a)(1), "Voluntary negotiations," reads in part:

be submitted to the state commission for approval.[6] The compulsory arbitration clause provides that:

> During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.[7]

The meaning of the phrase, "any open issues" is the subject of this appeal.

Once a petition for arbitration has been accepted by the state commission, the state commission "shall resolve each issue set forth in the petition ... by imposing appropriate conditions as required to implement subsection (c) of this section."[8] In resolving any open issues, the state commission shall ensure that the requirements of § 251 are met.[9]

II

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title.

[6] 47 U.S.C. § 252(a)(1).

[7] 47 U.S.C. § 252(b) (emphasis added).

[8] 47 U.S.C. § 252(b)(4)(C).

[9] 47 U.S.C. § 252(c)(1).

Coserv requested an interconnection agreement governing SWBT's duties under § 251. The parties proceeded with voluntary negotiations pursuant to § 252. Coserv sought to add to the negotiations its proposed rates, terms, and conditions for compensated access. SWBT refused to negotiate issues relating to compensated access. Voluntary negotiations over SWBT's § 251 duties continued but did not result in an interconnection agreement.

Coserv filed a petition for arbitration with the Public Utility Commission ("PUC"), pursuant to § 252. Coserv identified several issues that it claimed remained open between the parties, including issues relating to compensated access. SWBT argued that the PUC lacked jurisdiction to arbitrate issues relating to compensated access and the PUC ultimately agreed. The PUC read § 252's "any open issues" clause narrowly, concluding that:

> § 251(c) limits the scope of interconnection agreements arbitrated pursuant to FTA § 252 to those duties described in "paragraphs (1) through (5) of subsection (b) and this subsection." ... By the clear terms of § 251(c), the parties' good faith duties to negotiate in accordance with § 252 are restricted to those duties described in (1)-(5) of (b), which apply to all LECs, and (c), which applies to ILECs exclusively.

The PUC entered an arbitration award setting forth an interconnection agreement governing SWBT's duties to Coserv under § 251 and refusing to consider the compensated access issues based on lack of jurisdiction. Coserv brought an action in federal

district court challenging the PUC's jurisdictional finding. The district court agreed with the PUC and granted summary judgment accordingly. Coserv appeals the judgment of the district court.

III

We review the grant of summary judgment de novo, applying the same standard as the district court.[10] A district court reviews the compliance of an interconnection agreement with federal law and related matters of statutory interpretation de novo.[11]

We begin, as we always do in matters of statutory interpretation, with the plain language and structure of the statute.[12] Section 251 provides that an ILEC has:

> [t]he duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection.[13]

Section 252 provides in relevant part:

> (a) Agreements arrived at through negotiation
> (1) Voluntary negotiations
> Upon receiving a request for interconnection, services or network elements pursuant to section 251 of

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[10] Wyatt v. Hunt Plywood Co., 297 F.3d 405, 408 (5th Cir.2002).

[11] Southwestern Bell Telephone Co. v. Public Utility Commission of Texas, 208 F.3d 475, 482 (5th Cir. 2000); U.S. West Communications v. MFS Intelenet, 193 F.3d 1112, 1117 (9th Cir. 1999).

[12] See Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002).

[13] 47 U.S.C. § 251(c)(1).

> this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title....
>
> (b) Agreements arrived at through compulsory arbitration
> (1) Arbitration
> During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.[14]

Thus, compulsory arbitration under § 252 begins with a request by a CLEC to negotiate with an ILEC regarding its obligations under § 251. An ILEC is required by the Act to negotiate about those duties listed in § 251(b) and (c). During negotiations, however, the parties are free to make any agreement they want without regard to the requirements of § 251(b) and (c). To that extent, the parties are free to include interconnection issues that are not listed in § 251(b) and (c) in their negotiations. If the voluntary negotiations result in only a partial agreement, or in no agreement at all, either party can petition for compulsory arbitration of any open issue.

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[14] 47 U.S.C. §§ 252(a)(1); (b)(1) (emphasis added).

There is nothing in § 252(b)(1) limiting open issues only to those listed in § 251(b) and (c). By including an open-ended voluntary negotiations provision in § 252(a)(1), Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include other issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the § 252 framework. In combining these voluntary negotiations with a compulsory arbitration provision in § 252(b)(1), Congress knew that these non-§ 251 issues might be subject to compulsory arbitration if negotiations fail. That is, Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that <u>any</u> <u>issue</u> left open after unsuccessful negotiation would be subject to arbitration by the PUC.

We hold, therefore, that where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). The jurisdiction of the PUC as arbitrator is not limited by the terms of § 251(b) and (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations. It may arbitrate only issues that were the subject of the voluntary negotiations. The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations. This interpretation comports with the views of the

other courts that have reviewed this provision in similar contexts.[15] It also comports with the structure of the Act and our recognition of the flexibility accorded state PUCs by the Act.[16]

In reaching this conclusion, we do not eliminate the limits § 251 places on an ILEC's duty to negotiate nor do we create any new obligations under the Telecom Act. An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252. Indeed, in this case SWBT refused to negotiate the compensated access issues -- such that these issues potentially become subject to the appropriate state remedies.

