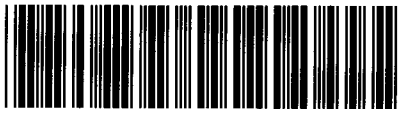

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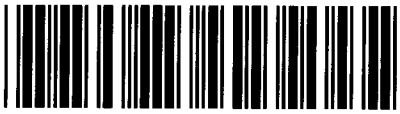

Item Number: 12

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Worldcall Interconnect, Inc.
May 8, 2015

DOCKET NO. 44538

WORLDCALL INTERCONNECT, INC.	**§**	**PUBLIC UTILITY COMMISSION**
PETITION FOR ARBITRATION	**§**	
AGAINST AT&T TEXAS UNDER §252	**§**	
OF THE COMMUNICATIONS ACT	**§**	**OF TEXAS**

WCX THRESHOLD ISSUES BRIEF

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WCX THRESHOLD ISSUES BRIEF

Now Comes Worldcall Interconnect, Inc. ("WCX"), and provides this Initial Brief on Threshold Issues as required by Order No. 3.

A. Introduction.

Procedural machinations obscure the ultimate questions to be resolved in this case. The principal practical question is a simple "whether": will the Commission allow AT&T Texas ("AT&T") to "block" WCX, and wield its regulatory power to affirmatively support AT&T's blocking maneuvers. AT&T blocks traffic today (and has for several years) by refusing to route calls originating on its network until there is an "Interconnection Agreement." This blocking has seriously inhibited WCX's ability to provide a full suite of interconnected services to its rural users. WCX has now filed for arbitration to stop AT&T's traffic blocking, secure the agreement AT&T demands as a condition to lift the block and be able to actually provide the many different types CMRS interconnected services its users expect and deserve.

AT&T then pivots to non-negotiable contract terms that still effectively "block" WCX's business plans. The AT&T terms expressly prohibit many of WCX's interconnected services and/or make them practically impossible. AT&T will lift the traffic block only if WCX agrees to the service block.

WCX will not willingly execute any agreement that contractually limits our rights to compete in the marketplace. WCX is a CMRS. AT&T's non-negotiable words are

broadly written to prevent market entry, often using vague and undefined terms. The clear intent and goal, however, is to limit if not stop WCX's ability to provide a host of lawful CMRS services. AT&T refuses to express the intent of these words, and refuses to explain "**whether**, **how**, or **how much**" the AT&T proposed terms could translate into a WCX "voluntary" waiver of its current rights. WCX has identified many illegal provisions, but some of the terms are so vague and broad no one except AT&T can discern and eliminate them all because only AT&T understands the full intent and desired result.

WCX has a federal right to interconnect with the PSTN so it can provide interconnected services.[1] In order to provide an interconnected service one must be able to both send traffic to and receive traffic from other networks participating in the PSTN, and if the major ILEC will not route traffic then the new entrant has a significant problem. You may be "interconnected" but the service is limited and not very competitive. AT&T wants to, but cannot be allowed to, block WCX's rights or WCX's entry as a pre-condition to WCX having fully-functional numbers. Yet all of AT&T's proposals effectively prohibit WCX from providing other interconnected services, with

[1] AT&T wants the Commission to not look at the wireless-LEC interconnection rules, but it must. FCC rule 20.3 defines "interconnect or interconnected" as "Direct or indirect connection through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit the transmission or reception of messages or signals to or from points in the public switched network." (emphasis added) An "interconnected service" is "A service: (a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or (b) For which a request for such interconnection is pending pursuant to section 332(c)(1)(B) of the Communications Act, 47 U.S.C. 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways...." (emphasis added) WCX is presently providing interconnected services, but it is doing so by working with a CLEC and the result is that WCX's ability to offer fully functional services like other wireless carriers is severely constrained. WCX has the right to provide interconnected services without the crippling limitations AT&T has imposed by refusing to let WCX have and maintain its own "wireless" numbering resources.

the result that WCX would just be trading one set of unreasonable restraints for another. WCX will not negotiate its rights away, and it should not have to. We will not pay ransom to AT&T in order to secure AT&T's release of the WCX numbers AT&T is holding hostage. We will not accept a new set of unreasonable restrictions in order to secure release of the current unreasonable restrictions. The Commission must tell AT&T to begin routing WCX's numbers without restrictions regarding the interconnected services WCX can support using those numbers.

