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June 5, 2015

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Re: Docket No.: 140156-TP: Petition of Communications Authority, Inc. for Section 252(b) Arbitration

Dear Ms. Stauffer:

Enclosed is BellSouth Telecommunications, LLC d/b/a AT&T Florida's Post-Hearing Brief, which we ask that you file in the captioned docket.

Copies have been served to the Parties shown on the attached Certificate of Service list.

Sincerely,

s/Tracy W. Hatch

Tracy W. Hatch

cc: All Parties of Record
Elise R. McCabe
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Docket No. 140156-TP

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Communications Authority, Inc. for arbitration of Section 252(b) interconnection agreement with BellSouth Telecommunications, LLC d/b/a AT&T Florida	DOCKET NO. 140156-TP DATED: June 5, 2015

AT&T FLORIDA'S POST-HEARING BRIEF

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Communications Authority, Inc. for arbitration of Section 252(b) interconnection agreement with BellSouth Telecommunications, LLC d/b/a AT&T Florida	DOCKET NO. 140156-TP DATED: June 5, 2015

AT&T FLORIDA'S POST-HEARING BRIEF

BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T Florida" or "AT&T"), by and through its undersigned attorneys, respectfully submits its post-hearing brief.

Although the parties have resolved a number of issues that were initially presented in this arbitration, there remain 74 open issues, including subparts, for the Commission to resolve. Several overarching considerations bear on multiple issues:

First, the Telecommunications Act of 1996 ("1996 Act") requires AT&T to provide interconnection, access to unbundled network elements ("UNEs") and collocation to Communications Authority ("CA") on "terms[] and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. §§ 251(c)(2)(D), 251(c)(3) and 251(c)(6). Consequently, if no law or regulation dictates the resolution of an arbitration issue, the Commission must apply the "just, reasonable and non-discriminatory" standard to resolve that issue. CA implies, however, that if contract language proposed by AT&T is not expressly mandated by any statute or regulation, the language must be rejected. *E.g.*, Tr. 369, lines 16-19; 371, lines 5-8; 655, lines 4-6. CA's view of the applicable legal standard is wrong. Consider, for example, AT&T's

proposed language requiring a party that disputes a bill to pay the disputed amounts (subject to several exceptions) into an escrow account in order to ensure that funds will be available to pay the bill if the dispute is resolved in favor of the Billing Party. At the hearing in this matter, CA asked AT&T witness Pellerin, "Is there any statutory or regulatory provision requiring CLECs to pay an ILEC disputed balances in an escrow . . . ?" Tr. 353, lines 20-22.[1] The answer is that no statute or Federal Communications Commission ("FCC") regulation requires an escrow. But no statute or regulation prohibits an escrow requirement either. Consequently, the question for the Commission is whether AT&T's proposed escrow language is just, reasonable and nondiscriminatory. As demonstrated below in the discussion of Issue 23, the answer to that question is "yes," and AT&T's language should therefore be included in the parties' ICA.

Second, the Commission is limited to resolving the issues presented in CA's arbitration petition and AT&T's response (47 U.S.C. § 252(b)(4)(A)) – *i.e.*, to resolving the contract language disputes the parties have presented. The Commission should abide by that limitation even though the testimony in some instances strayed from the issues presented. For example: Issue 2 is, "Is CA entitled to become a Tier 1 Authorized Installation Supplier (AIS) to perform work outside its collocation space?" As demonstrated below, the answer to that question is that CA is not *entitled* to become a Tier1 AIS, but it does have the right to have its application to become a Tier 1 AIS considered under the same criteria that apply to all other applicants. In its testimony on this issue, however, CA suggested that the ICA require AT&T to get CA's collocation work done at cost-based rates, so that CA would have no need to hire, or to become, a Tier 1 AIS. The Commission cannot entertain that "solution," however, because there is no disputed contract language having to do with AT&T taking responsibility for the performance of

[1] This brief cites the hearing transcript as "Tr."

CA's collocation work at cost-based rates. If the Commission were to address CA's proposed alternative solution on Issue 2, it would be improperly deciding an issue not presented in the petition or response. The Commision effectively recognized this at the hearing.[2]

As another example, there are several issues on which CA's position is inconsistent with *agreed* language in the ICA. In Issue 14b(ii), for instance, CA proposes language for section 4.6.4 of the Network Interconnection Attachment ("Net. Int.") that would prohibit AT&T from charging CA for processing orders related to ordering, rearranging or disconnecting local interconnection trunks. That proposal must be rejected because, among other reasons, it is directly at odds with agreed language in section 1.7.4 of the Pricing Schedule that states: "CLEC shall pay the applicable service order processing/administration charge for each service order submitted by CLEC to AT&T-21STATE to process a request for installation, disconnection, rearrangement, change, or record order." CA might claim that its agreement to that language was inadvertent, and that the Commission should resolve Issue 14b(ii) in its favor *and* modify Pricing Schedule § 1.7.4 in order to avoid the inconsistency. That would be unlawful, however, because Pricing Schedule § 1.7.4 is not at issue in this proceeding, and the Commission would therefore be violating the 1996 Act if it ordered it to be modified.[3]

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[2] Counsel for CA asked a cross-examination question to which counsel for AT&T objected on relevance grounds. In support of that objection, counsel for AT&T stated, " . . . if he [Mr. Ray] wanted those things, he could have proposed them in his petition for arbitration. Once he files the petition, . . . we're here based on what he has asked for in his petition." Tr. 671, lines 9-13. Commissioner Brisé, in ruling on the objection noted "that if it's not before us in the issues that were brought up as part of the petition, it's outside the scope of what we can consider." *Id*. at 671, line 22 – 672, line 1.

[3] In addition, CA had more than five months to flyspeck the ICA. (CA filed the arbitration petition on day 160 of the 135- to 160-day window the 1996 Act allows for arbitration, and that was after the parties extended the original arbitration window. See Petition Exhibit A.) That was more than enough time for CA to make sure it was comfortable with all the language it was agreeing to – as demonstrated by how much nit-picking of the contract language CA did. CA cannot disavow language it did not object to during the negotiations.

Third, the Commission should be wary of CA's requests for special treatment. There are a number of issues that arise because CA proposes to be treated differently than every other carrier in Florida with which AT&T has an interconnection agreement. For example: All other carriers use AT&T's form to dispute their bills, but CA wants to use its own form (Issue 22); all other carriers' ICAs do not include a definition of "HDSL-capable loop," but CA wants one in its ICA (Issue 44); all other carriers get notice of wire center non-impairment either by checking the Accessible Letters on AT&T's "CLEC Online" website or by having AT&T email the Accessible Letters to them, but CA wants certified mail (Issue 55).

The fact that every other carrier in the state does something in a particular manner does not *necessarily* mean that CA must be allowed to follow suit. However, the Commission should be mindful that AT&T will inevitably pay a price – whether in lost efficiency, implementation cost or otherwise – if it is required to make a change to accommodate CA's idiosyncratic preferences. The Commission should also attach weight to the fact that if every other carrier in the state has accepted a certain process and the Commission has heard no complaints about it, the process is probably reasonable. Unless CA has made a very strong case on a particular issue, the Commission should reject CA's proposals for special treatment.

Fourth, the Commission should examine CA's individual requests as parts of a larger whole. When it does, the Commission will see that CA's approach has no basis in normal commerce in general or in telecommunications in particular. To begin, consider CA's proposal that it be allowed to avoid late payment charges and interest on unpaid bills simply by disputing the bills. If that proposal were accepted, CA would have a strong incentive to dispute every bill it receives. It could then withhold payment at will and without penalty as long as the disputes are pending. Under CA's dispute resolution provisions, each dispute may take years to resolve.

For example, If CA disputes a bill, the minimum time for the ICA dispute resolution 60 days.[4] If AT&T filed a complaint at the Commission, the resolution would take a minimum of 120 days even if the complaint was granted expedited treatment in accordance with Rule 25-22.0365. Regardless of which party prevails, a motion for reconsideration will likely prolong the dispute for at least two more months. Regardless of the decision on reconsideration, the federal appellate process would take years. All the while, AT&T would be required – under CA's proposed regime – to provide service to CA while receiving potentially no payments.

Moreover, in the absence of an escrow requirement, which CA opposes, AT&T would suffer significant losses, notwithstanding a win in the complaint proceeding, if CA ceased operations and walked away, as often happens. CA's proposal to be allowed access to multiple ICAs through CA affiliates would further exacerbate the problem, because CA could simply move customers' services to an alternate ICA and the dispute process would simply start again with no penalty for any nonpayment and AT&T Florida again left holding the bag. Finally, CA's desire for a five-year term, for the express purpose of allowing more time for more CLECs to adopt the agreement, would exponentially compound the disputed bill problem and effectively declare "open-season" on AT&T Florida.

ISSUE 1: Is AT&T Florida obligated to provide UNEs for the provision of Information Services?

Affected contract language: UNE 4.1

<u>**AT&T Position**</u>**:** No. Section 251(c)(3) of the Telecommunications Act of 1996 provides that access to UNEs is for the provision of a telecommunications service. Information services are not telecommunications services, and AT&T has no

[4] Note that with CA's proposed "can't terminate until dispute is resolved" provision, CA can simply dispute AT&T's bills, sit back and force AT&T to begin the long dispute process. No company can behave like that in the normal commercial world. Even in the times of pervasive regulation of telecommunications companies prior to 1995 in Florida, the regulated company was not forced to seek the Commission's permission to terminate a non-paying customer.

obligation to provide a UNE solely for the provision of information services, as CA's proposed language would require.

Issue 1 involves section 4.1 of the UNE Attachment. AT&T's language states that it will provide UNEs for CA to use to provide a telecommunications service. CA's language, by contrast, would require AT&T to provide UNEs for use by CA "in any technically feasible manner." Although the disputed language does not make it apparent, CA's position statement in the Prehearing Order and the issue statement above show that CA's main goal is to use UNEs to provide information services. But CA cannot lawfully obtain a UNE solely to provide an information service – or, as CA's language puts it, for use "in any technically feasible manner."

The law is clear: AT&T is required to provide UNEs for the provision of a telecommunications service. If CA obtains and uses a UNE for that purpose, it may also use the UNE for the provision of an information service. But AT&T is not required to provide a UNE solely for the purpose of the provision of an information service. Specifically:

Section 251(c)(3) of the Telecommunications Act of 1996 ("1996 Act") requires ILECs to provide access to UNEs "***for the provision of a telecommunications service*** . . . ." 47 U.S.C. § 251(c)(3) (emphasis added). The FCC rule implementing the statute reinforces the point: 47 C.F.R. § 51.307(c) (ILECs must provide access to UNEs "in a manner that allows the requesting telecommunications carrier ***to provide any telecommunications service*** . . .") (emphasis added). *See also id*. § 51.309(d) (ILECs must provide access to UNEs so a CLEC "may provide any ***telecommunications services***" (emphasis added). AT&T's language accurately reflects this law.

"Information service" and "telecommunications service" are two different things. The terms are defined differently in the 1996 Act and in FCC rules and the two categories of service are regulated differently. *See* 47 U.S.C. §§ 153(24) & (53); 47 C.F.R. § 51.5. As one treatise explains, "[t]he 1996 Act's complementary definitions of 'telecommunications service' and

'information service' are drafted to cover mutually exclusive territory. . . . There is no hint in the Act that Congress expected the categories of telecommunications and information services to be anything other than mutually exclusive." Huber, Kellogg & Thorne, Federal Telecommunications Law, § 12.2.3 at 1078-79 (2d ed. 1999).

CA has suggested that if AT&T uses a UNE only for the provision of an information service, CA should be able to do the same.[5] The FCC has flatly rejected that argument, stating:

> Section 251(c)(3) and the Commission's rules look at what use a competitive LEC will make of a particular network element when obtaining that element pursuant to section 251(c)(3); the use to which the incumbent LEC puts the facility is not dispositive. In this manner, *even if an incumbent LEC is only providing an information service over a facility, we look to see whether the requesting carrier intends to provide a telecommunications service over that facility*. So long as a competitive LEC is offering an "eligible" telecommunications service – *i.e.,* not exclusively long distance or mobile wireless services – it may obtain that element as a UNE.[6]

The FCC's discussion makes clear that CA cannot obtain a UNE from AT&T for the provision of an information service alone, but having obtained a UNE for the provision of an eligible telecommunications service, it may use the UNE both for that purpose and for the provision of information service. AT&T's language is consistent with this binding federal authority, and CA's is not.

ISSUE 2: Is CA entitled to become a Tier 1 Authorized Installation Supplier (AIS) to perform work outside its collocation space?

Affected contract language: Collo 1.7.3

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[5] What CA actually said was, "AT&T's affiliate, AT&T U-Verse, uses UNE facilities provided by AT&T (or some other affiliated entity) for the provision of information services." Direct Testimony of Mike Ray on Behalf of Communications Authority ("Ray Direct") at 3 (Tr. 24), lines 22-23. As a factual matter, Mr. Ray was wrong. There is no company called "AT&T U-verse." Rather, U-Verse service is provided by AT&T Florida itself, so no UNEs are involved. Rebuttal Testimony of Susan Kemp on behalf of AT&T Florida ("Kemp Rebuttal") at 2 (Tr. 604), lines 16-18.

[6] *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.* 20 FCC Rcd 14853 (rel Aug. 5, 2005), at ¶ 127 (emphasis added).

> **<u>AT&T Position</u>**: No. CA is not "entitled" to become a Tier 1 AIS. CA may apply to become an AIS in the same manner as anyone else. If CA only wants to perform work within its own collocation space, it can become a Tier 2 AIS.

The disputed contract language for this issue appears as follows, with AT&T's language underscored and CA's italicized:

> 1.7.3 The Collocation terms and conditions within this Attachment are contingent upon Collocator doing its own work through the use of an AT&T-21STATE Approved Installation Supplier (AIS). **<u>If Collocator applies to become an AT&T-21STATE Approved Installation Supplier (AIS) for the purpose of performing work related to its own collocation(s), AT&T-21STATE shall act on Collocator's application within a reasonable period of time using criteria no more restrictive than applied by AT&T-21STATE to any other person applying to be an AIS</u>.** ***Collocator shall be entitled to become an AT&T-21STATE Approved Installation Supplier (AIS) within a reasonable period of time for the purpose of performing work related to its own collocation(s), using criteria no more restrictive than that applied by AT&T-21STATE to any other AIS***.

An Authorized Installation Supplier ("AIS") is an entity that AT&T authorizes, based on its qualifications, to install facilities and equipment in a central office and to perform other work within the central office. Direct Testimony of Susan Kemp on Behalf of AT&T Florida ("Kemp Direct") at 5 (Tr. 541), lines 22-23.[7] There are two types of AIS: Tier 1 and Tier 2. A Tier 1 AIS is authorized to perform work anywhere in the central office for any carrier with equipment there, including collocating CLECs and AT&T. Because a Tier 1 AIS can go anywhere in the building and access any and all equipment there, it bears an enormous responsibility and, if not fully qualified and dependable, poses enormous risks. The process for becoming a Tier 1 AIS is therefore extensive and rigorous. A Tier 2 supplier, in contrast, is authorized to work only on its

[7] This brief refers to the prefiled testimony as "Kemp Direct," "Kemp Rebuttal," "McPhee Direct," "McPhee Rebuttal," "Neinast Direct," "Neinast Rebuttal," "Pellerin Direct," "Pellerin Rebuttal," "Ray Direct," and "Ray Rebuttal." Citations to testimony include the page number of the testimony as filed and the page number of the hearing transcript ("Tr.").

own equipment in its own collocation space, and so is required only to attend a one-day training course in order to qualify. *Id.* at 5 (Tr. 541), line 23 – 6 (Tr. 542), line 17.

The disputed contract language in Collocation § 1.7.3 does not use the term "Tier 1" or "Tier 2," but the dispute necessarily focuses on Tier 1 vendors, because section 1.7.3 concerns work "***related to*** *[CA's] own collocation*" – not just work on CA's equipment in its own collocation space. Also, the agreed statement of the issue refers to CA becoming a Tier 1 vendor.

AT&T's language requires AT&T to consider CA's application to become an AIS within a reasonable time using criteria no more restrictive than AT&T applies to any other applicant. CA cannot reasonably ask for more. CA's language, however, appears to state that CA shall be *entitled* to become an AIS. CA's language must be rejected, because neither CA nor anyone else is *entitled* to become an AIS. (CA's language could be read to mean only that CA is entitled to consideration as an AIS according to the same criteria as anyone else. But the agreed statement of Issue 2 suggests otherwise, and if that were all CA intended by its language, it presumably would have resolved Issue 2 by accepting AT&T's language.)

Nothing in law, regulation or common sense entitles a CLEC to become a Tier 1 AIS without applying and qualifying for that position in the same manner as anyone else. Moreover, it would be unthinkable to permit a CLEC to become a Tier 1 AIS without satisfying the qualifications that apply to everyone else, because that would substantially increase the risk of damage to equipment and danger to personnel in AT&T's central offices. Kemp Direct at 6 (Tr. 542), line 20 – 7 (Tr. 543), line 4.

CA made no effort in its testimony to support the notion that it is entitled to become a Tier 1 AIS without submitting to the same process as anyone else. CA complained that AT&T

has "approved a very limited number of AIS contractors" in many areas and has "refused to permit, in its sole discretion, new entrants to become certified as an AIS." Ray Direct at 4 (Tr. 25), lines 8-12. That simply is not so. There are 87 vendors on the Tier 1 list as of January 2015, each of which is authorized to perform work in any AT&T central office in the country. There is no shortage of Tier 1 vendors to perform work for CLECs in a timely fashion. Kemp Direct at 7 (Tr. 543), lines 7-10. Indeed, AT&T researched the question specifically in connection with this arbitration issue, and the research indicated no complaints, anywhere in the country, about a shortage of Tier 1 vendors. Kemp Dep. (Exh. 50) at 58, lines 7-16.[8] Because there are enough Tier 1 vendors to do the work required by AT&T and collocated CLECs, AT&T was not accepting applications for Tier 1 vendor authorizations when the direct testimony was filed (Kemp Direct at 7 (Tr. 543), lines 5-10), but it is simply not true that AT&T has refused to permit new entrants to become certified. When AT&T is accepting applications, it accepts them from all comers on an equal basis. Consistent with AT&T's proposed contract language, AT&T will treat CA the same as any other potential Tier 1 applicant.

Most important, though, even if there were a shortage of Tier 1 vendors, that could not possibly change the resolution of Issue 2. The question presented by Issue 2 is whether CA is entitled to become a Tier 1 vendor. There is only one possible answer to that question, and that answer is no, CA is not entitled to become a Tier 1 vendor – though it is entitled to be treated the same as any other applicant to be a Tier 1 vendor, as AT&T's language states. The only issues the Commission may resolve in this proceeding are the issues presented in the Petition and Response (*see* 47 U.S.C. § 252(b)(4)(A)), and neither the Petition nor the Response presents any

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[8] Staff took the depositions of all witnesses in this case, and the deposition transcripts ("Dep.") were entered in the record as numbered hearing exhibits. The Exhibits cited in this brief ("Exh.") are the Hearing Exhibits listed on the Comprehensive Exhibit List for Entry into Hearing Record.

issue that would permit the Commission to remedy a shortage of Tier 1 vendors even if there were one.

CA's witness Mr. Ray also suggested that a "reasonable solution" would be for the parties to establish a TELRIC-based price for collocation construction elements and for CA to pay AT&T those prices for performing CA's collocation work. Ray Direct at 4 (Tr. 25), line 19 – 5 (Tr. 26), line 2. That suggestion is a non-starter for several reasons:

1. On its face, it is not an answer to the question presented by Issue 2. Again, the Commission is confined to deciding the issues presented in the Petition and Response (47 U.S.C. § 252(b)(4)(A)), and TELRIC-based prices for collocation construction elements are not an answer to the question whether CA is entitled to become a Tier 1 AIS.

2. There is no basis for CA's proposal in any event. AT&T must provide collocation to CA at TELRIC-based rates (47 U.S.C. §251(c)(6)), but the work that is the subject of CA's proposal is not collocation and there is no requirement that that work be performed at TELRIC-based rates. Kemp Rebuttal at 3 (Tr. 605), lines 20-24.

3. Even if there were a basis for requiring TELRIC-based prices, it would be impossible to arrive at such prices in this proceeding. The record contains neither a list of "collocation construction element[s] to be placed in the ICA" nor a cost study upon which TELRIC-based prices could be established. *Id.* at 4 (Tr. 606), lines 1-4.

4. AT&T is not, and cannot properly be made, responsible for performing CA's construction work. Under CA's proposal, CA, instead of hiring an AIS to do the work, would direct AT&T to get the work done, and AT&T would contract with an AIS to do the work. This novel arrangement is unworkable for at least three reasons: (i) Since AT&T does not control the rates charged by the AIS, which are not TELRIC-based, the rates that AT&T would pay the AIS

would in all likelihood exceed the TELRIC-based rates that CA's language would require AT&T to charge CA. As a result, AT&T would sustain financial loss every time CA obtained services; (ii) the obligation to get the work done timely and properly, along with the attendant liability, would improperly be shifted to AT&T; and (iii) AT&T would be required to establish a process to perform the functions that CA's new proposal contemplates. That process would include, for example, procedures for receiving direction from CA and hiring an AIS to perform the work. The establishment of such a process would cost money, and CA has not proposed to compensate AT&T for that cost. *Id.* at 4 (Tr. 606), line 5 – 5 (Tr. 607), line 8.

For the foregoing reasons, the Commission should direct the parties to include in their ICA AT&T's proposed language for Collocation § 1.7.3, which appropriately requires AT&T to treat CA in the same way it treats any other applicant for authorization to perform work as a Tier 1 AIS.

ISSUE 3: When CA supplies a written list for subsequent placement of equipment, should an application fee be assessed?

Affected contract language: Collo 3.17.3.1

AT&T Position: No. As the parties agree, AT&T will not charge an additional or separate fee pursuant to Collocation § 3.17.3.1 when CA supplements its original Equipment List with new equipment. AT&T's proposed language succinctly and accurately reflects this position, while CA's is vague and subject to misinterpretation.

The parties have agreed in Collocation § 7.1 that CA will pay an initial Planning/Application Fee when CA submits a complete collocation application to AT&T. The parties have also agreed in Collocation § 3.17.3.1 that AT&T will not charge an additional or separate fee when CA supplements its Equipment List with new equipment. Kemp Direct at 7 (Tr. 543), lines 19-22. However, the parties disagree on the specific language to reflect this

agreement. AT&T's proposed last sentence of Collocation § 3.17.3.1 is underlined, and CA's proposed addition is in italics:

> The Collocator shall furnish to AT&T-21STATE a written list in the form of an attachment to the original Equipment List for the subsequent placement of equipment in its Dedicated or Virtual Collocation Space. When the Collocator's equipment is not listed in the approved All Equipment List (AEL) the equipment will be reviewed by AT&T-21STATE and written approval or denial of the equipment will be forwarded to the Collocator. The additional equipment will also be reviewed as to whether it is "necessary equipment". Only if the equipment passes both reviews may it be collocated. **AT&T Florida shall not charge any separate fee for review under this subsection.** ***CLEC shall not be charged for submission of the attachment to the Equipment List or for this review process, regardless of outcome***.

AT&T's proposed sentence – "AT&T Florida shall not charge any separate fee for review under this subsection" – accurately states the parties' agreement that a new application fee does not apply when CA supplements the Equipment List with new equipment. CA's proposed sentence – "CLEC shall not be charged for submission of the attachment to the Equipment List or for this review process, regardless of outcome" – is unclear. It does not refer specifically to review of equipment additions under subsection 3.17.3.1 and could be interpreted to override the parties' agreement that application fees are required for initial collocation applications. Therefore, the Commission should accept AT&T's proposed language and reject CA's proposed language for Collocation § 3.17.3.1.

ISSUE 4a: If CA is in default, should AT&T Florida be allowed to reclaim collocation space prior to conclusion of a dispute regarding the default?

Affected contract language: Collo 3.20.1

AT&T Position: Yes. The ICA should not require AT&T to bear the safety, operational and economic risks of CA being in material default while dispute resolution is ongoing. CA has 60 days to cure its material default and has an available remedy if it believes it has not materially defaulted.

ISSUE 4b: Should AT&T Florida be allowed to refuse CA's applications for additional collocation space or service or to complete pending orders after AT&T

Florida has notified CA it is in default of its obligations as Collocator but prior to conclusion of a dispute regarding the default?

Affected contract language: Collo 3.20.2

<u>AT&T Position</u>: Yes. AT&T is subject to significant safety, operational and economic risks when CA materially defaults. The ICA should not require AT&T to accept CA's applications or complete its orders while dispute resolution is ongoing. CA has an available remedy if it believes it has not materially defaulted.

The parties have agreed in Collocation §§ 3.20.1 and 3.20.2 that if CA defaults on its obligations as Collocator, AT&T will have certain remedies, including reclaiming collocation space and refusing to process new or pending collocation orders. CA proposes to add language to those two provisions that would prohibit AT&T from exercising those remedies if CA is pursuing dispute resolution, including litigation and any subsequent appeals. AT&T opposes this language.

If CA materially breaches its collocation obligations, AT&T should not be forced to suffer the consequences of continuing to provide collocation services to CA.[9] For instance, if CA fails to pay material amounts it owes for collocation services, AT&T should not have to incur additional financial loss by allowing CA to remain collocated or to obtain additional collocation space that it cannot or will not pay for. Similarly, if CA's default is a failure to follow safety requirements that protect the personnel or equipment of other collocators, and of AT&T, CA should not be allowed to continue to collocate, and to continue the violation – and

[9] The agreed contract language does not require the CA default that triggers AT&T's remedies to be "material." AT&T proposes to say "If Collocator **<u>materially</u>** defaults . . ." in Collocation § 3.20.1 in order to clarify that the remedies enumerated there, and in § 3.20.2 (which takes its predicate from § 3.20.1) are available only if the default is material. That proposed addition is in aid of AT&T's opposition to CA's proposed language for both sections, and so would be implemented only if CA's language is rejected.

the endangerment of those personnel or equipment – while CA is disputing the violation through appeals. Such a process is likely to take several years.[10]

CA asserts that without the protection afforded by its proposed language, AT&T would be able to take action "without first providing an opportunity for CA to contest the assertion that it is in default" and "without oversight or review." Ray Direct at 6 (Tr. 27), lines 5-6, 9. That is wrong – and it is wrong in a way that strongly supports AT&T's position on Issues 4a and 4b:

The agreed language in section 3.20.1 does not allow AT&T to reclaim collocation space or refuse to process collocation requests until 60 days after AT&T notifies CA of the default. If CA receives such a notification and believes it is not in default, CA can initiate a proceeding to determine whether it is or is not default. In that proceeding, CA would be able to obtain an order temporarily prohibiting AT&T from taking action against CA by showing that the action would significantly harm CA and that CA is likely to show that it is not in default (or that the default is not material).

Thus, the question presented by Issue 4a boils down to this: Assume that AT&T notifies CA that it is in material default and that AT&T intends to reclaim CA's collocation space if CA does not cure the default in 60 days. Assume further that CA initiates a dispute at the Commission to contest AT&T's claim that it is in default (or that the default is material). In that scenario, should the ICA automatically prohibit AT&T from reclaiming the collocation space after 60 days if CA does not cure the default (CA's position), or should AT&T be prohibited from reclaiming the collocation space only if CA can satisfy the Commission on a preliminary basis that reclamation would significantly harm CA and that CA is likely to show that it is not in

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[10] CA has suggested the parties would be able to use an expedited dispute resolution process. Ray Direct at 6 (Tr. 27), lines 11-13. However, that process would not be available to the parties here. See discussion of Issue 19 below.

default (or that the default is not material)? Clearly, the latter. It is much more reasonable for the Commission to decide later, on a case-by-case basis concerning the facts of a specific alleged default, whether AT&T's remedy should be deferred while dispute resolution is ongoing, rather than to decide now, in the abstract, that AT&T's remedy must always await conclusion of the dispute resolution proceeding.

Issue 4b should be resolved in favor of AT&T for a different reason: The remedies that are the subject of that issue are the much more moderate remedies provided by Collocation § 3.20.2 – refusal to process new collocation orders or to complete pending orders, as opposed to reclamation of space in which CA is already collocated. Because the remedies provided by § 3.20.2 are so modest, AT&T should be able to proceed with them without awaiting the conclusion of a dispute resolution proceeding.

For these reasons, the Commission should reject CA's proposal to prohibit AT&T from exercising its contractual remedies for CA's breach of its obligations as Collocator in the event that CA disputes the default.

ISSUE 5: Should CA be required to provide AT&T Florida with a certificate of insurance prior to starting work in CA's collocation space on AT&T Florida's premises?

Affected contract language: Collo 4.6.2

AT&T Position: The issue statement does not capture the actual disagreement, because CA has agreed to provide a certificate of insurance before it starts work. The disagreement is how long CA should have to cure the delinquency if it breaches that obligation. Five business days is sufficient.

The parties have agreed in Collocation § 4.6.2 that, "A certificate of insurance stating the types of insurance and policy limits provided the Collocator must be received prior to commencement of any work." Thus, it is a given that CA must provide a certificate of insurance before it can start work in a collocation space. This stands to reason, because the required

insurance is necessary to protect personnel and equipment in the collocation space and central office. Kemp Direct at 11 (Tr. 547), line 21 – 12 (Tr. 548), line 6.

The actual disagreement concerns the situation in which CA breaches its obligation to provide an insurance certificate before it starts work. In that scenario, CA of course must cure its breach, but the parties disagree on how long CA should have to do so. AT&T proposes that CA should have five business days. CA proposes 30 thirty calendar days. *Id.* at 12 (Tr. 548), lines 6-10.

CA's proposal is patently unreasonable. The parties have agreed that insurance *must* be in place before any collocation work is commenced. This recognizes that it is essential for CA, as a collocated CLEC that has access to secure buildings and expensive equipment, to carry insurance in order to protect against the financial consequences of insurable events. To give CA 30 days to cure its breach while CA continues to work in the collocation space, and thus to create the dangers against which the agreed insurance is supposed to protect, would make a mockery of the parties' agreement that insurance must be in place *before* work begins. If CA breaches that obligation, it would be perfectly reasonable to require CA to stop work until it obtains insurance and provides the required certificate. The five-day grace period that AT&T proposes is generous, and is sufficient for CA to cure its breach. *Id.* at 12 (Tr. 548), line 12 – 13 (Tr. 549), line 2.

CA has suggested it will not be able to obtain insurance in five days, and that it may be difficult for it to obtain insurance at all. Ray Direct at 6 (Tr. 27), lines 19-21. That misses the point because, again, CA is contractually obliged, by its own agreement, to obtain insurance *before* it starts work. The five days comes into play only after AT&T notifies CA that it breached that obligation. CA is in control of the timing of its collocation work and can make

arrangements for insurance well in advance of starting work. Kemp Direct at 13 (Tr. 549), lines 11-13. AT&T doubts that CA will have great difficulty obtaining the required insurance. CLECs have been collocating in AT&T's premises for nearly 20 years and have been subject to similar insurance requirements. Other CLECs have not expressed concerns about complying, and AT&T has not had issues with CLEC non-compliance. *Id.* at 13 (Tr. 549), line 22 – 14 (Tr. 550), line 4. Furthermore, if CA thinks it will have trouble obtaining insurance, it should not have agreed to language requiring it to obtain insurance (or should not undertake any activity that requires it to obtain insurance).[11]

CA proposes language for Collocation § 4.6.2 to "clarify" that AT&T may not obtain insurance on behalf of CA "if CA has not commenced the work for which the insurance is required to cover." *Id.* at 14 (Tr. 550), lines 5-8. That language is nonsensical. The scenario being addressed in § 4.6.2 only arises if CA has begun work in the collocation space and has not obtained the required insurance certificate. AT&T can only send out a deficiency notice if there is a deficiency, and there can be no deficiency unless work has commenced without the required insurance certificate having been provided. Since the cure period will not begin until work has commenced (and a deficiency notice has been sent), it follows that the remedy that arises *after* the cure period expires will also not occur until after work has commenced. Thus, CA's clarification language is unnecessary and confusing. *Id.* at 14 (Tr. 550), lines 5-18.

ISSUE 6: Should AT&T Florida be allowed to recover its costs when it erects an internal security partition to protect its equipment and ensure network reliability and such partition is the least costly reasonable security measure?

Affected contract language: Collo 4.11.3.4

[11] CA has suggested there is no need for it to cure the delinquency within five days, because if it does not have the required insurance, it will stop work. Ray Dep. (Exh. 46) at 18, line 21 – 20, line 5. But Collocation § 4.6.2 does not say that.

> **<u>AT&T Position</u>**: Yes. AT&T would only erect a security partition if that is the least costly, most reasonable security measure under the circumstances. If CA's presence (or the presence of CA's equipment) necessitates the erection of a security partition, CA should bear the cost.

A security partition is a barrier that separates a CLEC's collocation space from other CLECs' or AT&T's space. It can range from a wire mesh cage screen to fully framed walls. Kemp Direct at 15 (Tr. 551), lines 5-7. In some situations, a security partition may be the least costly reasonable security measure. In other situations, the least costly reasonable security measure is to place the Collocator's equipment in a different location. *Id.* at 15 (Tr. 551), lines 7-10. Agreed language in Collocation § 4.11.3.4 provides:

> AT&T-21STATE may use reasonable security measures to protect its equipment. In the event AT&T-21STATE elects to erect an interior security partition . . . , AT&T-21STATE may recover the costs of the partition in lieu of the costs of other reasonable security measures if the partition costs are lower than the costs of any other reasonable security measure for such Eligible Structure. In no event shall a Collocator be required to pay for both an interior security partition to separate AT&T-21STATE's equipment in an Eligible Structure and any other reasonable security measure for such Eligible Structure. If AT&T-21STATE elects to erect an interior security partition and recover the cost, it must demonstrate to the Physical Collocator that other reasonable security methods cost more than an interior security partition around AT&T-21STATE's equipment at the time the price quote is given.

This agreed language is eminently fair and reasonable: If AT&T chooses to erect a security partition to separate CA's equipment from other carriers' equipment (including its own), it can recover the cost only if it demonstrates that other reasonable security methods cost more, and AT&T cannot charge CA for both the partition and an additional security measure.

CA, however, proposes to limit AT&T's right to recover the cost of a security partition to the situation where CA or its agent has committed wrongdoing or violated the ICA. That is unreasonable. If CA's presence on AT&T's premises creates the need for a security partition,

CA should bear the cost – whether or not CA has done something wrongful. The Commission should therefore reject CA's proposed additional language for section 4.11.3.4.

CA has asserted that AT&T's language would allow it to charge CA for "arbitrary construction costs entirely unrelated to CA's collocation" and to impose "arbitrary non-cost based financial obligations." Ray Direct at 7 (Tr. 28), lines 9-12. That is not so. In the first place, CA agreed to the very language it is complaining about. The agreed language allows AT&T to erect a security partition to segregate CA's equipment in the described (and very limited) circumstances, and provides that CA will bear the costs. Furthermore, the agreed language requires that the security partition be "reasonable"; that AT&T may recover the costs instead of the costs of other reasonable security measures only if the partition costs are lower than the costs of those other reasonable security measures; and that AT&T must "demonstrate to [CA] that other reasonable security methods cost more than an interior security partition around AT&T-21STATE's equipment at the time the price quote is given." There is no basis for CA's assertion that AT&T will be able to impose any arbitrary costs or non-cost-based obligations related to security partitions. The *only* question is whether CA's obligation to bear the cost should apply only when the partition is required as a result of CA's wrongdoing, as opposed to CA's mere presence.

CA also asserts that AT&T controls where collocations are placed and that central offices typically have a segregated collocation area. Ray Direct at 7 (Tr. 28), lines 16-21. That is irrelevant: If a central office has a segregated collocation space and AT&T locates CA's equipment somewhere else and insists on installing a security partition, AT&T would have to "demonstrate . . . that other reasonable security methods cost more than an interior security partition around AT&T-21STATE's equipment at the time the price quote is given." If using the

existing segregated space constitutes a reasonable security method, then presumably AT&T will not be able to show that using a security partition is less costly.

Finally, CA makes much of the fact that it is unlikely that AT&T will ever have occasion to erect a security partition. *See* Ray Rebuttal at 8 (Tr. 80), lines 5-6 ("AT&T admits it has never erected such a security partition. As such, there is simply no reason for such a provision in the ICA.") That is irrelevant. If AT&T never erects a security partition, section 4.11.3.4 will not come into play, and it will make no difference to CA what it says. If AT&T does reasonably erect a security partition – no matter how unlikely that may be – section 4.11.3.4 will come into play, and if CA is the cause of the need for a security partition, and if the other conditions in section 4.11.3.4 are met, CA should bear the cost, whether or not it committed a wrong.

ISSUE 7a: Under what circumstances may AT&T Florida charge CA when CA submits a modification to an application for collocation, and what charges should apply?

Affected contract language: Collo 7.4.1

AT&T Position: AT&T should be allowed to charge CA for reviewing each modification to an application, including when AT&T requests the modification and when the modification does not change the number, type or size of cables, floor space, or cost. AT&T only requests modifications when necessary and must review each modification request.

As reflected in Collocation § 7.4.1, the parties generally agree that AT&T may charge CA for the cost of reviewing a modified application for collocation. However, CA has proposed two exceptions. Specifically, CA seeks to add the following language to the end of Collocation § 7.4.1: "***This provision shall not apply if AT&T-21STATE requested or required the revision or modification, in which case no additional charges shall apply. This provision shall not apply if the revision results in no change in the number, type or size of cables, or floor space, and has no other cost impact on AT&T-21STATE***." Both proposed exceptions are unreasonable and should be rejected.

First, CA proposes that it should not be charged when AT&T has requested that CA submit the revision or modification to CA's original request. But AT&T will request a revision or modification only if AT&T determines, after reviewing the original application, that a change is necessary for technical reasons. Kemp Direct at 18 (Tr. 554), line 28 – 19 (Tr. 555), line 5. Thus, the cause of the revision or modification would be incomplete or inaccurate information in the original application, and CA should bear any costs arising from its submission of incomplete or inaccurate information. Moreover, CA's proposed language would reduce CA's incentive to provide accurate and complete information on its original applications (since it would know there would be no fee if the original was inaccurate or incomplete), which in turn would increase the likelihood of additional work and uncompensated expenses for AT&T. *Id.* at 19 (Tr. 555), lines 5-9. AT&T should not have to bear such expenses; the physical collocation application fees that AT&T has proposed were approved and ordered by the Commission. Kemp Rebuttal at 12 (Tr. 614), lines 3-10. Finally, if CA disagrees with AT&T's determination that a modified application is necessary, then CA can invoke the ICA's dispute resolution procedures. *Id.* at 11 (Tr. 613), line 17 – 12 (Tr. 614), line 2.

Second, CA proposes that it not be charged for the review of a modified collocation application that results "in no change in the number, type or size of cables, or floor space, and has no other cost impact on AT&T-21STATE." There is no sound reason for that language, because there is *always* a "cost impact on" AT&T. The Commission-approved fee that AT&T charges for reviewing a collocation application compensates AT&T for the review, not the resulting work, and AT&T must review a modified application in the same way as it reviews an original. AT&T must spend time and money reviewing each modified collocation application, regardless of how similar to or different from the original it may be. Whether in an initial or an

augment scenario, the application is required in order to provide AT&T with sufficient information to evaluate whether the proposed equipment is authorized for collocation, is compatible with the other technical requirements in the central office, and is safe to install. Kemp Direct at 17 (Tr. 553), lines 9-22.

For these reasons, an application fee is appropriately required for all modified applications, and CA's proposed exceptions should be rejected.

ISSUE 7b: When CA wishes to add to or modify its collocation space or the equipment in that space, or to cable to that space, should CA be required to submit an application and to pay the associated application fee?

Affected contract language: Collo 7.5.1

AT&T Position: Yes. When CA seeks to augment its collocation space, an Augment Application should be required to inform AT&T of any changes to CA's collocation space, equipment or cables. AT&T incurs costs to review an Augment Application, which AT&T is entitled to recover through the related fees.

Issue 7b is similar to Issue 7a, but deals with augments to an existing collocation arrangement under Collocation § 7.5.1, rather than with modifications to an application for collocation. The disputed language appears as follows; CA proposes to exclude the word "equipment" and to add the language in bold italics:

> 7.5.1 A request from a Collocator to add or modify space, **equipment**, and/or cable to an existing collocation arrangement is considered an Augment. Such a request must be made via a complete and accurate Application. ***This provision shall not apply and no fee shall be due if Collocator is installing or replacing collocated equipment in its own space, without requesting any action by AT&T even if Collocator submits updated equipment designations to AT&T in accordance with this agreement.***

CA's proposal to exclude the word "equipment" from the first sentence should be rejected, because it is just as appropriate and reasonable for AT&T to have an opportunity to review CA's intended addition or modification of collocated equipment as it is for AT&T to have the opportunity – to which CA has agreed – to review CA's intended addition or

modification of space. AT&T must review CA's application to add to or modify its collocated equipment to ensure that it (1) is compliant with the standards set out in Collo § 3.18.1; (2) meets the requirements for "necessary equipment"; and (3) will not adversely affect equipment or personnel.[12] The cost caused by this review must be recovered from the cost causer, which in this case is CA. Kemp Direct at 20 (Tr. 556), line 23 – 21 (Tr. 557), line 3.

CA's proposed additional sentence should be rejected because AT&T incurs costs in all instances when it reviews an augment application, including instances in which the collocator is installing or replacing collocated equipment in its own space without requesting any action by AT&T. AT&T is therefore entitled to be compensated for those costs at the rates the Commission has approved.

Finally, CA's position on Issue 7b is internally inconsistent. If the word "equipment" were deleted from the first sentence of Collocation § 7.5.1 as CA proposes, then the additional sentence that CA proposes – which concerns equipment – would have no effect. The reasonable and appropriate resolution of Issue 7b is to include the word "equipment" in Collocation § 7.5.1 and reject CA's proposed additional sentence.

ISSUE 8: Is 120 calendar days from the date of a request for an entrance facility, plus the ability to extend that time by an additional 30 days, adequate time for a CA to place a cable in a manhole?

Affected contract language: Collo 14.2

AT&T Position: Yes. 120 calendar days, with a possible 30 calendar day extension, is adequate time for CA to place cable in a manhole. Other carriers have consistently met this deadline under their ICAs with AT&T. CA can invoke

[12] The parties have agreed to language in Collocation § 3.17.1 that requires equipment to pass two reviews prior to approval for collocation: (1) the equipment must be listed on the approved All Equipment List ("AEL"); and (2) the equipment must be reviewed as to whether it is "necessary equipment." Only if the equipment passes both reviews may it be collocated. There is no disagreement between the parties as to the review process. If CA is replacing a piece of equipment with the same equipment, as opposed to modifying its equipment or adding new equipment, then section 3.17.1 does not apply.

> the force majeure provision in the ICA if extraordinary conditions hinder timely placement of CA's cable.

Issue 8 concerns how much time CA should be allowed to place its cable in a manhole after CA has requested that AT&T provide it with an entrance facility.[13] 120 calendar days from the date of a request for an entrance facility, plus the ability to extend that time by an additional 30 days, is sufficient. This is the same amount of time that all other carriers with which AT&T has ICAs have to complete the same work, and those carriers have consistently been able to meet the deadline. CA has not presented any evidence that would suggest it needs more time than other carriers in Florida to place cable in a manhole, and has provided no cogent basis for its proposal that it be given 180 days plus an extension of 90 days. Kemp Direct at 21 (Tr. 557), lines 14-18.