While the PUC erred in its interpretation of the compulsory arbitration provision, its ultimate refusal to arbitrate the compensated access issue was correct, because compensated access was not a mutually agreed upon subject of voluntary negotiation between SWBT and Coserv. As we find this a sufficient basis for the PUC's denial of jurisdiction, we do not reach the alternative

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[15] See US West Communications, Inc. v. Minnesota Public Utilities Commission, 55 F. Supp. 2d 968 (D. Minn. 1999) (holding that "open issues" are limited to those that were the subject of voluntary negotiations). See also MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 298 F.3d 1269 (11th Cir. 2002) (rejecting a district court's conclusion that the compulsory arbitration provision was so broad as to include any issue raised by the petitioning party).

[16] See Southwestern Bell Telephone Co. v. Waller Creek Communications, 221 F.3d 812, 816 (5th Cir. 2000) (courts review a state PUC's Telecom Act interpretations de novo, but resolution of all other issues under the arbitrary and capricious standard); 47 U.S.C. §§ 251(d)(3), 251(e)(3), and 261(c).

grounds offered by the PUC or other issues raised by the parties in this case.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With ALLTEL Pennsylvania, Inc.	:	Docket No. A-310489F7004

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of April, 2004, served a true and correct copy of the foregoing Exceptions on behalf of ALLTEL Pennsylvania, Inc. upon the persons and in the manner indicated below:

HAND DELIVERY

Honorable Wayne L. Weismandel
Administrative Law Judge
Pennsylvania Public Utility Commission
2nd Floor West
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

Office of Special Assistants
Pennsylvania Public Utility Commission
Room 210, North Office Building
Harrisburg, PA 17105-3265
(including diskette)

VIA E-MAIL AND FEDERAL EXPRESS

Christopher M. Arfaa
Drinker Biddle & Reath LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103

Elaine D. Critides, Esquire
Associate Director, Regulatory
Verizon Wireless
Suite 400 West
1300 Eye Street, N.W.
Washington, DC 20005

Patricia Armstrong

DATE: April 20, 2004

SUBJECT: A-310489f7004

TO: Cheryl W. Davis, Director
Office of Special Assistants

FROM: James McNulty
Secretary
nvl

Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With ALLTEL Pennsylvania, Inc.

Copies of the Recommended Decision have been served upon all parties of interest.

Exceptions have been filed by:

CELLCO
ALLTEL PA INC

Reply Exceptions have been received from:

c: Susan Hoffner, ALJ

DrinkerBiddle&Reath LLP

Christopher M. Arfaa
215-988-2715
christopher.arfaa@dbr.com

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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Law Offices
One Logan Square
18TH and Cherry Streets
Philadelphia, PA
19103-6996

215-988-2700
215-988-2757 fax
www.drinkerbiddle.com

NEW YORK
WASHINGTON
LOS ANGELES
SAN FRANCISCO
PRINCETON
FLORHAM PARK
BERWYN
WILMINGTON

April 22, 2004

Via Federal Express

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

RE: Petition of Cellco Partnership d/b/a Verizon Wireless For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996, Docket No. **A-310489F7004**

Dear Secretary McNulty:

Please be advised that at the request of the Office of Special Assistants ("OSA"), Petitioner, Cellco Partnership d/b/a Verizon Wireless, has agreed to a further extension of the time for the resolution of the unresolved issues presented in the referenced matter. OSA has indicated that counsel for Respondent, ALLTEL Pennsylvania, Inc., has no objection to the extension.

Please do not hesitate to contact me if you have any questions regarding this matter.

Very truly yours,

Christopher M. Arfaa

CMA/cms
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Via Federal Express – Over Night Delivery and E-mail

D. Mark Thomas, Esq.
Patricia Armstrong, Esq.
Thomas Thomas Armstrong & Niesen
212 Locust Street
Harrisburg, PA 17108-9500

dmthomas@ttanlaw.com
parmstrong@ttanlaw.com

Via First Class Mail

Charles F. Hoffman, Esq.
Office of Trial Staff
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105

Carol Pennington, Esq.
Office of Small Business Advocate
1102 Commerce Building
300 North Second Street
Harrisburg, PA 17101

Irwin A. Popowsky, Esq.
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Forum Place
Harrisburg, PA 17101-1923

Dated: April 22, 2004

Christopher M. Arfaa
Drinker Biddle & Reath LLP
18th and Cherry Streets
One Logan Square
Philadelphia, PA 19103-60996
(215) 988-2700

Counsel for Cellco Partnership
d/b/a Verizon Wireless