AT&T is focused on a procedural battle of forms game to perpetuate its hostage-taking and avoid the true policy issues. AT&T's efforts all reduce to a "***whether***," a "***how***," or a "***how much***." Every issue, at bottom, is about whether WCX can exercise its rights, how it will do so, and then how much it will cost.

AT&T wants the Commission to consider only the procedural "whethers" that might preclude even getting to the "hows" and "how muches." This "whether" will decide if AT&T and WCX will have a written traffic exchange arrangement that requires AT&T to route its originating traffic to WCX. AT&T refuses to route unless there is one, but now feverishly works to stop the process of obtaining the very thing it insists must exist.

But there is another **whether**. Will the Commission allow AT&T to impose terms that prohibit or limit WCX's ability to enter the market and provide services that compete with the AT&T family of companies? AT&T does not want to talk about that "whether" but it is unavoidable.

AT&T has, from the beginning, demanded that there be written terms before it will end the blockade. But they have to be very specific terms: WCX must accede to AT&T's unilateral demands that WCX "voluntarily" waive a host of federally-secured

rights before AT&T will stop blocking. These rights include the more familiar "hows"[2] and "how muches"[3] but they also directly strike at the heart of "whether" WCX can enter the market at all and provide services WCX has every right to provide but AT&T does not like. WCX refused AT&T's ransom demand, and has sought arbitration. So now AT&T is asking the Commission to allow the blockade to continue by dismissing, or impose the waivers by refusing to consider WCX's terms and then adopting AT&T's terms because they are the only remaining alternative.

AT&T very much likes its effective monopoly, but it does not like the duties imposed by the Communications Act precisely because it has an effective monopoly and can be a powerful gate-keeper for market entry since a carrier cannot provide meaningfully competitive service unless the service includes the ability to exchange traffic with users on AT&T's networks. AT&T's entire goal is to have the Commission impose duties on WCX that WCX does not have, while simultaneously relieving AT&T of duties that AT&T does have. AT&T, for example, has the §251(a) duty to indirectly interconnect.[4] WCX has no §251(c)(2) direct interconnection duties. AT&T is asking the Arbitrators to rule AT&T can avoid its §251(a) duty, and then impose on WCX the duty to directly interconnect under §251(c)(2). AT&T is standing the statute on its head.

AT&T does not like the result of several FCC rules and decisions that specifically require AT&T to indirectly interconnect, and submit to state commission arbitration if it

[2] For example, "how" will the parties interconnect (indirect, direct IP, direct TDM).

[3] For example, "how much" must WCX pay for physical interconnection facilities (special access tariff or a TELRIC rate); "how much" intercarrier compensation must WCX pay for intraMTA traffic (bill and keep or access) that is originated by dialing a WCX 5YY number; "how much" must WCX pay for intraLATA interMTA traffic (tariffed switched access or a specified rate not derived from the tariff).

[4] AT&T *also* has the duty to indirectly interconnect under §§201 and 332(c)(1)(B) and FCC Rule 20.11(a). Contrary to AT&T's contentions those duties are also eligible for arbitration and resolution in state commission §252 proceedings.

fails to offer reasonable indirect interconnection terms, so it wants the Arbitrators to ignore the decisions and refuse to enforce the rules. AT&T believes it should have no duty other than the few it, in its complete discretion, voluntarily undertakes. AT&T is essentially asking the Commission to find it lacks any jurisdiction or power to arbitrate issues and impose terms related to §§251, 252, 332(c) or FCC Rule 20.11 unless AT&T has "agreed" to "negotiate" regarding those provisions even though the FCC has found that state commissions can and should resolve those issues in a §252 arbitration. AT&T claims it has no duty to negotiate in good faith for IP-based interconnection, even though the FCC has directly held that it does. AT&T claims it has the unfettered right to block calls its users try to make to users on other networks, notwithstanding the prohibition against blocking imposed through §201 and multiple FCC orders proscribing call blocking because **blocking is an unreasonable practice**.

AT&T, as usual, insists it has no obligations, and is subject to no oversight, despite a host of FCC decisions holding that AT&T does have the duty to indirectly interconnect and cannot force WCX to directly interconnect, ruling that AT&T does have the duty to negotiate for direct IP-based interconnection, and making clear that AT&T must enter into an interim arrangement for only transport and termination of telecommunications if the requesting carrier does not have an existing written arrangement for transport and termination. AT&T says this Commission has no role, and no power to arbitrate the parties' disputes.