CA has control over its own activities, including the date on which it submits a collocation application, and so can take into account whatever other projects it is working on when it decides when to submit its application. Through proper project management, CA can address any hurdles or challenges it might encounter and complete the work within the standard 150 days (including the 30-day extension). *Id.* at 21 (Tr. 557), lines 19-24.[14]

Time is of the essence in completing work in the manhole. CA proposes that AT&T's cable should be coiled and waiting for CA at the manhole for up to 270 days. However, leaving the cable coiled and waiting for CA clutters the vault area near the manhole and makes it difficult to work in that area. Giving CA up to 270 days to place its cable in the manhole would also effectively allow CA to reserve space in the duct, which other carriers are not able to do. If

[13] To be clear, this "entrance facility" provides CA with the path to "enter" AT&T's premises to reach its collocation space. It is not the same "Entrance Facility" that is defined in Net. Int. section 2.9, which relates to local interconnection and is addressed in Issue 35.

[14] The force majeure provision in the ICA (GT&C § 36.1) will excuse CA from compliance with the deadline if CA is delayed by weather or other forces beyond its reasonable control. *Id.* at 22 (Tr. 558), lines 11-16.

CA were allowed to tie up space for nine months without making use of it, as CA proposes, CA could prevent AT&T from accommodating a request from another CLEC that is willing and able to use that space within the timeframes that AT&T proposes and that other CLECs abide by. *Id.* at 22 (Tr. 558), lines 1-10.

AT&T's proposal that a request for a thirty-day extension be made at least 15 calendar days before the end of the 120-day period is also reasonable. If CA is going to request the extension, AT&T needs 15 days' notice to be able to reassign the splicer who had been assigned to CA's work and to advise those involved with the other projects so they and AT&T can redeploy and reschedule the resources that they were going to use for those subsequent projects. Kemp Rebuttal at 14 (Tr. 616), lines 10-18.

ISSUE 9a: Should the ICA require CA to utilize an AT&T Florida AIS Tier 1 for CLEC-to-CLEC connection within a central office?

Affected contract language: Collo 17.1.2

<u>AT&T Position</u>: Yes. CLEC-to-CLEC connections must be performed by an AIS Tier 1 so that AT&T can properly maintain and organize its and other Collocators' facilities in AT&T's central offices and to ensure the safety and integrity of those facilities and AT&T's network.

AT&T reasonably requires all carriers to use an Approved Installation Supplier ("AIS") Tier 1 for installation work done in a central office, including CLEC-to-CLEC connections. As discussed above in connection with Issue 2, an AIS Tier 1 has the demonstrated qualifications and competence necessary to perform installation work efficiently and safely, which is essential when working on or around CLEC and AT&T equipment. Kemp Direct at 23 (Tr. 559), lines 6-11.

CA proposes special treatment that would allow it, alone among all carriers that collocate in AT&T central offices, to use its own personnel instead of an authorized Tier 1 vendor[15] to make direct connections from CA's facilities to other carriers' facilities within AT&T's central office. The Commission should reject that proposal. AIS Tier 1 suppliers undergo specific training to prepare them to perform central office installation work for AT&T and CLECs in AT&T's central offices in all collocation areas and common areas. CA's language would allow it to use someone without the requisite training and qualifications, which would increase the risk of network outages, electrical issues, damage to collocator and AT&T equipment, and would jeopardize the safety of other individuals in the building. *Id.* at 23 (Tr. 559), line 14 – 24 (Tr. 560), line 2.[16]

Accordingly the Commission should reject CA's proposed additional language for Collocation § 17.1.2.

ISSUE 9b: Should CLEC-to-CLEC connections within a central office be required to utilize AT&T Florida common cable support structure?

Affected contract language: Collo 17.1.5

AT&T Position: Yes. All CLEC-to-CLEC connections must use AT&T's common cable support structure regardless of the distance between the CLECs' collocated equipment. AT&T must ensure the safety and integrity of its network and the facilities of each Collocator, and has set specific common standards that apply equally to all Collocators.

Common support structure is cable support equipment, such as wire racks, used to safely and efficiently organize and manage all the wiring in a central office. This structure supports fiber or copper cables as they are routed from CLEC collocated equipment to the main

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[15] As discussed above in connection with Issue 2, CA is not automatically entitled to become a Tier 1 vendor.

[16] As an alternative to CA being allowed to do CLEC-to-CLEC installations itself, CA made the same proposal it made in connection with Issue 2 – performance of the work by AT&T at cost-based prices. Ray Direct at 11 (Tr. 32), lines 17-24. That proposal is a non-starter for the reasons discussed above in connection with Issue 2.

distribution frame or another CLEC's or AT&T's equipment. Common support structure is required for all carriers located in an AT&T central office, including AT&T. Kemp Direct at 24 (Tr. 560), line 20 – 25 (Tr. 561), line 2.

The Commission should reject CA's language for Collocation § 17.1.5 that would allow CA to run wire without using common cable support structures. In a central office that houses the equipment of multiple CLECs and AT&T, it is imperative that the enormous amount of wire be organized in a safe, systematic and efficient manner using appropriate support structures. CA proposes to ignore this system and simply run wires at random with no organizational system. Running wires even for a short distance without common support structure substantially increases the potential for unsafe working conditions as well as interfering with other carriers' equipment. If AT&T and collocating carriers did not use common support structure, the central office would degenerate into a disorganized, unsafe mess, and there is no reason that an exception should be made for CA. Kemp Direct at 25 (Tr. 561), lines 15-24.

ISSUE 10: If equipment is improperly collocated (*e.g.*, not previously identified on an approved application for collocation or not on an authorized equipment list), or is a safety hazard, should CA be able to delay removal until the dispute is resolved?

Affected contract language: Collo 3.18.4

AT&T Position: No. In the scenario that is the principal subject of this issue, AT&T contends that CA has collocated equipment that does not comply with safety standards; CA disagrees; and the parties are in dispute resolution. Prudence dictates that the equipment be removed until the dispute is resolved.

Collocation § 3.18.4 covers two scenarios in which the parties disagree about CA's compliance with the Collocation Attachment. In the first scenario, the parties disagree about whether equipment that CA has collocated is necessary for interconnection or access to UNEs (as it must be in order to be permissibly collocated). In the second scenario, the parties disagree about whether equipment that CA collocated complies with safety standards or was collocated

without having been identified on an approved application for collocation or on the All Equipment List ("AEL").

In the first scenario, where AT&T contends that CA has collocated equipment that is not necessary for interconnection or access to UNEs and CA disagrees, the parties have agreed that CA may leave its equipment in place while the disagreement is resolved. The reason AT&T was willing to agree to this is that if CA is collocating equipment that is not necessary for interconnection or access to UNEs, CA is breaching the ICA, but is not endangering persons or property. Accordingly, AT&T is willing for the uncertainty about whether equipment is permissibly collocated to be temporarily resolved in favor of CA, pending a final determination. Kemp Direct at 26 (Tr. 562), line 21 – 27 (Tr. 563), line 4.

In the second scenario, however, where CA has collocated equipment that AT&T contends does not comply with safety standards, the safety of persons and property is at stake. In this scenario, prudence dictates that the uncertainty about whether the equipment is permissibly collocated should be resolved, at least temporarily, in favor of safety, *i.e.*, against CA. Accordingly, CA should be required to remove the equipment until the dispute resolution process concludes. *Id*. at 27 (Tr. 563), lines 8 – 17.[17]

CA's suggestion that AT&T could "inflict serious and possibly fatal harm to CA based solely upon AT&T's 'belief'" is unfounded. Ray Direct at 12 (Tr. 33), lines 6-7. AT&T has no incentive to make unsubstantiated claims that CA is not complying with safety standards or that

[17] The second scenario also encompasses the situation in which AT&T believes CA has installed equipment that was not on CA's collocation application or that does not appear on the AEL. This situation should arise rarely, if ever, since there should be no debate about whether a particular piece of equipment was or was not on CA's collocation application or the AEL. In any event, much the same reasoning applies here as in the safety standard variation of the second scenario. *See id.* at 27 (Tr. 563), line 18 – 28 (Tr. 564), line 5.

CA has installed equipment that has not previously been approved. Kemp Direct at 28 (Tr. 564), lines 6-11.

CA belatedly said it would be willing to agree that it must remove collocated equipment that is not NEBS-certified, but that if it needs to "replace a failed piece of gear with a newer model of this same equipment which is also NEBS-certified to resolve an outage . . . CA should be allowed to leave it in pending the dispute resolution process." Ray Rebuttal at 12 (Tr. 84), lines 6-13. That offer is profoundly confusing, because it is not clear why there would be a dispute in the first place if CA is using NEBS-certified equipment. The Commission should simply approve AT&T's proposed language.

There is a second, lesser, disagreement concerning Collocation § 3.18.4, namely, how much time CA should have to remove its collocated equipment if (i) the equipment does not comply with the minimum safety standards or was not approved in advance, or (ii) the equipment is not used for interconnection or access to UNEs and CA does not dispute that fact. AT&T initially proposed ten business days, and CA proposed 30 calendar days. In its rebuttal testimony, CA proposed to split the difference at 15 business days. AT&T's principal concern is scenario (i), where safety is at stake. Accordingly, AT&T now advocates 15 business days for scenario (ii) (as CA proposed) and ten business days for scenario (i).[18]

ISSUE 11: Should the period of time in which the Billed Party must remit payment be thirty (30) days from the bill date or twenty (20) days from receipt of the bill?

Affected contract language: GTC 2.45

<u>AT&T Position</u>: The bill due date should be 30 calendar days from the date of the bill. Establishing the bill due date based on when a bill is received would

[18] AT&T proposed this compromise to CA, but CA countered by adding a condition that was not acceptable to AT&T.

> require the billing party to obtain and verify proof of receipt, and would require AT&T to revamp its billing systems.

As demonstrated below, the Commission's decision on a virtually identical issue in a previous arbitration strongly supports AT&T's position on Issue 11, and the Commission should adhere to its well-reasoned precedent.

"Bill Due Date" means the date by which payment must be made. The term is used in provisions of the ICA that govern what happens if payment is not made by the "Bill Due Date," such as, GT&C §§ 11 (Billing and Payment of Charges) and 12 (Nonpayment and Procedures for Disconnection). The definition of "Bill Due Date" is important because, for example, late fees and interest are assessed if payment is not received by the Bill Due Date. Consequently, the Bill Due Date must be a readily ascertainable date, not subject to uncertainty, that will facilitate administration of the ICA and minimize disputes. Pellerin Direct at 3 (Tr. 174), lines 15-22.

AT&T proposes that the Bill Due Date be 30 days after the date of the bill. Basing the Bill Due Date on the date of the bill is easy to administer, and 30 calendar days is ample time for the Billed Party to pay. *Id.* at 4 (Tr. 175), lines 7-9. CA does not contest that, but proposes that the Bill Due Date be the later of 30 days from the bill date or 20 days from receipt of the bill, in order to protect the Billed Party from the imposition of late fees or interest that CA claims could result from a bill being received late.

There is no need for the protection CA seeks, because, as CA admits, on the rare occasions when a bill is paid after the Bill Due Date (calculated as AT&T proposes) because the bill was delivered late, AT&T credits the CLEC with the accrued late fees and interest.[19] In fact,

[19] In its response to Staff Interrogatory 4a (Exh. 26, pp. 5-6), CA acknowledged, "When [a bill has not been timely received], AT&T Florida has promptly forwarded a copy of the detailed bill via email upon request . . . . AT&T Florida generally credits the associated late payment charges for that bill after [the CLEC] has promptly paid the bill following its receipt of the bill copy."

CA states that its proposed "language simply seeks to codify this routine business process into the ICA."[20]

In reality, however, CA's language does not codify the practice of crediting accrued late fees and interest to the Billed Party when delayed delivery of the bill is the cause of a late payment. Instead, CA's language redefines "Bill Due Date" in a way that would be very difficult to administer. Establishing the Bill Due Date based on when a bill is received, as CA proposes, would require the Billing Party to obtain and verify proof of receipt in order to know when each bill is due. Pellerin Direct at 4 (Tr. 175), lines 9-11. This would require a substantial revamping of AT&T's billing systems, which treat payments from all other carriers in Florida as past due if they are not made by the next bill date, *i.e.*, within 30 days of the bill date. *Id*. at 4 (Tr. 175), lines 11-14. CA's language adds an additional administrative burden in that it would require the Billing Party to track the date the bill was received and compare it to 30 calendar days from the bill date to determine which is later. CA's proposal complicates the billing process unnecessarily, would impose system modification costs on AT&T that CA has not offered to pay, and is likely to lead to disputes. *Id*. at 4 (Tr. 175), lines 14-18. *See also* Tr. 309, line 12 – 310, line 9 (explaining why CA's language would require revamping of AT&T's billing systems and expressing uncertainty whether it would even be possible to modify the systems to comply with CA's language or whether manual intervention might be required).

CA has suggested that AT&T's bills often arrive late, but there is a separate, Commission-approved, remedy for that. AT&T is subject to a performance measure regarding the timeliness of its invoices to CLECs as compared to its retail customers. *Id.* at 5 (Tr. 176), lines 1-3 and Exh. 3. AT&T would be subject to financial payments to CA if AT&T were to fail

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[20] *Id*.

to transmit its bills to CA in the same or less time than it transmits comparable retail bills. *Id*. at 5 (Tr. 176), lines 3-5. As the Commission found when it decided a virtually identical issue in Docket No. 040130-TP, this fully accommodates CA's stated concern about the timeliness of bills.

Docket No. 040130-TP was an ICA arbitration between a group of Joint Petitioners and BellSouth. One issue in the case was whether the time period for review and payment of bills "should be based upon the date bills are issued (by BellSouth), or whether it should be based on the date bills are received." Order No. PSC-05-0975-FOF-TP (Oct. 11, 2005), at 59. Like CA here, the Joint Petitioners contended that the bill due date should be based on the date bills are received, in part because BellSouth was supposedly untimely in posting or delivering bills. *Id.*

The Commission rejected the Joint Petitioners' position and ruled that the date for bill payment should be based on the date bills are issued, and not on the date they are received. Several considerations led the Commission to this conclusion, and those considerations apply equally here:

First, the Commission noted that this is a "'parity' issue" (*id.* at 62), and that "BellSouth's SQM performance results indicate that, on average, BellSouth is delivering bills to its wholesale customers at 'parity' with its own retail customers" (*id.* at 63-64). That is still the case.[21]

Second, the Commission stated, "Although the Joint Petitioners' proposal appears to introduce a fixed level of certainty to the bill review and payment timeframe, we find the practical implication could instead result in a degree of uncertainty." *Id.* at 63. Here, CA's

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[21] As compared to the time to deliver retail bills in 2014, AT&T consistently delivered CLECs' bills in less time – for interconnection, every month; for UNEs, 11 months out of 12; and for resale, 11 months out of 12. Pellerin Direct at 6 (Tr. 177) n.4.

proposal would inevitably result in uncertainty, because under that proposal, payment of a bill more than 30 days after the date of the bill would require a determination whether the bill was or was not paid within 20 days of receipt.

Accordingly, the Commission concluded: "We find BellSouth shall not be ordered to make substantive changes to its billing systems on behalf of the Joint Petitioners, and at its own expense, in order to exceed 'parity' performance." *Id.* at 64. Here, too, AT&T should not be required to make substantive changes to its billing systems on behalf of one CLEC, CA.

In its response to question 13 of AT&T's First Set of Interrogatories (Exh. 4), CA was not able to identify any circumstance in the last three years for which the Commission or any other body found that AT&T did not send timely bills. Instead, CA cited to the experience of Terra Nova Telecom and a small handful of problems CA alleges Terra Nova had in receiving bills by mail. Terra Nova did not have to escalate these matters to the Commission because AT&T promptly sent duplicate bills via email once Terra Nova asked for them. CLECs that elect to receive their bills by snail mail must expect that there will sometimes be delays or lost bills, just as we all experience from time to time with our personal mail. Pellerin Direct at 5 (Tr. 176), lines 14-16. Delayed delivery by the postal service does not mean the Billing Party failed to send the bill on time or is otherwise at fault. As the Commission previously concluded, the Bill Due Date should not be based on when a bill is received.

CA has suggested that "many previous interconnection agreements" contain CA's language (Ray Direct at 13 (Tr. 34), lines 8-9), but it is AT&T's proposed language that is the norm, not CA's. AT&T witness Pellerin examined a representative sample of AT&T ICAs and did not find any with the terms CA is proposing. Pellerin Rebuttal at 2 (Tr. 267), lines 10-14.[22]

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[22] Ms. Pellerin reviewed the following ICAs: Access Communications (2006), Alternative Phone (2011), Broadwing (2005), Cox (2010), Florida Multi-Media (2005), Interactive Services Network (2007), New Talk

When AT&T asked, CA provided three examples of the "many previous interconnection agreements" that CA claimed contain CA's proposed language (see CA Response to AT&T Interrogatory 61 (Exh. 33, pp. 435-436)),[23] but of the three, only one contained similar (not the same) language. See Pellerin Dep. (Exh. 47) at 10, line 8 – 11, line 4.

The Commission should adopt AT&T's proposed language for GT&C § 2.45, which is fair, straightforward and easy to administer, and should reject CA's proposed language, which would be difficult to administer, would require substantial changes to AT&T's billing systems – as the Commission found in Docket No. 040130-TP – and the only purpose of which is to solve a problem that does not exist, since AT&T does not impose late fees or interest when a payment is late due to delayed receipt of a bill provided it is paid promptly upon receipt.

ISSUE 12: Issue 12 is resolved. CA at one point disagreed, but based on the statement of its position on Issue 12 in the Prehearing Order, it has abandoned that position.[24] See discussion of Issue 24.

ISSUE 13a(i): Should the definition of "Late Payment Charge" limit the applicability of such charges to undisputed charges not paid on time?

Affected contract language: GTC 2.106

<u>AT&T Position</u>: No. Late payment charges ("LPCs") should accrue on any unpaid billed amount – but if the bill is disputed, LPCs will actually be paid only if the Billing Party wins the dispute. Indeed, the ICA states elsewhere that LPCs will apply to disputed amounts.

(2009), Sprint Communications (2001), Terra Nova Telecom (2005), and Time Warner Telecom (2007). One of those ICAs (Alternative Phone) provides for the 30-day payment period AT&T proposes here, and the others (all earlier vintage) require payment by the next bill date. Since bills are rendered monthly, the terms are essentially the same. Pellerin Rebuttal at 2 (Tr. 267) n.1.

[23] Most citations to interrogatory responses in this brief are to the page numbers of the documents as served. Where the document as served did not include page numbers (like the CA interrogatory responses cited in the text above), citations are to the page numbers of the collected Hearing Exhibits.

[24] Issue 12 had two subparts, 12(i) and 12(ii). The statement of CA's position on subpart (i) is "Resolved." The statement of CA's position on subpart (ii) is "AT&T unilaterally moved this issue to Issue 24."

Late payment charges ("LPCs") are assessed when the Billed Party does not pay on time. The purpose of LPCs is to encourage prompt payment. Pellerin Direct at 7 (Tr. 178), lines 15-16. The question presented by Issue 13a(i) is whether LPCs should or should not apply to disputed amounts. This should be a non-issue. Obviously, a party that does not pay its bill on time because it disputes the bill should have to pay LPCs if its dispute is not well-founded, but should not have to pay LPCs if its dispute is well-founded. That is exactly the way AT&T's language works: LPCs apply to disputed billed amounts in the sense that they accrue while dispute resolution is in progress – but that does not mean LPCs are actually paid on all disputed amounts. Rather, if the dispute is resolved in favor of the Billed Party, the accrued LPCs are credited to that party, and so are never paid. If the dispute is resolved in favor of the Billing Party, the accrued LPCs are paid to the Billing Party, as they should be. *Id*. at 7 (Tr. 178), line 17 – 8 (Tr. 179), line 2. See GT&C §§ 11.13.3 and 11.13.4.

CA proposes to insert the word "undisputed" into the definition of "Late Payment Charges," so that LPCs would not apply to disputed amounts. That proposal is unreasonable, because it would allow CA to pay late at will and to avoid LPCs simply by disputing the bill. Moreover, CA's proposal is inconsistent with ICA language to which CA has already agreed. Agreed language in section 6.13.7 of the Network Interconnection attachment states: "Late payment charges [and interest] will continue to accrue on the Disputed Amounts while the dispute remains pending." Thus, inclusion of CA's proposed language for GT&C § 2.106 would create an internal inconsistency in the ICA.

Furthermore, this Commission has ruled twice that LPCs apply to disputed amounts. First, in Order No. PSC-01-2017-FOF-TP, issued October 9, 2001 in Docket No. 001797-TP, the CLEC, like CA here, argued that LPCs should not apply to disputed amounts. The Commission

rejected that argument and held (at 118), "Where the dispute is resolved in favor of BellSouth, Covad shall be required to pay the amount it owes BellSouth plus applicable late payment charges." Two years later, in Order No. PSC-03-1139-FOF-TP (Oct. 13, 2003), at 21-22, the Commission held, "Consistent with this Commission's previous findings (Docket No. 001797-TP), late payment charges shall apply on disputed amounts if the dispute is ultimately resolved in favor of Verizon."

Finally, the reason for CA's objection to AT&T's definition of Late Payment Charges is a mystery, because Mr. Ray states that "CA does not object, as a practical matter, to AT&T's proposal that Late Payment Charges accrue on all unpaid balances and then are refunded for disputed amounts resolved in CA's favor." Ray Direct at 16 (Tr. 37), lines 4-10. Again, that is exactly how the agreed language works – without the insertion of the word "undisputed" that CA proposes. The Commission should reject CA's proposal.

ISSUE 13a(ii): Should Late Payment Charges Apply if Communications Authority Does Not Provide the Necessary Remittance Information?

Affected Contract Provision: GT&C § 2.106

<u>AT&T Position</u>: Yes. Without the proper remittance information, AT&T cannot process CA's payment. Agreed GT&C § 11.5 so states and also states – with CA's concurrence – that payment is not considered to have been made until the remittance information has been received.

CLECs typically have numerous billing account numbers ("BANs"). This might include, for example, one BAN for resale services, another for local interconnection services, and a third for access services. The remittance information that a CLEC provides when it pays a bill tells AT&T to which BAN(s) each payment should be applied, and thus allows the CLEC to manage its bill payments as it chooses. Pellerin Direct at 9 (Tr. 180), lines 12-17.

In many circumstances, the remittance information is the only way AT&T can know to which BAN(s) a payment is to be credited. For example, assume that CA owes AT&T $10,000

for resale services obtained pursuant to the ICA; $15,000 for local interconnection services obtained pursuant to the ICA; and $25,000 for access services obtained pursuant to tariff. Assume further that CA pays AT&T $35,000. Unless CA gives AT&T the remittance information that the ICA requires CA to provide, AT&T cannot possibly know how to allocate that $35,000. It could be $10,000 to resale, $15,000 to local interconnection, and $10,000 to access; it could be $0 to resale, $10,000 to local interconnection, and $25,000 to access; and so on. Consequently, CA may have fully paid what it owes under the ICA, or it may be as much as $15,000 in arrears under the ICA. *Id.* at 9 (Tr. 180), line 18 – 10 (Tr. 181), line 6.

For CA to remain in control of how its payments are applied, as it should be, AT&T cannot process CA's payment absent the proper remittance information. *Id.* at 10 (Tr. 181), lines 9-11. CA acknowledged this when it agreed to GT&C § 11.5:

> If the Remittance Information is not received with payment, AT&T-21STATE will be unable to apply amounts paid to CLEC's accounts. In such event, AT&T-21STATE shall hold such funds until the Remittance Information is received. If AT&T-21STATE does not receive the Remittance Information by the Bill due date for any account(s), Late Payment Charges shall apply.

Until AT&T receives the required remittance information, the bill remains unpaid. LPCs properly apply to payments not made by the bill due date, including those that are late because CA did not supply the remittance information. It is not clear why CA objects to the statement in GT&C § 2.106 (the definition of LPCs) that LPCs apply when CA does not submit the remittance information when it has agreed to that very proposition in section 11.5. In any event, the Commission should resolve Issue 13a(ii) in favor of AT&T, both because AT&T's position is sound on the merits and because adoption of CA's position would produce an internal inconsistency in the ICA.

ISSUE 13b: Should the definition of "Past Due" be limited to undisputed charges that are not paid on time?

Affected contract language: GTC 2.137

<u>AT&T Position</u>: No. Any payment not made on time is properly treated as "Past Due." If a bill is disputed, the accrued late payment and interest charges are credited to the billed party if the dispute is resolved in its favor.

This issue concerns the definition of "Past Due" in GT&C § 2.137. The agreed portion of the definition states in part: "'Past Due' means when a CLEC fails to remit payment for any charges by the Bill Due Date . . . ." CA proposes to insert "***undisputed***" before "charges," so that charges would not be "Past Due" if they were disputed. AT&T opposes that proposal.

To resolve a disagreement about how to define a term in the ICA, the Commission must examine the way the term is used and the consequences of the competing definitions. In this instance, then, the Commission would look at how the term "Past Due" is used in the ICA, and the consequences of inserting the word "undisputed" into the definition, as CA proposes.

The term "Past Due" is used in two provisions in the ICA. In those two provisions, the parties have agreed that LPCs and interest charges apply to Past Due amounts (GT&C §§11.3 and 11.4, respectively). Accordingly, if CA's proposal to insert "undisputed" into the definition of "Past Due" were approved, the consequence would be that LPCs and interest would not apply to disputed amounts.

As explained above in connection with Issue 13a(i), billed amounts that are not paid by the Bill Due Date should be subject to LPCs. Such amounts may also be subject to interest for the same reasons.[25] Once the dispute is resolved, LPCs and interest charges will be paid to the Billing Party or credited to the Billed Party depending on resolution of the dispute. CA's

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[25] Issue 43(i) addresses the separate question whether both LPCs and interest should apply to past due reciprocal compensation amounts. The only question presented by Issue 13b is whether LPCs and interest should not accrue while an unpaid bill is being disputed.

language would improperly allow CA to pay late at will and to avoid late payment and interest charges by disputing the bill.

ISSUE 13c: Should the definition of "Unpaid Charges" be limited to undisputed charges that are not paid on time?

Affected contract language: GTC 2.164

<u>AT&T Position</u>: No. An "Unpaid Charge," as that term is used in the ICA, is any charge not paid on time. CA's inclusion of "undisputed" in the definition is inconsistent with the way the term is used in agreed provisions in the ICA.

The disputed definition of "Unpaid Charges" is:

> "Unpaid Charges" means any ***undisputed*** charges billed to the Non-Paying Party that the Non-Paying Party did not render full payment to the Billing Party by the Bill Due Date, including where funds were not accessible.

Thus, CA proposes to limit "Unpaid Charges" to undisputed charges.

Again, the way to determine how a term should be defined is by examining how that term is used in the contract. The term "Unpaid Charges" is used in three provisions in the ICA, and in light of the way the term is used in those provisions, it would make no sense to include the word "undisputed" in the definition. Specifically:

1. Agreed language in GT&C § 11.9 states:

> If Unpaid Charges are subject to a billing dispute between the Parties, the Non-Paying Party must, prior to the Bill Due Date, give written notice to the Billing Party of the Disputed Amounts and include in such written notice the specific details and reasons for disputing each item listed in Section 13.4 below.

That provision obviously assumes that Unpaid Charges may or may not be disputed. Consequently, the provision would be rendered nonsensical if Unpaid Charges were defined to exclude disputed charges, as CA proposes. Pellerin Direct at 13 (Tr. 184), line 14 – 14 (Tr. 185), line 2.

2. Agreed language in GT&C § 12.4 states:

> 12.4 If the Non-Paying Party desires to dispute any portion of the Unpaid Charges, the Non-Paying Party must complete all of the following actions not later than fifteen (15) calendar days following receipt of the Billing Party's notice of Unpaid Charges:
>
> 12.4.1 notify the Billing Party in writing which portion(s) of the Unpaid Charges it disputes, including the total Disputed Amounts and the specific details listed in Section 13.4 below of this Agreement, together with the reasons for its dispute; and
>
> 12.4.2 pay all undisputed Unpaid Charges to the Billing Party; and

Like section 11.9, those provisions obviously assume that Unpaid Charges may or may not be disputed. So, again, the provisions would be rendered nonsensical if Unpaid Charges were defined in such a way as to exclude disputed charges. *Id*. at 14 (Tr. 185), lines 3-16.

3. Finally, GT&C § 12.6 uses the term "Unpaid Charges" twice, and it would make no sense in either instance for the definition of that term to include the word "undisputed" – though for different reasons. Generally, section 12.6 sets forth consequences for specified failures of the Non-Paying Party. The first enumerated failure (in agreed section 12.6.1) is a failure to "pay any undisputed Unpaid Charges in response to the Billing Party's discontinuance Notice." Since the word "undisputed" is already included in 12.6.1, the inclusion of the same word in the definition of "Unpaid Charges" would, in this instance, be redundant. *Id*. at 14 (Tr. 185), line 25 – 15 (Tr. 186), line 8.

The term "Unpaid Charges" is also used in section 12.6.2, which is disputed (Issue 23(c)). AT&T proposes that it identify as a failure by the Non-Paying Party a failure to "deposit the disputed portion of any Unpaid Charges into an interest bearing escrow account that complies with all of the terms set forth in Section 11.10 above within the time specified in Section 12.2 above." CA opposes this language – as well as all other provisions relating to escrow. For

present purposes, however, the important point is that if AT&T wins the escrow issue, so that its proposed section 12.6.2 is included in the ICA, it is explicit and obvious that the charges that are the subject of section 12.6.2 – the charges to be deposited in escrow – are disputed charges. Thus, the whole provision would be rendered nonsensical if “Unpaid Charges” were limited to undisputed charges.

In short, the Commission should reject CA’s proposal to include the word “undisputed” in the definition of “Unpaid Charges.” The reason for this has nothing to do with any substantive disagreement between the parties. Rather, the reason is that when one looks at the way the term “Unpaid Charges” is used in the ICA, it is undeniable that CA’s proposal would serve no defensible purpose and would turn perfectly sensible contract provisions on which the parties have agreed into nonsense.

ISSUE 13d: Should late payment charges apply only to undisputed charges?

Affected contract language: GTC 11.3.1

AT&T Position: No. Late payment and interest charges should accrue on all unpaid amounts, including disputed amounts. Once a dispute is resolved, late payment and interest charges will be released to the Billing Party or credited to the Billed Party depending on resolution of the dispute.

For the reasons discussed above in connection with Issue 13a(i), late payment and interest charges should apply to *all* unpaid amounts. As the Commission has held in two previous arbitrations, such charges properly accrue on any amount not paid on time, including charges subject to a dispute. (See discussion of Issue 13a(i).) Once the dispute is resolved, late payment and interest charges will be paid to the Billing Party or credited to the Billed Party depending on resolution of the dispute. Staff asked CA witness Ray at deposition if there was a reason for the Commission to decide this issue differently in this arbitration than it decided the same issue in the past, and he was unable to provide one. Ray Dep. (Exh. 46) at 28, lines 5-10. With the

revisions CA has proposed to the billing and payment language in GT&C section 11, it does not appear that CA would ever pay LPCs on any amounts it disputed – even when the dispute is resolved against CA. CA should not be permitted to pay late at will and avoid late payment and interest charges by disputing the bill.

ISSUE 14a: Should the GTCs state that the Parties shall provide each other local interconnection services or components at no charge?

Affected contract language: GTC 5.1

AT&T Position: No. AT&T is not obligated to provide any and all services and components related to interconnection at no charge. For example, AT&T is obligated to make entrance facilities available to CLECs at TELRIC-based prices (not for free) when those facilities are used solely for local interconnection.

CA proposes to include the following language in GT&C section 5.1:

> ***Each party shall bear all costs of local interconnection facilities on its side of the Point of Interconnection ("POI"), and neither party shall charge the other party non-recurring or monthly recurring charges associated with local interconnection services or components located at the POI or on the billing party's side of the POI.***

That language should be rejected, because part of it is unnecessary and potentially confusing, while the remainder is unclear.

The main thrust of CA's language is that each party is responsible for the costs of interconnection facilities on its side of the Point of Interconnection ("POI"). AT&T agrees with that. However, the ICA already makes this very clear – and it does so in the portion of the ICA where such matters are appropriately addressed, namely, the Network Interconnection ("Net. Int.") Attachment. Specifically, the definition of "POI" in Net. Int. § 2.26 states that the POI "serves as a demarcation point between the facilities that each Party is physically and financially responsible to provide." Similarly, Net. Int. § 3.2.2 states: "[u]nless otherwise specified in this Attachment, each Party is financially responsible for the provisioning of facilities on its side of the negotiated POI(s)." At a minimum, it is unnecessary to repeat the point in the GT&Cs,

which is for general terms that apply to the contract as a whole, as opposed to specific terms that apply to particular services, like local interconnection. See Pellerin Dep. (Exh. 47) at 15, line 13 – 16, line 1. See also Ray Dep. (Exh. 46) at 31, lines 19-22 (agreeing that GT&Cs is for language "that is applicable to the entire contract").

Beyond that, it is generally a bad idea for two provisions in a contract to say the same thing in two different ways, because that can lead to confusion and problems of interpretation. CA does not dispute the fact that the Network Interconnection Attachment already clearly states that each party is financially responsible for provisioning facilities on its side of the POI. CA asserts, however, that "the more clear the ICA's language can be, the better it is for both parties." Ray Rebuttal at 17 (Tr. 89), lines 12-13. It goes without saying that the clearer an ICA, the better. But the ICA is not made clearer by saying what is supposedly the same thing twice in two different sections using different language. The agreed language in the Network Interconnection Attachment is sufficient, and it would only confuse matters – at best – to insert CA's proposed language for GT&C § 5.1.

Moreover, it is not clear what CA's language means by "local interconnection services or components" or what would be "located at the POI," as opposed to being on one side of the POI or the other. AT&T pointed this out in its direct testimony (Pellerin Direct at 17 (Tr. 188), lines 16-17), and CA failed to provide any clarification in its rebuttal testimony (see Ray Rebuttal at 17 (Tr. 89), lines 6-18.) It appears, however, that CA's language is intended to align with its mistaken positions that there should be no nonrecurring charges to install interconnection trunks or revise a due date (Issues 66 and 14b(ii)), or for multiplexing (Issue 66), or, for example, for Local Channel-Dedicated-DS1 (Issue 66). Pellerin Direct at 17 (Tr. 188), lines 18-21. These

and related pricing issues are more appropriately addressed elsewhere and should not be duplicated here.

ISSUE 14b: (i) Should an ASR supplement be required to extend the due date when the review and discussion of a trunk servicing order extends beyond 2 business days?

(ii) Should AT&T Florida be obligated to process CA's ASRs at no charge?

Affected contract language: Net. Int. 4.6.4

AT&T Positions: (i) Yes. Section 4.6 addresses trunk servicing, *i.e.*, adjusting the sizing of trunk groups based on utilization. If a trunk servicing order is in held status more than two days while the parties discuss the order, an ASR supplement is necessary to establish a new due date.

(ii) No. As the cost-causer, CA is responsible for the costs AT&T incurs to process CA's trunk orders. Furthermore, CA's language is inconsistent with agreed language in the ICA that requires CA to pay all ASR charges.

Network Interconnection § 4.6 addresses trunk servicing, *i.e.*, adjusting the sizing of trunk groups based on over- or under- utilization. For example, if a trunk group is underutilized, section 4.6.3.2 allows either party to initiate a request to downsize the trunk group to a more efficient level. Pellerin Direct at 18 (Tr. 189), lines 12-16. If there is a question about the appropriateness of a request to resize a trunk group, the access service request ("ASR") that was submitted to initiate the request is placed in held status while the parties discuss it. *Id*. at 18 (Tr. 189), lines 16-18.

If a trunk servicing order is in held status for more than two business days, AT&T's language requires an ASR supplement to establish a new due date for completion of the order. CA proposes that the supplemental ASR to change the due date be optional. This is Issue 14b(i).

To decide this issue, the Commission needs to consider the purpose of the parties' discussion that could lead to an ASR for a trunk servicing request to be in held status for more than two business days. Suppose CA submits an ASR to reduce the size of a local

interconnection trunk group from 192 trunks (eight DS1s) to 72 trunks (three DS1s). Suppose further that AT&T's data indicate that the trunk group requires at least 120 trunks (five DS1s). Instead of immediately implementing the reduction to 72 trunks (which, given AT&T's data, could result in traffic congestion that would adversely affect CA's end user customers), AT&T would put the service order on hold and contact CA to discuss whether the order should be processed as placed or modified. The discussion could include sharing and comparing trunk data, review of trunk forecasting, etc. AT&T would only process the order when the parties have agreed to the size of the trunk group reduction. AT&T Response to Staff Interrogatory 105(b) (Exh. 38, p. 10).[26] Although the parties agree to expedite this discussion, it may take more than two business days to resolve the matter – long enough to prevent the order (whether modified or not) from being filled by the original due date. Pellerin Direct at 18 (Tr. 189), lines 16-19.

There is sound reason for requiring a supplemental ASR to establish a new due date if the completion of the order by the original due date is impeded while the parties discuss the order: AT&T is measured on the timeliness of the completion of local interconnection trunk orders,[27] and it is unreasonable to hold AT&T to the original due date when an order is on hold pending ongoing discussion about the particulars of the order.[28] Pellerin Direct at 19 (Tr. 190), lines 1-5. The ASR is the vehicle by which the due date is established. As a result, the only way a due date can be changed in AT&T's systems is by means of a supplemental ASR. Without one, the

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[26] It is important that trunk groups be properly sized to ensure against excessive call blocking, which occurs if there are too few trunks, while avoiding the wasted investment that results from having too many trunks. AT&T Response to Staff Interrogatory 24 (Exh. 26, p. 33).

[27] The relevant performance metrics are Exh. 5 (Percent Missed Installation Appointments) and Exh. 6 (Order Completion Interval).

[28] AT&T Florida could agree to the following language, which reflects a slight modification of Net. Int. § 4.6.4 to provide the parties with the joint option of retaining the initial order due date. (AT&T Response to Staff Interrogatory 105(b) (Exh. 38, pp. 10-11)): "… Extension of this review and discussion process beyond two (2) Business Days from ASR receipt will require the ordering Party to supplement the order with proportionally adjusted Customer Desired Due Dates, unless the Parties mutually agree otherwise."

original due date would be retained even if the parties agreed during their discussion of a trunk servicing order that the due date should be changed. AT&T Response to Staff Interrogatory 105 (Exh. 38, p. 10).

The second disagreement concerning Net. Int. § 4.6.4 (Issue 14b(ii)) arises out of CA's proposed language that would prohibit AT&T from charging CA for ASRs related to ordering, rearranging or disconnecting local interconnection trunks. CA's proposal that AT&T be required to process CA's ASRs for free is patently unreasonable. AT&T incurs costs when it processes ASRs, and CA's language would unreasonably require AT&T Florida to bear those costs. As the cost-causer, CA is responsible for the costs and should pay all applicable non-recurring charges. Pellerin Direct at 19 (Tr. 190), lines 14-19.[29]

Furthermore, CA's proposal is inconsistent with language to which it agreed in section 1.7.4 of the Pricing Schedule, which states: "CLEC shall pay the applicable service order processing/administration charge for each service order submitted by CLEC to AT&T-21STATE to process a request for installation, disconnection, rearrangement, change, or record order." That language applies to CA's trunk orders, just as it does to every other service order. Pellerin Direct at 19 (Tr. 190), line 19 – 20 (Tr. 191), line 3.

CA's lead argument on Issues 14b(i) and (ii) is that AT&T supposedly "fails to complete Local Interconnection Orders for weeks or months past the agreed due date," and that "[i]t is not parity for CA to be required to resubmit an [ASR] when the due date is not met, while AT&T is permitted to let the due date pass for weeks or months without consequence." Ray Direct at 17

[29] CA is the cost-causer because it is CA that seeks to directly interconnect with AT&T, and it is CA that controls the trunk orders it submits to AT&T. This is particularly true in the case of trunk orders associated with CA's rearrangements that would occur, for example, when CA shifts traffic from one trunk group to another. Such rearrangements would require one or more trunk groups to be augmented, while others are reduced. But even if CA were not the cost-causer, CA has agreed to pay for service orders pursuant to Pricing Schedule § 1.7.4, which does not exempt service orders for interconnection trunks. Pellerin Rebuttal at 7 (Tr. 273), lines 1-8.

(Tr. 38), lines 16-20. Mr. Ray's rant about AT&T's alleged failures to complete trunk orders on time has nothing to do with the limited context of Net. Int. § 4.6.4, which deals only with trunk servicing orders that are placed in held status for longer than two days to accommodate the parties' discussion about whether an order should be fulfilled as placed. Pellerin Rebuttal at 6 (Tr. 272), lines 14-21. Furthermore, to the extent that AT&T does miss due dates, AT&T is subject to consequences. *See supra* at 33.

It has been suggested that perhaps CA should not be required to pay the fee for a supplemental ASR if the "delay" – *i.e.*, the duration of the parties' discussions while the order is on hold – is caused by AT&T. Rarely if ever, however, would one party or the other be at fault for the parties' discussions lasting more than two business days. Rather, since the parties have a shared interest in making the right decision (see Pellerin Dep. (Exh. 47) at 16, line 22 – 18, line 20), the duration of the discussion of any given trunk servicing order will be driven by the complexity of the order, the extent to which the parties' usage and forecasting data differ, and the like. If it should happen in some extraordinary circumstance that AT&T demonstrably caused the discussions to take longer than two business days (by failing to talk with CA, for example), then AT&T would be receptive to waiving the fee for the Supplemental ASR. The mere possibility that such an unexpected event might occur, however, is hardly a reason to accept CA's proposal to excuse CA from paying the fee for any ASRs that relate to ordering, rearranging or disconnecting local interconnection trunks.

The Commission should (i) adopt AT&T's language that requires a supplemental ASR to change the due date on a trunk servicing order if the order is held for discussion for more than two business days; and (ii) reject CA's language that would obligate AT&T to process CA's trunk orders for free, in direct conflict with agreed language in the Pricing Schedule.

ISSUE 15(ii): May CA exclude explosion, collapse and underground damage coverage from its Commercial General Liability policy if it will not engage in such work?

Affected contract language: GTC 6.2.2.14

<u>AT&T Position</u>: No. The insurance requirement from which CA seeks an exemption only applies if CA collocates, and if CA collocates, CA will definitely engage in the work in question.

This issue concerns GT&C § 6.2.2.14, which is one of a series of provisions that concern insurance that CA must obtain if – and only if – it collocates on AT&T's premises. Section 6.2.2.14 provides (with agreed language in normal font and CA's proposed additional language in bold italics):

> Collapse, and Underground Damage Liability must not be excluded from the Commercial General Liability policy for any Work involving explosives or any underground Work and Explosion, Collapse, and Underground Damage Liability will have the same limit requirement as the Commercial General Liability policy ***(if CLEC will engage in such work)*** . . . .

CA's rationale for its proposed additional language is that CA should only be required to provide insurance related to underground work if it will be doing such work. AT&T does not disagree with that perfectly reasonable proposition. CA's language should nonetheless be rejected, for a very simple reason that CA does not dispute: If CA collocates – and the provision only applies if CA collocates – then CA will necessarily do such work. Pellerin Rebuttal at 8 (Tr. 274), lines 15-18.

This is because Collocation § 14.1.2 provides:

> *The Collocator is responsible for bringing its entrance facilities to the entrance manhole(s)* designated by AT&T-21STATE, and leaving sufficient length of the cable in the manhole for AT&T-21STATE to fully extend the Collocator-provided facilities to the designated point in the cable vault. (Emphasis added.)

In other words, if CA collocates, it must bring its fiber facilities to the entrance manhole. And to do that, CA must enter the underground structure, which is engaging in "Work" as that

term is used in GT&C § 6.2.2.14. Thus, CA is proposing to create an exception that, by definition, can never apply.