AT&T wants the Arbitrators to hold that AT&T can demand terms that operate to waive a requesting carrier's rights guaranteed by federal law, by incessantly and in numerous ways prohibiting the requesting carrier from doing things the requesting

carrier has every right to do under federal law. Then, AT&T asserts that the PUC can do nothing about it and the PUC's only choices are to (1) dismiss the entire arbitration; (2) refuse to consider open issues challenging AT&T's demands; or (3) impose AT&T's patently unlawful terms. WCX respectfully disagrees with AT&T on all counts.

This case involves §251(b)(5) reciprocal compensation, and WCX has sought terms that fully and completely implement the FCC's most recent intercarrier compensation rules. There are at least three §251(b)(5) related open issues. This case also involves the question whether a non-ILEC has the duty to directly interconnect under §251(c)(2), as AT&T contends, or if – as WCX contends – the requesting carrier can use indirect interconnection based on FCC decisions holding that requesting carriers in general and CMRS providers in particular have the right to exclusively use indirect interconnection and cannot be compelled to use direct interconnection. AT&T wants this Commission to rule that indirect interconnection is not permitted and is not arbitrable before a state commission even though the FCC and several courts have directly held that (1) the requesting carrier has the right to choose indirect interconnection, (2) cannot be compelled to employ direct interconnection, and (3) this topic is subject to state commission arbitration.

AT&T wants the Commission to hold AT&T can immunize itself from state commission arbitration by refusing to "voluntarily" negotiate even though the FCC has directly held that indirect interconnection is arbitrable even when the ILEC refuses to negotiate, and expressly reminded ILECs they have the duty to negotiate in good faith for IP-based interconnection if there is going to be direct interconnection.

But ultimately these issues are not the most important. The most important open issues relate to things WCX insists cannot be in a Commission-imposed ICA: provisions that vigorously and repeatedly prohibit the requesting carrier from providing services, or from providing a service in a particular way, even though the Act or FCC rules allow the requesting carrier to provide that service and in that particular manner. AT&T's goal is to block market entry and prohibit competition. AT&T is trying to force WCX to "agree" that it will not and cannot, among other things:

- Support "Machine to Machine" ("M2M") devices as a CMRS provider;
- Develop its own Machine to Machine "Centralized Core" that is SIP enabled and provides interconnected services through its Core;
- Develop its own Voice "Centralized Core" as a CMRS provider that is SIP enabled and has the ability to provide interconnected services through its Core;
- Provide fixed wireless services as a CMRS provider to its users;
- Support "Wi-Fi off-load" for its interconnected services and maintain its status as a CMRS provider;
- Enter strategic relationships with network and manufacturing partners of WCX's products and services;
- Allow resale of WCX's services;
- Offer voice or other interconnected services using new technology, especially if they involve multiple network technologies, including but not limited to light-licensed and unlicensed radio frequencies, to connect and service WCX supported devices;
- Develop its own use of 5YY non-geographic services which are supported through interconnection with AT&T.

AT&T claims no one can require AT&T to follow the law, and WCX has no choice but to capitulate to AT&T's illegal demands. AT&T can block traffic at will and with complete impunity. If WCX wants *any* traffic to flow, then WCX must agree to limit the exchange to only those kinds of traffic that AT&T deigns to allow, and must agree to all sort of adhesive and unlawful restrictions, conditions and prices.

The Commission of course has the power, indeed it has the duty and responsibility, to resolve WCX's open/unresolved issues contending that AT&T must honor its duties, must follow the rules and cannot force WCX to waive all of its rights through "voluntary" terms. WCX's open issues are arbitrable. WCX's proposed terms are eligible for consideration. AT&T's terms are not arbitrable or eligible for consideration. WCX is entitled to interim terms, and AT&T must be ordered to implement interim interconnection, consistent with FCC Rule 51.715. The Commission must stop AT&T's call blocking and it must refuse AT&T's "service blocking" efforts.

B. Threshold Issue 1: Is the proposed interconnection agreement ("ICA") provided with WCX's application (the "WCX Agreement") eligible for arbitration in this proceeding?