CA does not and cannot dispute that the ICA requires it to enter AT&T's underground structure if it collocates, or that by doing so, CA will be engaging in the "Work" that is the subject of § 6.2.2.14. CA states that CA may not be able to obtain the required insurance due to its lack of experience (Ray Direct at 18 (Tr. 39), lines 19-20), but if that is the case, CA should not collocate.

ISSUE 16: Which Party's insurance requirements are appropriate for the ICA when CA is collocating?

Affected contract language: GTC 6.2.2.6 through 6.2.2.10

AT&T Position: AT&T's proposed insurance limits when CA is collocated in AT&T's central office provide reasonable protection for AT&T, while CA's proposed coverage is inadequate. The 1996 Act requires AT&T to allow CA's equipment and personnel onto AT&T's premises, but CA, rather than AT&T, should bear the risk created by CA's presence.

Agreed language in GT&C § 6.2.2 provides that CA will maintain Commercial General Liability insurance covering "liability arising from premises, operations, personal injury, products/completed operations, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract)." The amount of coverage depends on whether CA is or is not collocated on AT&T's premises. The parties have agreed on coverage amounts in the situation where CA is not collocated. The disagreement concerns the coverage amounts when CA is collocated. The disagreements are displayed in the table below, which shows the coverage items that are in dispute and, for each item, the coverage amount proposed by AT&T and the coverage amount proposed by CA. Pellerin Direct at 21 (Tr. 192), line 17 – 22 (Tr. 193), line 5.

Coverage Provision[30]	AT&T Florida	CA
General Aggregate Limit	$10,000,000	$2,000,000
Each Occurrence	$5,000,000	$2,000,000
Personal Injury and Advertising Injury	$5,000,000	$2,000,000
Products/Completed Operations Aggregate limit	$10,000,000	$2,000,000
Damage to Premises Rented to you (Fire Legal Liability)	$2,000,000	$500,000

When a CLEC collocates its expensive, high tech electronic equipment in AT&T's central office, it is putting at risk the same types of equipment of other collocating CLECs, as well as AT&T's equipment, because the mere presence of electronic equipment has the potential to cause a major fire. *Id.* at 23 (Tr. 194), lines 11-13. In addition, the collocating company's employees have access to the premises. *Id.* at 22 (Tr. 193), lines 14-16. Any negligent act on the part of a CA employee or any malfunction of CA's collocated equipment can damage or destroy AT&T's and other collocators' equipment and the building itself. *Id.* at 24 (Tr. 195), line 14 – 25 (Tr. 196), line 2.

As a matter of simple common sense, the coverage limits should be commensurate with the magnitude of the potential loss. For example, when an individual buys fire insurance for his or her home, the prudent coverage amount will be determined by the replacement value of the house, not the likelihood of a fire. Tr. 400, line 6 – 401, line 7. Some of AT&T's central offices contain tens of millions of dollars worth of equipment (see AT&T Response to Staff Interrogatory 106) (Exh. 38, p. 12), and AT&T's proposed coverage limits appropriately reflect that. In addition, AT&T's proposed coverage limits are consistent with industry practice. Virtually all of the dozens of ICAs that AT&T has negotiated with CLECs and that this

[30] Commercial General Liability ("CGL") insurance protects business owners against claims of liability for bodily injury, property damage, and personal and advertising injury (slander and false advertising). Premises/operations coverage pays for bodily injury or property damage that occurs on the insured's premises or as a result of its business operations. Products/completed operations coverage pays for bodily injury and property damage that occurs away from the insured's business premises and is caused by the insured's products or completed work. Pellerin Direct at 22 (Tr. 193), lines 8-14.

Commission has approved in recent years contain the insurance limits AT&T is proposing here. *Id.* at 23 (Tr. 194), lines 4-8.[31]

In contrast, the limits CA is proposing are inadequate to cover the possible losses. For example, despite the fact that the AT&T central offices in which CLECs collocate contain millions (and in some cases tens of millions) of dollars of equipment that could be destroyed by a fire (AT&T Response to Staff Interrogatory 106) (Exh. 38, p. 10), CA proposes only $500,000 in coverage.[32] CA proposes to care for the potential for serious personal injury with only $2 million insurance, despite the high risk associated with personal injury damages. CA's proposal for only $2 million in aggregate insurance coverage (*i.e.*, the maximum total amount the insurer will pay out in a year) is very low. Pellerin Direct at 23 (Tr. 194), lines 13-17.

Any doubt about coverage limits should be resolved in favor of AT&T. Generally in the commercial world, companies are not required to house their competitors' equipment and to host their competitors' employees who work on that equipment. Uniquely, the 1996 Act requires AT&T to do so. That requirement should not expose AT&T to risk of loss. A collocator creates that risk, and it is the collocator, not AT&T, that should bear the burden of the risk. AT&T's proposed insurance levels are proportional to the risk CA creates as a collocator, and have been widely accepted by CLECs. *Id.* at 23 (Tr. 194), lines 4-8. CA's proposed levels are not proportionate to the risks CLECs present.

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[31] There are some relatively recent ICAs that were adoptions of earlier vintage ICAs in which the insurance terms and conditions are less detailed than AT&T proposes today, but many of those contain the minimum aggregate limit of $10 million. *Id*. at 23 (Tr. 194) n.6.

[32] CA has suggested that the risk of fire damage is mitigated because "this ICA requires the use of NEBS-certified equipment." Ray Direct at 19 (Tr. 40), lines 17-19. That is irrelevant and incorrect. It is irrelevant because the coverage limits should reflect the magnitude of the possible loss, not the likelihood of the loss. And it is incorrect because CA may collocate equipment that is not NEBS-certified as long as it is approved via CA's collocation application. AT&T Response to Staff Interrogatory 106 (Exh. 38, p. 12). In addition, even NEBS-certified equipment is subject to failure that could result in a fire. *Id.*

CA has suggested that its proposed insurance coverage limits are appropriate because they are based on the Verizon-Terra Nova ICA. Ray Direct at 19 (Tr. 40), lines 11-14. CA, however, presented no evidence to suggest that the possible magnitude of the loss to Verizon under the Verizon-Terra Nova ICA is even remotely comparable to the that AT&T if CA collocates in AT&T's space. Beyond that, AT&T is not, and should not be, bound to accept the insurance levels allegedly adopted by Verizon and Terra Nova. Pellerin Rebuttal at 10 (Tr. 276), lines 1-2.[33]

Finally, there has been some suggestion that CA's low proposed coverage limits may be justified by the improbability that CA's presence in AT&T's offices will cause a catastrophic event. But the probability of the events against which CA has agreed to insure is irrelevant. It is a given that such events may occur; that is why CA has agreed to insure against them. The appropriate coverage amount is dictated by the amount of the potential loss and, as AT&T has demonstrated, AT&T's proposed limits are commensurate with that potential loss and CA's are not.[34]

The Commission should adopt AT&T's proposed insurance coverage limits for the situation in which CA collocates.

ISSUE 17(ii): Should AT&T Florida be obligated to recognize an assignment or transfer of the ICA that the ICA does not permit?

Affected contract language: GTC 7.1.1

[33] Furthermore, CA's claim that its proposed insurance limits are "based on" the Verizon-Terra Nova ICA, which was an adoption of the Verizon-Clear Rate ICA, is misleading. Although that ICA provides for $2 million in coverage per occurrence, which is consistent with CA's proposed coverage here, it also requires $10 million in umbrella insurance coverage, which CA does not propose. *Id*. at 10 (Tr. 276) n.5.

[34] That said, when Staff inquired at deposition about accidents or incidents in AT&T central offices, AT&T witness Pellerin (without having researched the question (Pellerin Dep. (Exh. 47) at 49, line 22 – 50, line 4)), recalled off the top of her head calamitous events in New York City and Hinsdale, Illinois (*id*. at 50, lines 6-18).

> **<u>AT&T Position</u>**: No. The language to which CA inexplicably objects merely provides that if CA makes an assignment or transfer that is impermissible, the assignment or transfer is void as to AT&T. That is perfectly reasonable.

Issue 17(ii) concerns part of GT&C § 7.1.1, and Issue 17(iii), which is discussed below, concerns another part of GT&C § 7.1.1.[35]

The portion of GT&C § 7.1.1 that is the subject of Issue 17(ii) reads:

> 7.1.1 CLEC may not assign, delegate, or otherwise transfer its rights or obligations under this Agreement, voluntarily or involuntarily, directly or indirectly, whether by merger, consolidation, dissolution, operation of law, Change in Control or any other manner, without the prior written consent of AT&T-21STATE, which shall not be unreasonably withheld. For any proposed assignment or transfer CLEC shall provide AT&T-21STATE with a minimum of sixty (60) calendar days advance written Notice of any assignment associated with a CLEC Company Code (ACNA/CIC/OCN) change or transfer of ownership of assets and request AT&T-21STATE's written consent. CLEC's written Notice shall include the anticipated effective date of the assignment or transfer. **<u>Any attempted assignment or transfer that is not permitted is void as to AT&T-21STATE and need not be recognized by AT&T-21STATE unless it consents or otherwise chooses to do so for a more limited purpose.</u>**

The sentence in bold underline is proposed by AT&T and opposed by CA. The reason for CA's opposition is a mystery, because the only effect of the sentence is that if CA makes an assignment or transfer that is not permitted by the first sentence of section 7.1.1, the assignment or transfer is void as to AT&T, and need not be recognized by AT&T (subject to the stated exception, to which CA surely does not object). For example:

The first sentence of section 7.1.1, to which CA has agreed, prohibits CA from assigning its rights or obligations under the ICA without seeking AT&T's consent. If CA nonetheless made an assignment without seeking AT&T's consent, that would be a "not permitted" assignment under the disputed sentence that AT&T proposes, and so, under the AT&T-proposed language that CA opposes, would be void as to AT&T (even if it were not void as to the

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[35] There was an Issue 17(i), but the parties resolved it.

assignee). Similarly, the first sentence of section 7.1.1 prohibits CA from assigning its rights or obligations under the ICA if AT&T reasonably withholds its consent. If AT&T were to reasonably withhold consent to a transfer (because, for example, the proposed transferee was bankrupt), but CA transferred its rights and obligations nonetheless, AT&T's proposed last sentence would make the transfer void as to AT&T.

It is hard to imagine a sound objection to AT&T's language. Certainly, CA has not articulated one. The only objection CA has expressed is that the disputed sentence "would give AT&T unreasonable ability to prevent the sale or acquisition of CA or its assets." Ray Direct at 20 (Tr. 41), lines 7-9. That is obviously incorrect. The only ability AT&T has to prevent such a sale or acquisition is conferred by the first sentence of section 7.1.1 – the sentence to which CA has agreed. The sentence to which CA objects does not empower AT&T to prevent anything; it merely says that if CA violates the first sentence by making an impermissible assignment or transfer, the assignment or transfer is void as to AT&T and need not be recognized by AT&T.[36]

There has been some suggestion that the disputed sentence may be unnecessary, since the first sentence in section 7.1.1 states what is and is not permitted. But as AT&T witness Pellerin explained at deposition, the disputed sentence is necessary. Parties sometimes breach contracts, and it is possible that CA (or a carrier adopting CA's ICA) might make an assignment that is prohibited by that first sentence. In that scenario, the disputed sentence would have a significant effect – and so should be included in the ICA – because it would make the assignment void as to AT&T (even if, for example, it might be effective as between CA and the assignee). See Pellerin Dep. (Exh. 47) at 68, line 19 – 69, line 13.

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[36] AT&T does not believe the disputed sentence needs clarifying, but is willing, as AT&T has told CA, to modify it by adding the words "by this Section 7.1.1," so that the sentence would read, "Any attempted assignment or transfer that is not permitted **by this Section 7.1.1** is void as to AT&T-21STATE and need not be recognized by AT&T-21STATE unless it consents or otherwise chooses to do so for a more limited purpose.**"**

The Commission should reject CA's objection to AT&T's eminently reasonable proposed language.

ISSUE 17(iii): Should the ICA disallow assignment or transfer of the ICA to an Affiliate that has its own ICA in Florida?

Affected contract language: GTC 7.1.1

AT&T Position: Yes. CA and its potential assignee are each bound by the terms of its own ICA. CA and the assignee should not be permitted to ICA shop, selecting the terms and conditions they prefer between two different ICAs and bypassing the terms of their existing ICAs.

Issue 17(iii) concerns the following portion of GT&C § 7.1.1. Again, the bold, underscored language is proposed by AT&T and opposed by CA:

> CLEC may assign or transfer this Agreement and all rights and obligations hereunder, whether by operation of law or otherwise, to an Affiliate by providing sixty (60) calendar days advance written Notice of such assignment to AT&T-21STATE; provided that such assignment or transfer is not inconsistent with Applicable Law (including the Affiliate's obligation to obtain and maintain proper Commission certification and approvals) or the terms and conditions of this Agreement. **Notwithstanding the foregoing, CLEC may not assign or transfer this Agreement, or any rights or obligations hereunder, to an Affiliate if that Affiliate is a Party to a separate interconnection agreement with AT&T-21STATE under Sections 251 and 252 of the Act that covers the same state(s) as this Agreement. Any attempted assignment or transfer that is not permitted is void *ab initio*.**

AT&T's proposed language conforms with the law and is reasonable. Assume that CA has an affiliate called CAPrime that is a CLEC. If CAPrime has no ICA of its own, CA is free to assign or transfer its rights and obligations to CAPrime (subject to AT&T's agreed right to reasonably withhold its consent), just as it is free to assign or transfer those rights and obligations to any other carrier, and AT&T's proposed language does not come into play. But if CAPrime has an ICA with AT&T, it is bound by the provisions of that ICA until it expires or is terminated pursuant to the termination language of that ICA. During the term of CAPrime's ICA, CAPrime cannot jump out of its ICA and demand that AT&T negotiate a new ICA. Nor can it jump out of

its binding ICA and adopt a different ICA under section 252(i) of the 1996 Act. Nor – pertinent here – can it obtain a new ICA by assignment or transfer from CA. AT&T's proposed language merely gives effect to that indisputable principle.

The record includes no cogent basis for CA's objection to AT&T's language. CA contends (as it does in connection with Issue 17(ii)) that AT&T's language would give AT&T an "unreasonable ability to prevent the sale or acquisition of CA or its assets" (Ray Direct at 20 (Tr. 41), lines 7-9), but again, that is not so. AT&T's language merely reflects the proposition – a proposition that CA does not and cannot dispute – that a CLEC with an ICA cannot abandon that ICA in favor of another during the term of its ICA.[37]

ISSUE 18: Should the ICA expire on a date certain that is three years plus 90 days from the date the ICA is sent to CA for execution, or should the term of the ICA be five years from the effective date?[38]

Affected contract language: GTC 8.2.1

<u>AT&T Position</u>: The ICA should expire on a date certain that is three years plus 90 days from the date the ICA is sent to CA for execution. Using a date certain avoids any possible confusion regarding exactly when the ICA expires, and three years is an appropriate duration in today's rapidly changing industry.

AT&T proposes that the ICA expire three years plus 90 days after AT&T sends the ICA to CA for signature. CA proposes that the ICA expire five years after the Effective Date, which is ten days after the Commission approves the ICA (see GT&C § 8.1.1). Thus, there are two aspects to Issue 18. The first is whether the ICA should display the date on which the ICA expires: Under AT&T's proposal, the ICA would display that date, because AT&T would enter

[37] CA tried to suggest at hearing that its ICA is an asset and that AT&T's language would devalue the asset in the eyes of a potential buyer of CA that might want to take advantage of CA's ICA. Tr. 327, line 18 – 328, line 15. That is incorrect. The potential buyer should know, if it has an ICA of its own, that it is prohibited by law from abandoning its ICA in favor of another one. AT&T's language merely reflects that fact.

[38] AT&T modified the Issue Statement to reflect that it now proposes a term of three years plus 90 days rather than two years plus 90 days.

it into the ICA when it sends the final version of the document to CA for signature; under CA's proposal, in contrast, the expiration date would not appear on the ICA, because it would be determined by the date on which the Commission approves the ICA, which would be unknown when AT&T prepares the final version of the document. The second aspect of Issue 18 is how long the term of the ICA should be.

The ICA should expire on a date certain in order to eliminate any possible confusion regarding exactly when the ICA expires. This is important both for purposes of administering the ICA as between AT&T and CA and for CLECs who are interested in adopting the ICA pursuant to section 252(i) of the 1996 Act and who will naturally want to know when the ICA expires. Pellerin Direct at 28 (Tr. 199), lines 17-20. It is very simple to look at the ICA and see a specific expiration date (*e.g.*, October 1, 2018), which provides clarity. If the ICA instead expired a specified number of years from the Effective Date, as CA proposes, it would be impossible to determine the expiration date just by looking at the ICA. Rather, anyone needing to determine the expiration date would have to figure out the Effective Date by researching when the ICA was approved, and then adding the specified number of years. *Id.* at 28 (Tr. 199), line 16 – 29 (Tr. 200), line 10. Indeed, CA admits it would be preferable for the ICA to have a hard-coded expiration date, rather than the indeterminate date in CA's language proposal. Ray Rebuttal at 21 (Tr. 93), line 24 – 22 (Tr. 94), line 3.

As for the term of the ICA, a three-year term – as opposed to the five years that CA proposes – will enable the parties to accommodate the rapidly changing telecommunications industry if modifications to the ICA that are not tied to a change in law are necessary.[39] Pellerin

[39] Changes to the ICA that are necessitated by changes of law do not require a new ICA, because GT&C § 24 provides for amendments in light of such events.

Direct at 29 (Tr. 200), lines 14-16.[40] As this Commission has noted, "We believe there are few industries more dynamic than telecommunications."[41] That is no less true today than it was when the Commission said it in 2003.

The reason that AT&T proposes an additional 90 days beyond the three years is to give CA the full benefit of at least three years of operation under the ICA, if not more. Ninety days is ample time for normal processing and approval of an ICA. Pellerin Direct at 29 (Tr. 200), lines 19-22. So, for example, if it takes 18 days for CA to execute the document and for the parties to file it for Commission approval, and it takes the Commission an additional 30 days to approve the ICA,[42] the ICA would be in effect for three years and 32 days.[43]

The five-year term that CA proposes is too long in today's rapidly evolving telecommunications industry. This is particularly so as networks transition from TDM to IP. *See* Tr. 334, lines 17-23. In fact, during the parties' negotiations CA was advocating the three-year term that AT&T now proposes; CA did not propose a five-year term until it filed its petition. Pellerin Direct at 29 (Tr. 200), line 23 – 30 (Tr. 201), line 3.

By adopting AT&T's proposal, under which the ICA would not expire until the fourth quarter of 2018, if not later, the Commission will ensure that if significant technological changes in the next several years counsel a new agreement, either party will be able to obtain one. In particular, if AT&T were to enter into an ICA in the next three or four years that provides for IP

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[40] The cited testimony refers to AT&T's initial proposal for a term of two years plus 90 days, rather than its current proposal for a term of three years plus 90 days.

[41] Order No. PSC-03-0805-FOF-TP (July 9, 2003) at 22.

[42] Under section 252(e)(4) of the 1996 Act, the arbitrated ICA will be deemed approved 30 days after filing if the Commission does not act to approve or reject it by that time.

[43] In the example, 48 days is consumed by execution, filing and approval, and the ICA does not become effective until ten days after approval. This leaves 32 days of the 90 included in AT&T's proposal during which the parties would be operating under the ICA (on top of the three years).

interconnection, CA would be able, upon expiration of its ICA, to adopt that ICA, and thereby to achieve one of its goals in this proceeding. See Issue 41. If the ICA has a five-year term, however, CA would not be able to adopt that ICA until 2020 (if not later), because it would be bound by the current ICA until then.

In the absence of such technological change, however, it is almost certain that the parties would continue to operate under the ICA long after 2018, even with AT&T's proposed expiration date. Under agreed language in GT&C § 8.4, the parties will continue to do business under the ICA after the ICA expires unless one party or the other serves a "Notice of Expiration." It is the norm for AT&T to continue to operate under expired ICAs in such "evergreen" status, typically for years.[44] Indeed, it is very unusual for an ICA to actually be terminated when or shortly after it expires. Pellerin Direct at 30 (Tr. 201), lines 12-17. Thus, it is most likely that if the Commission adopts AT&T's proposal and the ICA has a hard-coded expiration date in 2018, the parties will nonetheless continue to operate under the ICA for years after that unless major changes in technology – such as a transition to IP networks – warrant a new ICA. *Id*. at 30 (Tr. 201), lines 17-20. Because that may happen, however, the ICA should not lock the parties into the terms the Commission is arbitrating now for five years, subject only to modifications for changes in law.

CA has argued that a five-year term would ensure that the ICA will be available for adoption by other CLECs for five years. Ray Direct at 21 (Tr. 42), lines 1-4 and 11-12. That argument does not hold water, because it is based on the mistaken assumption that an ICA with a five-year term will necessarily be available for adoption for five years. Under the FCC's rules,

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[44] CA witness Ray alleged that AT&T offered to operate under CA's ICA in evergreen status pursuant to an agreement "under separate cover." Ray Direct at 21 (Tr. 42), lines 13-15. That allegation was false. Pellerin Rebuttal at 12 (Tr. 277), lines 17-24. *See also* Tr. 336, line 24 – 337, line 16; Tr. 403, line 13 – 404, line 6 (stating that the AT&T negotiator emphatically denied Mr. Ray's allegation).

an ICA must only be made available for adoption for a reasonable period of time, not indefinitely. 47 C.F.R. ¶ 51.809(c) ("Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection . . ."). Neither the FCC nor this Commission has defined what constitutes a "reasonable period of time" for purposes of Rule 51.809(c). At least arguably, three years is a reasonable period of time, so that AT&T could appropriately reject a CLEC's request to adopt CA's ICA more than three years after it is approved, even if the ICA had a five-year term. Alternatively, the same sort of technological changes that militate against a five-year term for CA would also justify rejection of an adoption request on the ground that in light of the occurrence of such changes, a "reasonable period of time" has passed, so that an ICA that does not reflect those changes need no longer be made available for adoption.

The Commission need not, and should not, decide now whether it would sustain a rejection of a hypothetical future adoption request of CA's ICA on the ground that the requested ICA was already available for three years or does not reflect intervening technological changes. The important point for present purposes is simply that the Commission should not blithely assume, as CA does, that an ICA with a five-year term will necessarily be available for adoption for five years.

The Commission should adopt AT&T's proposal that the ICA expire on a date certain that is three years and 90 days from the date AT&T sends the ICA to CA for execution. In addition to the fact that AT&T's proposal is superior to CA's, the Commission, in order to encourage parties to resolve issues via negotiation, should discourage parties from taking one

position in negotiation and then asserting a different position in the ensuing arbitration, as CA has done here.

ISSUE 19: Should termination due to failure to correct a material breach be prohibited if the Dispute Resolution process has been invoked but not concluded?

Affected contract language: GTC 8.3.1

AT&T Position: No. Consistent with Florida contract law, AT&T should be able to terminate the ICA if CA is guilty of a material breach without awaiting adjudication of the matter and the exhaustion of all appeals, as CA proposes.

Agreed language in GT&C § 8.3.1 states that either party may terminate the ICA if the other party breaches a material term of the ICA and fails to cure the breach within forty-five (45) calendar days after written notice thereof. CA, however, proposes to add the following limitation:

> ***Neither party shall terminate this Agreement or service under this provision if the alleged breach is disputed and the Dispute Resolution process has been invoked but not concluded, including all appeals.***

That language is unreasonable, because it would require AT&T to continue to provide services to CA even if CA is in material breach of the ICA. Under CA's language, the Commission could find in a formal complaint proceeding (which would take months) that CA was in material breach of the ICA, and AT&T would nonetheless have to continue to perform under the ICA throughout the appeal process, which would likely take years, notwithstanding CA's continuing breach. Pellerin Direct at 32 (Tr. 203), lines 1-9.

CA's proposal is not only unreasonable, but also contrary to basic principles of Florida contract law, which holds that if one party materially breaches a contract, the other party can terminate it – without awaiting an adjudication of the breach. *E.g.*, *Colucci v. Kar Kare Automotive Group, Inc.,* 918 So.2d 431, 441 (Fla. App. 2006) ("The rule is that a prior material breach by the party seeking enforcement entitles the opposing party to terminate his own

performance and treat the contract as breached."); *Toyota Tsusho America, Inc. v. Crittenden,* 732 So.2d 472, 477 (Fla. App. 1999) ("When a nonbreaching party to a contract is confronted with a breach by the other party, the nonbreaching party may stop performance, treating the breach as a discharge of its contractual liability."); *Posik v. Layton,* 695 So.2d 759,762 (Fla. App. 1997) ("One need not continue to perform a contract when the other party has first breached.").

Thus, a party to a Florida contract does not have to successfully prosecute a breach of contract claim before terminating a contract based on the other party's material breach. What is it, then, that disciplines the non-breaching party's exercise of its right to terminate? The answer is obvious: If X terminates a contract based on Y's material breach and turns out to be wrong, then X, by virtue of its wrongful termination, will be in breach and will be liable to Y.

There is no reason for the parties' ICA to depart from the law that applies to all other contracts in Florida.[45] If CA materially breaches the ICA, AT&T should be able to terminate the ICA after giving CA the agreed 45 days to cure the breach. If CA believes it is not in breach, or that the breach is not material, it will surely communicate that to AT&T in response to AT&T's notice of breach – thus putting AT&T on notice that it had better be sure it is right before it terminates the ICA. Just as Florida contract law posits that a party will not lightly terminate a contract based on the other party's breach for fear of the potential liability if it were later determined that that party was not in breach – or that the breach was not material – this Commission need not be concerned that AT&T might terminate CA's ICA unless it is highly confident that CA is in material breach. AT&T is very cautious about terminations and is

[45] And elsewhere. The rule excusing further performance under a contract in the event of a material breach is the norm throughout the country. *See* Restatement (Second) of Contracts §§ 241-242.

mindful of the liability to which it would be exposed if it terminated any CLEC's ICA without ample cause. Pellerin Direct at 33 (Tr. 204), lines 1-8.[46]

Furthermore, if CA has any basis for concern that AT&T is about to wrongfully terminate the ICA, a remedy will be readily available in this Commission. Assume that AT&T notifies CA that it is in material breach and that it will terminate the ICA if CA does not cure the breach within the 45 days upon which the parties have agreed. If CA believes it is not in breach – or that the breach, if any, is not material – it can initiate a proceeding at the Commission and simultaneously ask a court to temporarily enjoin the threatened termination pending resolution by the Commission.

CA has suggested that AT&T's concern about having to operate under the ICA for a prolonged period while CA is in material breach is mitigated by the availability of the Commission's expedited dispute resolution process. Ray Direct at 22 (Tr. 43), lines 11-12. AT&T cannot count on the availability of that process, however. In the first place, Rule 25-22.0365(d) of the Florida Administrative Code states that the expedited process is not available if the dispute is "governed by dispute resolution provisions contained in the parties' relevant interconnection agreement."[47] This ICA will include comprehensive dispute resolution provisions (GT&C § 13), and the parties agreed in GT&C § 13.2.1 that the dispute resolution procedures will apply "to any controversy or claim arising out of or relating to this Agreement or its breach." Thus, any dispute the parties may have under the ICA is "governed by dispute

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[46] Under Florida law, the non-breaching party can terminate without giving the breaching party a cure period. In this respect, the agreed language in the ICA is already significantly more protective of the breaching party than is the general law of contracts. The Commission should not make it even more protective by requiring the non-breaching party to obtain an adjudication before it can terminate.

[47] Rule 25-22.0365(5)(d) states that a request for expedited proceeding must include: "A statement that the complainant company attempted to resolve the dispute informally and *the dispute is not otherwise governed by dispute resolution provisions contained in the parties' relevant interconnection agreement*." (Emphasis added).

resolution provisions contained in the parties' relevant interconnection agreement," and therefore is not eligible for an expedited proceeding. And even if the Commission's expedited process were available, most of the prolonged period about which AT&T is concerned is the appeal period.

There has been some suggestion that the lack of precision of the word "material" is problematic. *See, e.g.*, Tr. 138, line 14 (CA witness Ray stating "In our view, a breach is a breach.") It should not be. As explained above, Florida law permits termination based upon a material breach of contract; the cases also sometimes refer to a "vital" breach. Whether a given breach is "vital or material is reviewed as a question of fact." *Covelli Family, L.P. v. ABG5, L.L.C.,* 977 So.2d 749, 752 (Fla. App. 2008). "To constitute a vital or material breach, a party's nonperformance must 'go to the essence of the contract.'" *Id.* (citation omitted). *See also Burlington & Rockenbach, P.A.,* 2015 WL 1736915 *4 ("To establish a material breach, the party alleged to have breached the contract must have failed to perform a duty that goes to the essence of the contract and is of such significance that it relieves the injured party from further performance of its contractual duties."). The point, of course, is not that there is a bright line separating material breaches from immaterial breaches. Rather, it is that Florida law allows termination for material breaches, and parties to contracts, as well as forums, are routinely called upon to determine whether a given breach is or is not material. CA's view that "a breach is a breach and a material breach is not substantially different" (Tr. 139, lines 21-23) is inconsistent with the law.

Indeed, this Commission has ruled that a material breach of an ICA relieves the non-breaching party of its obligations under the ICA *and* has determined that particular breaches were material. For example, the Commission addressed a claim by AT&T that Halo Wireless,

Inc. ("Halo") materially breached the parties' ICA by delivering traffic that was not originated through wireless facilities as required by the ICA. The Commission found that Halo was delivering traffic in violation of the ICA. Then, citing the definition of "material breach" in Black's Law Dictionary, the Commission concluded that Halo's conduct "constitute[d] a breach of the fundamental terms of the ICA" and therefore was "a material breach of the parties' ICA."[48] In light of this material breach, the Commission "authorized AT&T to discontinue further performance under" and "immediately terminate" the ICA with Halo.[49] Any suggestion that the termination right in GT&C § 8.3.1 is somehow inappropriate or questionable because it is triggered by a material breach must be rejected, as must CA's proposed limitation of that right.

ISSUE 20: Should AT&T Florida be permitted to reject CA's request to negotiate a new ICA when CA has a disputed outstanding balance under this ICA?

Affected contract language: GTC 8.4.6

AT&T Position: Yes. CA should not be permitted to negotiate a new ICA unless it has satisfied its payment obligations under the existing ICA. CA's position to the contrary is squarely at odds with Commission precedent.

The parties agree in GT&C § 8.4.6 that AT&T is entitled to reject CA's request to negotiate a successor ICA when CA has an "outstanding balance under this Agreement." However, CA proposes to insert the word "undisputed" before "outstanding balance," so that AT&T would be required to negotiate with CA for a successor ICA when there is an unresolved billing dispute.

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[48] Final Order Authorizing AT&T Florida To Discontinue Performance and Terminate Interconnection Agreement and Determining Liability for Access Charges from Halo Wireless, *In re Complaint and Petition for Relief Against Halo Wireless, Inc. for Breaching the Terms of the Wireless Interconnection Agreement, by BellSouth Telecommunications, LLC d/b/a AT&T Florida,* Docket No. 110234-TP, Order No. PSC-12-0593-FOF-TP, at 16-17 (Fla. P.S.C. Oct. 31, 2012).

[49] *Id.* 18-19.

CA's proposal is unreasonable, because CA should not be permitted to negotiate a new ICA until it has satisfied all of its payment obligations pursuant to the existing ICA, including final resolution of disputed amounts. CA's language would eviscerate the agreed language, because it would allow CA to negotiate a new ICA when it has an unpaid balance simply by disputing the balance.

CA's unreasonable position has already been rejected by this Commission. In Docket No. 110087-TP, a CLEC, Express Phone, sought to enter into a new ICA when it had an outstanding disputed balance due under its existing ICA. AT&T contested Express Phone's right to do so. The Commission sustained AT&T's position, stating in pertinent part:

> For Express Phone to benefit [by adopting a new ICA] while not in good standing [under] its existing ICA is inconsistent with sound public policy and does not promote effective business practices in the state of Florida.
>
> . . .
>
> Unless Express Phone is in good standing with the existing CA, we find that AT&T Florida does not have to enter into a new ICA . . . .[50]

The only argument CA offered in support of its proposed insertion of "undisputed" was a contention that AT&T could blackmail CA into paying a disputed charge by "fail[ing] to invoke the dispute resolution provision of this Agreement to resolve such disputes, but then refuse to negotiate a successor agreement at the end of the term." Ray Direct at 22 (Tr. 43), line 21 – 23 (Tr. 44), line 1. That contention is absurd, first and foremost because it ignores CA's right to invoke dispute resolution itself. AT&T's Request for Admission No. 58 asked CA to admit that

[50] FPSC Order No. PSC-11-0291-PAA-TP (July 6, 2011), at 11. The reason that Express Phone was not "in good standing" was that there were live billing disputes – not that those disputes had been resolved against Express Phone. *See id*. at 2 n.2 and 3 (referring to Express Phone "withholding payments in dispute").

in the "blackmail" scenario that CA hypothesized, "CA could invoke those dispute resolution provisions itself." CA's Response: "Admitted." See Exh. 10.[51]

With that argument disposed of, the record includes *no* basis for CA's proposal to insert the word "undisputed" in GT&C § 8.4.6, and the proposal should be rejected.

ISSUE 22a: Should the disputing party be required to use the billing party's preferred form or method to communicate billing disputes?

Affected contract language: GTC 11.9

AT&T Position: Yes. AT&T deals with many CLECs and is able to process billing disputes most expeditiously when they use a standard mechanism for submitting them. Allowing CA to use a non-standard format would serve only to inject delay and confusion into the processing of billing disputes.

ISSUE 22b: Should CA use AT&T Florida's form to notify AT&T Florida that it is disputing a bill?

Affected contract language: GTC 13.4

AT&T Position: Yes. See AT&T Position for Issue 22a.

AT&T proposes language for two sections of the GT&Cs that would require the Billed Party to submit disputes on the Billing Party's dispute form. First, AT&T proposes a sentence for GT&C § 11.9 that would state, "The Disputing Party should utilize the preferred form or method provided by the Billing Party to communicate disputes to the Billing Party." Second, AT&T proposes a sentence for GT&C § 13.4 that would state, "Written Notice sent to AT&T-21STATE for Disputed Amounts must be made on the 'Billing Claims Dispute Form,'" which is the form that all carriers that have ICAs with AT&T currently use to notify AT&T of billing disputes. Pellerin Direct at 38 (Tr. 209), lines 1-5. CA opposes AT&T's language.

AT&T's proposal is reasonable and consistent with current practice. Bills for services provided under an ICA can be voluminous and complex, and billing disputes are frequent. In

[51] In addition, the hypothesis is intrinsically absurd because AT&T has an incentive to handle billing disputes reasonably and expeditiously so that it will be paid what it is owed. Pellerin Direct at 35 (Tr. 206), lines 4-9.

order for AT&T to efficiently process the many disputes it receives from numerous carriers, it is essential for all carriers to use the same form – AT&T's standard dispute form[52] – which is compatible with AT&T's billing and collections systems. AT&T has worked successfully with other carriers to ensure they are using AT&T's billing dispute form properly and providing the necessary data.[53] There is no sound reason for CA to be treated differently than other carriers in this respect. Pellerin Direct at 38 (Tr. 209), lines 8-15.

AT&T's language gives CA the "parity" that CA so often claims it wants, because it requires AT&T to submit disputes to CA on CA's preferred form. This even-handed approach recognizes that standardization in ordering and billing processes leads to operational efficiencies that are lost if the Billing Party – whichever party that is – has to reconcile a variety of different formats and data inputs from different carriers. Standardization results in billing dispute claims being handled more quickly and accurately than they would be if billed parties used their own idiosyncratic forms. *Id.* at 38 (Tr. 209), line 16 – 39 (Tr. 210), line 2.

CA claims it has a system that can automatically submit billing disputes that include all the information AT&T requires. Ray Direct at 23 (Tr. 44), line 24 – 24 (Tr. 45), line 4. In fact,

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[52] AT&T's standard dispute form is available on its CLEC Online website: https://clec.att.com/clec/hb/shell.cfm?section=200&hb=507. The "Billing Claims Dispute Form" link opens an Excel workbook, which includes four worksheets: the data spreadsheet ("Claim Spreadsheet"), two job aids ("Spreadsheet Field Definitions" and "Record-Claim Types"), and a delivery guide ("Where to Send This Form"). CA admitted that it never reviewed AT&T's Billing Guide. Exh. 20.

[53] AT&T provides all CLECs with query access to its "Exclaim" billing dispute system. AT&T offers training and will hold any CLEC's hand in getting comfortable with the system. The CLEC enters its dispute information and Exclaim generates a template. The CLEC needs only to add the amount in dispute and any related comments and then submit the form to AT&T via email. The dispute flows automatically into AT&T's dispute system, facilitating expeditious handling. Exclaim also provides the CLEC with the ability to query the system to monitor AT&T's handling of the dispute through the process. Pellerin Dep. (Exh. 47) at 45, lines 1-20; *see also* Tr. 350, line 9 – 351, line 7 (explaining that Exclaim gives CLECs "by far the most efficient . . . and the most expeditious way to get disputes resolved."). If a CLEC elects not to use Exclaim to generate the template, it submits AT&T's dispute form via email and the system will attempt to mechanically load the dispute into Exclaim. If that fails, AT&T personnel will manually enter the dispute into Exclaim, which could prolong the time it takes to process the dispute. Pellerin Dep. (Exh. 47) at 45, line 21 – 46, line 7.

however, the record shows that CA's system does not provide all the information AT&T needs to process a billing dispute. Pellerin Dep. (Exh. 47) at 46, lines 8-10 (CA's form "does not have all of the fields that are required on AT&T's form"). See also Tr. 348, line 21 – 350, line 8 (explaining that CA's bill dispute form omits at least two pieces of information that are necessary to process a bill dispute: the USOC and the amount of the bill). But even if it did, AT&T can efficiently process the numerous billing disputes it receives only if it receives the disputes in a consistent form. Pellerin Direct at 39 (Tr. 210), lines 8-9.

It would be unmanageable for AT&T– and would cost AT&T time and money – if each CLEC used its own preferred method for communicating billing dispute information. *Id.* at 39 (Tr. 210), lines 15-17. When a vendor has many customers, it is the norm for the customers to conform to the vendor's systems. This is true of a credit card company vis-à-vis its customers, an airline vis-à-vis its customers, and a hospital with respect to its patients. The reason is obvious: if a credit card company's hundreds of thousands of customers could choose their own individualized means of communicating with the company, chaos would result. Likewise for the airline and the hospital. And for AT&T with respect to its hundreds of wholesale customers – as all but one of those customers, CA, accept using AT&T's billing dispute form. *Id.* at 40 (Tr. 211), lines 12-19.

CA asserts it will incur costs if it is required to use AT&T's form (Ray Direct at 24 (Tr. 45), lines 6-9), but offered no meaningful evidence to back up that assertion. Moreover, as a new entrant, CA could design its process to use AT&T's form from the outset; it does not need to modify a current process. Pellerin Direct at 39 (Tr. 210), lines 22-24.[54]

[54] Since CA is not yet in business, and since it has known for months that AT&T expects CLECs to use AT&T's bill dispute form, one can only wonder why CA would have a system that, as CA claims, can automatically submit claims that include all the information AT&T requires but in a different form.

On the other hand, AT&T would have to expend resources of its own if the Commission were to allow CA to use a different method to lodge billing disputes than every other CLEC in Florida. *Id*. at 39 (Tr. 210), line 24 – 40 (Tr. 211), line 1. Even if CA's billing form included all the information AT&T needs to analyze a bill dispute (which it does not), it would still be impracticable for AT&T to process CA's forms, because it would have to do so manually. As Ms. Pellerin explained, "[W]hen we receive an email to the dispute mailbox, it goes automatically into the system that processes the dispute, and that system is looking for certain information in certain fields in a certain format. When it receives that, it processes it through untouched by human hands . . . into the system. If it's coming in anything other than that precise format, it will kick out for a person to take their time to actually input the information into the billing dispute system." Tr. at 404, line 20 – 405, line 4. The question then becomes, as between CA and AT&T, which party should be required to bear a cost associated with CA's dispute of an AT&T bill? Given the limited information the Commission has (see *id.* at 40 (Tr. 211), lines 3-5), a reasonable answer is that since it is CA that wishes to take the action, *i.e.* to dispute the bill, it is CA that should bear the cost.

The Illinois Commerce Commission ("ICC") resolved this same issue in favor of AT&T Florida's Illinois affiliate. When AT&T Illinois arbitrated the issue with Sprint, Sprint took the same position that CA takes here. The ICC decided the issue in favor of AT&T Illinois, stating, "The Commission agrees with AT&T that use of the Billing Party's dispute form allows the Billing Party to more quickly and accurately process disputes, which would actually benefit the Billed Party. … The Commission notes that AT&T's proposed language is party-neutral and that, to the extent Sprint bills AT&T and there is a dispute, AT&T would then need to use

Sprint's dispute process."[55] This Commission should resolve the issue in favor of AT&T as well.

ISSUE 23: Should a Party that disputes a bill be required to pay the disputed amount into an interest-bearing escrow account pending resolution of the dispute?

Affected contract language: GTC 11.9 through 11.12; 11.13.2 through 11.13.4; 12.3; 12.4; and 12.6.2

AT&T Position: Yes. AT&T ILECs have lost hundreds of millions of dollars to carriers that disputed their bills and then lacked the funds to pay the amounts they owed when the disputes were resolved in the ILECs' favor. AT&T's escrow language is a reasonable measure to prevent this.

AT&T proposes that if either party disputes the other's bill, the disputing party must, subject to certain exceptions, pay the disputed amount into an escrow account, so that when the dispute is resolved, the escrowed funds, along with the interest those funds earn, can be disbursed in accordance with that resolution. CA objects to having any escrow language in the ICA.

The purpose of the escrow requirement is to ensure that if the Billed Party disputes a bill and the dispute is resolved in favor of the Billing Party, there will be funds available to pay what is owed. AT&T ILECs, including AT&T Florida, have lost hundreds of millions of dollars in the following scenario: A carrier disputes the ILEC's bills, sometimes with no good faith basis; the dispute is resolved a year or two later in favor of the ILEC; the carrier files for bankruptcy; and the ILEC ultimately must write off the wrongfully disputed amounts as uncollectible expense. If the carrier is required to escrow disputed amounts, the ILEC is protected against such losses. Pellerin Direct at 41 (Tr. 212), line 20 – 42 (Tr. 213), line 6.

[55] Arbitration Decision, Docket No. 12-0550, SprintCom, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996, to Establish an Interconnection Agreement With Illinois Bell Telephone Company d/b/a AT&T Illinois, 2013 WL 3366199, at *88 (Ill. Comm. Comm'n June 26, 2013).

AT&T ILECs have written off over $308 million in uncollectible losses under ICAs in the last five years, and the AT&T ILEC in the Southeast Region, BellSouth, has written off over $245 million in such losses in the last ten years, including over $17 million in Florida. *Id.* at 42 (Tr. 213), lines 7-12.

Florida is a poster child for the importance of including escrow provisions in ICAs. Two CLECs called BLC Management LLC and LifeConnex Telecom LLC, both controlled by Florida resident Thomas Biddix, left AT&T Florida and other AT&T ILECs holding the bag to the tune of more than $34 million. Both Biddix-controlled CLECs had ICAs with BellSouth pursuant to which they did business in Florida and the other eight BellSouth states. The ICAs, typical of BellSouth ICAs at the time the BLC and LifeConnex ICAs were entered into, did not include escrow provisions. *Id.* at 47 (Tr. 218), lines 1-10.

From 2008 until April 2012, the Biddix CLECs paid BellSouth next to nothing for resale services BellSouth provided to them under the ICAs. Instead, they asserted bogus claims for credits and discounts that they claimed offset the amounts BellSouth billed. These claims were litigated in a number of state commissions in complaint actions initiated by BellSouth. BellSouth prevailed in all instances. As a result, the state commissions of Kentucky, Mississippi, North Carolina and Tennessee issued decisions finding the Biddix CLECs in breach of their ICAs with BellSouth. All told, those four commissions determined that the Biddix CLECs owed BellSouth more than $34 million for services BellSouth furnished under the ICAs and that the CLECs wrongfully withheld. *Id*. at 47 (Tr. 218), lines 11-20.

In January 2010, AT&T Florida sued one of the Biddix CLECs – LifeConnex – for breaching the parties' ICA by failing to pay more than $1 million as a result of LifeConnex's assertion of the Biddix CLECs' bogus claims. In that proceeding, AT&T sought approval to

terminate service to LifeConnex. LifeConnex then entered into an arrangement with its affiliate, American Dial Tone ("ADT") (another Biddix entity), under which ADT – without informing AT&T or this Commission – purchased wholesale services from AT&T and resold them to LifeConnex, which then resold the AT&T services to LifeConnex's customers. AT&T challenged this arrangement as a violation of LifeConnex's ICA with BellSouth and threatened to disconnect ADT. The Commission opened a second docket to deal with the ADT issue. After a series of procedural maneuvers, the parties agreed that AT&T would not disconnect ADT if ADT deposited approximately $197,000 into a segregated escrow account pending resolution of the docket. (Like the other Biddix CLEC ICAs, the ADT ICA did not have an escrow provision.) However, after depositing the amount into escrow, ADT stopped doing business in Florida. LifeConnex's CLEC certificate was revoked in 2011, and LifeConnex was administratively dissolved in 2012 for failure to file an annual report with the Florida Secretary of State. The Commission ultimately dismissed AT&T's complaint against LifeConnex (neither party had pursued the matter after LifeConnex stopped doing business) and issued a default judgment in favor of AT&T and against ADT. As a result of the default judgment against ADT, the $197,000 escrow was released to AT&T. *Id*. at 47 (Tr. 218), line 21 – 48 (Tr. 219), line 17.

As of today, the Biddix CLECs' ability to dispute the AT&T ILECs' bills – including AT&T Florida's – without depositing the disputed amounts in escrow has cost the AT&T ILECs more than $34 million. It is highly unlikely that any of that money will ever be recouped. *Id.* at 49 (Tr. 220), lines 5-8.

AT&T is not likening Mike Ray to Tom Biddix, but the Biddix experience demonstrates how important it is for the Commission to require CLECs that dispute their bills to escrow the disputed amounts.

And AT&T does have reason for concern with respect to CA, because Mr. Ray was previously the president of AstroTel, Inc., a CLEC that filed for Chapter 11 bankruptcy protection in December 2010.[56] AstroTel's bankruptcy left AT&T with a substantial uncollectible. Tr. 360, lines 13-22.

Mr. Ray applied for CA's local exchange certificate October 24, 2011, and was able to pay the application fee and demonstrate financial fitness sufficient to obtain approval of CA's application. This despite the fact that the ink was barely dry on the sale of AstroTel's assets to Birch Communications pursuant to the January 13, 2012, order of the bankruptcy court. Ironically, Mr. Ray requested on March 25, 2013, that the Commission cancel AstroTel's certificate because AstroTel could not pay the Florida Regulatory Assessment Fees for 2012 or 2013. *Id*. at 49 (Tr. 220), line 18 – 50, line 3.

Thus, AT&T has legitimate concerns about CA's future ability to pay its bills, particularly if the parties' ICA were to allow CA to postpone payment by filing billing disputes with no escrow requirement. AT&T also has valid concerns about unknown CLECs' future adoption of CA's ICA. Inclusion of AT&T's proposed escrow provisions will mitigate those concerns. *Id*. at 50 (Tr. 221), lines 4-9.

AT&T's proposed escrow language is eminently reasonable. It requires the disputing party to deposit disputed amounts (with the exception of reciprocal compensation and three other exceptions discussed below) into an interest-bearing escrow account held by a qualifying financial institution. The escrowed funds are disbursed upon resolution of the dispute. If the disputing party loses the dispute, the disputed amount held in escrow would be disbursed to the Billing Party. If the disputing party wins the dispute, it gets its money back, with interest. If

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[56] U.S. Bankruptcy Court, Middle District of Florida, Orlando Division, Case No. 8:10-bk-29992-MGW.

there is a split decision on the dispute, the Billing Party and the disputing party will be reimbursed from the escrow account proportionately. *Id.* at 43 (Tr. 214), lines 3-12.

In addition to the fact that the escrow requirement does not apply to reciprocal compensation, there are three other exceptions to the requirement:

First, GT&C § 11.9.1.1 provides that the disputing party need not escrow disputed amounts if the total disputed amounts do not exceed $15,000. This exclusion recognizes that if the disputed amounts are relatively small, the associated risk is correspondingly small, and there is less justification for any burdens or costs associated with establishing or maintaining an escrow account. *Id.* at 43 (Tr. 214), lines 17-21.

Second, GT&C § 11.9.1.2 provides that the disputing party does not have to escrow the disputed amount if it has established 12 consecutive months of timely payment history and if the total amount of its unpaid invoices does not exceed 10% of the then current monthly billing to that party. This recognizes that the risk that the escrow requirement seeks to protect against is reduced when the disputing party is a timely payer and is disputing only a relatively small portion of its total bill. *Id.* at 43 (Tr. 214), line 22 – 44 (Tr. 215), line 3.

Third, GT&C § 11.9.1.3 provides that if the Billed Party believes a billed amount is incorrect because of an arithmetic or clerical error, the Billed Party can dispute the bill by bringing the error to the Billing Party's attention without putting the erroneously billed amount into escrow, though an escrow may be required if it is not clear there was a billing error and the parties continue to disagree about the matter. This exclusion recognizes that there are sometimes readily correctible errors in bills, and that the Billed Party should be able to bring such errors to the Billing Party's attention without escrowing the affected amounts. *Id.* at 44 (Tr. 215), lines 4-11.

When AT&T first included an escrow requirement in its ICAs some years ago, these three exclusions were not included. AT&T added them over the years to accommodate concerns that some carriers expressed about what they saw as the burdens of the escrow requirement. Particularly in light of these exclusions, AT&T's language provides a balanced and equitable means to achieve an undeniably worthwhile goal: reduction of AT&T's unwarranted financial loss to CLECs that do not pay their bills – losses that inevitably harm AT&T's paying customers. *Id*. at 44 (Tr. 215), line 12 – 45 (Tr. 216), line 9.

The escrow requirement has another benefit as well: It discourages the assertion of frivolous billing disputes. With no escrow requirement, the Billed Party can, in effect, make the Billing Party its banker by submitting a dispute rather than paying its bill – and some carriers have in fact done that. If the Billed Party is required to escrow the disputed amounts, that behavior is discouraged. Again, this is not to suggest that CA would engage in such machinations, but CA is a new market entrant and does not yet have a proven track record. Moreover, AT&T must concern itself with the likelihood that other carriers will adopt CA's ICA pursuant to Section 252(i) of the 1996 Act – as should this Commission. *Id*. at 45 (Tr. 216), lines 10-21.

CA's objections to AT&T's proposed escrow language are without merit. First, CA implies that AT&T might purposely bill CA "in error" to drive CA into default if it could not raise the funds to place into escrow. Ray Direct at 24 (Tr. 45), line 22 – 25 (Tr. 46), line 1. That is absurd and offensive. AT&T does not and will not fabricate inflated bills to drive CLECs out of business. And if it did such a thing, CA would have ready recourse at the Commission.

CA asserts, "Nothing in the law says that AT&T shall bear no risk." Ray Rebuttal at 26 (Tr. 98), line 12. The question, however, is whether it is reasonable – in the absence of law

either mandating or prohibiting an escrow requirement – for the parties' ICA to include such a requirement as a "reasonable institutional financial loss prevention control" – the absence of which CA blames for AT&T's losses to defaulting CLECs. Ray Rebuttal at 28 (Tr. 100), lines 3-4. Furthermore, CA's suggestion that AT&T should bear risk overlooks the fact that the AT&T/CLEC relationship is not a normal business relationship in which the seller seeks buyers in order to make a profit. In that situation, the seller is reasonably expected to take some risk. The ILEC/CLEC relationship, in contrast, is the product not of the ILEC's quest for wholesale buyers, but of the 1996 Act, which compels ILECs to sell to CLECs at cost-based prices that the Supreme Court has said are "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon Commcn's v. FCC*, 535 U.S. 467, 489 (2002). There is no reward for ILECs in this arrangement, so there should be no avoidable risks.

CA's assertion that the deposit language in the ICA "would provide adequate assurance of payment" (Ray Direct at 25 (Tr. 46), lines 7-8) is incorrect. The maximum deposit amount is two months' projected billings, and so covers a maximum of two months' disputed bills. Needless to say, AT&T's biggest losses are caused by CLECs that dispute their bills for many months, not just one or two. *See* Pellerin Rebuttal at 18 (Tr. 284), lines 3-7. The deposit amount is "usually significantly less than what [AT&T is] left with in terms of uncollectibles." Tr. 354, lines 4-11.

CA has suggested that the availability of the Commission's expedited dispute resolution process mitigates the need for an escrow requirement. AT&T believes that process will be unavailable under this ICA, as discussed in connection with Issue 19. And even if the expedited dispute resolution process is available in theory, that is not a good reason to reject AT&T's

escrow language. The Prehearing Officer has discretion to decide whether the use of the expedited procedure is appropriate in any given case. Thus, AT&T cannot count on the availability of the expedited procedure in any particular case. Pellerin Direct at 46 (TR. 217), lines 8-12.

In any event, AT&T would need the protection provided by an escrow requirement even if the expedited procedure were available in all cases. Before a petition for expedited proceeding can be filed, the Commission's rule requires the parties to try to resolve the dispute themselves. The ICA allots a minimum of 90 days for that attempt (30 days initially, and then 60 days of informal dispute resolution). Then, the Commission's expedited procedure – assuming it is available – allows 120 days for a decision after the request for expedited proceeding is filed. Thus, even if one conservatively assumes that the parties move the process along briskly – so that, for example, a request for expedited proceeding is made on the first permissible day – it would still take at least seven months to get the dispute resolved. AT&T should not be exposed to the risk of seven months unpaid bills. Pellerin Direct at 46 (Tr. 217), lines 12-22.

Finally, CA has speculated that AT&T's hundreds of millions of dollars of uncollectibles must be due to AT&T's failure to timely prosecute its claims against non-paying CLECs. *E.g.*, Ray Rebuttal at 27 (Tr. 99), lines 20-21; 28 (Tr. 100), lines 2-6. That speculation is baseless. It would be irrational for AT&T to routinely delay its pursuit of claims for money it is owed, and AT&T does not do so. As the discussion of the timeline of an expedited proceeding in the preceding paragraph shows, it can take many months for even an expedited proceeding to run its course. And as the Biddix saga illustrates, there is no assurance that even the most meritorious AT&T claims will be resolved soon enough to spare AT&T from substantial losses in the

absence of an escrow requirement, no matter how promptly and aggressively AT&T pursues its claims.

For all these reasons, the Commission should adopt AT&T's proposed escrow provisions.

ISSUE 24: **(i) Should the ICA provide that the billing party may only send a discontinuance notice for unpaid undisputed charges?**

(ii) Should the non-paying party have 15 or 30 calendar days from the date of a discontinuance notice to remit payment?

Affected contract language: GTC 12.2

AT&T Positions: (i) The question that is actually presented by the disagreement in the first sentence of GT&C § 12.2 is whether disputed amounts must be paid, either to the Billing Party or into escrow. The answer to that question is yes, for the reasons set forth above in connection with Issue 23.

(ii) The non-paying party should have 15 calendar days from the date of a discontinuance notice to remit payment. That party has already had 31 days from the bill date to pay before the bill becomes past due.

Issue 24 concerns GT&C section 12.2, which reads as follows, with AT&T's proposed language in bold underline and CA's in bold italics:

> 12.2 For purposes of this section 12.2, to "pay" a bill means to pay all undisputed charges to the Billing Party **and to pay all Disputed Amounts either to the Billing Party or into an escrow account in accordance with Sections 11.9 and 11.10**. If the Billed Party fails to pay any portion of a bill, including but not limited to any Late Payment Charges, by the Bill Due Date, the Billing Party may send a written Notice ("Discontinuance Notice") informing such Non-Paying Party that in order to avoid disruption or disconnection of the Interconnection Services furnished under this Agreement, the Non-Paying Party must pay all ***undisputed*** unpaid amounts as provided above, within **fifteen (15)** ***thirty (30)*** calendar days. The Non-Paying Party must pay the bill in full as described herein within **fifteen (15)** ***thirty (30)*** calendar days of the Discontinuance Notice. If the Non-Paying Party does not pay as described herein within **fifteen (15)** ***thirty (30)*** calendar days of the Discontinuance Notice, the Billing Party may discontinue or disconnect Interconnection Services furnished under this Agreement.

Thus, there are two disagreements: whether disputed amounts must be paid into escrow (Issue 24(i)), and whether the Non-Paying Party should be required to pay within 15 days or 30 days after receiving a Discontinuance Notice (Issue 24(ii)).[57]

Disputed amounts should be paid into escrow for the reasons set forth above in the discussion of Issue 23. Consequently, AT&T's proposed reference to escrow ("**and to pay all Disputed Amounts either to the Billing Party or into an escrow account in accordance with Sections 11.9 and 11.10**") should be included in section 12.2, and CA's proposed insertion of the word "***undisputed***" should be rejected (so that *all* unpaid amounts must be paid – either to the Billing Party or into escrow).[58]

As for Issue 24(ii), AT&T's proposed 15-day period is sufficient time after receiving a Discontinuance Notice for the Billed Party to pay Unpaid Charges, either to the Billing Party or into escrow. Pellerin Direct at 52 (Tr. 223), lines 1-3. Since the Discontinuance Notice cannot be sent to the Billed Party until after the charges are already Past Due (meaning the carrier has already had at least 31 days to pay), the carrier actually has a minimum of 46 days from the invoice date to avoid service disconnection. That is certainly a reasonable amount of time for a party to pay its undisputed charges and escrow disputed charges, or make mutually satisfactory payment arrangements to avoid such action. *Id.* at 52 (Tr. 223), lines 3-8. The Commission has

[57] At one time, CA and AT&T disagreed about exactly what contract language is in dispute for Issue 24 and about whether Issue 12 was resolved. Based on the treatment of Issues 12 and 24 in the Prehearing Order, AT&T believes those disagreements have been resolved. If there is any doubt about this, however, AT&T respectfully refers the Commission to the Rebuttal Testimony of Patricia Pellerin (at 19, line 1 – 25, line 26), which explains in detail how Issue 12 was resolved and GT&C § 12.2 came to read as it now does.

[58] CA asserted in connection with this issue that there is no need for disputed amounts to be escrowed because, "CA has already agreed that if either party seeks dispute resolution from the Commission and the Commission finds against CA that CA would be required to post a bond in order to appeal that decision." Ray Direct at 14 (Tr. 35), lines 13-15. That is not correct; no language in the ICA requires a bond in the situation Mr. Ray describes. Pellerin Rebuttal at 26 (Tr. 292), lines 8-13. And even if there were, that would not render the escrow requirement unnecessary, because AT&T would still be exposed to all the loss that could accrue during the many months of the dispute resolution proceeding preceding the appeal. *Id.* at 26 (Tr. 292), lines 14-21.

approved many AT&T ICAs with a 15-day limit, including most, if not all, new ICAs approved since 2005. *Id.* at 52 (Tr. 223), lines 11-15.

CA's proposal, on the other hand, would give the Billed Party a minimum of 61 days after the invoice date to pay its undisputed bills. That is unreasonably long. *Id.* at 52 (Tr. 223), lines 9-10.

The Commission should approve AT&T's proposed language for GT&C § 12.2, which reasonably requires a party that disputes a bill to pay disputed amounts into escrow (subject to the several exceptions discussed in connection with Issue 23) and requires a party that receives a Discontinuance Notice to pay the unpaid amounts within 15 days, either to the other party or, if the amounts are disputed, into escrow.

ISSUE 25: Should the ICA obligate the billing party to provide itemized detail of each adjustment when crediting the billed party when a dispute is resolved in the billed party's favor?

Affected contract language: GTC 11.13.1

AT&T Position: No. AT&T will provide the associated claim number when processing billing dispute credits where its systems are capable of doing so. However, there may be some instances where that is not possible, and AT&T should not be contractually obligated to do the impossible.

Under agreed language in GT&C § 11.3.1, if a billing dispute is resolved (in whole or in part) in favor of the party that disputed the bill, the Billing Party will credit the invoice of the Non-Paying Party for that portion of the Disputed Amounts resolved in favor of the Non-Paying Party. CA proposes to add language to section 11.13.1 requiring the Billing Party to "identify each specific adjustment or credit with the dispute reference number provided by the Billed Party in its dispute of the charges being credited." AT&T opposes the addition of that language – but not because it is unwilling to provide the type of information CA seeks.

AT&T is perfectly willing to provide that information when it can, and will do so. In particular, AT&T will provide the associated claim number when processing billing dispute credits where its systems are capable of doing so. Pellerin Direct at 53 (Tr. 224), lines 14-18. However, there may be instances where that is not possible, and AT&T should not be contractually obligated to do the impossible. *Id*. at 53 (Tr. 224), lines 18-20. In addition, credits may be applied following resolution of formal billing disputes as directed by the Commission, which may not include the level of specificity CA's language would require. *Id.* at 53 (Tr. 224), lines 20-22.

CA has claimed that the only reason it would be impossible for AT&T to provide the detail CA's language would require is that AT&T's billing records are unreliable. Ray Direct at 26 (Tr. 47), lines 21-24. That is incorrect. CA's language would require AT&T to provide itemized detail of individual credits associated with individual dispute reference numbers, and there are circumstances where that may be impossible that have nothing to do with the reliability of AT&T's billing systems. Pellerin Rebuttal at 27 (Tr. 293), lines 17-21. For example, suppose the parties had 20 disputes totaling $30,000 on a single billing account number ("BAN"). Suppose also that the parties agreed to resolve all 20 disputes together with CA's payment of $20,000 and AT&T's credit of $10,000. AT&T would credit CA's bill for $10,000, but because of the bulk nature of the dispute resolution, AT&T could not provide a specific credit amount for each of the 20 disputes. Nor would such detail be necessary to effectuate the resolution. Similarly, CA's payment of $20,000 would go towards the BAN associated with the disputes, but not towards any particular billed items. The end result would be that the BAN would show a

zero balance (assuming all undisputed amounts were paid) and all the disputes would be closed. *Id.* at 27 (Tr. 293), line 25 – 28 (Tr. 294), line 7.[59]

The Commission should reject CA's language for GT&C § 11.13.1 that would contractually obligate AT&T to provide detail on credit adjustments even when it is impossible for AT&T to comply. AT&T would, however, be willing to accept CA's language with the added words, "When the billing system permits," so that the entire sentence would read, "When the billing system permits, the Billing Party shall identify each specific adjustment or credit with the dispute reference number provided by the Billed Party in its dispute of the charges being credited." See AT&T Response to Staff Interrogatory 112 (Exh. 38, p. 24). That is an eminently reasonable resolution of this issue because, as Ms. Pellerin testified, "If it [the billing system] can't do it, it can't do it. And that's all we're looking to have the contract language say is if we can't do it, you know, all the contract . . . language in the world isn't going to magically make it happen." Tr. 365, lines 10-14.

ISSUE 27: Should the ICA permit CA to dispute a class of related charges on a single dispute notice?

Affected contract language: GTC 13.4.3.8

AT&T Position: No. AT&T accepts bulk disputes in some cases, but its billing system cannot accommodate bulk disputes in all instances that would be required under CA's proposed language.

CA proposes language that would require AT&T to accept a billing dispute that includes an entire class of related charges on a single dispute notice. AT&T opposes this language,

[59] CA recognizes that in the stated example, it would be impossible for AT&T to provide the detail CA's language calls for and suggests that to deal with the example, CA's language could be modified by adding the words "unless otherwise agreed by the parties." Ray Dep. (Exh. 46) at 50, lines 16-21. There are two problems with that suggestion. One is that there is no assurance that CA would "otherwise agree." The second is that AT&T offered the example merely as an illustration. Pellerin Rebuttal at 27 (Tr. 293), lines 22-25. When AT&T conclusively demonstrates a flaw in CA's proposal by providing an example of a circumstance in which the proposal is unworkable, CA should not be allowed to salvage its proposal merely by offering a fix that it contends would address the example.

because normal monthly recurring and nonrecurring charges should be disputed at the billed item level, and the AT&T dispute template is structured in that manner. Pellerin Direct at 57 (Tr. 228), lines 13-14. In most cases, CLECs have large billing accounts with a mixture of services, and the specificity required to identify the disputed service necessitates that the customer submit the billing detail. CA's language would obligate AT&T to accept multiple billing disputes on a single dispute notice, even if AT&T could not process those particular individual disputes on a bulk basis. *Id.* at 57 (Tr. 228), lines 14-19.

This is not to say that AT&T will never accept a bulk billing dispute. AT&T does so in some instances, generally as the result of an agreement on an individual case basis. If a CLEC wants to dispute a large number of related billing entries that it believes were adversely affected by a single factor, the CLEC can ask AT&T to accept a single dispute for the entire class of entries. AT&T will be open to such requests in appropriate cases, because it is to both parties' advantage to work cooperatively to process billing disputes in the most efficient and expeditious manner possible, which in some instances includes bulk processing. *Id.* at 57 (Tr. 228), line 20 – 58 (Tr. 229), line 3. Rejection of CA's proposed language will not, of course, preclude CA from making such requests.

For example, if CA prevailed on the issue of interconnection trunk charges in this arbitration (Issues 14(b)(ii) and 66) and AT&T failed to update its billing tables to zero rate those charges specifically for CA,[60] it might make sense for the parties to agree to handle those charges on a single dispute. On the other hand, if CA filed a single dispute for the nonrecurring charges for all types of UNE loops because CA considered those charges to be "related," AT&T probably would not be able to accommodate all the disputes on a bulk basis. This is because

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[60] Other Florida CLECs pay AT&T's interconnection trunk charges pursuant to their ICAs.

different loops have different charges, making the disputes unique. Pellerin Rebuttal at 29 (Tr. 295), lines 11-21.

The Commission should reject CA's proposed language for GT&C § 13.4.3.8 that would obligate AT&T to accept a single dispute for a group of allegedly related bill entries.[61]

ISSUE 29(i): Should the ICA permit a party to bring a complaint directly to the Commission, bypassing the dispute resolution provisions of the ICA?

Affected contract language: GTC 13.9.1

<u>AT&T Position</u>: No. The dispute resolution provisions of the ICA provide the framework for dispute resolution. Neither party should burden the Commission with a complaint alleging a violation of the ICA without first attempting to resolve the issue informally, which is what the agreed dispute resolution provisions require.

Section 13 of the General Terms and Conditions governs "Dispute Resolution." CA proposes to include a sentence in section 13.9.1 that would say:

> ***Nothing in this agreement shall be construed to prohibit a party from seeking relief from the Commission at any time for an alleged violation of this agreement or of any law or regulation by the other party, whether or not dispute resolution procedures have been followed.***

AT&T opposes that sentence for two reasons. The first, which gives rise to Issue 29(i), is that the parties should not be allowed to seek relief from the Commission "at any time." Rather, they should be required to try to resolve any disagreement that arises under the ICA by complying with the agreed dispute resolution process in the ICA. Only if that fails should the parties be permitted to ask the Commission to intervene.

In GT&C § 13.2.1, the parties have agreed:

> The Parties desire to resolve disputes arising out of this Agreement without litigation. Accordingly, the Parties agree to use the following Dispute

[61] CA notes that an ICA between Terra Nova and Verizon contains a provision similar to what CA proposes here. Ray Direct at 28, (Tr. 49) lines 1-3. That is irrelevant, of course. A CLEC that seeks an ICA with AT&T cannot even adopt a particular provision from an *AT&T* ICA without adopting the whole ICA, and the fact that Verizon may have agreed to a particular provision in an ICA with Terra Nova is even further removed.

> Resolution procedures with respect to any controversy or claim arising out of or relating to this Agreement or its breach.

That is followed by terms that govern the commencement of dispute resolution via written notice (section 13.3); Service Center Dispute Resolution for billing disputes (section 13.4)[62]; and time periods for resolving disputed amounts (sections 13.4.5 and 13.4.6). Section 13.4.7 then provides for the Disputing Party to invoke Informal Resolution of Disputes pursuant to section 13.5, which establishes procedures for informal dispute resolution. Then, section 13.6, entitled "Formal Dispute Resolution," provides:

> If the Parties are unable to resolve the dispute through the informal procedure described in Section 13.5 above, then either Party may invoke the formal Dispute Resolution procedures described in this Section 13.6. Unless agreed among all Parties, formal Dispute Resolution procedures, including arbitration *or other procedures* as appropriate, may be invoked not earlier than sixty (60) calendar days after receipt of the letter initiating Dispute Resolution under Section 13.5 above. (Emphasis added).

One of the "other procedures" encompassed by Formal Dispute Resolution is a Commission proceeding. Thus, the parties have agreed that a Commission proceeding may not be initiated until the parties have engaged in 60 days of Informal Dispute Resolution pursuant to section 13.5.

The main reason the parties should not be allowed to seek relief from the Commission before they attempt informal dispute resolution, as CA's proposed language for GT&C § 13.9.1 would permit, is the simple fact that the parties have agreed they would not. Section 13.2.1, quoted above, plainly says that the parties desire to resolve any disputes under the ICA without litigation, and therefore have agreed to abide by the dispute resolution procedures set forth in section 13. Those procedures include informal dispute resolution under section 13.5 – and

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[62] Most of section 13.4 is agreed, but there are two disagreements concerning the section, which are the subject of Issues 22b and 27.

section 13.6, which covers Commission proceedings as well as other means of formal dispute resolution, clearly states that no such formal proceeding may begin until the parties have engaged in informal dispute resolution for 60 days. Thus, the language CA is proposing for section 13.9.1 is inconsistent with the agreed language. That alone is sufficient reason to reject it.

CA contends that its proposed language is not inconsistent with the agreed language because it states, "***Nothing in this agreement shall be construed to prohibit a party from seeking relief from the Commission at any time . . . .***" – so that the inclusion of CA's language would override the agreed language, rather than creating an inconsistency. Ray Rebuttal at 32 (Tr. 104), line 14 – 33 (Tr. 105), line 2. CA is mistaken, because the agreed language – which says clearly and emphatically that there shall be no recourse to the Commission until the parties have engaged in informal dispute resolution for 60 days – is not in need of, or subject to, construction. A contract says, "Nothing in this agreement shall be construed to mean X," when there is language in the contract that could be misconstrued to mean X and the parties want to make sure that does not happen. In this case, however, it is absolutely clear that the parties have agreed to try for 60 days to resolve a dispute informally before bringing it to the Commission. If CA did not want to agree to that, it shouldn't have. It is as if agreed language in the ICA said, "CA may not store explosive devices in its collocation space" and CA proposed to add, "Nothing in this agreement shall be construed to prohibit CA from storing explosive devices in its collocation space." That proposed addition would be rejected as inconsistent with the unambiguous agreed language, and CA's proposal for GT&C § 13.9.1 should be rejected for the same reason.

Even if the parties had not already agreed to engage in informal dispute resolution before bringing a complaint to the Commission, it would be eminently reasonable for the Commission to require it. Many of the disagreements that arise between parties to ICAs can be resolved without litigation. The ICA should ensure that the parties will not waste the Commission's time with disputes that the parties may be able to work through on their own if they make an effort to do so. Pellerin Direct at 61 (Tr. 232), lines 5-9.

CA has offered no cogent reason for its proposal to undermine the parties' agreed informal dispute resolution process.[63] CA claims that AT&T could "us[e] its monopoly power" to "cause severe harm to CA" (Ray Direct at 30 (Tr. 51), lines 10-11), but to the extent that allegation is supposed to relate to Issue 29(i), it is nonsense. The dispute resolution process is fair and equitable, and CA agreed to almost all the language memorializing the process. Pellerin Rebuttal at 32 (Tr. 298), lines 11-12. Either party can invoke the dispute resolution terms, and Mr. Ray's statement that "CA may not have the luxury of invoking Dispute Resolution while AT&T runs out the clock" (Ray Direct at 30 (Tr. 51), lines 11-12) is equally nonsensical. Dispute resolution is certainly not a luxury – it is a reasonable and efficient way to handle disputes. Pellerin Rebuttal at 32 (Tr. 298), lines 12-16. Further, it is altogether unclear what CA means by "runs out the clock" or how that would be harming CA's customers, and CA offers no evidence to support its allegation. *Id.* at 32 (Tr. 298), lines 16-18.

[63] Much of Mr. Ray's direct testimony on this issue was so far afield that it does not warrant discussion in this brief. For reference in the event that CA repeats Mr. Ray's assertions in its brief, we note that Ms. Pellerin responded in her rebuttal testimony (at 31 (Tr. 297), line 1 – 32 (Tr. 298), line 6) to Mr. Ray's false assertions that AT&T "seems to prefer its elective commercial arbitration provision" (Ray Direct at 29 (Tr. 50), lines 14-15) and that AT&T did not negotiate in good faith (*id.* at 30 (Tr. 51), lines 4-8).

The Commission should reaffirm the parties' agreement to engage in informal dispute resolution before taking recourse to the Commission by rejecting CA's inconsistent proposal to say that the parties may seek relief from the Commission "at any time."

ISSUE 29(ii): Should the ICA permit a party to seek relief from the Commission for an alleged violation of law or regulation governing a subject that is covered by the ICA?

Affected contract language: GTC 13.9.1

AT&T Position: No. Once an ICA is in effect, the parties are bound by it, and not by the 1996 Act and the FCC's implementing regulations. Parties to an ICA can therefore have no claims against each other for violations of the 1996 Act or the FCC's implementing regulations.

The second flaw in CA's proposed language for GT&C § 13.9.1 is its proposition that the parties may seek relief from the Commission "for an alleged violation of this agreement ***or of any law or regulation*** by the other party." The reference to "any law or regulation" must be rejected, because once the ICA is in effect, the only claims the parties can have against each other with respect to the matters covered by the ICA will be claims for breach of the ICA. As the case law uniformly holds, neither party will be able to assert a claim against the other for violation of the 1996 Act or the FCC's implementing regulations.

The duties imposed by the 1996 Act are enforced *only* through the ICA process mandated by section 252 of the 1996 Act. In other words, apart from an alleged violation of an ICA, there can be no free-standing claim of a failure to comply with the requirements of section 251(c) or the FCC's implementing regulations.

Section 251(c) of the 1996 Act requires ILECs to provide interconnection, unbundled network elements, and services for resale to CLECs. But section 252 establishes the exclusive mechanism by which an ILEC becomes bound to fulfill those requirements for a particular CLEC – the comprehensive regime of negotiation and arbitration through which ICAs are

established. The duties imposed by section 251(c) exist only within that framework. Thus, for example, a CLEC cannot simply demand that an ILEC furnish what section 251 requires, and sue if the ILEC refuses. Rather, the CLEC must enter into an ICA (through adoption, negotiation or, if necessary, arbitration) that obliges the ILEC to perform its section 251 duties. Then, if the ILEC fails to fulfill its obligations, the CLEC has a claim against the ILEC, but that claim is for breach of the ICA, not of the 1996 Act.

The ICA, then, is "the Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the Act." *Mich. Bell Tel. Co. v. Strand.*, 305 F.3d 580, 582 (6th Cir. 2002)**Error! Bookmark not defined.**. *See also Verizon Maryland, Inc. v. Global NAPs, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004)**Error! Bookmark not defined.** ("Interconnection agreements are thus the vehicle chosen by Congress to implement the duties imposed in § 251."). Section 251(c) does not require an ILEC to do *anything* that is not included in an ICA.[64]

Accordingly, as the FCC has ruled, there can be no claim for violation of section 251 by a carrier that has an ICA. In *Core Commc'ns, Inc. v. SBC Commc'ns Inc.*, 18 FCC Rcd. 7568, 2003 WL 1884294 (April 10, 2003)**Error! Bookmark not defined.**, two CLECs complained that ILECs were refusing to allow them to use an unbundled network element called "shared transport" in violation of, among other things, section 251(c)(3) of the 1996 Act and the FCC's implementing rules. *Id.* ¶¶ 2, 28. With respect to the claim of one CLEC, Z-Tel, against one of the ILECs, Pacific, the FCC ruled:

> Our rules do plainly require unbundling of shared transport . . . . At the same time, however, the obligations created by section 251 and our rules

[64] This is also made clear by 47 U.S.C. § 252(a)(1), which specifies that after a carrier requests interconnection pursuant to section 251, the carriers may negotiate and enter into a "binding agreement . . . without regard to the standards set forth in subsections (b) and (c) of section 251."

> are effectuated through the process established in section 252 – that is, by reaching agreement through negotiation, arbitration, or opt-in. In this case, Z-Tel opted into a pre-existing Pacific interconnection agreement with another party, including its shared transport terms . . . . We agree with Defendants that Z-Tel is bound by the terms of its agreement . . . .

Id. ¶ 30 (quotation marks and footnotes omitted). Thus, the FCC declined to consider Z-Tel's claim for violation of section 251(c)(3) and the FCC's rules, because Z-Tel, having entered into an ICA, had only the rights spelled out in that ICA.

The FCC's reasoning is in line with the decisions of every court that has addressed the question. As the Second Circuit explained, once a carrier enters "into an interconnection agreement in accordance with section 252, . . . it is then regulated directly by the interconnection agreement." *Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev'd in part on other grounds sub nom. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). "[O]nce an agreement is approved," the parties are "governed by the interconnection agreement" and "these general duties [under the 1996 Act] do not control" and "no longer apply." *Mich. Bell Tel. Co. v. MCIMetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003). *See also Trinko*, 305 F.3d at 104 ("The issue before us is whether conduct that breaches [an] interconnection agreement . . . can also be considered a violation of subsections (b) and (c) of section 251. We conclude that in this case it does not"); *Verizon New Jersey v. Ntegrity Telecontent Servs., Inc.*, 219 F. Supp. 2d 616, 632-33 (D.N.J. 2002) (dismissing claim alleging ILEC "failed to fulfill the duties imposed by section 251," because "[t]he [ILEC] complied with the requirements of [section 251] by entering into a negotiated [ICA] with [the CLEC]. Upon the approval of the agreement, the duties of each party are defined by the parameters of their agreement rather than section 251(b) and (c). [The CLEC] may not rely upon the general duties imposed by section 251 to litigate around the specific language provided in the negotiated contracts"); *Net2Globe Int'l, Inc. v. Time Warner Telecom of*

New York, 273 F. Supp. 2d 436 , 459 (S.D.N.Y. 2003)**Error! Bookmark not defined.** (dismissing claim under section 251, states "[o]nce an interconnecti[on] agreement such as those between the parties in the present dispute is formed and approved by government regulators, 'the [C]ommunications Act intends that the [local exchange carrier] be governed directly by the specific agreement rather than the general duties described in . . . section 251'" (quoting *Trinko*, 305 F.3d at 103)); *Goldwasser v. Ameritech Corp.*, 1998 U.S. Dist. LEXIS 1463, at *32-33 (N.D. Ill. Feb. 4, 1998), *aff'd on other grounds*, 222 F.3d 390 (7th Cir. 2000) (dismissing a claim for violations of the 1996 Act, holds that "These duties [imposed by sections 251 and 252 of the 1996 Act] exist . . . only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition" and "[i]f there are problems with carriers . . . failing to satisfy these duties to their competitors, the Act establishes the sole remedy: state PUC arbitration and enforcement proceedings, with review by federal courts.").

In short, CA's proposed language for GT&C § 13.9.1 stating that the parties may seek relief from the Commission not only for an alleged violation of the ICA, but also for an alleged violation of "any law or regulation by the other party" must be rejected because it is contrary to law.

ISSUE 30(i): Should the joint and several liability terms be reciprocal?

Affected contract language: GTC 17.1

<u>AT&T Position</u>: No, because no entity other than AT&T Florida can possibly have ILEC obligations under the ICA.

GT&C § 17.1 reads as follows, with AT&T's language underscored and CA's language in italics:

> 17.1 In the event that ***either party*** **<u>CLEC</u>** consists of two (2) or more separate entities as set forth in this Agreement and/or any Amendments hereto, or any third party places orders under this Agreement using CLEC's company codes or identifiers, **<u>all such entities shall be jointly and</u>**

> **<u>severally liable for CLEC's obligations under this Agreement</u>** ***the Party shall be solely liable to the other for obligations under this Agreement related to the actions of its affiliate, agent or designate. This Agreement does not provide for action against or recovery from any third party, except as otherwise provided herein.***

Issue 30(i) concerns the disagreement in the first line, where AT&T's language would make section 17.1 apply to CA alone, while CA's language would make it apply to AT&T as well.

The purported rationale for CA's proposal is "to provide parity between the parties." Ray Direct at 31 (Tr. 52), line 5. That makes no sense, however, because no entity other than AT&T Florida can possibly take on ILEC responsibilities under the ICA. An AT&T Florida affiliate that is a CLEC could adopt the ICA, and thus become subject to it, but in that event, the AT&T affiliate would be subject to the same terms and conditions as CA, not AT&T Florida. Pellerin Direct at 64 (Tr. 235), lines 12-18. Simply put, there is no conceivable circumstance in which another company could be jointly and severally liable with AT&T Florida under CA's ICA with AT&T Florida, so CA's proposed "either party," which assumes the contrary, should be rejected.

Not surprisingly, CA never even tried to explain its position on this issue. The six-word phrase in Mr. Ray's direct testimony ("to provide parity between the parties") is literally all he said on the subject; Mr. Ray offered no explanation of what he was talking about. Furthermore, Mr. Ray's rebuttal testimony included no discussion of Issue 30(i). In other words, he had nothing to say in response to Ms. Pellerin's demonstration that CA's proposal makes no sense.

ISSUE 30(ii): Can a third-party that places an order under this ICA using CA's company code or identifier be jointly and severally liable under the ICA?

Affected contract language: GTC 17.1

<u>AT&T Position</u>: Yes. If a third party places an order under the ICA using CA's company code or identifier, that third party should be jointly and severally liable for the order. CA should agree, since the third party's liability reduces CA's exposure.

Issue 30(ii) relates to the disputed language in GT&C § 17.1 (AT&T's underlined and CA's italicized) other than in the first line, which is the subject of Issue 30(i):

> 17.1 In the event that ***either party*** **<u>CLEC</u>** consists of two (2) or more separate entities as set forth in this Agreement and/or any Amendments hereto, or any third party places orders under this Agreement using CLEC's company codes or identifiers, **<u>all such entities shall be jointly and severally liable for CLEC's obligations under this Agreement</u>** ***the Party shall be solely liable to the other for obligations under this Agreement related to the actions of its affiliate, agent or designate. This Agreement does not provide for action against or recovery from any third party, except as otherwise provided herein.***

The "all such entities" that AT&T's language makes jointly and severally liable for CA's obligations under the ICA includes "any third party" that "places orders under this Agreement using [CA's] company codes or identifiers." AT&T does not understand why CA would not want such a third party to be jointly and severally liable with CA; after all, the liability of a third party that uses CA's company codes or identifiers to place an order under the ICA would reduce CA's liability. Oddly, though, CA opposes the AT&T language that would have that effect, and proposes to say the opposite, *i.e.*, that the ICA does not provide for recovery from such a third party. The Commission should resolve this disagreement in favor of AT&T, because it is eminently reasonable for a third party that places orders using CA's identifiers to be jointly and severally liable for those orders.

ISSUE 32: Shall the purchasing Party be permitted to not pay taxes because of a failure by the providing Party to include taxes on an invoice or to state a tax separately on such invoice?

Affected contract language: GTC 37.1

<u>AT&T Position</u>: No. AT&T will show taxes as a separate line item on CA's bill whenever possible. In the unlikely event that a tax is omitted (*e.g.*, a new tax not yet in AT&T's billing system), CA is still obligated to pay those taxes.

As AT&T's proposed language for GT&C § 37.1 states, AT&T will identify taxes as a separate item on its bills to CA whenever it can. AT&T certainly has no reason to hide the

legitimate taxes it bills and seeks to collect from CA, or to purposely omit taxes from its bills. However, it is possible that a tax could be omitted from a bill if, for example, there is a new local tax that applies to the services AT&T provides to CA, but AT&T's billing system has not yet been updated to reflect the new tax. Pellerin Direct at 65 (Tr. 236), lines 9-17.

Agreed words in GT&C § 37.1 state that "[t]axes shall be billed as a separate item on the invoice." In light of the fact that there may be the occasional instance where that is not possible, AT&T proposes to insert the words "Whenever possible" before the agreed words. CA objects, but the objection is baseless. Obviously, if it is impossible for some reason for AT&T to bill a tax as a separate item on the invoice, AT&T will not be able to do it.

In the rare instance where there is a legitimate tax that CA is obliged to pay but that AT&T omits from a bill, the omission should not excuse CA from paying the tax. Pellerin Direct at 65 (Tr. 236), lines 18-23. AT&T proposes language for GT&C § 37.1 that so states. Again, CA objects, but without basis. If there is a legitimate tax that CA has an obligation to pay, there is no reason that AT&T's omission of the tax from an invoice should excuse CA from paying the tax.

CA has said literally nothing in support of its opposition to AT&T's proposed contract language for GT&C § 37.1. In his direct testimony, Mr. Ray simply stated that CA needs to see taxes as a separate line item on the bill in order to audit its bill and to lodge disputes, and that "AT&T already bills taxes as a separate line item." Ray Direct at 32 (Tr. 53), lines 10-14. AT&T agrees, which is why it has agreed to language stating that taxes will be shown as a separate line item. AT&T merely wishes to add "Whenever possible" to accommodate the unlikely situation where it would not be possible for AT&T to list taxes separately, as well as language saying that the omission of a tax from a bill does not excuse CA from paying the tax.

Ms. Pellerin made this clear in her direct testimony, and CA did not address this issue in Mr. Ray's rebuttal testimony – presumably because CA recognizes there is actually nothing objectionable about AT&T's language.

The Commission should adopt AT&T's proposed language.

ISSUE 33a: Should the purchasing Party be excused from paying a Tax to the providing Party that the purchasing Party would otherwise be obligated to pay if the purchasing Party pays the Tax directly to the Governmental Authority?

Affected contract language: GTC 37.3-37.4

AT&T Position: The real question is whether, when CA resells AT&T's telecommunications services, AT&T should collect the taxes from CA and remit them to the taxing authority. AT&T should do so, because that is how it works with all resellers, and the parties have agreed on contract language to that effect.

Section 251(c)(4) of the 1996 Act requires an ILEC "to offer for resale at wholesale rates any telecommunications service that the [ILEC] provides at retail to subscribers who are not telecommunications carriers." Thus, resale services are AT&T's retail telecommunications services that AT&T sells to CLECs for resale to their end user customers. AT&T sells these services to CA at the retail price, less a discount, which in Florida is 21.83% for residential lines and 16.81% for business lines. McPhee Direct at 3 (Tr. 416), lines 10 – 16.