Order No. 3 directs the parties to include in their briefing on this issue an identification of "the open issues associated with each ICA that are or are not eligible for arbitration." With all due respect the apparent intent to work from ICA terms up to open issues is precisely backwards, and not consistent with what the statute contemplates and requires.

All of the open issues identified in its petition are eligible for arbitration. Some of the open issues, however, are not necessarily tied to specific terms of the permanent agreement that WCX provided in Petition Attachment B. For example, AT&T is preventing its users from making calls to WCX's numbers by refusing to perform the necessary switch translations. In other words, AT&T is engaging in call blocking. WCX has sought interim relief by the Commission to make AT&T stop blocking traffic. *See* WCX Petition Issue 7.

The FCC has repeatedly held that call blocking is highly disfavored and is an unreasonable practice under §201(b). This was a point of heavy emphasis in *Connect America Fund*:

> 734. Parties also proposed that the Commission allow selective call blocking, which would permit carriers in the call path to block traffic that is unidentified or for which parties refuse to accept financial responsibility. We decline to adopt any remedy that would condone, let alone expressly permit, call blocking. The Commission has a longstanding prohibition on call blocking.[n1278] In the 2007 *Call Blocking Order*, the Wireline Competition Bureau emphasized that "the ubiquity and reliability of the nation's telecommunications network is of paramount importance to the explicit goals of the Communications Act of 1934, as amended" and that "Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way."[n1279] We find no reason to depart from this conclusion. We continue to believe that call blocking has the potential to degrade the reliability of the nation's telecommunications network.[n1280] Further, as NASUCA highlights in its reply comments, call blocking ultimately harms the consumer, "whose only error may be relying on an originating carrier that does not fulfill its signaling duties."
>
> [n1278] *See Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11629, 11631 paras. 1, 6; *see also Blocking Inter-state Traffic in Iowa*, Memorandum Opinion and Order, 2 FCC Rcd 2692 (1987) (denying application for review of Bureau order, which required petitioners to interconnect their facilities with those of an interexchange carrier in order to permit the completion of interstate calls over certain facilities).
>
> [n1279] *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11631, para. 6.
>
> [n1280] *Id.* at 11631, para. 5 (internal citation omitted).
>
> 973. As the Commission has long recognized, permitting blocking or the refusal to deliver voice telephone traffic,[n2036] whether as a means of "self-help" to address perceived unreasonable intercarrier compensation charges or otherwise, risks "degradation of the country's telecommunications network."[n2037] Consequently, "the Commission, except in rare circumstances[,] . . . does not allow carriers to engage in call blocking"[n2038] and "previously has found that call blocking is an unjust and unreasonable practice under section 201(b) of the Act."[n2039]
>
> [n2036] By this, we mean "block[ing], chok[ing], reduc[ing] or restrict[ing] traffic in any way." *Call Blocking Declaratory Ruling*, 22 FCC Rcd 11629, 11631, para. 6.

[n2037] *Access Charge Reform Seventh R&O and NPRM*, 16 FCC Rcd at 9932-33 para. 24.

[n2038] *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11632, para. 7. As the Commission noted, the *Call Blocking Declaratory Ruling* had "no effect on the right of individual end users to choose to block incoming calls from unwanted callers." *Id.* at para. 7 n.21.

[n2039] *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11631, para. 5.
Connect America Fund, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17903, 18029, ¶¶734, 973 (2011) ("*CAF*") (some notes omitted); *See also In re Verizon,* 30 FCC Rcd 245, 249-250, ¶4 (2015).

AT&T is blocking traffic, contrary to clear law and clear policy. It is doing so as a means of self-help and for entirely self-interested, untoward reasons. WCX has sought relief and this is an open issue. But resolution of this open issue will not be addressed through permanent ICA language. Instead the remedy is an interim order and an interim arrangement for transport and termination that requires AT&T to perform the required translations and start delivering its originated traffic.

To give another example, WCX's open issues 1 and 2 contend that WCX cannot be required to engage in direct TDM based interconnection. In other words, WCX asserts there should ***be no direct TDM interconnection terms***.