When CA purchases a resale service from AT&T and resells it to its end user customer, that customer has a retail relationship with CA for purposes of buying and paying for that service, but the underlying network and call functions are performed by AT&T, and the CA resale customer is assigned a telephone number that belongs to AT&T, *i.e.*, a number that is within a block of numbers (NPA-NXX) that AT&T obtained from the numbering authority. *Id.* at 3 (Tr. 416), line 18 – 4 (Tr. 417), line 1. As a result, calls to and from the CA resale customer appear on the network as if they terminated to – or originated from – an AT&T end user customer. Thus, for example, transport and termination charges for calls originated by a CA

resale customer are paid to the terminating carrier by AT&T – rather than by the reseller – because those calls are originated on AT&T's network and, from the point of the terminating carrier, appear as AT&T-originated calls. AT&T, having paid the transport and termination charges to the terminating carrier, then bills those charges to CA. *Id.* at 3 (Tr. 416), line 18 – 4 (Tr. 417), line 6.

In fact, everything pertaining to the treatment and billing of a resale line is the same as for a retail line, including the treatment of taxes and surcharges payable by the end user customer. Because a resale line is operationally identical to an AT&T retail line, AT&T handles all taxes and surcharges the same as it does for its own retail lines. When AT&T bills one of its retail customers, the bill includes all applicable taxes and fees, in addition to AT&T's retail charges. AT&T then pays the taxes and fees to the appropriate governmental authority. Likewise in the case of a resale line, AT&T bills the CLEC reseller all applicable taxes and fees payable by the CLEC's customer and remits those taxes and fees to the appropriate governmental authority; the reseller recovers those taxes and fees from its customer. *Id.* at 4 (Tr. 417), lines 8-16.

CA, however, proposes to modify this established system – with which all resellers in Florida comply without complaint (*id.* at 9 (Tr. 422), lines 14-15) – by proposing to remit the taxes to the governmental authority itself, rather than allowing AT&T to collect and remit the taxes to the governmental authority.

There are two affected contract sections. First, GT&C § 37.3 reads as follows, with CA's language in bold italics and AT&T's underlined:

> 37.3 To the extent a purchase of products or services under this Agreement is claimed by the purchasing Party to be for resale or otherwise exempt from a Tax, the purchasing Party shall furnish to the providing Party an exemption certificate in the form reasonably prescribed by the providing

> Party and any other information or documentation required by Applicable Law or the respective Governmental Authority. ***Purchasing Party shall have the right to claim and receive exemption from any governmental tax, fee or surcharge which it can reasonably prove that it remits directly to the proper government entity. If an official certificate of exemption does not exist for a specific tax or government surcharge, the parties agree that proof of payment of the tax or surcharge directly to the government entity shall constitute adequate proof of exemption.*** Prior to receiving such exemption certificate and any such other required information or documentation, the Providing Party shall have the right to bill, and the Purchasing Party shall pay, Tax on any products or services furnished hereunder as if no exemption were available, subject to the right of the Purchasing Party to pursue a claim for credit or refund of any such Tax pursuant to the provisions of this Section 37.0 and the remedies available under Applicable Law. If it is the position of the purchasing Party that Applicable Law exempts or excludes a purchase of products or services under this Agreement from a Tax, or that the Tax otherwise does not apply to such a purchase, but Applicable Law does not also provide a specific procedure for claiming such exemption or exclusion or for the purchaser to contest the application of the Tax directly with the respective Governmental Authority prior to payment, then the providing Party **<u>may in its discretion agree not to bill and/or not to</u>** ***shall not*** require payment of such Tax by the purchasing Party, provided that the purchasing Party (i) furnishes the providing Party with any exemption certificate requested by and in the form reasonably prescribed by the providing Party, (ii) furnishes the providing Party with a letter signed by an officer of the purchasing Party setting forth the basis of the purchasing Party's position under Applicable Law; and (iii) furnishes the providing Party with an indemnification agreement, reasonably acceptable to the providing Party, which holds the providing Party harmless from any Tax, interest, penalties, loss, cost or expenses (including attorney fees) that may be incurred by the providing Party in connection with any claim asserted or actions taken by the respective Governmental Authority to assess or collect such Tax from the providing Party.

Similarly, GT&C § 37.4 provides:

> To the extent permitted by and pursuant to Applicable Law, and subject to the provisions of this Section 3[7].0, the purchasing Party shall have the right to contest with the respective Governmental Authority, or if necessary under Applicable Law to have the providing Party contest (in either case at the purchasing Party's expense) any Tax that the purchasing Party asserts is not applicable, from which it claims an exemption or exclusion, or which it claims to have paid in error; provided, however, that (i) the purchasing Party shall ensure that no lien is attached to any asset of the providing Party as a result of any contest of a disputed Tax; (ii) with respect to any Tax that could be assessed against or collected from the providing Party by the

> respective Governmental Authority, the providing Party shall retain the right to determine the manner of contesting such disputed Tax, including but not limited to a decision that the disputed Tax will be contested by pursuing a claim for credit or refund; (iii) except to the extent that the providing Party has agreed pursuant to this Section 35.0 not to bill and/or not to require payment of such Tax by the purchasing Party pending the outcome of such contest, the purchasing Party pays any such Tax previously billed by the providing Party and continues paying such Tax as billed by the providing Party pending the outcome of such contest. In the event that a disputed Tax is to be contested by pursuing a claim for credit or refund, if requested in writing by the purchasing Party, the providing Party shall facilitate such contest (i) by assigning to the purchasing Party its right to claim a credit or refund, if such an assignment is permitted under Applicable Law; or (ii) if an assignment is not permitted, by filing and pursuing the claim on behalf of the purchasing Party but at the purchasing Party's expense. Except as otherwise expressly provided in this Section 35.0, nothing in this Agreement shall be construed to impair, limit, restrict or otherwise affect the right of the providing Party to contest a Tax that could be assessed against or collected from it by the respective Governmental Authority. With respect to any contest of a disputed Tax resulting in a refund, credit or other recovery, as between the purchasing Party and the providing Party, the purchasing Party shall be entitled to the amount that it previously paid, plus any applicable interest allowed on the recovery that is attributable to such amount, and the providing Party shall be entitled to all other amounts. ***Taxes for which the Purchasing Party has provided evidence of direct payment to the Governmental Authority shall not be treated as contested under this provision and shall be entitled to exemption by the Providing Party.***

CA's proposed language for sections 37.3 and 37.4 uses the term "exemption" in a manner that departs from normal usage and from the agreed language. McPhee Direct at 7 (Tr. 420), lines 37-38. In normal usage, and in the agreed language, an "exemption" is a statutory exclusion from a tax. *Id.* at 7 (Tr. 420), line 38 – 8 (Tr. 421), line 3.[65] In its proposed language, CA is not using the word in that sense. Rather, when CA's language says "exemption," it is

[65] End users may be exempt from taxes and/or surcharges, and AT&T's CLEC website, CLEC Online, explains how a reseller can apply for and obtain tax exemptions from the taxing agency. The website contains the necessary forms and instructions at https://clec.att.com/clec/shell.cfm?section=2544. As it states there for Florida, a "State issued tax document is required. The CLEC must go to the state and request a certificate and then submit a completed and signed copy to the AT&T Tax exemption group in order to be considered for State exemptions." Once the CLEC completes this process, AT&T no longer bills tax charges on the exempt lines. McPhee Direct at 4 (Tr. 417), line 17 – 5 (Tr. 418), line 4.

referring to a situation where a tax applies (thus, no exemption in the usual sense), but where CA seeks to be excused from remitting to AT&T the tax amount that AT&T remitted to the government on the ground that CA has paid the tax itself. *Id*. at 8 (Tr. 421), lines 3-7.

The issue, then, is whether CA can collect and remit a tax directly to the taxing authority or whether AT&T should pay that tax and then obtain reimbursement from CA. Either way, CA remits the tax amount once; the only question is whether it remitsto the governmental authority or AT&T. The answer to the question is in agreed GT&C § 37.1, which states – in the language shown in bold – that AT&T has the right to remit the taxes and pass the charges through to CA:

> Except as otherwise provided in this Section, with respect to any purchase of products or services under this Agreement, **if any Tax is required or permitted by Applicable Law to be billed to and/or collected from the purchasing Party [CA] by the providing Party [AT&T], then: (i) the providing Party shall have the right to bill the purchasing Party for such Tax; (ii) the purchasing Party shall pay such Tax to the providing Party; and (iii) the providing Party shall pay or remit such Tax to the respective Governmental Authority**. Taxes shall be billed as a separate item on the invoice. Nothing shall prevent the providing Party from paying any Tax to the appropriate Governmental Authority prior to the time: (i) it bills the purchasing Party for such Tax, or (ii) it collects the Tax from the purchasing Party. (Emphasis added.)

The taxes at issue are in fact "permitted by Applicable Law to be billed to and/or collected from" CA by AT&T. Consequently, CA and AT&T have agreed that AT&T has the right to pay the taxes and pass the charges through to CA. AT&T will exercise that right, because that is the way its billing systems are set up – and is the way AT&T deals with every other reseller in Florida. McPhee Direct at 9 (Tr. 422), lines 14-19. CA's proposed language for GT&C §§ 37.3 and 37.4 would nullify what the parties have already agreed upon, and so is an improper attempt to renege on that agreement. *Id.* at 9 (Tr. 422), lines 1-7.

Even if the parties had not already agreed on GT&C § 37.1, CA's proposed language would still be unreasonable. *Id*. at 9 (Tr. 422), lines 8-13. Every reseller in Florida complies

with the arrangement that CA is proposing to undo, and there is no chance of any CLEC double-paying under this arrangement, as long as it does not foolishly pay taxes that AT&T is supposed to pay. *Id.* at 9 (Tr. 422), lines 14-17. CA is asking the Commission to require AT&T Florida to revamp its billing systems to accommodate CA alone, but with no sound justification. *Id.* at 9 (Tr. 422), lines 17-19. All CA has to do if it wants to avoid any risk of double-payment is to let AT&T pay the taxes, as the parties have agreed it has the right to do in section 37.1. *Id*. at 9 (Tr. 422), lines 19-20.

CA contends that it "cannot determine what taxes AT&T has paid to whom." Ray Rebuttal at 34 (Tr. 106), line 3. But that is only pertinent – as CA admits (*id*. at 34 (Tr. 106), lines 7-9) – if and when CA provides both resale and facilities-based service, and that scenario is the subject of Issue 33b, not Issue 33a.

The Commission should reject CA's proposed additions to GT&C §§ 37.3 and 37.4.

ISSUE 33b: If CA has both resale customers and facility-based customers, should CA be required to use AT&T Florida as a clearinghouse for 911 surcharges with respect to resale lines?

Affected contract language: E911 5.2.2

AT&T Position: As with Issue 33a, CA should adhere to the same process as every other CLEC in Florida with respect to 911 surcharges on resale lines: Let AT&T pay the surcharge amounts to the governmental authority and pay AT&T's bill for those amounts. There is no risk of double-payment.

Issue 33b is very similar to Issue 33a, but it involves surcharges associated with E911 services rather than taxes. McPhee Direct at 10 (Tr. 423), lines 19-21. As in Issue 33a, CA proposes language, in this instance for the E911 Attachment, that would excuse CA from paying a portion of AT&T's resale bill. *Id*. at 10 (Tr. 423), lines 21-23. Specifically, CA proposes that AT&T not pay E911 surcharges for CA in those areas where CA is both a reseller and a

facilities-based CLEC, so that CA would then pay E911 surcharges for *all* of its retail lines, whether provisioned via its facilities-based network, or via resale from AT&T.

Attachment E911 provides terms and conditions under which AT&T will provide CA with access to E911 services where AT&T is the E911 network service provider. E911 services often include surcharges payable to an E911 agency. *Id.* at 10 (Tr. 423), lines 8-11. The dispute is over which carrier should remit those surcharges when CA serves some customers with resold AT&T services and other customers with service provided over CA's own facilities. It is a given that CA itself will remit the surcharges on its facilities-based lines; AT&T has nothing to do with those lines. The issue concerns the surcharges on CA's resale lines. For essentially the same reasons as on Issue 33a, AT&T should remit those surcharges to the governmental authority that imposes them, and CA should pay AT&T's bill for those charges. (Either way, of course, CA pays the surcharge only once and recovers the surcharge amounts from its end user customers.)

The disputed language is in E911 § 5.2.2, which reads as follows with the bold italics language proposed by CA and opposed by AT&T:

> 5.2.2 For Resellers, the ILEC shall serve as a clearinghouse between Resellers and PSAPs except where state law requires Reseller to collect and remit directly to the appropriate 911 Authority***, or in the case of a Facility based CLEC which also has resale service from AT&T-21STATE, and which remits and reports its facility-based and resale-based data in the aggregate to the 911 Customer***. The Parties agree that:
>
> 5.2.2.2 AT&T SOUTHEAST REGION 9-STATE will provide the 911 Customer a monthly settlement letter which provides the total number of access lines broken down into residence and business line totals only. If state statutes require a break out of Reseller information, the AT&T SOUTHEAST REGION 9-STATE shall include this information upon request by the 911 Customer. ***In the case of a facility-based CLEC which also has resale service, and which remits and reports its facility-based and resale-based data in the aggregate to the 911 Customer, AT&T SOUTHEAST REGION 9-STATE shall omit CA's resale lines from its own reporting to 911 Customer. If CA claims exemption from 911 surcharges under this provision, CA shall be solely responsible for remitting and reporting of 911 surcharges to the 911 Customer.***

As explained in connection with Issue 33a, whenever AT&T provides a resale product or service, the entirety of the product or service that AT&T provides for resale is identical to AT&T's corresponding retail offering. In the case of 911 services, this includes payment of 911 surcharges. McPhee Direct at 10 (Tr. 423), lines 13-16. Just as AT&T collects the surcharge amounts from its retail customers and pays them to the E911 authority that imposes the surcharge, so AT&T collects the surcharge amounts from resellers of AT&T 911 services and pays those amounts to the authority that imposes the surcharge; the reseller, in turn, recovers the surcharge amounts from the customers to whom it provides the resold AT&T service. CA wants to change this, however – at least in the scenario where it has facilities-based customers as well as resale customers.

CA claims that the established system does not work (at least in the situation in which CA provides facilities-based service as well as resold AT&T service) because "AT&T does not provide any way for CA to determine the county for each resale line for which AT&T bills the E911 surcharge on its bill. Therefore, it is impossible for CA to deduct the resale lines from its monthly filings and payments to the Florida 911 Board . . . ." Ray Direct at 33 (Tr. 54), lines 7-10. That cannot be right. Surely CA knows who its customers are and where they reside, as well as which ones are facilities-based and which are resale customers. If CA did not know where its resale customers reside, how could it know the appropriate surcharge amounts to bill its customers, and what amounts to remit to each of the different municipalities? Furthermore, CA must be able to discern from its billing records which of its customers are facilities-based and which are resale – which in turn would allow CA to remit E911 surcharges only on the lines of its facilities-based customers. McPhee Direct at 12 (Tr. 425), line 14 – 13 (Tr. 426), line 3.

And indeed, in its Response to AT&T Interrogatory 84 (Exh. 21), CA stated, "CA can identify where its customers are and which county they are in." Therefore, and contrary to Mr. Ray's assertion (Ray Direct at 33 (Tr. 54), lines 9-10), it *is* possible for CA to "deduct the resale lines from its monthly filings and payments to the Florida 911 board which are county-specific." McPhee Rebuttal at 3 (Tr. 454), lines 22–27. By doing so, like every other CLEC that purchases AT&T's resale services, CA would eliminate its purported concern about possible double-payments. *See* Ray Direct at 33 (Tr. 54), lines 11-12. There should be no double-payments. AT&T's process of remitting E911 surcharges for resale services provided to all other carriers in the state of Florida has not resulted in those other carriers double-paying E911 surcharges, and there is no reason it should have that effect on CA. McPhee Rebuttal at 3 (Tr. 454), lines 27-29.

Finally, AT&T provides resellers clear guidelines delineating each party's responsibilities with respect to remitting E911 surcharges and fees. In AT&T's online resource guide for CLECs, CLEC Online, AT&T provides E911 technical documents, including one titled "CLEC Users Guide to E911 for Facilities Based Providers." McPhee Direct at 13 (Tr. 426), lines 4–9. Section 2 is titled Roles and Responsibilities and states in pertinent part:

CLEC Responsibilities

1. The CLEC has a responsibility to contact the county / parish to determine the following information:

    - Default ESN (The default ESN is a 3-digit number that translates to a specific PSAP where calls are routed in case the CLEC cannot deliver ANI from their switch to the AT&T E911 tandem).

    - Surcharge information - Surcharge information refers to the money billed by the CLEC on behalf of the county / parish to their customers for providing E911 service. The CLEC must also obtain information from the county / parish in order to remit these surcharges back to the county / parish. A list of county/parish coordinators can be found on the NENA Website at http://www.nena.org. Click on Chapters and Contacts for the state for which you need information.

NOTE:

- **Resale CLECs:** AT&T will bill Resale Providers the applicable 911/E911 surcharges who will remit to AT&T; AT&T will then remit surcharges to the appropriate county / parish.

This guidance, which addresses each party's obligations with respect to payment of E911 surcharges, is available to all carriers that purchase E911 services from AT&T Florida. Consistent with those statements of responsibility, AT&T bills the resale purchaser (CA, in this instance), and then remits the charges to the appropriate E911 government authority. McPhee Direct at 13 (Tr. 426), line 9 – 14 (Tr. 427), line 8.

CA will not be at risk of double-paying if it complies with these Guidelines that apply equally to every reseller in Florida. The Commission should reject as unreasonable CA's proposed language for E911 § 5.2.2.

ISSUE 34: Should CA be required to interconnect with AT&T Florida's E911 Selective Router?

Affected contract language: E911 3.3.2; E911 4.1-4.3.4

AT&T Position: Yes. AT&T provides 911 service to certain PSAPs. All 911 calls to those PSAPs must be routed through AT&T. CA should be required to send those calls directly to AT&T, because routing the calls to AT&T through a 911 aggregator would introduce an additional, and unnecessary, point of failure.

Because CA has displayed a misunderstanding of AT&T's position (*see* McPhee Rebuttal at 4 (Tr. 455), lines 17-23), we begin with a summary of the logic of that position, and then elaborate. As AT&T witness McPhee explained in his rebuttal testimony (at 4 (Tr. 455), line 23 – 5 (Tr. 456), line 24), the basics of AT&T's position are as follows:

- Some Florida E911 customers (governmental authorities or PSAPs)[66] contract with AT&T to furnish their E911 service, and other Florida E911 customers contract with other providers, such as Intrado, to furnish their E911 service.

[66] A PSAP is a Public Safety Answering Point, which obtains E911 network services from AT&T (or another provider) and answers E911 calls. McPhee Direct at 14 (Tr. 427), line 23 – 15 (Tr. 428), line 3. AT&T refers to "PSAP" and "E911 customer" interchangeably. *Id*. at 15 (Tr. 428) n.5.

- In areas where the E911 customer contracts with a provider of E911 service other than AT&T (*e.g.*, Intrado), then of course CA should interconnect with that provider, rather than with AT&T, for the routing of CA's end user customers' E911 calls to that E911 customer in that area.

- In areas where the E911 customer contracts with AT&T to provide 911 network service, on the other hand, the E911 customer has no contract with another provider to provide that service. Consequently, all E911 calls in such areas must be routed to the PSAP through AT&T.

- In this scenario, where all E911 calls must be routed to the PSAP through AT&T, CA apparently wants to interconnect with a third-party aggregator for the transmission of CA's end users' E911 calls. However, the aggregator would merely function as a middleman between CA and AT&T – because, ultimately, CA's end users E911 calls would still have to be routed to the PSAP by AT&T.

- The introduction of the third-party aggregator into the call path would imperil the reliability of the E911 system.

- To ensure against that danger, the Commission should require CA to directly connect with AT&T in those areas where AT&T is the E911 agency's designated service provider, rather than sending the traffic through an aggregator to AT&T.

A carrier that provides E911 network services, such as AT&T, typically provides a complete service platform. Three integrated components provide the routing and transmission of an E911 call. The first is a Selective Router ("SR"), which is a specialized switch used to route a 911 call to the proper PSAP based upon the number and location of the call. Second, the Automatic Location Identification ("ALI") (or E911) database contains end user information, such as the caller's telephone number, the address/location of the telephone, and sometimes additional emergency services information that is automatically displayed at the PSAP during an emergency call. The third component is the network facilities used to connect the PSAP to the SR and to the ALI database. McPhee Direct at 15 (Tr. 428), line 17 – 16 (Tr. 429), line 4.

When a CLEC's end user customer calls 911, the CLEC must route the call to the appropriate PSAP. Where AT&T is the PSAP's designated E911 network service provider, the CLEC routes its customer's E911 call from its end office switch that serves the calling party to

AT&T's Selective Router. The emergency call contains Automatic Number Information ("ANI") within the SS7 data associated with the call, and the SR performs a lookup of the ANI information in order to find the associated Emergency Services Number ("ESN") via a Telephone Number/ESN translation table. Based on the ESN, AT&T switches the call, via a dedicated trunk, to the appropriate PSAP. Once the PSAP receives the call, ANI information is sent to the ALI processor for retrieval of the end user subscriber's information, which is then displayed on a screen at the PSAP for use by the E911 operator. From there, and based upon the caller's needs, the PSAP operator may transfer the call to the appropriate responding agency, *e.g.*, fire, police or ambulance. *Id.* at 16 (Tr. 429), lines 8-20.

When AT&T is the E911 network service provider for a particular PSAP in a particular area, that PSAP does not contract with other E911 network service providers in that area. *Id.* at 16 (Tr. 429), line 21 – 17 (Tr. 430), line 5.

AT&T does not seek to require CA to use AT&T to connect to all 911 or E911 services in Florida; the E911 Attachment only applies where AT&T is the authorized provider of E911 network services to the PSAP. *Id.* at 14 (Tr. 427), line 18 – 15 (Tr. 428), line 1. Each PSAP (or other E911 customer) contracts with a single service provider for E911 network services, and all other carriers connect to that provider for purposes of routing their 911 calls to the PSAP. *Id.* at 15 (Tr. 428), lines 1-4; 16 (Tr. 429), line 21 – 17 (Tr. 430), line 5. AT&T is the designated 911/E911 service provider for many E911 customers. Other E911 customers in Florida contract with different service providers, such as Intrado or CenturyLink. *Id.* at 15 (Tr. 428), lines 3-6. If CA has end user customers in the E911 service areas served by one of those carriers, then CA would presumably obtain those E911 services from that carrier. *Id.* at 15 (Tr. 428, lines 6-8.

The E911 Attachment includes a number of provisions that describe the routing of E911 traffic. All the language in those provisions is agreed, except that CA proposes to insert the words "***Where it [CA] chooses to purchase E911 service from AT&T-21STATE***" in front of each provision. That language should be rejected because it is the E911 customer (the county or the PSAP) – not CA – that chooses the company that will be the E911 service provider in a particular area. In those areas where the E911 customer has chosen AT&T, CA should be required to respect that choice by routing its end users' E911 calls directly to AT&T. McPhee Rebuttal at 6 (Tr. 457), lines 5-12.

CA's proposed language, however, would allow CA to route its traffic to AT&T's Selective Routers not directly, but through an intermediary – a so-called "aggregator" that acts as a middleman between CA's network and AT&T's E911 tandem. The Commission should reject CA's proposal, because the use of such a middleman would imperil the public safety by introducing an unnecessary point of potential failure into the call flow for E911 calls made by CA's end user customers. McPhee Direct at 17 (Tr. 430), lines 10-11.

All 911 calls should be delivered to the correct PSAP with the information about the caller's location transmitted expeditiously. However, every time another carrier is introduced into a call sequence, another point of potential failure is introduced as well, and thus increases the risk that a call will be delivered to the wrong PSAP or without the caller's location, which would delay the dispatch of emergency assistance. *Id.* at 17 (Tr. 430), lines 16-21. Additionally:

- There are no mechanisms to ensure that third party 911 aggregators have sufficient trunking capacity. Insufficient trunking capacity could result in call blockage (*i.e.*, in 911 calls failing to complete). *Id.* at 17 (Tr. 430), lines 21-24.

- 911 aggregation increases the risk of call blockage due to a trunking maintenance problem of the trunking provider and/or intermediate carriers that switch and/or transport the 911 traffic for eventual connection to AT&T Florida's selective router and the responsible PSAP. *Id.* at 17 (Tr. 430), line 24 – 18 (Tr. 431), line 2.

- If an aggregator mixes different types of traffic on the same trunk group *e.g.*, wireless, VoIP, and traditional landline, any default routing requested by the PSAP could be negated, resulting in misrouted 911 calls. *Id*. at 18 (Tr. 431), lines 3-8.[67]
- Call aggregation increases the difficulty of tracing a call to the originator in an emergency situation when call data is not available and/or not correct in the E911 database. *Id*. at 18 (Tr. 431), lines 8-10.

CA's arguments on this issue are unpersuasive. CA notes that several counties direct CLECs to interconnect with Intrado, rather than AT&T, for E911 service. Ray Direct at 34 (Tr. 55), lines 4-5. That does not undermine AT&T's position in the slightest, because AT&T does not claim it is the E911 service provider for all PSAPs in Florida, but only that where it is, CA should send its customers' 911 calls to AT&T directly.

CA also misses the mark when it asserts, "AT&T seems to be arguing that CA can send 911 traffic wherever it likes, but must still maintain expensive 911 trunks to AT&T anyway." Ray Rebuttal at 35 (Tr. 107), lines 7-8. CA seems to think that AT&T wants it to interconnect with AT&T for the transmission of E911 calls even in areas where the E911 customer – the county, for example – has designated a provider other than AT&T as the E911 service provider. That simply is not the case, and nothing in the E911 Attachment suggests it is. AT&T's position is simply that in those areas where the E911 customer has designated AT&T as the E911 service provider, CA should be required to directly connect with AT&T's Selective Router *rather than sending its traffic to AT&T through a third party aggregator of E911 traffic.*

[67] Default routing is where a PSAP pre-arranges to alternately route its traffic to another PSAP in the event that the first PSAP is out of service (*e.g*., night closedown) or all of its 911 trunks are in use. That second PSAP will have an established method of handling those emergency calls, and the two PSAPs work together to handle these situations. If the second PSAP were to receive a call that it was ill-prepared to deal with, then additional time would be required to route the 911 caller to the correct PSAP in order to dispatch first responders from the correct jurisdiction. Each PSAP that has default routing established as part of its 911 service adds complexity and cost to providing 911 service, because trunk groups for each default-routed PSAP must use unique routes. A PSAP may even have different default routes for wireless traffic than it does for wireline traffic, which is under the control of the given PSAP, not AT&T. McPhee Direct at 18 (Tr. 431), line 14 – 19 (Tr. 432), line 2.

Finally, CA's claim that AT&T's 911 infrastructure is "antiquated" and "inferior" (Ray Direct at 33 (Tr. 54), lines 20, 23), in addition to being incorrect, is irrelevant. Again, the issue is how traffic should be routed in areas where the E911 customer has chosen AT&T as its provider of E911 network services, and where the traffic will therefore, by definition, make use of AT&T's E911 network.

The Commission should reject CA's proposed language for the E911 Attachment that would allow CA to imperil the reliability of the E911 system by sending its E911 traffic to AT&T through an aggregator in those areas where AT&T is the PSAP's (or other E911 customer's) designated E911 network service provider.

ISSUE 35: Should the definition of "Entrance Facilities" exclude interconnection arrangements where the POI is within an AT&T Florida serving wire center and CA provides its own transport on its side of that POI?

Affected contract language: Net Int. 2.9

AT&T Position: No. The parties' agreed language appropriately defines Entrance Facilities. CA's additional language is a clumsy attempt to inappropriately expand the definition to include intra-building facilities and then argue that CA should not have to pay for them – even though CA has elsewhere agreed to pay for intra-building facilities.

Agreed language in Net. Int. § 3.3 gives CA three ways to establish interconnection with AT&T: collocation, leased entrance facilities, and fiber meet point. If CA elects the leased entrance facilities option (section 3.3.2), it may self-provision the facilities, lease them from another carrier, or lease Entrance Facilities from AT&T (section 3.3.2.1). Pellerin Direct at 66 (Tr. 237), lines 13-17.

The parties have agreed to the following definition:

> "Entrance Facilities" are the transmission facilities (typically wires or cables) that connect CLEC's network with AT&T-21STATE's network for the mutual exchange of traffic. These Entrance Facilities connect CLEC's network from CLEC's Switch or point of presence ("POP") within the LATA to the AT&T-21STATE Serving Wire Center of such Switch or POP

> for the transmission of telephone exchange service and/or exchange access service.

CA proposes to add the following language, to which AT&T objects:

> ***Entrance Facilities do not apply to interconnection arrangements where the mutually-agreed Point of Interconnection ("POI") is within an AT&T-21STATE Serving Wire Center, and CA provides its own transport on its side of that POI.***

CA has provided no comprehensible justification for its proposed language. CA has stated:

> AT&T's definition of entrance facilities implies that AT&T could charge for entrance facilities regardless of where the POI is located, when it should only be entitled to charge for actual entrance facilities where the POI is *not* within an AT&T central office. Ray Direct at 34 (Tr. 55), lines 12-14. (Emphasis added).

As demonstrated below, that is wrong and makes no sense – and neither does CA's proposed contract language – because the only time AT&T would charge CA for an Entrance Facility is when the POI *is* within an AT&T central office. It appears that CA misunderstands what Entrance Facilities are and the options CA has to interconnect with AT&T. Pellerin Direct at 67 (Tr. 238), lines 12-16.

CA may establish a POI that is not located in an AT&T central office. Specifically, CA may request interconnection using a fiber meet point arrangement pursuant to Net. Int. § 3.3.3, in which case the POI will be at a designated manhole outside AT&T's central office building.[68] *Id.* at 67 (Tr. 238), lines 17-21. Pursuant to Net. Int. § 3.3.3.7, CA would be responsible to bring its own fiber to the designated manhole (*i.e.*, the POI), and AT&T would (at its own expense) pull CA's fiber through to the cable vault inside the building. In this fiber meet scenario, there is

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[68] Net. Int. § 3.3.3.7.

no Entrance Facility as the parties have defined that term, so of course AT&T would not charge for Entrance Facilities. *Id.* at 67 (Tr. 238), line 23 – 68 (Tr. 239), line 5.

CA has stated that "[t]he POI should be the actual building,"[69] but an AT&T building cannot be the POI. Consistent with federal law (see discussion of Issue 38), the parties have agreed in Net. Int. § 2.26 that a POI is a point on the AT&T network. That point may be within an AT&T end office or tandem building, but the building itself cannot be a POI, because it is not a point on AT&T's network; it houses equipment that is part of the network, but the building itself is not network equipment. The POI would be at a physical piece of AT&T's equipment within the building to which both parties connect their facilities, such as a cross-connect point on a distribution frame. And as discussed in connection with Issue 38, CA is responsible to provide the facilities to connect its network with AT&T's network at the POI, even when CA is collocated in the same building where it has established the POI. Pellerin Direct at 68 (Tr. 239), lines 6-16.

Just as the POI cannot be an AT&T building, so it cannot be CA's collocation space within an AT&T building. CA's collocation space is not part of AT&T's network any more than the building itself is. *Id.* at 68 (Tr. 239), lines 17-19. See discussion of Issue 38.

When CA collocates for the purpose of interconnection (Net. Int. § 3.3.1), the parties have agreed to language stating that CA is responsible for the facilities to connect from the collocation space to the demarcation point designated by AT&T.[70] Those intra-building facilities are not "Entrance Facilities" as the ICA defines that term. Consequently, AT&T will

[69] CA Response to Staff Interrogatory 7 (Exh. 7).

[70] See, for example, Attachment 12, sections 3.34.1.3 and 3.35.1.3.

not charge CA for entrance facilities when CA collocates with AT&T. Pellerin Direct at 68 (Tr. 239), line 21 – 69 (Tr. 240), line 6.

The only situation in which AT&T will bill CA for Entrance Facilities pursuant to the ICA is the situation described in Net. Int. § 3.3.2.1:

> When CLEC does *not* elect to collocate transport terminating equipment at an AT&T-21STATE Tandem or End Office, CLEC may self provision facilities, deploy third party interconnection facilities, *or lease existing Entrance Facilities from AT&T-21STATE.* (Emphasis added.)

That is, AT&T will provide CA with Entrance Facilities – and bill for Entrance Facilities – *only* when the POI is within an AT&T central office and CA does not collocate in that office. AT&T will not provide CA with Entrance Facilities (or bill for them) when CA collocates transport terminating equipment or leases facilities from another carrier or self-provisions. Pellerin Direct at 69 (Tr. 240), lines 7-18.

Against this background, consider CA's proposed language:

> ***Entrance Facilities do not apply to interconnection arrangements where the mutually-agreed Point of Interconnection ("POI") is within an AT&T-21STATE Serving Wire Center, and CA provides its own transport on its side of that POI.***

It may be that all CA intends by that language is that AT&T will not charge CA for Entrance Facilities when CA collocates. If that is all CA intends, the language is unnecessary, because, as discussed above, there are no Entrance Facilities, and there are therefore no Entrance Facility charges, when CA collocates. Thus, at a minimum, CA's language is unnecessary. Worse, though, is that the language is confusing and vague.

In the first place, it is not clear what "Entrance Facilities do not apply" actually means, so CA's proposed language is open to differing interpretations. Does it mean that CA cannot order Entrance Facilities? Does it mean that CA may order Entrance Facilities but AT&T may not charge for them? Does it mean that AT&T may not charge CA for any intra-building facilities,

even when those facilities are not Entrance Facilities? If the answer to that last question is yes, CA's language is downright wrong (not just unnecessary), because the parties have agreed that CA is responsible for all transport facilities on its side of the POI, regardless of whether CA provides the facilities itself, leases them from another carrier, or leases them from AT&T.[71] In light of that agreed responsibility, CA's proposed language stating that "Entrance Facilities do not apply" when CA "provides its own transport," is confusing and could be interpreted to include when CA leases facilities from AT&T. This would contradict other ICA provisions, and would thus create an internal inconsistency within the ICA, which of course must be avoided. Pellerin Direct at 69 (Tr. 240), line 23 – 70 (Tr. 241), line 10.

Further, in response to Staff's Interrogatories 7 and 8, which are related to this Issue 35, CA describes a Terra Nova collocation scenario for which CA states it does not believe Terra Nova should be charged for facilities within AT&T's central office.[72] CA stated that its proposed language is intended to address the Terra Nova collocation scenario, as CA has described it, and to eliminate CA's responsibility to pay for any facilities within AT&T's central office. As explained above, however, collocation and Entrance Facilities are mutually exclusive, so CA's language would not accomplish what it apparently seeks to accomplish. CA's confusion on this matter makes CA's proposed language ripe for future dispute. Pellerin Direct at 70 (Tr. 241), lines 11-19.

CA has offered no persuasive explanation for its proposed language for Net Int. § 2.9. As noted above, Mr. Ray stated that "AT&T's definition of entrance facilities implies that AT&T

[71] Net. Int. section 3.2.2 states: "[E]ach Party is financially responsible for the provisioning of facilities on its side of the negotiated POI(s). Each Party is responsible for the appropriate sizing, operation and maintenance of the transport facility to its side of the POI(s)."

[72] See Exhs. 7 and 8.

could charge for entrance facilities regardless of where the POI is located" (Ray Direct at 34 (Tr. 55), lines 12-13), but that is distinctly unpersuasive. In the first place, it is not "AT&T's" definition of Entrance Facilities; the definition of that term is agreed. Furthermore, the agreed definition says nothing about when AT&T would or would not charge for Entrance Facilities; all it does is define the term, which is what a definition is supposed to do. The terms and conditions for CA's interconnection with AT&T using Entrance Facilities are set forth in Net. Int. § 3.3.2, and the associated rates are in the Pricing Sheets. If CA interconnects with AT&T via collocation (section 3.3.1) or meet point (section 3.3.3), and not by leasing Entrance Facilities (section 3.3.2), then of course AT&T will not charge for Entrance Facilities.

The Commission should reject CA's proposed additional language for Net Int. § 2.9, which is confusing, open to differing interpretations, is inconsistent with and contradicts other agreed language, and would likely lead to disputes.

ISSUE 36: Should the network interconnection architecture plan section of the ICA provide that CA may lease TELRIC-priced facilities to link one POI to another?

Affected contract language: Net Int. 3.2.4.6

AT&T Position: No. Section 3.2.4 addresses *when* and *where* CA shall establish POIs; it does not (and need not) address *how*. Section 3.3 provides the terms pursuant to which CA may establish interconnection, and section 3.3.2 provides for CA's use of leased facilities. CA's additional language in section 3.2.4.6 should be rejected.

Section 3.2.4.6 of the Network Interconnection attachment is in the portion of that attachment (namely, section 3.2) that concerns the network interconnection plan. Sections 3.2.4.2 through 3.2.4.4 state that CA may establish a single POI per LATA, and section 3.2.4.5 provides the criteria pursuant to which CA is obligated to add an additional POI. Pellerin Direct at 71 (Tr. 242), lines 11-19. Section 3.2.4.6 is as follows:

> 3.2.4.6 The additional POI(s) will be established within ninety (90) calendar days of notification that the threshold has been met. ***CA may lease facilities from AT&T as Dedicated Transport - Interoffice Channel from an existing POI to the additional POI for this purpose***.

AT&T objects to CA's proposed language (in bold italics) because it has nothing to do with the parties' network architecture plan, is not necessary, and introduces an ambiguity that could lead to disputes. Pellerin Direct at 71 (Tr. 242), lines 20-22.

Net. Int. § 3.2 sets forth overarching terms and conditions regarding how the parties will interconnect. It generally describes AT&T's network and provides that the parties will agree to and document a physical architecture plan for each area (section 3.2.1) and states how the parties will handle changes to the plan (section 3.2.5). It describes the parties' physical and financial responsibilities associated with the interconnection arrangement CA selects (sections 3.2.2 and 3.2.6), as well as how foreign exchange ("FX") services will be handled (section 3.2.3). It provides the terms for establishment of one or more POIs in a LATA (section 3.2.4). And it sets forth the technical interfaces the parties will use (section 3.2.7). It does not include the specific interconnection methods available to CA (the how), which are set forth in section 3.3, nor does it include any pricing (the how much), which is in the Pricing Sheets and/or relevant tariffs. *Id*. at 71 (Tr. 242), line 25 – 72 (Tr. 243), line 10.

CA's proposed language for section 3.2.4.6 is unnecessary (at a minimum) because CA's options for interconnecting with AT&T, including the establishment of one or more POIs, are set forth in Net. Int. § 3.3, which is an agreed provision. Specifically, CA may collocate in an AT&T central office (section 3.3.1); it may lease facilities from AT&T, lease them from another carrier, or self-provision them (section 3.3.2); or it may establish a fiber meet point (section 3.3.3). In light of those provisions, CA's proposed language setting forth options for

interconnecting at an additional POI in section 3.2.4.6 is at best unnecessary. *Id*. at 72 (Tr. 243), lines 11-21.

CA's proposed language is also potentially confusing, because it is not clear what it means when it refers to "Dedicated Transport – Interoffice Channel" that CA may lease to establish an additional POI. "Dedicated Transport – Interoffice Channel" is available as an unbundled network element ("UNE") pursuant to section 251(c)(3), and it is also a separate rate element for the purpose of interconnection pursuant to section 251(c)(2). CA's language fails to recognize the distinction. *Id*. at 72 (Tr. 243), line 22 – 73 (Tr. 244), line 4.

That vagueness is problematic because the availability and use criteria for UNEs and interconnection are different. Specifically, CA may use a UNE for many purposes,[73] including interconnection, but unbundled Dedicated Transport – Interoffice Channel is only available when the requested route is impaired.[74] In contrast, while there is no impairment test for availability of interconnection facilities, there are strict criteria regarding their use.[75] *Id.* at 73 (Tr. 244), lines 5-13. In its testimony, though, CA stated its desire for UNE rates, not that it seeks to use a local interconnection facility to connect to the additional POI. Ray Direct at 35 (Tr. 56), lines 1-7.

The foregoing argument appeared in full in the direct testimony of AT&T witness Pellerin (at 71 (Tr. 242), line 5 – 73 (Tr. 244), line 16). CA offered no rebuttal testimony. The Commission can reasonably infer that CA has no plausible answer to AT&T's argument.

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[73] There are limited exceptions. For example, a CLEC is not entitled to UNEs for the sole purpose of providing information services (see Issue 1) or for self-provisioning service to itself, nor are UNE DS1 and DS3 loops available in non-impaired wire centers.

[74] Terms and conditions for UNE DS1 and DS3 Dedicated Transport are set forth in section 9 of the UNE attachment.

[75] See Net. Int. §§ 3.3.2.2 and 3.3.2.3.

The Commission should reject CA's proposed additional language for Net. Int. § 3.2.4.6 because it is at best unnecessary and at worst confusing and could lead to disputes.

ISSUE 37: Should CA be solely responsible for the facilities that carry CA's OS/DA, E911, Mass Calling, Third Party and Meet Point trunk groups?

Affected contract language: Net Int. 3.2.6

AT&T Position: Yes. Because OS/DA, E911, Mass Calling and Third Party Trunk Groups are used for ancillary services for the benefit of CA's customers, and not for the mutual exchange of traffic between the parties, CA should be solely responsible for the facilities that carry those trunk groups.

Issue 37 concerns Net. Int. § 3.2.6, which reads as follows, with the italicized language proposed by CA and opposed by AT&T:

> CLEC is solely responsible, including financially, for the facilities that carry Operator Services/Directory Assistance ("OS/DA"), E911, Mass Calling, Third Party and Meet Point[76] Trunk Groups ***on its side of the Point of Interconnection ("POI")***.

CA should be solely responsible for the facilities that carry its OS/DA, E911, Mass Calling and Third Party trunk groups – and that responsibility should not end at the POI – because the facilities are used by CA for the sole benefit of its own customers, and not for the mutual exchange of traffic with AT&T. Pellerin Direct at 74 (Tr. 245), lines 16-22.

AT&T presented extensive direct testimony on this issue concerning each type of facility referenced in section 3.2.6. *Id.* at 75 (Tr. 246), line 13 – 77 (Tr. 248), line 16. However, CA has declared that the disagreement only concerns facilities that carry E911 trunk groups. Ray Direct at 35 (Tr. 56), lines 13-17 ("If AT&T omitted 911 trunks from this language, CA would have no objections."). Accordingly, CA's proposed language for section 3.2.6 must be regarded as

[76] Because the network interconnection attachment was drafted to accommodate interconnection with AT&T ILECs in 21 states, it includes numerous references to both Third Party and Meet Point Trunk Groups. Third Party Trunk Groups are applicable in AT&T's Southeast region (section 4.3.6), including Florida, while Meet Point Trunk Groups are used in AT&T's 12-state region. Any references in the ICA to Meet Point Trunk Groups will not apply to CA in Florida. Pellerin Direct at 74 (Tr. 245) n.25.

rejected as it pertains to facilities that carry OS/DA, Mass Calling, Third Party and Meet Point Trunk Groups, and this brief will only discuss why it should also be rejected as it pertains to facilities that carry E911 trunk groups.

Financial responsibility for local interconnection facilities is divided at the POI, with each party responsible for facilities on its side of the POI. But the facilities on which E911 trunk groups ride are not local interconnection facilities. Pellerin Direct at 75 (Tr. 246), lines 5-7. The FCC has defined interconnection as "the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic."[77] In the case of E911 trunk groups, there is no "mutual exchange of traffic." These trunk groups carry ancillary services (Net. Int. § 4.1.2), separate and apart from the local interconnection trunks (§§ 4.3.1 and 4.3.3).[78] The POI is not the demarcation point between the parties' networks for ancillary services. Pellerin Direct at 75 (Tr. 246), lines 7-12.