All of this is perfectly consistent with the statute. Not every open issue must be "associated" with text in an ICA. Section 252(b)(1) and (2) do not even mention agreement terms; the statutory scheme revolves around "open" or "unresolved" issues. Section 252(b)(4)(A) requires the Commission to "limit its consideration of any petition under paragraph (1) (and any response thereto) to the ***issues*** set forth in the petition and in the response." Section 252(b)(4)(C) then provides that the Commission "shall resolve each **issue** set forth in the petition and the response, if any, by imposing appropriate conditions as required ..." The ICA is the contractual mechanism (the "appropriate conditions") by which the resolution of an open issue is implemented when

contract terms are necessary to that resolution. *See also* §252(c) ("In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions ..."). WCX's issues 1 and 2 ask the Commission to resolve the open issues by making a conscious and express decision to ***have no terms requiring direct TDM interconnection***.

Section 252 requires that the question be whether WCX's ***open issues*** are eligible for resolution. Then the next question becomes whether the terms WCX provided in Petition Attachment B relate to an arbitrable open issue and can be considered as the "appropriate conditions," if any, that should be imposed under §252(b)(4)(C) to effectuate the resolution of the open issue. WCX's terms clearly relate to the open/unresolved issues WCX raised that require actual ICA provisions. None of the terms suffer any substantive or procedural defect that would render them ineligible for consideration and imposition.

1. Indirect interconnection is arbitrable despite AT&T's refusal to negotiate since reciprocal compensation is also in issue.

(a) *Coserve* does not prevent arbitrability.

AT&T admits that WCX sought terms regarding indirect interconnection at the very beginning and then all the way through the parties' discussions. AT&T contends that the allowed scope of an arbitration, however, is confined to matters that were actually "negotiated." AT&T refused to negotiate indirect interconnection so the topic is said to be out of bounds. AT&T asserts that indirect interconnection is governed by §251(a),[5] not §251(c)(2), and argues that it had no duty to negotiate §251(a) issues

[5] WCX notes that §251(a) is not the only "indirect interconnection" provision in the Act. Sections 201(a) and 332(c)(1)(B) also comprehend and can lead to an indirect interconnection requirement. Further, the FCC's wireless rules expressly state that a LEC must provide the "must provide the type of

since its §252(a)(1) negotiation obligation is confined to §251(b) and (c) matters. Given that §251(a) is supposedly not a "mandatory negotiation" topic and AT&T refused to voluntarily negotiate, AT&T concludes that indirect interconnection is not eligible for arbitration under §252(b), given the holding in *Coserv LLC v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003).

As a factual matter, WCX agrees that AT&T refused to discuss indirect interconnection, just as it did IP-based direct interconnection (even though that ***is*** a "mandatory negotiation" §251(c)(2) issue). WCX, however, asserts that AT&T *did* have the duty to negotiate over and then provide indirect interconnection, because of FCC Rule 20.11(a), which requires a LEC to provide the type of interconnection reasonably requested by a mobile service provider. WCX requested indirect. Indirect is reasonable and both technically and economically feasible. AT&T has a duty to provide indirect.

The question is therefore purely legal: is indirect interconnection arbitrable before a state commission under §252(b) when the ILEC has refused to negotiate indirect interconnection despite §251(a) and Rule 20.11(a)? FCC precedent demonstrates that *if* §251(b)(5) reciprocal compensation is also in issue[6] then indirect interconnection is arbitrable even when the ILEC refused to negotiate the topic, and perhaps did not technically have a §252 duty to negotiate regarding indirect interconnection.

There would have been some force to AT&T's position several years ago. This Commission previously relied on *CoServ* in a somewhat analogous situation. A CLEC

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interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request, unless such interconnection is not technically feasible or economically reasonable." *See* FCC Rule 20.11(a). For Part 20 purposes "interconnection" means both direct and indirect interconnection. *See* FCC Rule 20.3 (definition of interconnection). Wireline to wireless "interconnection" has a broader meaning than "interconnection" in the Part 51 context, because it means not only the physical aspects but also traffic exchange. *CAF*, 26 FCC Rcd at 17949, ¶835.

[6] WCX presented §251(b)(5) open issues. *See* WCX Petition Issues 8, 9, 10.

sought to negotiate and then arbitrate indirect interconnection under §251(a) and reciprocal compensation under §251(b)(5) with an RLEC. The RLEC, however, was exempt from §251(c) duties and had no duty to negotiate in good faith over §251(c) terms. The RLEC refused to negotiate over indirect interconnection and reciprocal compensation. Sprint (the CLEC) filed for arbitration before the PUC. The RLEC made the same argument AT&T presses here. The Commission agreed and dismissed. Judge Sparks also agreed and dismissed Sprint's petition for review, citing *CoServ.* Sprint *Communs. Co. L.P. v. PUC*, 2006 U.S. Dist. LEXIS 96569 (W.D. Tex. Aug. 14, 2006). The district court held that the PUC had properly dismissed the petition for arbitration for only §251(a) and (b)(5) issues when the ILEC had stood on its rights and refused to negotiate over those topics.