CA's proposal that its financial responsibility for the facilities used for its E911 traffic end at the POI directly conflicts with agreed language in the E911 attachment:

Attachment E911, section 4.2.1 states:

> CLEC shall be financially responsible for the transport facilities to each AT&T-21STATE E911 SR [Selective Router] that serves the Exchange Areas in which CLEC is authorized to and will provide Telephone Exchange Service.

And E911 section 4.2.5 states:

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[77] 47 C.F.R. § 51.5.

[78] CA witness Ray indicated that "911 is generally accepted to be included as a component of local interconnection." CA Response to Staff Interrogatory 50 (Exh. 27, p. 18). AT&T witness Pellerin disagreed. Pellerin Dep. (Exh. 47) at 54, line 4 – 55, line 7. If CA believed 911 is a component of local interconnection, one can only wonder why CA agreed to language in Network Attachments §§ 4.1.2, 4.3.1 and 4.3.3 that identifies E911 as an ancillary service separate and distinct from local interconnection.

> CLEC shall maintain facility transport capacity sufficient to route 911 traffic over trunks dedicated to 911 Interconnection between the CLEC switch and the AT&T-21STATE E911 SR.

AT&T's selective router ("SR") is not a POI. E911 section 2.13 defines AT&T's SR as "the equipment used to route a call to 911 to the proper PSAP based upon the number and location of the caller." In other words, the SR is a switch specially equipped to handle the proper routing of E911 calls – it is not a POI. Pellerin Direct at 76 (Tr. 247), lines 1-18.

The only argument CA has advanced in support of its position is that AT&T would supposedly be double-billing if CA paid for E911 trunks because "the county historically pays for 911 trunks on the AT&T side of the POI." Ray Direct at 35 (Tr. 56), lines 13-17. CA is confused. The provision at issue here – Net. Int. § 3.2.6 – says nothing about who pays for *trunks*, and AT&T is not saying CA should pay for E911 trunks. The issue is about the *facilities* over which trunks ride, and the public safety agencies do not pay for the facilities between CA and AT&T's selective router. Pellerin Rebuttal at 37 (Tr. 303), lines 15-21.

The Commission should reject CA's language that would improperly make AT&T financially responsible for a portion of the facilities that carry CA's ancillary services trunks. CA has conceded the point with respect to everything except E911 facilities, and its position with respect to E911 facilities is untenable.

ISSUE 38: May CA designate its collocation as the POI?

Affected contract language: Net Int. 3.4.4

<u>AT&T Position</u>: No. Under controlling federal law, the point of interconnection ("POI") must be on AT&T's network. CA's collocation cannot be the POI, because CA's collocation is not on AT&T's network.

This issue arises from Net. Int. § 3.4.4, which reads as follows, with agreed language in normal font and language proposed by CA in bold italics:

> 3.4.4 The Parties recognize that a facility handoff point must be agreed upon to establish the demarcation point for maintenance and provisioning responsibilities for each Party on its side of the POI. ***If the POI is a collocation arrangement within an AT&T Wire Center, then the demarcation point shall be that collocation***.

CA's proposed language must be rejected, because it assumes that the collocation arrangement may be the POI, which it cannot be.

Section 251(c)(2)(B) of the 1996 Act requires that interconnection be "at any technically feasible point ***within the [incumbent] carrier's network***." 47 U.S.C. § 251(c)(2)(B) (emphasis added). Accordingly, the FCC, in its 1996 *Local Competition Order*,[79] noted (at ¶ 209) that section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point "***on that network***" (emphasis added), and promulgated 47 C.F.R. § 51.305(a)(2), which requires interconnection "[a]t any technically feasible point ***within the incumbent LEC's network***." (Emphasis added.) In light of this, it is a fundamental principle of interconnection under the 1996 Act that while the requesting carrier may designate any technically feasible point on the ILEC's network as the POI, the POI *must* be on the ILEC's network.

CA's proposed language contemplates that the POI may be CA's "collocation arrangement" in AT&T's central office, or wire center – a building that houses AT&T switches and related network equipment, as well as collocating carriers' equipment.[80] When CA physically collocates with AT&T, it places its equipment within its leased collocation space, and CA's equipment is connected with AT&T's equipment in order to establish interconnection or to

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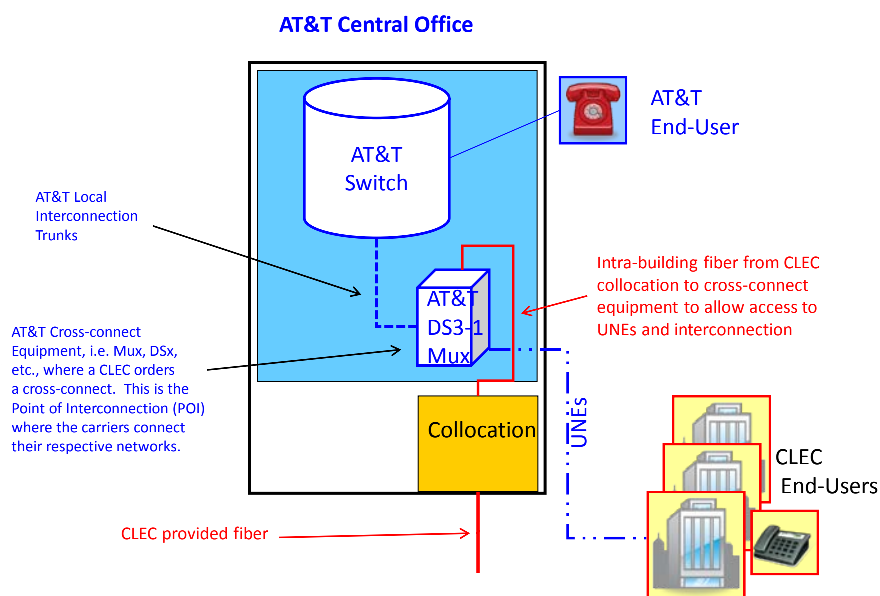
[79] First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

[80] The ICA defines "Wire Center" as follows, in GT&C § 2.165: "'Wire Center' means the location of one (1) or more local switching systems. It is also a point at which End User's loops within a defined geographic area converge. Such local loops may be served by one (1) or more Central Office Switches within such premises."

give CA access to unbundled elements of AT&T's network. With a physical collocation arrangement, CA's personnel have access to and maintain CA's equipment. Below in Figure 1 is a diagram illustrating a physical collocation. Neinast Direct at 4 (Tr. 489), line 13 – 5 (Tr. 490), line 7.[81]

FIGURE 1



Given the FCC's Rule that the POI must be on AT&T's network, it is immediately apparent that the POI cannot be the "collocation arrangement," as CA's language mistakenly states. In the first place, a "collocation arrangement" is not a location; it is an arrangement. But putting that aside, and assuming that what CA means is that the POI will be the location in the AT&T building where CA is collocated, that location cannot be the POI because it is not "within the incumbent LEC's network," which is where FCC Rule 51.305(a)(2) requires the POI to be.

[81] If physical collocation is not practical for technical reasons or because of space limitations in the AT&T wire center, AT&T may instead provide virtual collocation. In a virtual collocation arrangement, the CLEC equipment is placed in the ILEC's central office, but the ILEC (rather than the CLEC) installs it, configures it and maintains it. *Id.* at 5 (Tr. 490) , lines 8-12.

In Figure 1, for example, the AT&T switch, the AT&T local interconnection trunks, and the AT&T cross-connect equipment depicted as a DS3-1 Mux are parts of AT&T's network. Neinast Direct at 6 (Tr. 491), lines 5-12. The building itself, however, is not part of the network (rather, it houses part of the network), and neither is the floor of the building or the space in the building. In particular, the space in which CA is collocated is not part of AT&T's network. And of course, CA's equipment in that space is not part of AT&T's network either; it is part of CA's network. Consequently, FCC Rule 51.305(a)(2) does not allow CA to designate that location as the POI. *Id.* at 6 (Tr. 491), lines 12-19.

In figure 1, the POI would be at the point where the cable running from CA's equipment in its collocation space meets AT&T's network; in other words, at the cross-connect equipment depicted as a cube in the middle of the figure. *Id.* at 6 (Tr. 491), line 20 – 7 (Tr. 492), line 3.

FCC Rule 51.305(a)(2), after stating that the POI must be at any technically feasible point "within the incumbent LEC's network," lists six such technically feasible points. AT&T's position is strikingly consistent with the FCC's list, and CA's language is strikingly inconsistent with it. The FCC's minimum list of technically feasible points of interconnection within the ILEC's network are

(i) The line-side of a local switch;

(ii) The trunk-side of a local switch;

(iii) The trunk interconnection points for a tandem switch;

(iv) Central office cross-connect points;

(v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and

(vi) The points of access to unbundled network elements as described in § 51.319.

Item (iv) on that list is where the POI would be in Figure 1 – the cross connect point in AT&T's central office. And all of the points on the FCC's list are clearly and indisputably **within** and "**on**" (to use the FCC's word in the *Local Competition Order*) AT&T's network.[82]

In contrast, the FCC's list of technically feasible points of interconnection does not include a collocation arrangement or anything like a collocation arrangement. The list does not include the ILEC's central office, or floor space within the ILEC's central office or, of course, a collocating carrier's equipment, since that equipment is part of the collocator's network, not the ILEC's.

The Commission need not concern itself with the reason it matters where the POI is, because the law is clear that a collocation arrangement cannot be the POI, regardless of the reason. The reason does make sense, however: By definition, each party bears financial responsibility for the equipment on its side of the POI. Neinast Direct at 7 (Tr. 492), lines 6-7. Because the POI is on the AT&T network, CA must bear the cost of all equipment on its side of the cross-connect depicted in Figure 1. Accordingly, CA must bear the cost of the cable running from the CA equipment in the collocation space to the AT&T cross-connect. *Id.* at 7 (Tr. 492), lines 7-10. If the POI were in the CA collocation space, as CA proposes, then AT&T would have to bear the cost of the cable between that space and the AT&T cross-connect equipment. *Id*. at 7 (Tr. 492), lines 10-12. That would be an anomaly, because the whole point of the FCC's requirement is that the CLEC must bring its network all the way to the ILEC's network – not just most of the way.

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[82] 47 C.F.R. § 51.319, to which item (vi) refers, is a list of the network elements to which ILECs must provide access on an unbundled basis. By definition, those UNEs are elements of – *i.e.* parts of – the ILEC's network. So, therefore, are the points of access to those UNEs to which item (vi) refers.

Not surprisingly, since its position is contrary to controlling federal law, CA has cited no statute, rule or other legal authority in support of its position, and what it has said is woefully unpersuasive. CA spoke of situations in which AT&T has supposedly claimed that the POI is somewhere other than where the parties had agreed. Ray Direct at 35 (Tr. 56), line 22 – 36 (Tr. 57), line 4. AT&T does not agree with Mr. Ray's depiction of those situations, but for present purposes, the important point is that CA should have no misunderstanding about where the POI is going to be under this ICA: It is going to be on AT&T's network just as the FCC requires – not on a piece of CA equipment in a collocation space near the AT&T network.

CA also stated that it is "not permitted to present interconnection circuits to AT&T anywhere else in the wire center other than a collocation" so that "AT&T's language would make it impossible for CA to actually meet AT&T at the POI." Ray Direct at 36 (Tr. 57), lines 9-11. That is preposterous. When CLECs collocate with AT&T for the purpose of establishing interconnection, the POI is routinely at the AT&T cross-connect exactly as depicted in Figure 1, and CLECs routinely pay for the intra-building fiber that runs from the collocation space to that AT&T equipment. If CA collocates, it will meet AT&T at the POI by means of the cable – paid for by CA, as it should be (and thus effectively part of CA's network) that runs from CA's collocated equipment to the AT&T cross-connect. Neinast Rebuttal at 2 (Tr. 502), line 26 – 3 (Tr. 503), line 5.

Desperate, CA contends that AT&T is arguing that "some rooms in its Central Office are on its network and others are not" (Ray Rebuttal at 37 (Tr. 109), lines 9-10), and then derides that argument. This grossly mischaracterizes AT&T's position. As AT&T has made clear from the outset – and consistent with the FCC's list of technically feasible points of interconnection – the AT&T network within which CA must interconnect is the system of connected pieces of

telecommunications equipment – switches, transport, and so forth – by means of which AT&T provides telecommunications service. It is not a building that houses that equipment; it is not the rooms in that building – not any of them; and it is not the space in that building in which CA collocates.

Finally, the Commission should not be confused by the FCC collocation rule about which Staff inquired at hearing. That rule, 47 C.F.R. § 51.323(d)(1) provides:

> When an incumbent LEC provides . . . collocation . . . the incumbent LEC shall:
>
> (1) Provide an interconnection point or points, physically accessible by both the incumbent LEC and the collocating telecommunications carrier, at which the fiber optic cable carrying an interconnector's circuits can enter the incumbent LEC's premises, provided that the incumbent LEC shall designate interconnection points as close as reasonably possible to its premises . . . .

The questioning about that rule suggested that the rule might support CA's position on Issue 38, on the theory that the rule requires interconnection points to be "physically accessible by both the incumbent LEC and the collocating telecommunications carrier" – which the collocation space is and AT&T's cross-connect equipment is not. Tr. 523, line 8 – 525, line 5. Upon examination, however, it is indisputable that the "interconnection point" that is the subject of this rule is not the same thing as the "point of interconnection" that is the subject of Issue 38, and that Rule 51.323(d)(1) has no bearing on Issue 38. Specifically:

1. Rule 51.323(d)(1) requires that the "interconnection point or points" be points "at which the fiber optic cable carrying an interconnector's circuits can enter the incumbent LEC's premises." Obviously a point within the ILEC's premises (such as the collocation space) is not a point at which cable enters the premises. Rather, as AT&T's witness explained, that point is a "manhole where the cable comes . . . into the building." Tr. 526, lines 4-19.

2. Rule 51.323 is a collocation rule, not an interconnection rule. It is Rule 51.305 (the rule that requires interconnection at a technically feasible point and that lists six technically feasible points of interconnection) that governs where the POI must be, and it would be bizarre indeed for the FCC to promulgate a separate rule governing POI location in the collocation portion of its rules.

3. The "interconnection points" that are the subject of Rule 51.323(d)(1) cannot possibly be the same thing as the "points of interconnection" that are the subject of Issue 38 and Rule 51.305, because if they were, then something would be terribly wrong with the FCC's list of technically feasible points of interconnection in Rule 51.305. Rule 51.305(a)(2)(iv) expressly states that the cross-connect point is an eligible point of interconnection. Undeniably, therefore, the "accessible by both the incumbent LEC and the collocating telecommunications carrier" language in Rule 51.323(d)(1) cannot be overruling that. For that matter, none of the six technically feasible points of interconnection listed in Rule 51.305(a)(2) is physically accessible by the collocating carrier.

4. There is only one possible conclusion: The "interconnection points" that are the subject of Rule 51.323(d)(1) are not the same thing as the "points of interconnection" that are the subject of Rule 51.305. As AT&T witness Neinast testified, the collocation rule – 51.323(d)(1) – is not talking about POIs in the sense of Issue 38. Tr. 526, line 25 – 527, line 2.

Thus, the Commission can comfortably disregard Rule 51.323 when it decides Issue 38. The Commission should reject CA's proposed language contemplating the "collocation arrangement as" a POI, because the collocation arrangement cannot possibly be the POI.

ISSUE 40: Should the ICA obligate CA to establish a dedicated trunk group to carry mass calling traffic?

Affected contract language: Net Int. 4.3.9

> **<u>AT&T Position</u>**: Yes. Mass calling trunks are necessary to minimize the risk that a mass calling event will cause an outage or otherwise harm the network. AT&T itself establishes segregated trunk groups for mass calling and reasonably expects all carriers with which it interconnects (including its affiliates) to do the same.

AT&T proposes ICA language that would require CA to establish trunk groups for mass calling traffic. CA objects to the proposed language.

Mass calling traffic (also called "High Volume Call In" or "HVCI" traffic) is traffic generated by a mass calling event, which is an event that generates an extraordinary volume of traffic to a particular phone number or numbers. Classic examples are a radio station contest in which a listener participates by calling a certain number at a specified time and call-in voting for a TV show like American Idol. Neinast Direct at 8 (Tr. 493), lines 12-17.

An extraordinary volume of traffic flowing to a single number, or several numbers served by a given end office switch, can overwhelm the network and lead to calls being blocked – including 911 calls. This is a concern of the highest order. As a 911 provider, AT&T is responsible for ensuring that no emergency 911 calls are blocked due to avoidable network situations. AT&T cannot run the risk of a mass calling event overwhelming an end office switch and preventing end users from obtaining a dial tone to call 911 or other emergency services. *Id.* at 8 (Tr. 493), line 19 – 9 (Tr. 494), line 2.

There is a sound basis for AT&T's concern about the possible dire consequences of a mass calling event. In July 1992, for example, the AT&T network in Oklahoma was overloaded with more than 320,000 calls in one hour by fans trying to buy tickets to a Garth Brooks concert. During that time, a man tried to call 911 when his wife suffered a heart attack. After a number of attempts resulting in a busy signal, he dialed 0 for the operator, but his wife died before an ambulance could respond. *Id.* at 9 (Tr. 494), lines 3-8.

On October 16, 2002, there was a significant HVCI event in the AT&T California network. The event was caused by media advertisements that caused the public to initiate calls to purchase World Series tickets. Two AT&T California access tandems experienced significant degradation during the event (both switches went into "machine congestion"; call register capacity was exceeded; billing records were lost; and control, visibility and diagnostic capability were lost). *Id*. at 9 (Tr. 494), lines 10-16.

Also, the Dallas/Fort Worth area experienced a similar "machine congestion" due to a Garth Brooks concert in 1993. *Id.* at 9 (Tr. 494), lines 17-18.

While a mass calling event that would result in a network impairment that would impede end users' access to emergency services may not be terribly likely, it could certainly happen, and the Commission should join AT&T in taking reasonable measures to make sure it does not.

AT&T ILECs, including AT&T Florida, have established separate mass calling trunks to ensure against harmful mass calling events. *Id.* at 10 (Tr. 495), lines 7-8. Mass calling trunks (also referred to as choke trunks or high volume call in trunks) limit the number of calls allowed at one time to a particular mass calling number, and thereby prevent disasters of the sort described above. There were no mass calling trunks in place at the time of any of those events, and if there had been, the problems could not have occurred. Ironically, CA notes that the harmful mass calling events that AT&T has cited are not recent (Ray Rebuttal at 39 (Tr. 111), lines 15-16), but that is like arguing that polio vaccinations are unnecessary because polio is now relatively rare in the western world. Polio is rare because people get vaccinated, and the apparent absence of harmful mass calling events in recent years is most likely due to the fact that

preventive measures are widespread.[83] AT&T ILECs not only establish mass calling trunks on their own networks, but also expect all carriers with which they interconnect to do the same. Neinast Rebuttal at 4 (Tr. 504), lines 13-19. That includes AT&T Florida's wireless affiliate, AT&T Mobility, which has choke trunks to each AT&T switch. Tr. 518, lines 3-6. Other ILECs, including Verizon and US West, also use mass calling trunks. Tr. 509, line 25 – 510, line 6.

In a 2012 arbitration between AT&T Indiana and a CLEC called Big River Telephone Company, the Indiana Utility Regulatory Commission ruled that an ICA should require mass calling trunk. It stated:

> [T]he Commission finds in favor of AT&T Indiana on Issue 6. We find that the issue relates to the ability of AT&T Indiana to protect its network performance and customers from the impact of high-volume call-ins through the use of choke/mass calling trunks. The use of choke/mass calling trunks to handle mass calling events as AT&T Indiana proposes is well established and supported by NIIF, an industry standards group.
>
> We note that AT&T and its affiliates establish facilities to handle high-volume call-ins. The fact that AT&T is asking no more from Big River than AT&T asks of itself in this regard is persuasive. The choke/mass calling facilities at issue would be used exclusively by Big River's customers, and therefore Big River should bear the cost associated with those facilities, just as other CLECs bear the cost of the choke/mass calling facilities that their customers use. . . .[84]

The Indiana Commission found it relevant that the use of mass calling trunks was "supported by NIIF, an industry standards group." The use of choke trunks was voted on by the industry as the preferred method for preventing mass calling events. Tr. 510, lines 9-12.

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[83] It makes no difference that the notorious mass calling events AT&T cited did not occur in Florida. There is nothing distinctive about Florida that would make such an event less likely here than elsewhere. Neinast Dep. (Exh. 49) at 24, lines 9-14.

[84] Order of the Commission, Indiana Utility Regulatory Commission Cause No. 44078 INT 01, Feb. 11, 2012, at 17-18. The Michigan Public Service Commission reached a contrary result in a decision about which Staff inquired in its Interrogatory 116 to AT&T. In its interrogatory response (Exh. 38, pp. 31-32), AT&T explained at length what distinguished the Michigan issue from the issue presented here, and where the Michigan commission went wrong.

CA contends there is no need for mass calling trunks because the ICA requires SS7 signaling and "choke trunks are deprecated with the use of Signaling System 7." Ray Direct at 37 (Tr. 58), lines 13-17.[85] That is incorrect, and the three mass calling calamities described above prove it. All three of those events involved networks that used SS7 but that did not have choke trunks in place. Obviously, those events would not have occurred if the use of SS7 obviated the need for choke trunks, as CA claims.[86]

There is no satisfactory alternative to mass calling trunks. CA witness Ray acknowledged this at deposition. Staff asked, "Does Communications Authority know of any alternative besides using SS-7 that can be used to prevent calls from being blocked or damaging the PSTN during a mass-calling event?" Mr. Ray answered, "CA is not aware of an alternative that would alleviate this issue." Ray Dep. (Exh. 46) at 79, line 21 – 80, line 6.

In addition to erroneously claiming that the use of SS7 "deprecates" choke trunks, CA has made other incorrect assertions in its attempt to avoid a requirement that it install mass calling trunks:

1. CA contends that if its trunks did get choked, that would not be a problem because CA would direct its overflow traffic to long distance trunks. That contention mistakenly assumes that if calls from CA's customers cause the blockage, only CA's customers would be affected. That is not the case. Rather, as in the 2002 episode described above, the whole network can be affected. Furthermore, if CA were to overflow mass calling to long distance

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[85] "SS7" or "Signaling System 7" is a set of telephony signaling protocols, developed in the mid-1970's, that are used to set up and take down telephone calls.

[86] CA does not explain *why* the use of SS7 would obviate the need for choke trunks. Mr. Ray just declares it as if saying it makes it so. Mr. Ray's theory is probably that with SS7, interconnection trunks won't get tied up because if the called number is busy, the call won't be set-up, so the trunks cannot get choked. If that is what Mr. Ray is thinking, he is mistaken, because while SS7 signaling in some networks can look ahead to determine if the called party line is on-hook or off-hook, AT&T's SS7 does not have that feature; nor does the SS7 of any other Regional Bell Operating Company. Neinast Rebuttal at 3 (Tr. 503), line 23 – 4 (Tr. 504), line 6.

trunks, that would subject the network to further blocked calls, because the choke network is a local network and does not contemplate IXC traffic being pumped into the local area. Neinast Direct at 11 (Tr. 496), lines 9-16.

2. CA has suggested that mass call-in events are caused by residential customers rather than business customers, and that CLECs typically do not serve large numbers of residential customers. That misses the point. Whether or not CLECs "typically" do not serve large numbers of residential customers, CA does not say that it will not do so, and there is no guarantee that a carrier adopting CA's ICA will not do so either. In any event, employees at a place of business are as likely as anyone else to make calls to radio stations running promotions or to a number where World Series tickets are available. *Id.* at 11 (Tr. 496), line 17 – 12 (Tr. 497), line 2.

3. CA claims that AT&T has not committed to establish choke trunks to CA, but that is incorrect. AT&T's proposed language for Net. Int. § 4.3.9.3 states, "If CLEC should acquire a HVCI/Mass Calling customer, (*e.g.*, a radio station) CLEC shall notify AT&T-21STATE at least sixty (60) days in advance of the need to establish a one-way outgoing SS7 or MF trunk group from the AT&T-21STATE HVCI/Mass Calling Serving Office to the CLEC End User's serving office. CLEC will have administrative control for the purpose of issuing ASRs on this one-way trunk group." *Id.* at 12 (Tr. 497), lines 3-10

4. CA asserts that AT&T's proposal to require mass calling trunks is discriminatory because AT&T does not impose the same requirement on all CLECs and CMRS providers and does not impose the same requirement on itself. Ray Direct at 37 (Tr. 58), lines 17-20. That assertion is false. It has been the policy and practice of all AT&T ILECs for years to insist on mass calling provisions in their ICAs (Neinast Rebuttal at 4 (Tr. 504), lines 14-15), and all ICAs

proposed by AT&T for the last seven years require mass calling trunks. *See* AT&T Response to Staff Interrogatory 41 (Exh. 36, p. 53).[87] And as stated above, AT&T does impose the same requirement on itself.

The Commission should require the parties' ICA to include the language AT&T Florida has proposed for Network Interconnection section 4.3.9 that requires choke trunks.

ISSUE 41: Should the ICA include CA's language providing for SIP Voice-over-IP trunk groups?

Affected contract language: Net Int. 4.3.11

<u>AT&T Position</u>: No. CA's language is objectionable for several reasons, including that it is directly at odds with the FCC's "All-or-Nothing Rule." Under that rule, a carrier cannot adopt just part of an existing ICA, which is what CA is asking the Commission to allow it to do.

This issue concerns CA's proposed Net. Int. § 4.3.11, to which AT&T objects. It reads in pertinent part as follows:

> ***In the event that AT&T-21STATE offers, installs, or provides any interconnection trunking using SIP Voice-over-IP or Voice-using-IP to any entity including its affiliates, CA shall be entitled to order the same type of interconnection trunking in the same areas and under the same terms where it has been offered, installed or provided for others under this agreement. The parties may mutually agree to complete a contract amendment to codify additional terms and conditions, but such an amendment shall not be required in order for CA to obtain the service under nondiscriminatory terms and pricing. . . .***

To fully understand this issue, one must understand what CA's language means by "IP" (or "SIP") and how IP differs from "TDM."

TDM (Time Division Multiplexing) is the format in which voice traffic has been transported for many years on the public switched telephone network. When traffic is in TDM

[87] Some earlier ICAs allowed for alternative means of protection against mass calling events, but those alternatives were inferior. *Id.* *See also* Neinast Dep. (Exh. 49) at 10, line 16 – 11, line 22 (explaining why mass calling trunks are superior to call gapping, as recognized by an industry forum).

format, it is transported over dedicated circuits using SS7 signaling. McPhee Direct at 28 (Tr. 441), lines 1-8.

When traffic is in IP (Internet Protocol) format, in contrast, a given message is not sent over a dedicated circuit using SS7 signaling. Instead, the signals are divided into packets and each packet is sent over the fastest available route in a packet switched network. The packets are then reassembled at the receiving end. (IP is alternatively called SIP, for Session Initiation Protocol.) *Id.* at 28 (Tr. 441), lines 8-11.

AT&T's network is a TDM network. All traffic on AT&T's network is in TDM format, and AT&T exchanges traffic with other carriers, including its affiliates, only in TDM format. Because AT&T's network includes no IP-capable equipment, AT&T is not interconnected with any carrier in IP format. *Id*. at 28 (Tr. 441), lines 14-16.[88]

Trunks are communications pathways from one point to another. The term "SIP Voice-over-IP trunk groups," as used in CA's proposed language, presumably refers to trunk groups that carry, or that are capable of carrying, traffic in IP format, as opposed to TDM. McPhee Direct at 27 (Tr. 440), line 26 – 28 (Tr. 441), line 2.

Whether the interconnection requirement in section 251(c)(2) of the 1996 Act applies to IP interconnection (in the case of an ILEC with IP capability) is an open question that is currently pending at the FCC. *Id.* at 28 (Tr. 441), lines 17-20. CA acknowledges this.[89] AT&T

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[88] CA has said it believes otherwise (Ray Direct at 38 (Tr. 59), lines 12-13), but if CA really does believe AT&T is providing SIP interconnection to others, it has no basis for that belief. AT&T asked CA who the other carriers were to which CA supposedly believes AT&T is providing SIP interconnection, CA answered, "I do not have an exhaustive list of carriers to whom AT&T is interconnected via SIP [in other words, I know of none], nor do I know which AT&T affiliate is interconnecting via SIP [even though all that matters is if AT&T Florida is]." CA Response to AT&T Florida Interrogatory 97 (Exh. 23). Thus, there is no basis for CA's purported belief. The simple fact of the matter is that AT&T Florida does not provide SIP interconnection to any carrier.

[89] CA stated, "The FCC is considering the issue as are several states." CA Response to Staff Interrogatory 56 (Exh. 27, p. 22).

maintains that the 1996 Act does not require IP interconnection. Some carriers agree with AT&T, and others disagree. Presumably, the FCC will decide the matter. McPhee Direct at 28 (Tr. 441), line 20 – 29 (Tr. 442), line 2.[90]

In any event, this Commission need not decide whether the 1996 Act requires IP interconnection in order to resolve Issue 41[91] – and should not – because CA's language would be contrary to the 1996 Act even if the 1996 Act did require IP interconnection. This is because CA's language is directly contrary to the FCC's All-or-Nothing Rule (47 C.F.R. § 51.809(a)) implementing section 252(i) of the 1996 Act.

Section 252(i) provides, "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." In 2004, the FCC addressed the question whether a carrier exercising its adoption rights under section 252(i) could adopt only selected portions of an existing ICA and answered that question in the negative.[92] The FCC then promulgated the All-or-Nothing rule, 47 C.F.R. § 51.809(a):

> An incumbent LEC shall make available . . . to any requesting telecommunications carrier ***any agreement in its entirety*** to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms and conditions as those provided in the agreement. (Emphasis added.)

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[90] CA has cited a decision by the Michigan Public Service Commission that required AT&T Michigan to file an ICA including IP interconnection. Ray Rebuttal at 41 (Tr. 113), lines 6-8. That decision, which is on appeal, has no bearing on Issue 41 for the reasons discussed in AT&T's Response to Staff Interrogatory 117 (Exh. 38, pp. 33-34).

[91] CA has suggested that it is not asking the Commission to find that the 1996 Act governs IP interconnection. CA may not intend to do so, but the fact is that the Commission could not adopt CA's proposed language without first finding that IP interconnection is governed by the 1996 Act. For if it is not, the Commission could not lawfully impose any language having to do with IP interconnection on the ICA in this proceeding under the 1996 Act.

[92] Second Report and Order, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd. 13494 (rel. July 8, 2004) ("*Second Report and Order*").

Thus, a carrier cannot adopt only part of another carrier's ICA. If it wants to lay claim to particular provisions in an ICA, it must adopt the contract in its entirety. CA acknowledges this. AT&T made the following discovery request, and CA gave the following response:

> Issue 41: Admit that under 47 C.F.R. § 51.809(a), a CLEC is entitled to adopt an existing state commission-approved ICA in its entirety, but is not entitled to adopt only part of an existing state commission-approved ICA.
>
> CA Response: Admitted.[93]

CA's proposed language is directly contrary to the All-or-Nothing Rule, because it would allow CA to adopt the rates, terms and conditions governing IP interconnection in another agreement ("***CA shall be entitled to order the same type of interconnection trunking in the same areas and under the same terms where it has been offered, installed or provided for others***"), while spurning the remaining rates, terms and conditions in that agreement. CA's language must therefore be rejected.

CA has asserted that the All-or-Nothing Rule does not "apply in cases where an ICA [is] being arbitrated; it applies to the separate process of ICA adoption, which CA is not attempting to invoke." CA Response to Staff Interrogatory 58 (Exh. 27, pp. 55-56). That argument is frivolous. If the Commission were to adopt CA's proposed language, it would be giving CA advance permission to violate the All-or-Nothing Rule in the future.

This is not to say that CA will definitely have no right to terms and conditions for IP interconnection in the future if AT&T agrees to such terms with another carrier. In some circumstances CA would have that right under the 1996 Act, and in others, it would not. For example:

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[93] Exh. 22.

Assume that AT&T were to establish an IP network; the FCC were to rule that section 251(c)(2) of the 1996 Act requires interconnection in IP format; and AT&T were to enter into an ICA with a CLEC that includes rates, terms and conditions for IP interconnection. At the appropriate time, CA could adopt that CLEC's ICA as its own. But CA does not need language in *this* ICA authorizing it to do so.

On the other hand, assume that the FCC were to rule that the 1996 Act does not require or govern IP interconnection, and that after that ruling, AT&T enters into a commercial agreement with a CLEC – *i.e.*, a voluntary agreement not compelled by or subject to sections 251 and 252 of the 1996 Act – that includes rates, terms and conditions for IP interconnection. Certainly, nothing in the 1996 Act or in any FCC regulation implementing the 1996 Act would require AT&T to provide the same rates, terms or conditions to CA, or to any other CLEC (though the commercial agreement itself might be available to CA under certain circumstances).

Previous decisions by this Commission support AT&T's position here. In an arbitration between Global NAPs ("GNAPs") and Verizon, Docket No. 011666-TP, GNAPs proposed to include in the ICA a provision – in addition to the general change-in-law provision on which the parties agreed – specifically entitling GNAPs to renegotiate the reciprocal compensation provisions in the ICA if the FCC's then recently-issued *ISP Remand Order* was overturned or modified. (The 2001 *ISP Remand Order* addressed intercarrier compensation on ISP-bound traffic, which was a hot topic at the time.) The Commission rejected GNAPs' proposal, stating

> We believe there are few industries more dynamic than telecommunications. The possibility of a change in the law affecting any provision of any interconnection agreement is ever present; thus, the general change-in-law provision. It is not apparent to us that the general change-in-law provision is inadequate in the event of a change in the law affecting the ISP issue. Additionally, it would be inconsistent to include a specific provision for ISP issues and not for other issues which may also see change in the foreseeable future.

Order No. PSC-03-0805-FOF-TP (July 9, 2003) at 43. Here, too, CA's proposed contract language is unnecessary if AT&T in the future enters into arrangements with another carrier for IP interconnection to which CA is also entitled, because CA will be able to avail itself of its rights – whatever they may be – at the time. *See also*, Order No. PSC-10-0711-FOF-TP (Dec. 3, 2010), issued in an arbitration between Verizon and Bright House Networks, Docket No. 090501-TP, at 11 ("Bright House is asking this Commission to address future interconnections without reference to any specific network configuration. Upon review, we are persuaded by Verizon that we should not make decisions at this time regarding such future interconnections . . . . Brighthouse has not presented sufficient justification to warrant a ruling on issues that *may* exist at some time in the future.") (emphasis in original).

Simply put, there are circumstances under which the 1996 Act would allow CA to obtain IP interconnection from AT&T in the future (*e.g.,* lawful adoption of another carrier's ICA; change of law amendment to this ICA), and there are circumstances under which it would not (*e.g.,* FCC rules IP interconnection not subject to 1996 Act and AT&T enters into a commercial agreement for IP interconnection). The ICA the parties are arbitrating now need not and should not try to anticipate those circumstances. And most certainly, the language that CA proposes is a non-starter because it violates the All-or-Nothing Rule. The Commission should therefore reject CA's proposed Net. Int. § 4.3.11.[94]

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[94]There is yet another defect in CA's proposal. CA's language states in part, "The parties may mutually agree to complete a contract amendment to codify additional terms and conditions, but such an amendment shall not be required in order for CA to obtain the service under nondiscriminatory terms and pricing." That language is contrary to the fundamental principle that the parties' relations with respect to the matters covered by the ICA are governed solely by the ICA. If something happens during the term of the ICA that warrants a change in those relations, that change must be reflected in an amendment to the ICA before it goes into effect. The Commission enforced this principle in Docket No. 000649-TP, an interconnection agreement arbitration between MCI and BellSouth. At the time of the arbitration, the FCC's rules allowed carriers to exercise their adoption rights under section 252(i) of the 1996 Act by opting into individual provisions of an ICA – the so-called "Pick and Choose Rule," which the FCC abandoned in favor of the current "All or Nothing Rule" in 2004. One issue in the arbitration was when a price, term or condition that MCI might adopt from another ICA would become effective. MCI

ISSUE 43(i): Is the billing party entitled to accrue late payment charges and interest on unpaid intercarrier compensation charges?

Affected contract language: Net Int. 6.13.7

<u>AT&T Position</u>: Yes. The parties have agreed in the General Terms and Conditions that both late payment charges and interest charges apply to past due amounts. Florida law appropriately permits the imposition of both, and there is no reason to treat past due intercarrier compensation amounts differently than other past due amounts.

Agreed GT&C § 11.3 provides that late payment charges ("LPCs") apply to past due amounts,[95] and agreed GT&C section 11.4 provides that interest charges accrue on unpaid amounts.[96] Under these agreed provisions, the Billing Party is entitled to accrue both LPCs and interest on the disputed amounts while a dispute is pending.

Oddly, though, CA opposes language in Net. Int. § 6.13.7 that subjects past due intercarrier compensation amounts to interest charges in addition to LPCs. That is, agreed language in section 6.13.7 provides that disputed intercarrier compensation amounts will be subject to LPCs; AT&T contends they should also be subject to interest charges, and CA disagrees.

CA's position on this issue cannot be squared with its agreement in the GT&C's that past due amounts in general are subject to both interest and LPCs. Past due intercarrier compensation amounts are no different than any other past due amounts in this respect, and CA has not suggested otherwise.

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contended that the adoption should be effective immediately upon MCI's election to adopt the term or condition. *See* Order No. PSC-01-0824-FOF-TP (March 30, 2001) at 190. BellSouth, on the other hand, argued that the effective date of the adopted term or condition should be the date of a conforming ICA amendment. *Id*. at 191. The Commission agreed with BellSouth "that new terms and conditions cannot become effective until incorporated in writing by both [MCI] and BellSouth." *Id*. at 192.

[95] GT&C § 11.3 states: "A Late Payment Charge will be assessed for all Past Due payments as provided below, as applicable."

[96] GT&C section 11.4 states: "If any charge incurred by **<u>AT&T-21STATE</u>** under this Agreement is Past Due, the unpaid amounts will accrue interest from the day following the Bill Due Date until paid."

Moreover, interest and late payment charges serve different purposes. Interest is compensation for the time value of money, while late payment charges are intended as an incentive to encourage prompt payment. Pellerin Direct at 82 (Tr. 253), lines 7-9. Accordingly, Florida courts have applied both simultaneously. *See Verneret v. Foreclosure Advisors, LLC,* 45 So. 3d 889, 891 (Fla. Ct. App. 3d Dist. 2010) (trial court, in granting judgment for a principal amount owed, also entered judgment for interest and late payment fees). CA says it "believes that late payment charges and interest are mutually exclusive" (Ray Direct at 39 (Tr. 60), line 13), but that is wrong, both as a matter of common sense and under Florida law.

CA has also suggested that the coupling of interest and LPCs "would violate Florida's usury limit of 18%." Ray Rebuttal at 43 (Tr. 115), lines 16-17. CA is incorrect. Florida usury law expressly allows a Late Payment Charge (which the statute calls a "delinquency charge") on top of the 18% interest limit, and states that the delinquency charge "shall not be deemed interest." Fl. Stat. § 687.03(2)(c).

ISSUE 43(ii): When a billing dispute is resolved in favor of the billing party, should the billed party be obligated to make payment within 10 business days or 30 business days?

Affected contract language: Net Int. 6.13.7

<u>AT&T Position</u>: When a billing dispute arising from intercarrier compensation charges is resolved in the Billing Party's favor, ten business days (typically two weeks) is a reasonable time for the Billed Party to make payment.

Once a dispute regarding intercarrier compensation is resolved in favor of the Billing Party, AT&T proposes that the Billed Party pay the Billing Party within ten business days (at least two weeks). CA proposes that the Billed Party have 30 business days (at least six weeks).

AT&T's proposal is eminently reasonable. The Billing Party will have already waited months (or longer) to be paid while the dispute ran its course. Following resolution of the dispute, two weeks is a reasonable period of time for the Billed Party to make payment; the

Billing Party should not have to wait six weeks or longer to be paid what it is owed. CA argues that it "may need time to secure financing to make payment of such amounts if it is found responsible for them." Ray Direct at 39 (Tr. 60), lines 14-15. However, CA would know throughout the dispute period what intecarrier compensation charges were accruing, and it should plan for that eventuality. CA should not need additional time to secure financing for payments it should have reasonably anticipated, and it is not reasonable for AT&T to have to wait six weeks following the closure of the dispute before it is paid what it is due. Pellerin Direct at 83 (Tr. 254), lines 12-18.

Furthermore, the mere possibility that CA "*may* need time to secure financing" (emphasis added) does not justify contract language that assumes extra time is the rule rather than the exception. Clearly, if CA can pay within ten business days, it should. Accordingly, the ICA should allow ten business days, and if it happens in some instance that CA genuinely needs more time because it must obtain financing, AT&T will be willing to consider it at that time.

ISSUE 44: Should the ICA contain a definition for HDSL-capable loops?

Affected contract language: UNE 16.5

AT&T Position: No. The ICA should not provide a separate definition for "HDSL-capable" loop. Whether CA orders an HDSL loop or an "HDSL-capable" loop, it receives exactly the same facility. CA's proposed definition is intended to try to evade the impairment thresholds under federal law by re-labeling HDSL loops as "HDSL-capable" loops.

The ICA should not define "HDSL-capable loop." There is no need for a definition, and including one would serve only to enable CA to obtain access to UNEs when it is not legally entitled to.

There is no relevant difference between an HDSL loop and an HDSL-capable loop. An HDSL loop is a dry copper loop with certain design specifications that is capable of a signal speed of 1.544 megabytes per second ("mbps"). This transmission speed is achieved when the

appropriate electronic equipment is added to each end of the loop. Whether CA orders an HDSL loop or an HDSL-capable loop, it receives exactly the same thing: a copper loop capable of 1.544 mbps. Kemp Direct at 31 (Tr. 567), lines 8-14. CA acknowledges this in its Response to Staff Interrogatory 81 (Exh. 28, p. 83), in which the only difference it identifies between the two is that with an HDSL-capable loop, CA must place electronics on each end of the loop to actually provide the 1.544 mbps transmission. There is no separate element distinct from an HDSL loop that can be defined as an HDSL-capable loop. Kemp Direct at 31 (Tr. 567), lines 15-19.

CA proposes a second definition in order to avoid the limit that the FCC has placed on the number of DS1 loops that CA can purchase at UNE rates. The Commission should not permit CA to do so. HDSL loops are subject to the DS1 loop cap in an impaired wire center because HDSL loops are included in the federal definition of a DS1 loop. As defined in 47 C.F.R. § 51.319(a)(4), "[a] DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services ('HDSL'), including T1 services."

Subject to technical limitations, HDSL loops are always available. This issue is the price at which they are available. In an impaired wire center, HDSL loops are available at UNE prices. By attempting to redefine HDSL loops, CA is attempting, by its own admission, to obtain access to HDSL loops at UNE prices "anywhere, regardless of Tier 1 non-impairment criteria." CA Response to Staff Interrogatory 17 (Exh. 26, pp. 22-23). CA's proposed language is inconsistent with federal law.

CA's position is also inconsistent with this Commission's order in Docket No. 041269-TP (Order No. PSC-06-0299-FOF-TP, issue 5, at 8-12) – an order with which AT&T's position

fully complies. In that order, the Commission stated that HDSL-capable loops are not the equivalent of DS1 loops for evaluating wire center impairment and should not be counted as voice grade equivalents. AT&T agrees. The Commission went on to say, however, that provisioned HDSL loops that include the associated electronics, whether configured as HDSL-2-wire or HDSL-4-wire, should be considered the equivalent of a DS1 and counted as 24 business lines for determining wire center impairment in meeting part (3) of the business line count definition found in 47 C.F.R. § 51.5. *Id.* at 12. AT&T agrees with this as well.

The Commission's decision also states (at 12): "Additionally, in those wire centers that are no longer DS1 impaired, [AT&T] will not be required to offer an HDSL UNE. The Unbundled Copper Loop (UCL) UNE with Loop Makeup (LMU) and routine network modifications will allow CLECs to deploy HDSL electronics on the UCL." AT&T agrees with this determination that AT&T is not required to offer an HDSL UNE in wire centers that are no longer impaired.

In view of these Commission determinations, the loop that AT&T provides is an HDSL-capable loop; in other words, a dry loop that comes equipped with no electronics. AT&T does not provide a loop with HDSL electronics.

For these reasons, the Commission should reject CA's proposed language in UNE §16.5.

ISSUE 45: How should the ICA describe what is meant by a vacant ported number?

Affected contract language: LNP 3.1.4

AT&T Position: A ported number, just like any other phone number, is vacant when it is no longer in service with the end user to whose use it was assigned. At that point, the number reverts to the phone company that assigned it to that end user.

The parties agree that when a ported number becomes vacant, the number must be released to the carrier that owns the switch where the number resides, but the parties disagree

about how to define what is meant by "when a ported telephone number becomes vacant." AT&T proposes that the telephone number is vacant when it is "no longer in service with the original End User," while CA proposes that it is vacant only when it is "no longer assigned to an End User."

To illustrate the difference between the two proposals, assume that AT&T customer Ms. Smith switches to CA for local phone service and retains the same phone number she had with AT&T – a number that resides in AT&T's switch. Assume further that Ms. Smith then moves to Europe and discontinues her local phone service in Florida. Under AT&T's language, Ms. Smith's number at that point becomes vacant and must be released back to AT&T, because the number is no longer in service with the original end user – Ms. Smith. Under CA's language, the number could instead be conveyed (apparently by Ms. Smith, according to CA's view) to another end user, and it would not be regarded as vacant, and so be released back to AT&T, until it was no longer assigned to any end user. As explained below, CA's approach is based on a fundamental misunderstanding of how number porting works, which is explained below, and should be rejected. Pellerin Direct at 84 (Tr. 255), line 13 – 85 (Tr. 256), line 2.

The North American Numbering Administrator assigns telephone number codes (NXXs)[97] to carriers, and unless/until a carrier returns an unneeded NXX to the administrator, the NXX "belongs to" (or is "owned by") that carrier. When establishing local exchange service for a new end user, the carrier selects a telephone number from its available inventory of numbers (from a code assigned to it by the Administrator) to use in providing the service. Informally, one might say that the number is "assigned" to the end user, but that is not

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[97] As a result of telephone number pooling, which was instituted as a number conservation measure, the numbering administrator may also assign codes in thousand number blocks (NXX-X). Thus, there may be different carriers that share an NXX, but the NXX-X is always assigned to only one carrier. This brief refers to NXX code, NXX, or simply code, to mean either NXX or NXX-X. *Id.* at 85 (Tr. 256) n.31.

technically correct; the number is assigned to the code owner (the carrier), which associates that number with a particular end user's local exchange service. *Id*. at 85 (Tr. 256), lines 3-11.

Local number portability ("LNP") permits an end user to change local service provider without having to change the associated telephone number.[98] Subject to certain geographic limitations that are not relevant to this issue,[99] an end user can change his local service provider any number of times while retaining his telephone number. Regardless of the local service provider serving the end user using the original telephone number, however, the number is still officially "owned" by the carrier to which the Administrator assigned the NXX. That is why there must be an LNP database query to identify how to route a call to a ported number; without that query and the resulting routing instructions, a call will be default routed (*i.e.*, misrouted) to the carrier that owns the code. *Id*. at 85 (Tr. 256), line 12 – 86 (Tr. 257), line 8.

CA's language states that a ported telephone number will not be considered vacant as long as the number is "assigned to an End User." CA begins with the mistaken premise that the end user owns the ported telephone number. But the telephone number belongs to a carrier, not to an end user. The end user has a right to use that ported telephone number only while he or she maintains service associated with that number (including any subsequent ports of the number to different local service providers). When that end user no longer subscribes to telephone exchange service using the ported telephone number, the number becomes vacant and must be released back to the NXX code owner for eventual reuse. CA's language would improperly

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[98] When local competition was in its infancy, an end user would have to change his telephone number each time he changed local service provider. This was an obvious impediment to the development of competition that was overcome with the advent of LNP. *Id*. at 85 (Tr. 256) n.33.

[99] See Issue 46.

allow CA to maintain control of the ported number as long as CA used it for *any* end user. *Id*. at 86 (Tr. 257), lines 9-20.

CA presumes that an end user can "convey" his or her telephone number to another end user. That is not the case. In the illustration used above, for example, when Ms. Smith moves to Europe she cannot somehow convey her phone number to a friend. An end user does not control his or her telephone number and has no right to "convey" it to anyone. *Id.* at 87 (Tr. 258), lines 1-6.

CA focuses on the case of a business end user, rather than a residential end user. *See* Ray Rebuttal at 44 (Tr. 116), lines 20-23. If a phone company customer sells the business, the new owner may or may not be able to use the same phone number under the same business name – depending on in whose name the phone service was established. If the local exchange service was established in the name of the business, the ported telephone number would be associated with the business name. If the current business owner sells the business, including the business name, there would be no reason for the ported telephone number to be uncoupled from the business (unless the new owner wanted a different telephone number).[100] In fact, AT&T would not even be aware of the sale. If, however, the local exchange service was established in the name of the owner (and not the business), the new owner (who has a different name) could not

[100] In CA's response to Staff Interrogatory 61 (Exh. 27, p. 24), CA stated that "if Fred's Sandwich Shop is CA's customer, and Fred decides to sell his shop to Subway, which intends to continue his operating business under its own name, Fred should be permitted to convey the business's phone number along with the rest of the business assets in the sale. In order to keep Fred's business phone number, which there is no doubt Subway would want to do, Subway should not have to dismantle Fred's service from CA and go become an AT&T customer instead." In that scenario, where the ported number was assigned to the business, Fred's Sandwich Shop (rather than to Fred), the number would not need to be uncoupled from the business. Thus, when Subway purchased Fred's Sandwich Shop (which AT&T would not even know happened), Subway could leave the phone service intact and convert the shop into a Subway, and people who dialed the number they associated with Fred's Sandwich Shop would reach the new Subway location. In this scenario, then, AT&T's language achieves the result CA wants. This is because under AT&T's language, the number becomes vacant only when it is "no longer in service with the original End User." In the example, the number is still in service with the original End User, because it is still – from the point of view of number assignments – in service with Fred's Sandwich Shop, which is now owned by Subway, which is using its "Fred's Sandwich Shop" number for its new location.

use the existing ported telephone number for service in a different name once the previous owner's service was disconnected. Pellerin Direct at 87 (Tr. 258), lines 7-18.

CA hypothesized a scenario where an AT&T end user ports his telephone number to CA and implied that CA would be competitively harmed by AT&T's language. Ray Direct at 40 (Tr. 61), lines 3-10. That is not the case. The same rules apply no matter what carrier owns the NXX code. For example: Assume that CLEC A is the NXX code owner, and CLEC A established local exchange service for End User A using a telephone number from that code. End User A then elects to switch to AT&T and ports his number to AT&T. CA subsequently wins End User A to its service, so End User A again ports his number, this time to CA. When End User A disconnects his local exchange service because he is moving out of the area, his telephone number becomes vacant. At this point, the telephone number is released back to the NXX code owner, which is CLEC A. Pellerin Direct at 87 (Tr. 258), line 19 – 88 (Tr. 259), line 5.

The same steps would apply in reverse if CA was the code owner and established the original service for End User A. When End User A elects to go with AT&T for local exchange service and retain his telephone number, the number will be ported to AT&T. When End User A disconnects his service, AT&T will release that vacant telephone number back to the code owner, in this case CA. There is nothing discriminatory or anti-competitive about AT&T's language. *Id*. at 88 (Tr. 259), lines 6-12.

CA has also asserted that AT&T's language "denies the end user a choice of provider without cause." Ray Direct at 40 (Tr. 61), lines 7-9. That assertion is false. It proceeds from the mistaken premise that an end user (Ms. Smith) can convey her telephone number to the next resident (Mr. Jones) when she moves out, which simply is not the case. CA then extrapolates that concept to conclude that if Ms. Smith cannot pass along her telephone number to Mr. Jones,

Mr. Jones must select AT&T as his local service provider. That is absurd. If Mr. Jones wants service with CA, he can simply contact CA and place an order for service. CA would then assign Mr. Jones' service a telephone number from CA's inventory of available numbers. Furthermore, CA offers no support for its assertion that the industry practice of releasing telephone numbers to the carrier owning the NXX code denies an end user the ability to select the local service provider of his choice. That is because there is no support for that assertion. Pellerin Rebuttal at 39 (Tr. 305), lines 4-21.

The Commission should adopt AT&T's Florida's language in LNP § 3.1.4, because its description of when a ported number is vacant is consistent with industry treatment of ported numbers and CA's is not.

ISSUE 46(i): i) Should the ICA include limitations on the geographic portability of telephone numbers?

Affected contract language: LNP 3.2.1

<u>AT&T Position</u>: Yes. The FCC's rules require *service provider portability*, but not *location portability*.

Under the FCC's rules, CA is not permitted to port a phone number outside the rate center where the number is assigned. Accordingly, the parties' ICA should include AT&T's proposed language for LNP § 3.2.1 that so states.

FCC Rule 52.21 (47 C.F.R. § 52.21) is a set of definitions of which three are pertinent here:

- Rule 52.21(l) states, "The term ***location portability*** means the ability of users of telecommunications services to retain existing telecommunications numbers without impairment of quality, reliability, or convenience when moving from one physical location to another."
- Rule 52.21(n) states, "The term ***number portability*** means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."

- Rule 52.21(t) states, "The term ***service provider portability*** means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

The FCC requires *number portability* (or *service provider portability*). Thus, a customer must be enabled to retain ***"at the same location"*** the same number when he or she changes from one provider (such as AT&T) to another (such as CA).

The FCC does not, however, require AT&T to provide *location portability*. That is, there is no requirement that a customer be enabled to retain his or existing number "when moving from one physical location to another." 47 C.F.R. § 52.21(l). As AT&T witness Neinast stated, the FCC has not ordered that geographic porting be permitted. On the contrary, "[a]ll of the FCC's orders and recommendations have limited number portability to within rate centers." Neinast Direct at 13 (Tr. 498), line 19 – 14 (Tr. 499), line 2.

CA witness Mike Ray admitted this at deposition (Ray Dep. (Exh. 46) at 88, lines 21-25):

> **Q [W]ould you agree that the Telecom Act only provides for service provider portability and does not address service or location portability?**
>
> A We agree.[101]

It appears that the last time the FCC addressed location portability was in a 2007 Order[102] in which the FCC noted that in its 1996 *First Number Portability Order*, "The Commission

[101] "***Service portability***," to which Staff's question referred is another term defined in FCC Rule 52.21. It is the ability of users of telecommunications services to retain existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications service to another, without switching from one telecommunications carrier to another." 47 C.F.R. § 52.21(s). The FCC does not require ILECs to provide service portability, but that is not particularly pertinent to Issue 46(i).

[102] Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, WC Docket No. 07-243; WC Docket No. 07-244; WC Docket No. 04-36; CC Docket No. 95-116; CC Docket No. 99-200, *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization*, 22 FCC Rcd 19531 (rel. Nov. 8, 2007).

determined that it was not in the public interest at that time to require LECs to offer service or location portability. *See id.* at 8447-49, paras. 181-87."[103] The FCC went on to note that in its 2003 *Intermodal Number Portability Order*, the FCC "rejected the argument that it imposed a location portability duty on carriers because the number must retain its original rate center designation, *i.e.*, the number remains at the same location despite the fact that a wireless subscriber may travel outside a rate center and make calls without incurring toll charges."[104]

That is how the law stands today: Location portability is not required. The FCC's consumer site explains this in lay terms:

> Under the Federal Communications Commission's "local number portability" rules, you can switch telephone service providers for wireline, wireless or Voice over Internet Protocol and keep your existing phone number ***if you remain in the same geographic area. If you are moving from one geographic area to another, however, you may not be able to take your number with you***.[105]

That makes crystal clear that carriers are not required to port numbers from one rate center (which the FCC refers to as "geographic area" for the benefit of lay readers) to another.

If that were not enough, a February 19, 2015, white paper entitled, "Non-Geographic Number Portability," which was issued by the North American Numbering Council Local Numbering Administration Working Group and which Staff noted at the deposition of Mr. Ray (Ray Dep. (Exh. 46) at 91, line 2 *et seq.*), concluded (at p. 11) that location portability (*i.e.*, non-geographic number portability or "NGNP") is a long way off:

> Any implementation of NGNP will encounter significant consumer, industry, regulatory, and technical challenges as documented in this paper and will require collaboration and support by all parties involved. An

[103] *Id.* at ¶ 6 n.9.

[104] *Id.* at ¶ 8 n.18.

[105] http://www.fcc.gov/cgb/consumerfacts/numbport.html (emphasis added).

> industry move to NGNP will require a mandate by the FCC. The current regulations, standards, and infrastructure were constructed for the TDM network and are based upon a premise that telephone numbers and geography are intertwined.
>
> Efforts to implement NGNP in a TDM environment (or an environment transitioning from TDM to IP) would require significant re-engineering of legacy TDM infrastructure, would require an extended duration of time to design and implement, and will necessitate a thorough review for impacts on the underlying number assignment and number portability rules, regulations, systems and processes. Some Service Providers may already be making plans or undergoing system and switch upgrades to support and implement IP with upgraded equipment and given the industry is moving away from TDM-based networks, the re-engineering of the TDM environment to support NGNP would be costly and the benefits short-lived.
>
> A single approach to implement NGNP has not yet been determined and once determined, the massive complexity and cost of this undertaking will certainly require significant analysis and an extended duration of time to design, re-engineer, and implement. As the industry infrastructure evolves more toward an all IP environment, the LNPA WG will need to re-evaluate NGNP in that context, and continue to work collaboratively with industry standards bodies such as ATIS.[106]

Needless to say, CA has identified no FCC rule or Order that supports its position on this issue. That is because there is no such rule or Order.

AT&T's proposed LNP § 3.2.1 accurately reflects current law and should be included in the ICA.

ISSUE 48a: Should the provisioning dispatch terms and related charges in the OSS Attachment apply equally to both parties?

Affected contract language: OSS 6.4

AT&T Position: No. Reciprocity in OSS § 6.4 is inappropriate because CA provides no products or services to AT&T. CA should follow the trouble-reporting process set forth in OSS § 7.6 to isolate any problems on AT&T's side of the network.

[106] The white paper is available at https://www.npac.com/content/download/30274/252690/NANC%20LNPA%20WG%20WHITE%20PAPERONNON-GEOGRAPHIC%20NUMBER%20PORTING%20FINAL%20FEB%2019%202015.docx

ISSUE 48b: Should the repair terms and related charges in the OSS Attachment apply equally to both parties?

Affected contract language: OSS 7.12

<u>AT&T Position</u>: No, for the same reasons as Issue 48a.

OSS § 6.3 deals with ordering and provisioning. It provides that AT&T will be entitled to assess a charge "[i]n the event AT&T-21STATE must dispatch to the End User's location more than once for provisioning of ICA Services due to incorrect or incomplete information provided by CLEC," such as an incomplete address or an incorrect contact name or phone number. CA does not take issue with OSS § 6.3. However, CA asserts that section 6.3 should be "reciprocal," and therefore proposes to add a new section 6.4 to the OSS Attachment. Section 6.4 would authorize CA to impose charges on AT&T "[i]n the event CLEC must dispatch to the End User's location to resolve an issue solely caused by AT&T-21STATE's employees, contractors or agents," such as "AT&T tampering with CLEC End User's service, AT&T falsely reporting that service has been properly installed when it has not, or AT&T falsely reporting that service has been repaired when it has not."

Issue 48b is similar to Issue 48a, but involves repair and maintenance rather than provisioning. OSS § 7.11 provides that if AT&T is required to dispatch to an end user's location more than once for repair or maintenance due to incorrect or incomplete information provided by CA, AT&T will bill CA for the additional dispatch at the rates set forth in the pricing schedule. CA proposes to add a new OSS § 7.12, which would authorize CA to charge AT&T an unspecified amount (not to exceed AT&T's Trouble Determination Charge) if CA dispatches to the end user premises and discovers that, in CA's opinion, the problem was solely caused by AT&T or its agents or AT&T "falsely reported" that a service was installed or repaired when it was not.

The Commission should reject CA's proposed new language in OSS §§ 6.4 and 7.12. *First*, the provisioning, repair and maintenance terms and related charges set forth in OSS §§ 6.3 and 7.11 should not be made reciprocal because the parties' relationship is not reciprocal: CA purchases products and services from AT&T, but AT&T does not purchase any products or services from CA. When AT&T receives orders from CA and completes the orders as requested, sometimes AT&T must dispatch a technician to complete the order. AT&T never orders services from CA and CA never dispatches on behalf of AT&T. *See* AT&T Response to Staff Interrogatory 55 (Exh. 36, pp. 67-68); Kemp Direct at 32 (Tr. 568), lines 19-22. For that reason alone reciprocity of the ordering, provisioning and repair requirements is simply inapplicable.

Second, CA's alleged concern that it will have to dispatch technicians to End User locations due to the fault of AT&T is misplaced. As a preliminary matter, AT&T denies CA's unsubstantiated claim that AT&T often reports that it has installed or repaired service when it has not. CA offers no proof of such a problem. *See* AT&T Response to Staff Interrogatory 55 (Exh. 36, pp. 67-68). Regardless, CA could avoid being required to dispatch its own technicians by simply following the trouble-shooting process set forth in OSS § 7.6. That provision states: "CLEC must test and isolate trouble to the AT&T-21STATE network before reporting the trouble to the Maintenance Center. Upon request from AT&T-21STATE at the time of the trouble report, CLEC will be required to provide the results of the CLEC test isolating the trouble to the AT&T-21STATE network." If CA follows this process to isolate the trouble, and the trouble is on AT&T's side of the network, there will be no need for CA to dispatch a technician. Instead, CA would report the trouble by submitting a trouble report to the AT&T Maintenance Center. AT&T would then dispatch its own technicians as necessary, and CA would not be subject to dispatch charges under OSS § 6.3 unless the error on AT&T's side of the

network was caused by CA providing "incorrect or incomplete information" to AT&T. If the trouble is not on AT&T's side of the network, then CA would be responsible for handling the issue according to its own methods and procedures. *See* AT&T Response to Staff Interrogatory 55 (Exh. 36, pp. 67-68).

Third, CA claims that, for resale services, CA must dispatch a technician to its customer's location simply to test and isolate the problem to AT&T's side of the network. However, this is unnecessary and inconsistent with the way AT&T handles its own customers. For resale service, "AT&T provides the exact service that [AT&T] would provide to one of [its] retail customers." Tr. 666, lines 7-9. When AT&T is the provider of service to the retail end user, and the end user reports a problem, AT&T instructs its end user to go to the network interface device ("NID") at the customer's premises, plug in a telephone, and check to see if there is a dial tone. If there is no dial tone, this isolates the problem to AT&T's side of the network, and AT&T will take the steps necessary to restore the service. If the customer requests that AT&T come to the premises to investigate problems on the customer's inside wiring, AT&T would charge the customer accordingly. *Id.* at lines 9-13. CA is free to handle its end users as it sees fit, but cannot reasonably expect AT&T to favor CA and CA's customers over AT&T's own retail end users. *Id.* at lines 14-23.

Fourth, even if there were a factual basis for CA's proposed reciprocity language, the language CA wishes to add as OSS §§ 6.4 and 7.12 expands the scope of 6.3 and 7.11 far beyond ordering, provisioning and repair. Under the guise of the OSS Attachment, CA wants the Commission to award CA the ability to bill AT&T for any dispatch by CA based simply on a claim that AT&T created the problem. CA's proposed sections 6.4 and 7.12 contain no limits and enable CA alone to determine that the issue was caused by AT&T and bill AT&T for all

dispatches that CA attributes to AT&T's error. The proposed language would create a disincentive for CA to perform its own due diligence prior to reporting provisioning trouble to AT&T.

For these reasons, the Commission should reject the addition of OSS §§ 6.4 and 7.12 as proposed by CA.

ISSUE 50: In order for CA to obtain from AT&T Florida an unbundled network element (UNE) or a combination of UNEs for which there is no price in the ICA, must CA first negotiate an amendment to the ICA to provide a price for that UNE or UNE combination?

Affected contract language: UNE 1.3

<u>AT&T Position</u>: Yes. Under the 1996 Act – and agreed language in the ICA – CA can only obtain UNEs from AT&T pursuant to the rates, terms and conditions in its ICA. CA's proposed language is contrary to controlling federal law, because it would allow CA to "pick and choose" terms from another ICA.

CA proposes that the Commission allow it to obtain a UNE or UNE combination from AT&T at the price that appears in another carrier's ICA if CA's ICA includes no price for the UNE or UNE combination. Specifically, CA proposes the following language for UNE § 1.3:

> ***If CA orders any UNE or UNE combination for which a price does not exist in this agreement, but for which a price does exist in any then-current Commission-Approved AT&T-21STATE Interconnection Agreement, then CA shall be entitled to obtain that UNE or UNE combination on a non-discriminatory basis under the same rate and terms. The Parties shall execute an amendment within thirty (30) days of request from CA for such an amendment, and the UNE(s) shall be available to CA for ordering within five (5) days after execution of the amendment.***

CA's proposal is inconsistent with language in the ICA to which CA agreed. Section 1.4.2 in the Pricing Schedule provides in pertinent part:

> AT&T-21STATE obligation, under this Agreement . . . is to only provide Interconnection Services [which include UNEs per GT&C § 2.98] for which complete rates, terms and conditions are contained in this Agreement. Accordingly, to the extent CLEC orders a product or service for which there

> are not complete rates, terms and conditions contained in this Agreement, AT&T-21STATE may reject the order.

Even if CA had not already agreed that AT&T is only required to provide UNEs for which complete rates, terms and conditions are contained in the ICA, CA's proposal would still have to be rejected, because it is contrary to controlling federal law in two separate ways. First, once a CLEC has an ICA with an ILEC, the ILEC's only obligations to the CLEC with respect to the requirements of section 251 of the 1996 Act – including interconnection, UNEs and resale – are the obligations set forth in that ICA. Thus, the CLEC must see to it, through the negotiation and arbitration process, that the ICA sets forth everything the CLEC wants and is entitled to under the 1996 Act. If the ICA does not cover resale, for example (as it may not because some CLECs choose not to engage in resale), then the CLEC cannot obtain services from the ILEC for resale until the CLEC obtains a new ICA or the parties' voluntarily amend the ICA to include resale. Similarly, if the ICA doesn't provide for the CLEC to obtain a particular UNE at a specified price, the CLEC cannot obtain that UNE from the ILEC (subject, of course, to the occurrence of a possible change of law or negotiation/arbitration of a new ICA).

Section 252 of the 1996 Act requires ILECs to enter into what § 252(a) calls "binding agreements" with requesting CLECs. 47 U.S.C. § 252(a). Those agreements may be arrived at through negotiation, arbitration, or adoption. To the extent they are arrived at through negotiation, § 252(a) allows the parties to agree to what they wish "without regard to the standards set forth in subsections (b) and (c) of Section 251" – that is, without regard to the substantive requirements of the 1996 Act that govern interconnection, network element unbundling and so forth. Thus, AT&T and a requesting CLEC are free to enter into an ICA that, for example, does not require AT&T to provide a particular telecommunication service for resale, even though § 251(c)(4) of the 1996 Act generally requires ILECs to provide that service,

or to agree on prices that are different than those called for by the 1996 Act. The give and take of negotiation is a core value of the 1996 Act,[107] so the parties' agreement on a contract that entitles the CLEC to more than the law requires in one respect, or to less than the law requires in another, must be respected. That is what makes it a "binding agreement."

The interconnection agreement then is "the Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the Act." *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2002). Accordingly, once a carrier enters "into an interconnection agreement in accordance with section 252, . . . it is then regulated directly by the interconnection agreement." *Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev'd in part on other grounds sub nom., Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). With the interconnection agreement in place, the requirements of the 1996 Act no longer apply. *Mich. Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003) ("[O]nce an agreement is approved, these general duties [under the 1996 Act] do not control" and parties are "governed by the interconnection agreement" instead, and "the general duties of [the 1996 Act] no longer apply").

In light of the foregoing legal principles, if CA wanted to be able to obtain a UNE or UNE combination from AT&T, the 1996 Act required CA to make sure that its ICA covers – and includes a price for – that UNE or UNE combination. If CA failed to do that, CA cannot obtain that UNE or UNE combination from AT&T.[108]

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[107] *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part and dissenting in part) ("[s]ection 252 sets up a preference for negotiated interconnection agreements"); *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) ("private negotiation . . . is the centerpiece of the Act").

[108] The unlawfulness of CA's proposal is not mitigated by the fact that it contemplates that the parties would amend the ICA to cover the missing UNE or UNE combination. Once the ICA is in place, CA has no right to amend it willy-nilly. The parties can of course agree to amend it, and one party can force an amendment pursuant to the change of law provision in the ICA if there is a change of law that warrants an amendment. Other than that, though,

Separate and apart from that, CA's proposal violates the FCC's All-or-Nothing Rule. As discussed above in connection with Issue 41, that rule prohibits CLECs from adopting only selected parts of an ICA; if a CLEC wants to obtain the benefit of prices or terms of an existing, Commission-approved ICA, it can only do so by adopting that ICA in its entirety. By asking the Commission to allow it to adopt just a price or two from another CLEC's ICA, as CA's proposed language for UNE § 1.3 does, CA is asking the Commission to violate the FCC's rule.

CA states that it is seeking assurance "that should a UNE or UNE combination become available in the future to another carrier, CA may seek the same element(s)." Ray Rebuttal at 50 (Tr. 122), line 24 – 51 (Tr. 123), line 1. CA admits, however, that "if the new UNE was created by a change of law, CA could seek an amendment using the change of law provision in the ICA." *Id*. at 51 (Tr. 123), lines 2-4. CA suggests, though, that AT&T might refuse to amend the ICA even if there were a change of law. *Id*. at 51 (Tr. 123), lines 4-5. This argument – that CA needs another contract provision to back up the change of law provision that CA hypothesizes AT&T would violate – is the height of absurdity. Moreover, even though CA asserts it is not seeking to "pick and choose" from another ICA in violation of the All-or-Nothing Rule (*id*. at 50 (Tr. 122), lines 23-24), that is undeniably what CA is proposing. In the (extraordinarily unlikely) event that some future ICA were to include a UNE that is not in CA's ICA without there having been a change of law, the All-or-Nothing Rule would flatly prohibit CA from laying claim to that UNE as it appears in that hypothetical ICA.

ISSUE 51: Should AT&T Florida be required to prove to CA's satisfaction and without charge that a requested UNE is not available?

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the parties are bound by the ICA. If CA were to come to AT&T during the term of the ICA and say, "I forgot to include this UNE in the ICA and now I want to amend the ICA to include it," AT&T would be perfectly within its rights to decline to do so.

Affected contract language: UNE 1.5

AT&T Position: No. For each UNE order received, AT&T determines in good faith whether the necessary facilities are available. If CA disputes AT&T's determination, CA can invoke dispute resolution and other remedies. CA's language would unreasonably require AT&T to prove unavailability to CA's satisfaction, with CA being the sole arbiter of satisfaction.

CA's proposed language would require AT&T to prove the unavailability of facilities to CA's satisfaction, with CA having sole discretion to determine if and when it is satisfied. The Commission should reject CA's unreasonable language for several reasons.

First, CA's proposed language is vague. It does not provide any guidance as to what AT&T would have to do to "reasonably prove" to CA that facilities do not exist. CA has failed to identify what proof AT&T could offer CA above and beyond the proof already at CA's disposal. CA has access to the same tools to determine the availability of facilities that AT&T uses to make its determination. For example, CA may perform at no charge a mechanized Loop Make Up ("LMU") by accessing the Loop Facility Assignment Center via Enhanced Verigate, and by using either an existing telephone number or end user address. This process uses the same records AT&T relies on to determine availability, and would enable CA to conduct its own research if it is not satisfied with AT&T's response. In addition, if CA wishes, it may ask AT&T to perform a manual LMU at the charge set forth in the Pricing Schedule. Kemp Direct at 43 (Tr. 579), lines 8-16.

CA witness Ray asserted that CA does not have access to the same tools as AT&T. Ray Rebuttal at 51 (Tr. 123), lines 13-14. But none of his alleged examples demonstrates that AT&T has any tools to which CA does not also have access. Indeed, his testimony shows that AT&T is making available to CA the same tools AT&T uses.

Nor is there any merit to CA's claim that AT&T has "unofficially retired" facilities – or any indication what CA even means by "unofficially retired." Ray Rebuttal at 52 (Tr. 124), lines

2-3. The single example that CA provided does not demonstrate what CA claims. *See* CA Response to Staff Interrogatory 91 (Exh. 28, pp. 94-95). In fact, at no point in CA's recitation of the alleged facts is there any mention that AT&T said its facilities were retired, officially or otherwise. *Id.* AT&T complies with all applicable rules as it relates to retiring facilities. *See* AT&T Response to Staff Interrogatory 131 (Exh. 38, p. 48). And by CA's own admission, the reason its order was repeatedly rejected was that CA was trying to order an HDSL loop in a wire center that was not impaired, and AT&T is not required to provide HDSL loops in that situation. *See* Issue 44 above.

Second, CA's language is unnecessary. If CA believes that AT&T's determination regarding a lack of facilities is incorrect, or that AT&T is somehow not cooperating with CA in determining the availability of facilities, CA is free to invoke its right to dispute resolution under the ICA and could also submit the issue to the Commission for resolution.[109] Permitting the Commission to resolve disputes is much more reasonable than adoption of CA's one-sided subjective standard.

Third, even if it were appropriate to require AT&T to meet some undefined standard to satisfy CA that requested facilities do not exist (which it is not), CA would have AT&T perform this task at no charge to CA. This is inconsistent with federal law, which permits AT&T to recover the costs it incurs to provision services to a CLEC.

Accordingly, the Commission should reject CA's proposed addition to UNE § 1.5.

ISSUE 53a Should CA be allowed to commingle any UNE element with any non-UNE element it chooses?

[109] CA's accusation that AT&T will provide incorrect information to CA in hopes of causing CA to invoke dispute resolution is baseless. CA Response to Staff Interrogatory 90 (Exh. 28, p. 30). Nor does it make any sense to suggest that AT&T would incur the costs to go through dispute resolution on matters on which it would not prevail and for which the Commission might take action against AT&T if it was shown that AT&T intentionally provided false information.

Affected contract language: UNE 2.3

> **<u>AT&T Position</u>**: No. The agreed language for UNE § 2.3 is consistent with controlling federal law, which limits commingling to linking a UNE with facilities or services obtained from AT&T at wholesale. CA's proposed additional language unlawfully fails to limit commingling to wholesale services or facilities.

The parties are close to resolving Issue 53a, which concerns whether UNE § 2.3 should impose a commingling requirement that exceeds the commingling required by the FCC's definition set forth in 47 C.F.R. § 51.5. The FCC defines commingling in 47 C.F.R. § 51.5 as follows:

> Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services.

The agreed language in section 2.3 of the UNE Attachment defines "Commingling" (or "Commingled Arrangement") in a manner that is consistent with the FCC's regulation. However, after the agreed language, CA proposes to add:

> ***CLEC shall be entitled to commingle any UNE with any other service element purchased from AT&T-21STATE either from this Agreement or from any AT&T-21STATE tariff, so long as the combination is technically feasible. Such commingling shall be required even if the specific arrangement sought by CLEC is not commonly commingled by AT&T-21STATE.***

CA's proposed addition to UNE § 2.3 is inconsistent with the FCC's definition, which limits commingling to linking a UNE with facilities or services obtained from AT&T at wholesale. While the agreed language in the first sentence of UNE Attachment § 2.3 tracks this limitation, CA's proposed language would undo that limitation by adding language that would allow it to commingle a UNE with "any other service element purchased from" AT&T. "Service element" is not defined in the ICA and CA could claim that it includes any sub-part of a service

or facility, even those that AT&T does not provide at wholesale on a stand-alone basis. CA's added language is overreaching and inconsistent with the binding FCC definition of commingling.

In response to Staff's Interrogatory 96, CA stated that it would not oppose inserting "at wholesale" after ". . . with any other service element purchased . . ." to its proposed language, if that would resolve the issue. Exh. 28, p. 100. AT&T concurs. Thus, AT&T would accept:

> "Commingling" or "Commingled Arrangement" means an arrangement connecting, attaching, or otherwise linking of a UNE, or a combination of UNEs, to one (1) or more facilities or services that CLEC has obtained at wholesale from AT&T-21STATE, or the combining of a UNE, or a combination of UNEs, with one (1) or more such facilities or services. CLEC shall be entitled to commingle any UNE with any other service element purchased at wholesale from AT&T-21STATE either from this Agreement or from any AT&T-21STATE tariff, so long as the combination is technically feasible. Such commingling shall be required even if the specific arrangement sought be CLEC is not commonly commingled by AT&T-21STATE.

ISSUE 54a: Is thirty (30) days written notice sufficient notice prior to converting a UNE to the equivalent wholesale service when such conversion is appropriate?

Affected contract language: UNE 6.2.6

<u>AT&T Position</u>: Yes. CA should know before receiving notice that a UNE no longer meets eligibility criteria. Furthermore, conversion of UNEs to equivalent wholesale services does not require facilities changes, just a rate change. Requiring 180 days' notice would prolong CA's enjoyment of reduced rates to which it is not entitled.

Thirty days is more than enough time for written notice to CA that it no longer meets the eligibility requirements for UNE services. In fact, CA should be well aware of how many loops it has to every building it serves and should therefore know when its UNEs or UNE combinations satisfy eligibility criteria and when they do not. Since CA has all the information it needs to determine its eligibility, it should not need any notice from AT&T. Regardless,

AT&T has proposed 30 days' written notice when CA's UNEs or UNE combinations no longer meet the eligibility criteria. Kemp Direct at 47 (Tr. 583), lines 15-19.

CA can – and should – avoid the necessity of this notice, however, by effectively monitoring its activities and UNE and UNE combination loop inventory. This would enable CA to proactively convert the services on its own, rather than waiting until AT&T manages the conversion for CA. *Id*. at 47 (Tr. 583), lines 19-22. In light of CA's ability to monitor its own eligibility, AT&T's proposed 30 days' written notice is more than sufficient.

Based on the deposition testimony of Mr. Ray, CA now appears to agree that 30 days is the appropriate time period. At first, CA professed to be "unaware of any event that would cause a CLEC to no longer meet the eligibility criteria for UNEs other than a wire center classification." CA Response to Staff Interrogatory 98 (Exh. 28, p. 39). That interrogatory response was troubling, because one need not look further than the parties' ICA for an example: Pursuant to UNE § 8.1.3.4.4, AT&T is not obligated to provide CA more than ten (10) DS1 UNE Loops to any single Building in which DS1 UNE Loops have not been otherwise declassified. Therefore, a conversion to wholesale services would be appropriate for CA's DS1 UNE Loops to that building over the count of ten (10).[110] Kemp Direct at 47 (Tr. 583), lines 1-7.

When presented with this precise scenario from Ms. Kemp's testimony, Mr. Ray repeated that CA thinks that Issue 54a addresses wire center reclassifications. Ray Dep. (Exh. 46) at 98, line 25 – 99, line 10. It does not; Issue 54b is the issue that addresses wire center reclassifications. Issue 54a addresses scenarios of the type in Ms. Kemp's example. And Mr. Ray testified that a 30-day timeframe is appropriate for that scenario. *Id.* at 99, lines 21-24. That is AT&T's position, which this Commission should adopt.

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[110] Wire center reclassification is addressed in Issue 54b. Issue 54a relates only to situations in which CA fails to meet or ceases to meet the eligibility criteria applicable to the UNE or UNE combination.

CA also claims that it "cannot possibly transition its customer base to new service arrangements in 30 days." Ray Direct at 44 (Tr. 65), line 23. But CA misses the point. CA will only be limited to 30 days to transition its customers if CA fails to properly monitor its own eligibility. If it monitors its eligibility, as it should, CA will have more than 30 days to plan its transition.

Requiring a longer notice period than AT&T's proposed 30 days would delay the conversion from UNE to wholesale services for that same length of time and permit CA to enjoy lower UNE rates to which it is not legally entitled. By the same token, AT&T would experience the loss of revenue equal to the difference between the lower UNE rates and the higher special access rates it is entitled to bill for that same length of time. CA's request for 180 days' notice is simply an attempt to keep paying lower UNE rates to which it is not entitled for as long as possible, which is unreasonable, especially in light of the fact that CA should already know it no longer meets the criteria.

For the foregoing reasons, the Commission should adopt AT&T's proposed 30-day notice period.

ISSUE 54b: Is thirty (30) calendar days subsequent to wire center Notice of Non-impairment sufficient notice prior to billing the provisioned element at the equivalent special access rate/Transitional Rate?

Affected contract language: UNE 14.10.2.2, 14.10.2.3.1.1 and 14.10.2.3.1.2

AT&T Position: Yes. Thirty days following notice of non-impairment is the appropriate timeframe to begin billing special access rates. Requiring notice of 180 days would prolong CA's enjoyment of reduced rates to which it is not entitled. Moreover, CA may self-certify, which provides a timeline different from the 30-day special access billing.

Once a wire center is no longer impaired, a CLEC is no longer entitled to obtain service at UNE rates; instead a CLEC may obtain those services at the special access or transitional

rates.[111] In the event of a future reclassification of a wire center as non-impaired, AT&T proposes a grace period of 30 days (which does not start until 60 days after the notice of non-impairment is provided)[112] before AT&T begins to bill at the special access or transitional rate. CA proposes a grace period of 180 days.

There is no basis for CA's proposed half-year grace period. All that is involved here is a rate change; there is no physical conversion of any facilities. Kemp Direct at 49 (Tr. 585), line 18. Thus, Mr. Ray's suggestion that 30 calendar days makes it "impossible" for CA to transition its customers to alternate commercial arrangements (Ray Direct at 45 (Tr. 66), lines 15-19) is a red herring. Issue 54b has nothing to do with CA actually transitioning its end users to new arrangements. It is about the applicable rate change from UNE to wholesale rates for circuits that CA has not transitioned when the wire center is considered non-impaired and UNE rates are no longer available. In any event, if CA decides to transition its customers to a different arrangement, it can take as long as it chooses. All the language requires is a rate change; it does not impose a deadline for CA to change physical arrangements of its customers if CA so chooses.

Moreover, CA can avail itself of a longer period than AT&T's proposed 30 days if CA disputes the AT&T wire center non-impairment designation by providing a self-certification to AT&T. After that, AT&T may choose to file for dispute resolution at the Commission, which would trigger a different timeline, during which AT&T will continue to provide the high-

[111] Issue 54b is distinct from Issue 54a, which deals with the scenario in which CA fails to meet or ceases to meet the eligibility criteria applicable to UNEs or UNE combinations.

[112] UNE § 15.1.5 addresses wire center designations that may occur after the parties' ICA goes into effect. (*See also* UNE § 15.1 ("[t]he parties recognize that Wire Centers that AT&T-21STATE had not designated as meeting the FCC's non-impairment thresholds as of March 11, 2005, may meet those thresholds in the future."). Section 14 addresses wire center designations that were made before execution of the ICA. In that situation, the 60-day notice has previously been provided and has already run, so there is no need to reference the 60-day notice period in UNE § 14.

capacity UNE loop or transport facility in question to CA at the rates in the pricing schedule. Kemp Direct at 49 (Tr. 585), lines 7-12.

CA's reliance on the 180-day transition period in the *TRRO*[113] (Ray Rebuttal at 55 (Tr. 127), lines 13-18) is unavailing. Those transition periods were specifically ordered for the initial transition from UNE rates to special access rates, as CA concedes (*id.* at 55 (Tr. 127), line 15), at a time when the entire industry was undergoing a significant change as a result of the *TRRO*. Those changes affected all ILECs and all CLECs. Tr. at 703, lines 19-25. Years later, there is nothing groundbreaking or novel about the FCC's impairment criteria and eligibility standards, and the factors that led the FCC to declare a 180-day transition period simply are not present here. In any event, AT&T's proposed language properly takes into account any transition periods that are within the initial *TRRO* transition period. *See* UNE §§ 14.10.2.3.1.1 and 14.10.2.3.1.2.

In sum, allowing CA to pay the lower UNE rate for any amount of time after notice gives CA a rate to which it is not legally entitled and deprives AT&T of the revenue it is permitted to receive. AT&T's proposed 30-day grace period is reasonable and should be adopted.

ISSUE 55: To designate a wire center as unimpaired, should AT&T Florida be required to provide written notice to CA?

Affected contract language: UNE 15.1

AT&T Position: No. AT&T provides notice of network changes via an Accessible Letter that is posted to CLEC Online, a website accessible to all CLECs. In addition, any CLEC that wants to receive individual notices may subscribe to direct notices of Accessible Letters and email notices of wire center unimpairment designations,

[113] Order on Remand, *In re Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (rel. Feb. 4, 2005) ("*TRRO*").

There are two main ways that AT&T notifies CLECs that a wire center is unimpaired. First, network information is posted on CLEC Online in the form of an Accessible Letter. As defined in GT&C § 2.2, an Accessible Letter is "the correspondence used to communicate pertinent information regarding AT&T-21STATE to the CLEC community and is (are) provided via posting to the AT&T CLEC Online website." All CLECs, including CA, can access this website. Kemp Direct at 50 (Tr. 586), line 21 – 51 (Tr. 587), line 2.

Second, if a CLEC wants to receive Accessible Letters directly so that it does not have to rely on CLEC Online, it may subscribe to direct notices of Accessible Letters via email. The CLEC that does so will specify the recipients to whom AT&T is to send the Accessible Letters. *Id*. at 51 (Tr. 587), lines 2-3 and 6-11; Kemp Rebuttal at 21 (Tr. 623), lines 16-23. CA was apparently unaware of this option, because it mistakenly stated that under AT&T's proposal, AT&T would only post notice that a wire center had been designated unimpaired on its website (Ray Direct at 46 (Tr. 67), lines 1-3).

CA's testimony on this issue is inconsistent with its proposed contract language. CA's proposed contract language for UNE § 15.1.2 would require AT&T to inform CA of wire center unimpairment "***under the notices provision of this Agreement*** – which allows for notice via fax, email, first class mail or certified mail (*see* GT&C § 21.1). And yet, according to CA's testimony, CA wants to receive unimpairment notices by certified mail. Ray Direct at 46 (Tr. 67), lines 5-6. CA's apparent uncertainty about what it wants is a good reason to reject its proposed language.

This is yet another instance in which CA proposes, for no persuasive reason, for the Commission to require AT&T to establish a special process for dealing with CA that is different from the process that applies to all other CLECs in Florida – and in which CA does not propose

to compensate AT&T for the expenditure of time and money that would be necessary in order for AT&T to do so.[114] The Commission should resolve Issue 55 in favor of AT&T.

ISSUE 56: Should the ICA include CA's proposed language broadly prohibiting AT&T Florida from taking certain measures with respect to elements of AT&T Florida's network?

Affected contract language: UNE 4.6.4

<u>AT&T Position</u>: No. CA's proposed language is overly broad and could inhibit AT&T from maintaining its network in an efficient fashion.

CA proposes a new UNE § 4.6.4:

> ***AT&T-21-STATE shall not tamper with or convert an in-service UNE provided to CA for its own benefit or business purposes or for its own customers and/or substitute another UNE in its place.***

AT&T does not "tamper" with any CLEC's UNEs or services. If CA believes AT&T has done so, it is free to file a complaint and support its claim. That aside, CA's language is overly broad and could inhibit AT&T from maintaining its network in an efficient fashion. It may be necessary for AT&T, in the course of maintaining and repairing its network, to switch CA's UNE from one facility to another to ensure the integrity of the UNE being provided to CA or to another CLEC. For example, if a cable serving CA is cut, it could be necessary for AT&T to transfer CA's UNE circuit to a different cable to place it back in service. This certainly would not be "tampering," but the vague unqualified language proposed by CA could easily be read to prohibit AT&T from taking such necessary measures. CA's proposed language is unreasonable and should not be included in the ICA. Kemp Direct at 52 (Tr. 588), lines 5-20.

However, AT&T would not object to including the following sentence as UNE § 4.6.4: "If AT&T Florida converts an in-service UNE provided to CA, it will replace the UNE with a

[114] The Accessible Letter process, with the option of direct notices, is used by all AT&T ILECs and is accepted by the CLEC community. Kemp Direct at 51 (Tr. 587), lines 3-5.

UNE with the ability to provide the level of service ordered by CA." This should alleviate CA's stated concern (unfounded though it is) about the possibility of AT&T replacing CA's in-service loop with an inferior loop. *See* AT&T Response to Staff Interrogatory 138 (Exh. 38, p. 56).

ISSUE 57: May CA use a UNE to provide service to itself or for other administrative purposes?

Affected contract language: UNE 4.7.1

AT&T Position: No. FCC rules require AT&T to provide UNEs to CLECs only for the provision of telecommunications services to the CLEC's end-user customers. AT&T's language appropriately prohibits CA from using UNEs to provide service solely to itself or for administrative purposes.

Issue 57 concerns whether CA should be allowed to use a UNE provided by AT&T to provide service to itself or for other administrative purposes. AT&T's proposed language in UNE § 4.7.1 would, consistent with the 1996 Act, provide that CA "cannot use a UNE . . . with a network element possessed by [CA] to provide service to itself, or for other administrative purpose(s)." CA takes the position that this language should not be included in the ICA.

The Commission should adopt AT&T's position, because the 1996 Act does not allow a CLEC to use a UNE to provide service to itself or for other administrative purposes. Section 251(c)(3) of the 1996 Act requires an ILEC to provide UNEs to a CLEC "for the provision of a telecommunications service . . . ." 47 U.S.C. § 251(c)(3); *accord*, 47 C.F.R. §§ 51.307(a) and 51.309(d). The 1996 Act and the FCC's rules define a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(53); 47 C.F.R. § 51.5. If a CLEC used a UNE to provide service to itself or for its own administrative purposes, it would not be using that UNE to provide service "to the public" or "for a fee," and therefore would not be using the UNE to provide a telecommunications service. Kemp Direct at 53 (Tr. 589), lines 12-15.

CA claims it is allowed to use a UNE for "any permissible purpose" (Ray Direct at 47 (Tr. 68), lines 1-2), but ignores that *permissible* purposes does not mean *any* purpose. As the 1996 Act and FCC rules show, the "permissible purpose" is to provide a "telecommunications service," which is defined as a service to the public for a fee. Kemp Rebuttal at 23 (Tr. 625), lines 8-12.

CA's testimony suggests that it has a concern AT&T would refuse to provide UNEs that are not used to serve a specific customer, but rather are part of CA's "overall network infrastructure." Ray Direct at 47 (Tr. 68), lines 5-7. That is not the case. There are some UNEs, such as dedicated interoffice transport, that would not be used by CA to serve a specific customer, but rather would be part of its overall network. CA can still obtain available UNEs, provided they are used to provide telecommunications service and to provide service to CA's customers in general (*e.g.*, by connecting to the local loops that serve CA's customers). The only effect of AT&T's proposed language in UNE § 4.7.1 is to make clear that CA cannot obtain a UNE and then use that UNE *solely* to provide service to itself or for administrative purposes, rather than using it as part of its overall network to serve end-user customers. Kemp Rebuttal at 23 (Tr. 625), line 15 – 24 (Tr. 626), line 2.

The Commission should adopt AT&T's proposed UNE § 4.7.1, which correctly states that CA cannot use a UNE to provide service to itself or for other administrative purposes.

ISSUE 58a: Is Multiplexing available as a stand-alone UNE independent of loops and transport?

Affected contract language: UNE 6.4.2

<u>AT&T Position</u>: No. 47 C.F.R. § 51.319 is the exclusive list of UNEs, and multiplexing is not on the list. Consequently, multiplexing is not available as a standalone UNE. Multiplexing is available when ordered in conjunction with unbundled dedicated transport to provide an enhanced extended loop.

ISSUE 58b: Is Multiplexing available as a stand-alone UNE independent of loops and transport?

Affected contract language: UNE 9.6.1

<u>AT&T Position</u>: No. Multiplexing is available under the ICA only as part of an enhanced extended loop. AT&T's proposed language in UNE § 9.6.1 makes clear that when CA orders DS1 or DS3 unbundled dedicated transport, this service will include multiplexing.

Issues 58a and 58b concern whether AT&T must offer multiplexing to CA as a stand-alone UNE independent of loops and transport. Multiplexing converts a circuit from higher to lower bandwidth, or from digital to voice grade. Kemp Direct at 55 (Tr. 591), lines 22-24. Multiplexing is necessary to combine loop and transport to provide an extended enhanced loop ("EEL"), which "consists of a combination of an unbundled loop and unbundled dedicated transport, together with any facilities, equipment, or functions necessary to combine those network elements." 47 C.F.R. 51.5.

The affected language for Issue 58a is in UNE § 6.4.2, which identifies services to which AT&T is *not* required to provide access as an UNE. AT&T has proposed the following:

> 6.4.2 AT&T-21STATE is not obligated, and shall not, provide access to (1) an unbundled DS1 UNE Loop in combination, or Commingled, with a DS1 UDT facility or service or a DS3 or higher UDT facility or service, or an unbundled DS3 UNE Loop in combination, or Commingled, with a DS3 or higher UDT facility or service, or (2) an unbundled DS1 UDT facility in combination, or Commingled, with an unbundled DS1 UNE Loop **<u>or a DS1 channel termination service, or to an unbundled DS3 UDT facility in combination, or Commingled, with an unbundled DS1 UNE Loop or a DS1 channel termination service,</u>** or to an unbundled DS3 UNE Loop **<u>or a DS3 or higher channel termination service</u>** (collectively, the "Included Arrangements"), unless CLEC certifies that all of the following conditions are met with respect to the arrangement being sought:

CA opposes the addition of the bolded/underlined language, but that language is necessary to make clear that multiplexing is not a UNE and need not be unbundled by AT&T on a standalone basis. FCC Rule 51.319 is the sole and exclusive list of UNEs, and states cannot

add to it. Multiplexing is not on the list and, therefore, does not have to be provided on a stand-alone basis. *See* Kemp Direct at 54 (Tr. 590), lines 1-7. AT&T's proposed language conforms the ICA to the matching provision in 47 C.F.R. §51.318(b).

The affected language for Issue 58b is in UNE § 9.6.1, which defines "multiplexing" that AT&T will provide when CA orders DS1 Unbundled Dedicated Transport ("UDT") or DS3 UDT under the ICA. CA proposed to delete the definition of multiplexing in UNE § 9.6.1 because it conflicts with CA's desire to order standalone multiplexing. However, there is no basis for CA's proposal. As reflected in AT&T's proposed definition, multiplexing may be ordered in conjunction with UDT at the time the UDT is ordered; in this instance it will be provided at the rates in the pricing schedule. Kemp Direct at 54 (Tr. 590), lines 12-14. AT&T's proposed language in UNE § 9.6.1 accurately defines multiplexing as an item ordered in conjunction with DS1 or DS3 UDT that converts a circuit from higher to lower bandwidth, or from digital to voice grade. Multiplexing is only available when ordered at the same time as DS1 or DS3 UDT at the rates set forth in the Pricing Schedule. Kemp Direct at 55 (Tr. 591), lines 24-25.[115]

Finally, CA has conceded that multiplexing is not a UNE and, therefore, is not subject to unbundling as a standalone UNE. Nonetheless, CA argues that multiplexing is a "routine network modification" that AT&T performs for its own customers and therefore must provide pursuant to 47 C.F.R. § 51.319(d)(4). CA is wrong. The FCC rule on which CA relies states: "An incumbent LEC shall make all routine network modifications to unbundled dedicated transport facilities used by requesting telecommunications carriers *where the requested dedicated transport facilities have already been constructed*." 47 C.F.R. § 51.319(d)(4)(i) (emphasis

[115] If it wishes, CA may order stand-alone multiplexing from AT&T's special access tariff. Kemp Direct at 54 (Tr.. 590), lines 11-12.

added). Examples of such "[r]outine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; installing a repeater shelf; and deploying a new multiplexer or reconfiguring an existing multiplexer." 47 C.F.R. § 51.319(d)(4)(ii). CA focuses solely on the regulation's reference to "deploying a new multiplexer or reconfiguring an existing multiplexer," but ignores that such work is only considered a routine network modification under the FCC's rules when it is performed on "dedicated transport facilities [that] have *already* been constructed." 47 C.F.R. § 51.319(d)(4)(i) and (ii) (emphasis added). Thus, the FCC only requires AT&T to provide multiplexing as a routine network modification where there is "a circuit that was already multiplexed and something happened and AT&T had to install a new multiplexer or reconfigure one that is already there to make sure the circuit is good." Tr. 699, lines 4-10.

For these reasons, the Commission should adopt AT&T's language in UNE §§ 6.4.2 and 9.6.1.

ISSUE 59a: If AT&T Florida accepts and installs an order for a DS1 after CA has already obtained ten DS1s in the same building, must AT&T Florida provide written notice and allow 30 days before converting to and charging for Special Access service?

Affected contract language: UNE 8.1.3.4.4

AT&T Position: No. CA must manage and track its inventory of DS1 loops. If CA has ten DS1 loops to a building, it should be aware that if it orders another DS1 loop to that building, it must pay special access rates. It is not AT&T's responsibility to manage CA's network.

Like Issue 54a, Issue 59a turns on whether CA will be responsible for managing and tracking what it has ordered from AT&T, or whether that burden will be foisted on AT&T.

FCC Rule 51.319(a)(4)(ii) limits a CLEC to obtaining "a maximum of ten unbundled DS1 loops to any single building[.]" 47 C.F.R. § 51.319(a)(4)(ii). Thus, if a carrier orders more than ten DS1 UNE loops to a single building, it is not entitled to pay DS1 UNE loop rates on

loops 11 and above. Rather, it must switch to a DS3 unbundled loop, build its own loops, or pay tariffed special access rates to AT&T. *See TRRO*, ¶ 181.

The parties disagree as to what happens when CA orders more than the ten DS1 loops in a building than it is entitled to order. AT&T proposes that it be permitted to "convert any requested DS1 Digital UNE Loop(s) in excess of the Cap to Special Access" and apply "applicable Special Access charges . . . for such DS1 Digital UNE Loop(s) as of the date of provisioning." CA, on the other hand, proposes that in the event CA orders a DS1 loop at a rate to which it is not entitled, then AT&T must "notify CLEC in writing and CLEC shall then have 30 days in which to transition or disconnect the circuit prior to conversion by AT&T-21STATE or to invoke the dispute resolution process in this agreement if it believes that AT&T is not entitled to the conversion."

AT&T's position accurately reflects applicable law, while CA's does not. AT&T's proposed language correctly provides that if CA orders more DS1s than the FCC's rules permit, AT&T can accept the order but convert the DS1s that exceed the cap from UNE rates to special access rates. CA's language provides that if AT&T accepts an order for a DS1 unbundled loop to a building where CA has already met the cap, AT&T must provide 30 days' prior written notice before converting that facility to special access and charging the tariffed special access rate. In other words, CA proposes to put the burden on AT&T to track the number of CA's DS1 unbundled loops to make sure they do not exceed the cap, and to keep charging UNE rates for at least a month after AT&T discovers that CA has improperly obtained a DS1 facility that exceeds the cap.

As the carrier that orders and obtains DS1 UNE loops, CA is responsible for tracking the number of DS1 UNE loops it orders to any building and knowing when it has reached the ten

DS1 cap. CA concedes this. Ray Dep. (Exh. 46) at 104, line 24 – 105, line 1. AT&T is not required to notify CA when CA exceeds the cap. Nor, if AT&T provisions an order for a DS1 UNE loop that exceeds the cap, is AT&T required to keep charging UNE rates during a 30-day notice period. A CLEC has no legal right to obtain more than 10 DS1 UNE loops to a building, and if CA exceeds that limit, AT&T is entitled to charge special access rates for the extra circuits from the day they are provisioned, regardless of whether AT&T notified CA it exceeded the cap or when AT&T discovers the error. CA's language would unfairly require AT&T to act as CA's UNE record keeper and would unlawfully allow CA to pay UNE rates for some period when it has no legal right to UNE rates.

CA complains that AT&T should not automatically install a circuit other than what was ordered if what was ordered is unavailable, and instead "should reject the UNE order back to CA[.]" Ray Direct at 48 (Tr. 69), lines 18-20. That is what AT&T normally will do if it catches CA's error at the time of the order and knows CA is going to exceed the cap. Kemp Rebuttal at 26 (Tr. 628), lines 3-7. The ICA language in dispute, however, is necessary to protect AT&T in situations where it does not catch CA's error and proceeds to provision CA's order. In that case, AT&T should be allowed to recover special access prices from the date of provisioning. Any other result would give CA a windfall discount just because AT&T did not immediately catch CA's error. The burden should not be on AT&T to police CA's ordering and provide written notice of a violation, nor should AT&T have to delay charging special access rates when, as matter of law, CA has no right to UNE rates. *Id.* at 26 (Tr. 628), lines 7-14.

Nor is there any merit to CA's suggestion that additional notice is needed to deal with purported differences between building addresses in AT&T's records versus the postal service's records. Ray Dep. (Exh. 46) at 104, lines 11-21. CA does not present a single example of such a

problem, nor could there be an example. In order for a CLEC (or any customer) to submit an order, it must provide a building address that exists in *AT&T's* database, regardless of what is in the postal service's database. If CA submits an order for a building address that does not exist in AT&T's database, the order will not be processed. If the order is for a building address that does exist, the order will process and CA will be able to determine if an order at that address would cause it to exceed the relevant cap. Moreover, if inconsistent addresses really were CA's primary concern, as it claims,[116] then its proposed solution would be far too broad. Rather than an extended notice period in all instances, the appropriate remedy if there were a legitimate issue (which there is not) would be to deal with any purported address inconsistencies through the agreed dispute resolution procedures.

In the end, this dispute (as well as Issues 59b and 59c below) is about who bears the risk of CA's errors. As the party ordering service, it is CA's obligation to monitor its UNE count and not place UNE orders that exceed the cap. Indeed, CA has already agreed to language in UNE § 8.1.3.4.4 stating that "CLEC may not order or otherwise obtain, and CLEC will cease ordering unbundled DS1 Digital UNE Loops once CLEC has already obtained ten DS1 Digital UNE Loops at the same Building."[117] Thus, CA agrees it has no right to order DS1 or DS3 UNEs that exceed the FCC's caps. If CA places such an order, it has breached its contract with AT&T and it should bear the risk that AT&T will fulfill the order by providing the circuit at special access prices – which is all CA is legally entitled to. If CA does not want to pay special access prices for the circuit, it can always have the circuit taken down.

[116] Ray Dep.(Exh. 46) at 104, lines 11-12.

[117] CA also agreed to similar language in section 8.1.3.5.4 regarding DS3 loops (Issue 59b) and sections 9.6.2 and 9.6.3 regarding dedicated transport (Issue 59c).

For these reasons, the Commission should adopt AT&T's proposed language for UNE § 8.1.3.4.4 and reject CA's.

ISSUE 59b: Must AT&T provide notice to CA before converting DS3 Digital UNE loops to special access for DS3 Digital UNE loops that exceed the limit of one unbundled DS3 loop to any single building?

Affected contract language: UNE 8.1.3.5.4

AT&T Position: No. CA must manage and track its inventory of DS3 loops. If CA already has a DS3 loop in a building, it should be aware that if it orders another DS3 loop in the building, it must pay special access rates. It is not AT&T's responsibility to manage CA's network.

Issue 59b is essentially the same as Issue 59a and should be resolved in the same way – by adopting AT&T's proposed language and rejecting CA's.

FCC Rule 51.319(a)(5)(ii) limits a CLEC to "a maximum of a single unbundled DS3 loop to any single building[.]" 47 C.F.R. § 51.319(a)(5)(ii). When a CLEC needs two or more DS3s to single building, the CLEC must either self-deploy DS3s beyond the first one or find some other way to carry its traffic – it cannot obtain a second DS3 loop at UNE rates from the ILEC. *See TRRO* ¶ 177 & n.483. And if a carrier orders more than one DS3 UNE loop to a single building, the ILEC is entitled to charge special access rates for those additional circuits above the cap. As with Issue 59a, CA seeks to avoid these requirements and shift the burden to AT&T to act as CA's record keeper and allow CA to keep paying UNE rates for some period when it has no right to do so.

The Commission should adopt AT&T's language and reject CA's proposed language for Issue 59b for the same reasons as on Issue 59a.

ISSUE 59c: For unbundled DS1 or DS3 dedicated transport circuits that AT&T Florida installs that exceed the applicable cap on a specific route, must AT&T Florida provide written notice and allow 30 days prior to conversion to Special Access?

Affected contract language: UNE 9.6.2 and 9.6.3

> **<u>AT&T Position</u>**: No. This is essentially the same issue as Issues 59a and 59b, but in this instance it pertains not to loops, but to DS1 and DS3 dedicated transport. See Summary Statements for Issues 59a and 59b.

Issue 59c is essentially the same as Issues 59a and 59b, except that Issue 59c pertains to DS1 and DS3 dedicated transport rather than loops.

Because AT&T is not obligated to provide more than twelve DS3 UDT circuits and ten DS1 UDT circuits on any route, AT&T should not be obligated to provide 30 days' written notice to CA before converting transport circuits to special access when CA exceeds the UNE limit. If CA does not want to pay special access rates, CA should monitor its own activities and DS1 and DS3 UDT circuit inventory and cease ordering when it has met the cap. If CA has already obtained the limit of DS1 or DS3 UDT circuits on a single route, and orders additional UDT circuits that exceed the limit, AT&T should be able to reject the order or to install the service. Once it is installed, AT&T should be able to convert any UDT circuit in excess of the cap to special access with no notice. Kemp Direct at 59 (Tr. 595), line 21 – 60 (Tr. 596), line 6.

The Commission should reject CA's proposed language in UNE §§ 9.6.2 and 9.6.3.

ISSUE 60: Should a CLEC be prohibited from obtaining resale services for its own use or to sell them to affiliates?

> **Affected contract language: Resale 3.2**
>
> **<u>AT&T Position</u>**: Yes. FCC and state commission precedents strongly support AT&T's language prohibiting CA from obtaining telecommunications services from AT&T at wholesale rates for resale to itself or its affiliates. The prohibition is a reasonable limitation on resale and is consistent with the purpose of the resale requirement.

Section 251(c)(4) of the 1996 Act requires AT&T to sell telecommunications services to CA at a wholesale discount for resale to its end user customers. Because the purpose of the resale requirement is to allow CA to compete with AT&T by reselling to end users the services that CA buys from AT&T at wholesale rates, AT&T proposes language for Resale § 3.2 that

states that AT&T has no obligation to make services available at the wholesale discount to CA for its own use or for the use of an affiliate. CA opposes AT&T's proposed language.

While section 251(c)(4)(B) of the 1996 Act prohibits AT&T from imposing. "unreasonable or discriminatory … limitations on, the resale of … telecommunications service," it allows AT&T to impose reasonable, nondiscriminatory limitations on resale. The prohibition on a CLEC reselling AT&T's services to itself or its affiliate is a reasonable and non-discriminatory limitation on resale, and, as discussed below, has been approved by state commissions. Pellerin Direct at 89 (Tr. 260), line 17 – 90 (Tr. 261), line 3.

More important, CA's position that it should be allowed to resell AT&T's services to itself or its affiliate is squarely at odds with FCC rulings. In its 1996 *Local Competition Order*, the FCC stated (at ¶ 875), "section 251(c)(4) does not require the incumbent LECs to make services available for resale at wholesale rates to parties who are not 'telecommunications carriers' *or who are purchasing service for their own use*." (Emphasis added). Similarly, paragraph 874 states, "section 251(c)(4) does not entitle subscribers to obtain services at wholesale rates for their own use." The FCC is clear: AT&T must offer its services for resale to CA, but it is not required to provide services to CA *as an end user* at a wholesale rate.

This principle comports with the purpose of section 251(c)(4), which is to enable CLECs to compete with the ILEC by purchasing the ILEC's services at wholesale rates and reselling the services to end users at a profit. That purpose would not be served by allowing CA to buy services from AT&T at a wholesale discount for its own or its affiliates' use. Pellerin Direct at 90 (Tr. 261), lines 17-20. As other state commissions have concluded:

- "The Panel adopts [the ILEC's] proposed language [providing that the Sprint may purchase resale services only for sale to a person other than Sprint, its subsidiaries and affiliates]. . . . [T]he Panel is of the opinion that federal law clearly provides guidance that the 1996 Act did not

> require the ILEC to provide services to other carriers at wholesale rates for their own internal use. This does not mean that Sprint will not have access to the telephone lines it needs to establish its business, but simply that it must purchase them at retail rates, like every other competitive local exchange carrier and end user."[118]

- "We read 251(c)(4) . . . as not requiring [the ILEC] to sell Sprint lines at wholesale rates for its own use. . . . Neither the Act nor the FCC Order explicitly requires [the ILEC] to sell Sprint such lines at wholesale rates and we believe competition will not be impaired by Sprint's purchase of its own lines at retail rates." [119]

- "Prohibiting Sprint from using resale services for its own corporate use or use by its corporate affiliates is reasonable and supported by the Act."[120]

CA's arguments in opposition to AT&T's proposed language are frivolous. CA asserts that it may resell AT&T's services to any party it chooses as long as it does not violate the ICA. Ray Direct at 49 (Tr. 70), lines 5-6. Perhaps so, which is why the ICA should state that CA may not resell AT&T's services to itself or its affiliates. *See* Pellerin Direct at 89 (Tr. 260), lines 6-16. CA also states that AT&T "should have no input into how CA designs its network or provisions its customers." Ray Direct at 49 (Tr. 70), line 4. That has nothing to do with this issue. When CA elects to provision its customers by reselling AT&T's service, CA is bound by the reasonable limits that are part and parcel of section 251(c)(4) and the FCC's implementing rules. That means that CA is not entitled to resell AT&T's services to itself or its affiliates.

The Commission should adopt AT&T's language for Resale § 3.2.

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[118] Decision of the Arbitration Panel, Docket No. 6055-MA-100, *Petition of Sprint Communications Company per § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Wisconsin Bell, Inc.* (Wisc. Pub. Serv. Comm'n Jan. 15, 1997).

[119] Arbitration Decision, Cause No. 40625-INT-01, *Sprint Communications Company L.P.'s Petition for Arbitration for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Indiana Bell Telephone Co.* (Ind. Util. Reg. Comm'n Jan. 9, 1997).

[120] Decision of Arbitration Panel, Case No. U-11203, *Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Michigan Bell Tel. Co.* (Mich. Pub. Serv. Comm'n Dec. 12, 1996).

ISSUE 61: Which party's language regarding detailed billing should be included in the ICA?

Affected contract language: Resale 5.2.1

<u>AT&T Position</u>: AT&T's language should be adopted because it provides CA with the ability to obtain, without charge, all the detailed billing information it needs. CA's language inappropriately relies on an FCC Order that concerns retail billing, not billing for resale services.

The parties disagree as to how the ICA should describe the detailed billing AT&T will make available to CA for resale services. AT&T proposes the following language for Resale § 5.2.1, to which CA objects:

> **<u>AT&T-21STATE shall provide CLEC with the option to obtain detailed monthly billing detail which, at a minimum, meets all regulatory requirements for detailed billing and which provides the telephone number and rate of each resold line billed for that month, along with any optional features for each line and the rate associated with each optional feature billed.</u>**

If AT&T's language is included in the ICA, CA will be able to request detailed billing for its resale customers via its CLEC Profile. AT&T does not charge for detailed billing as described in section 5.2.1. However, CA also has the option of obtaining a daily usage file ("DUF") for its resale customers, for which AT&T charges the rates set forth in the Pricing Schedule. CA has not contested these rates. Pellerin Direct at 92 (Tr. 263), lines 14-21.

CA's objection to AT&T's language is a mystery, because it is precisely the language CA proposed during the parties' negotiations, except that it states that detailed monthly billing is an option. *Id*. at 92 (Tr. 263), lines 9-13. If CA had to pay to exercise the option, the objection would be understandable – but it does not have to pay.

CA states that it needs billing detail in order to bill its resale customers or dispute AT&T's bills (Ray Direct at 49 (Tr. 70), lines 15-16 and 19-20), but that does not explain CA's objection to AT&T's language, because CA can have the detail under AT&T's language; all it

has to do is ask for it. The reason for requiring the request for detail is that AT&T gives all CLECs, including CA, the ability to select the level of billing detail they deem appropriate for their business needs. AT&T provides a comprehensive CLEC Billing Guide on its CLEC Online website from which CA can select the detail to appear on its bills.[121] When it completes its CLEC Profile, CA will select the specific billing detail it wants; AT&T does not make those decisions on the CLEC's behalf. Pellerin Rebuttal at 41 (Tr. 307), lines 5-11. Whatever CA's objection to this approach may be, it cannot be taken seriously: CA hasn't even bothered to review the CLEC Billing Guide to understand the levels of billing detail AT&T offers. See Exh. 20 (CA stating, in response to interrogatory, that it has not reviewed the Billing Guide).

CA's language for Resale § 5.2.1 must be rejected, because it would require AT&T's detailed billing to "meet[] all regulatory requirements of FCC Order 99-72 for detailed billing." The billing rules established in that order (47 C.F.R. §§ 64.2400 and 2401) relate to retail bills to consumers, not resale bills to other carriers. Pellerin Direct at 93 (Tr. 264), lines 1-3.[122]

The Commission should adopt AT&T's language for Resale § 5.2.1, because it will provide CA with the detailed billing information on resale lines it needs to bill its end users and to dispute AT&T's bills.

ISSUE 62a: Should the ICA state that OS/DA services are included with resale services?

Affected contract language: CIS 1.2.2

AT&T Position: Yes. In a resale situation, a CLEC purchases in its entirety the existing retail service being provided to the CLEC's customer. AT&T's OS/DA services are provided in conjunction with AT&T's retail services and therefore automatically provided with resale services.

[121] http://wholesale.att.com/reference_library/guides/html/understanding_bill.html

[122] The first sentence of FCC Order 99-72 states, "In this Order, we undertake common-sense steps to ensure that consumers are provided with basic information they need to make informed choices in a competitive telecommunications marketplace . . . ." Also, the rules the FCC promulgated in that Order apply, by their terms, to "telephone bills." The bills AT&T sends CLEC resellers are not telephone bills.

ISSUE 62b: Does CA have the option of not ordering OS/DA service for its resale end users?

Affected contract language: CIS 1.2.3.3

<u>AT&T Position</u>: No. If CA does not want OS/DA, it can order blocking, just as AT&T's own retail customers are required to do to block OS/DA.

Issues 62a and 62b concern whether AT&T will automatically provide Operator Services ("OS") and Directory Assistance Services ("DA") when CA purchases AT&T's retail services for resale. When a CLEC acts as a reseller of AT&T retail services, the CLEC purchases in its entirety the existing retail service being provided to the customer the CLEC acquires. Because AT&T's retail local service includes operator services and directory assistance ("OS/DA"), each resale line comes equipped with OS/DA services. CA obtains them simply by purchasing the resold service of a retail customer. Kemp Direct at 61 (Tr. 597), lines 8-13. Therefore, AT&T proposes to add language in Attachment Customer Information Services ("CIS") § 1.2.2 making clear that "OS/DA Services are included on Resale Services purchased under this Agreement." AT&T also proposes to add language in CIS § 1.2.3.3 making clear that CA is *not* required to order OS/DA Services from AT&T for *facilities-based* end users.

If CA wants to remove the OS/DA service from a resale line, it must order the appropriate blocking for each line and pay the associated charges. *Id.* at 61 (Tr. 597), lines 21-22. This is consistent with how AT&T provides OS/DA services to its own retail customers: the customer must order blocking if it wishes to remove OS/DA services. *See* AT&T Response to Staff Interrogatory 141 (Exh. 38, p. 59). By contrast, when CA is providing retail services to its own facilities-based End Users, it is not required to order OS/DA services from AT&T or to provide such services to its End Users. Kemp Direct at 61 (Tr. 597), lines 16-18. AT&T's proposed language for CIS § 1.2.3.3 clarifies this distinction.

The Commission should adopt AT&T's proposed language in CIS §§ 1.2.2 and 1.2.3.3 and reject CA's proposed language.

ISSUE 64: What time interval should be required for submission of directory listing information for installation, disconnection, or change in service?

Affected contract language: CIS 6.1.5

AT&T Position: AT&T must receive listing information from CA within one (1) business day of installation or other change in service to ensure that the listed customer's information is timely and accurately reflected in the listing database.

Issue 64 concerns how long CA should be given to submit directory listing information to AT&T's Directory Assistance ("DA") database following the installation, disconnection, or change in service to a customer line. This new listing information might include new subscriber listings, changes to existing listings or disconnection of existing listings. CA should be required to submit directory listing change information within one (1) business day of the installation, disconnection or change in service, as reflected in AT&T's proposed language for CIS § 6.1.5. This timeline ensures that the directory information is up-to-date and that callers are able to reach a customer whose service has recently changed. CA, by contrast, takes the position that the ICA should not provide any timeframe in which CA must submit necessary directory assistance changes. CA's position is unreasonable, would negatively impact CA's customers and any consumers trying to reach CA's customers, as well as AT&T, and should be rejected.

AT&T works diligently to maintain the accuracy of the DA database. This requires that information be updated as soon as possible to ensure that customers seeking directory assistance have the most accurate information available. The sooner the database is updated the better, because it is unlikely the new customer will provide updated information to all those who may wish to reach the customer. Those wishing to reach the customer can obtain directory listing information only if it is in the DA database. AT&T set the one business day requirement to

ensure the same level of quality for accurate directory listings that AT&T provides for itself and for other CLECs. In order to provide consistent service to CA, it is necessary for AT&T to obtain listing information from CA within one business day of installation. It takes up to 72 hours to process the listings and AT&T requests submission within one business day from all CLECs. Kemp Direct at 63 (Tr. 599), lines 13-21; Kemp Rebuttal at 28 (Tr. 630), lines 7-17.

If CA delays in submitting customer directory information, CA's end users may be harmed by the inability of others to find the CA customer's current number. Kemp Direct at 63 (Tr. 599), line 23 – 64 (Tr. 600), line 3. CA's delay would also cause additional administrative burdens to AT&T. For delayed submissions, AT&T would place the directory listing service orders in pending status. If the pending service orders are not resolved timely by CA, AT&T would have to contact CA in an attempt to resolve the issue. This effort could be avoided if CA submitted the directory listing information within the timeframe set out in the ICA. *Id.* at 64 (Tr. 600), lines 5-10.

CA suggests in its Response to Staff Interrogatory 27 (Exh. 26, p. 29), that neither CA nor AT&T should have the right to force an end user to place a listing. However, AT&T's proposed language would not have this effect. The language applies only where there is a change "affecting the [directory assistance] database or the directory listing of a CLEC End User." If the CA end user does not want a listing, there is nothing for CA to submit and the deadline in CIS § 6.1.5 does not apply. Kemp Rebuttal at p. 27 (Tr. 629), lines 26-29.

For these reasons, the Commission should reject CA's proposal that it have no specific timelines for submission of DA listing information and adopt AT&T's language in CIS § 6.1.5.

ISSUE 65: Should the ICA include CA's proposed language identifying specific circumstances under which AT&T Florida or its affiliates may or may not use CLEC's subscriber information for marketing or winback efforts?

Affected contract language: CIS 6.1.9.1

> **AT&T Position**: No. Section 222 of the Communications Act governs the uses to which AT&T and its affiliates may put customer information. AT&T's language appropriately requires compliance with section 222; CA's language goes beyond that and attempts to impose obligations and limitations on AT&T that are not consistent with section 222.

AT&T's proposed language appropriately points to 47 U.S.C. § 222, which is the federal law that governs the uses to which AT&T and its affiliates may put customer proprietary network information ("CPNI"). Section 222 includes specific requirements imposed on telecommunications carriers regarding the protection and disclosure of CPNI and sets forth specific exceptions to the general prohibitions against its disclosure.

CA's proposed language attempts to add additional criteria that must be met to enable AT&T or its affiliates to use CA subscriber information. This additional language is not appropriate or necessary because the three sections of the 1996 Act referenced in CIS § 6.1.9.1 (sections 251 and 271 as agreed by the parties, and section 222 as proposed by AT&T) sufficiently address the parties' rights and obligations; therefore, no additional details regarding scenarios or criteria are necessary.

CA claims that its position complies with current FCC orders regarding CPNI as well as ection 222 of the Act. Ray Direct at 51 (Tr. 72), lines 9-10. In so claiming, CA makes AT&T's point for it by acknowledging that the language of the agreement ought to comply with section 222 of the Act (and the FCC orders regarding CPNI that are promulgated pursuant to section 222). That is precisely what AT&T's language achieves, because it points directly to 47 U.S.C. § 222; no additional language or criteria is necessary or proper. Moreover, the best that CA can say is that it "believes" its language complies with "current" FCC orders. Even if that is true, that is not sufficient. The language of the agreement should comply with section 222 and FCC orders as they may exist now *or may exist in the future*.

Finally, CA does not present any argument as to why a reference to section 222 is not sufficient or how CA's language is necessary. If AT&T's language complies with section 222 as CA concedes, there is no reason for additional language. CA does not even try to explain what its language accomplishes that a reference to section 222 does not. For instance, section 222 provides that "A telecommunications carrier that receives or obtains customer proprietary network information … may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1)." CA proposes to prohibit use of CPNI for winback or marketing "unless … the subscriber information is provided in the aggregate form along with all AT&T-21STATE subscriber information." It is not clear if there is any intended difference between section 222 and CA's language. If there is, it is not clear if CA's language is intended to be less restrictive (in which case AT&T has agreed to the more restrictive language, and CA's language is superfluous) or more restrictive (in which case, CA's language is inconsistent with federal law). And if there is no intended difference, then CA's language is redundant.

For these reasons, the Commission should adopt AT&T's proposed language for CIS § 6.1.9.1.

ISSUE 66: For each rate that CA has asked the Commission to arbitrate, what rate should be included in the ICA?

Affected contract language: Pricing Sheet

<u>AT&T Position</u>: The AT&T rates that CA disputes are the standard rates that AT&T charges CLECs in Florida. They are (1) TELRIC-based rates that the Commission has approved; (2) resale prices that reflect the Commission-established wholesale discount; or (3) market-based prices for products that are not subject to regulation.

CA has challenged more than 200 of AT&T's rates (Tr. 396, lines 18-20), proposing a lower rate in each instance. The challenges are frivolous, as is the basis CA offers for its

proposed rates. As the undisputed evidence shows, all the rates AT&T proposes to charge CA either were approved by the Commission or are "market-based" rates, *i.e.*, rates that are not subject to the pricing standards of the 1996 Act or to regulation by this Commission. For that reason alone, none of the challenged rates can be changed in this proceeding. In addition, CA has provided no support for its proposed rates.

CA knows that AT&T's rates cannot and will not be changed in this proceeding, and so has stated that it would accept a "new cost study case . . . as a suitable remedy for all TELRIC-based charges raised by its petition and drop them from the case." Ray Rebuttal at 60 (Tr. 132), lines 18-19. As explained below, a new cost study case is inadvisable. Also, however, the Commission need not decide in this docket whether or not it will conduct a new cost study case. All the Commission needs to do in this case, and all it should do, is determine the terms, conditions and rates that will be included in CA's ICA with AT&T. Thus, the Commission should resolve Issue 66 simply by approving the AT&T rates on the Pricing Sheets and rejecting the unsupported rates proposed by CA.

With one exception, all of AT&T's local interconnection rates were approved by the Commission in Docket No. 990649-TP, Order No. PSC-01-2051-FOF-TP. The exception is DS0 trunk installation charges. Pellerin Direct at 93 (Tr. 264), lines 14-18. AT&T witness Pellerin explained the source of those charges:

AT&T's switches are equipped with dedicated DS1 trunk ports for interconnection trunking. DS1 trunk ports can accommodate up to 24 individual DS0 trunks, and AT&T charges for installation of trunks on an individual basis. Thus, if a CLEC requires only 12 trunks, AT&T assesses nonrecurring charges to install 12 trunks on a single order (one initial at $21.73, plus 11 additional at $8.19) rather than for the entire DS1 trunk port. The installation trunk charges per

DS0 on the Pricing Sheets are based on an April 2000 cost study for DS1 trunk ports, divided by 24.[123] AT&T was unable to identify the Commission order number approving these charges. The DS0 interconnection trunk installation charges AT&T proposes for CA's ICA are the same charges AT&T charges all CLECs in Florida. *Id*. at 93 (Tr. 264), line 19 – 94 (Tr. 265), line 7.

Like AT&T's local interconnection rates, the AT&T cost-based rates for UNEs and collocation that CA challenges were approved by this Commission. The Commission approved AT&T's UNE rates in Docket No. 990649-TP, Order No. PSC-01-2051-FOF-TP and Docket No. 990649A-TP, Order No. PSC-02-1311-FOF-TP. The Commission approved AT&T's collocation rates in Docket Nos. 981834-TP and 990321-TP, Order Nos. PSC-04-0895-FOF-TP and PSC-04-0895A-FOF-TP. Kemp Direct at 65 (Tr. 601), line 23 – 66 (Tr. 602), line 2.

There are no Commission-approved rates for branding for directory assistance and operator services. Branding for directory assistance and operator services are not UNEs and are subject to market-based rates. For these services, AT&T charges market-based rates, and the charges are identical for every CLEC in Florida. *Id.* at 66 (Tr. 602), lines 2-9.

CA's ICA must include the standard prices for local interconnection, UNEs and collocation that AT&T proposes. Indeed, the Commission has ruled that "the rates we established in Docket Nos. 990649-TP and 000649-TP are the appropriate rates for (B) Network Elements, (C) Interconnection, (E) LNP/INP, (F) Billing Records, and (G) Other." Order No. PSC-02-0413-FOF-TP, at 74 (issued March 26, 2002 in Docket No. 001305-TP, footnotes omitted).[124]

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[123] The DS1 trunk port nonrecurring cost is $521.58 for the first DS1 and $196.50 for each additional DS1 installed at the same time. Dividing by 24 yields the first and additional DS0 trunk charges of $21.73 and $8.19, respectively, set forth in the Pricing Sheets.

[124] Exhibit 4 to AT&T's Response to Staff Interrogatory 76 (at pages 644-655 of the Hearing Exhibits) is an Excel spreadsheet that shows the basis for each of AT&T's rates. The spreadsheet is explained in the response to

CA provided no evidentiary support for its proposed rates. All it said is that "[i]n most cases, CA has suggested alternate rates that are similar to those charged in Florida by Verizon for the same rate element. For other charges, particularly those that are not found in Verizon's ICAs or do not appear to be cost-based, CA has suggested rates that are more commercially reasonable than those suggested by AT&T." Ray Direct at 51 (Tr. 72), lines 15-18. Verizon's rates for products or services that are required to be cost-based are irrelevant, because (among other reasons) Verizon's costs are different than AT&T's.[125] Kemp Rebuttal at 29 (Tr. 631), lines 19-22. As for rates that are not required to be cost-based, those rates are not subject to regulation, and Mr. Ray's mere assertion that CA's proposed rates are more commercially reasonable than AT&T's establishes nothing.

Even if CA had some support for its proposed rates, the Commission would not appropriately consider the proposals in this two-party arbitration. As Mr. Ray admitted, "the appropriate venue for deciding these rates would be a new generic proceeding to set new TELRIC-based rates." Tr. 157, lines 21-25. Like almost all state commissions in the United States, this Commission establishes TELRIC-based rates in generic dockets in which all interested parties are allowed to participate. Docket Nos. 990649-TP and 000649-TP were such dockets. The Commission has appropriately refused to reconsider in a two-party arbitration the rates it established in those dockets, and it should do so again here. Docket No. 041464-TP, for example, was an arbitration between Florida Digital Networks, Inc. ("FDN") and Sprint Florida, whose UNE rates – like AT&T's –were established by the Commission in Docket No. 990649-

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Interrogatory 76 (Exh. 36, p. 89). Further elaboration on Exhibit 4 is provided in AT&T's Responses to Staff Interrogatory 142 (Exh. 38, pp. 60-61).

[125] CA admitted that one ILEC's cost-based rates would not necessarily be equal to the cost-based rates of another ILEC in the same state. CA Supplemental Response to AT&T Request for Admission 77 (Exh. 34, p. 14).

TP. *See* Order No. PSC-06-0027-FOF-TP (Jan. 10, 2006), at 30. FDN sought to revisit those rates, and the Commission declined, stating (at 31):

> FDN has continuously argued throughout this proceeding that it has an unconditional right under Section 252 of the Act to arbitrate UNE rates in this proceeding, however, this argument alone does not necessarily warrant this Commission revisiting its earlier decisions in the Sprint UNE Docket. To revisit this Commission's pricing decisions in the Sprint UNE Docket, without a showing of changed circumstances, would nullify the basic rationale for consolidating such proceedings …
>
> We agree with Sprint's position that the UNE rates approved in Docket No. 990649B-TP should be the rates incorporated in the new interconnection agreement between FDN and Sprint … We find that it would be discriminatory to allow FDN to arbitrate different rates than what has been approved in Docket No. 990649-TP. In conclusion, we find that the use of a generic proceeding rather than 73 separate arbitrations was more practical and efficient. It would be impossible for this Commission to effectively and efficiently arbitrate 73 separate interconnection agreements.

In short, Issue 66 must be resolved in AT&T's favor, and AT&T's rates must be included in the parties' ICA. That leaves only CA's suggestion that the Commission conduct a cost docket to examine AT&T's costs and re-evaluate AT&T's rates. That would be inadvisable at this time. A cost docket is tremendously burdensome and time-consuming for all involved (*see* Pellerin Dep. (Exh. 47) at 64, lines 9-21; 65, lines 3-6 and 9-2 (Staff indicating "it took over three years to set rates in the last generic pricing docket" and "it was over four and half years before prices were set in the generic collocation docket"), and there is no reason to believe that new rates would be lower than current rates, because while some costs have decreased since the last cost docket, others have increased (*id*. at 66, line 3 – 68, line 12). *See also* Tr. 400, lines 5-7 (noting that labor costs have increased). Most important, it is likely that rapidly changing telecommunications technology would render obsolete in short order any new rates the Commission might establish. *See id*. at 64, line 22 – 65, line 2); Tr. 397, lines 9-24. Finally, there is no reason for the Commission's arbitration decision to say anything one way or the other

about a possible cost docket, because any declaration on that subject would have no effect on the ICA that emerges from this proceeding.

* * *

For the reasons set forth above, AT&T Florida respectfully requests that the Commission resolve the arbitration issues in favor of AT&T Florida.

Respectfully submitted, this the 5th day of June, 2015.

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