But that is not the end of the story. *CoServe* and *Sprint* are no longer good law for the proposition that §251(a) and (b)(5) issues are not arbitrable if the ILEC refuses to negotiate, in the Fifth Circuit or anywhere in the United States. The FCC – which has plenary authority – has rejected AT&T's position that it can refuse to negotiate over indirect interconnection and thereby avoid state commission arbitration. This Commission (and the courts) must defer to the FCC's determination. Judge Yeakle recognized this was so only one year after Judge Spark's *Sprint* decision. *See Consol. Communs. of Fort Bend Co. v. PUC of Tex.*, 497 F. Supp. 2d 836, 846 (W.D. Tex. 2007).

The law has changed as a result of several FCC determinations after *CoServ* and *Sprint.* The FCC has now directly and repeatedly held that a state commission can and should arbitrate indirect interconnection matters even when the ILEC has no duty to

negotiate and refuses to negotiate, if there are also open issues relating to §251(b)(5) reciprocal compensation. The FCC has also reaffirmed that a CMRS provider's Rule 20.11(a) right to indirect interconnection cannot be eliminated in favor of mandated direct interconnection under §251(c)(2). Indirect interconnection under §251(a) and Rule 20.11(a) is arbitrable, even when the ILEC refused to negotiate. AT&T's argument was serially undercut beginning in 2007, and has now been completely dismembered.

(i) FCC holds in 2007 that wholesale providers have the right to interconnect under §251(a) and to reciprocal compensation terms under §251(b).

The first brick was removed from AT&T's *CoServ* wall in 2007. The FCC's Wireline Competition Bureau held in the *TWC Declaratory Ruling* that a "wholesale" carrier had the right to interconnect with an ILEC under §251(a) and obtain reciprocal compensation terms under §251(b)(5).[7] This decision did not directly deal, however, with the question of arbitrability under §252(b) *per se*.[8] But all concerned could see the link. This FCC determination was one of the reasons the PUC basically chose to reverse course in *Consolidated*, and why Judge Yeakle affirmed the PUC's decision to do so.

(ii) FCC holds in 2011 that §251(a) indirect interconnection is arbitrable even when the ILEC refused to negotiate, so long as there are also §251(b)(5) open issues.

The FCC bulldozed AT&T's *CoServ* brick wall in 2011. In a decision that directly overruled the Texas PUC's *Sprint* decision that relied on *CoServe* (affirmed by Judge

[7] *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513, ¶1 (Wireline Comp. Bur. 2007) ("*TWC Declaratory Ruling*").

[8] Nonetheless it is relevant to this case for more than mere background. As explained below AT&T's proposed terms expressly say that WCX can only use interconnection to provide retail service to its own end users, and therefore cannot provide wholesale service to resellers or partners. The *TWC Declaratory Ruling* makes plain that AT&T cannot so restrict WCX's interconnection rights.

Sparks), the FCC definitively ruled that a requesting carrier can seek to implement an ILEC's §251(a) indirect interconnection duty through state commission §252(b) arbitrations even if the ILEC refused to negotiate – so long as there were also open issues relating to §251(b)(5).[9] WCX will not provide extensive excerpts from the decision because it must be read in its entirety. The Arbitrators' review will confirm that *CRC* is directly on point, controlling and completely disposes of AT&T's *Coserve* arguments.[10] *CoServ* may have some remaining vitality when the issue is something entirely unrelated to LECs' §251 duties or applicable FCC rules, but the FCC has made it clear that an ILEC cannot avoid arbitration over a §251 duty (or a duty imposed by §332 or FCC Rule 20.11) by refusing to negotiate at all. Indirect interconnection is an affirmative ILEC duty imposed by several provisions in the Act, and a proper topic for state commission arbitration even over the objection of the ILEC and despite any ILEC refusal to negotiate.

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[9] *In the Matter of Petition of CRC Communications*, Declaratory Ruling, 26 FCC Rcd. 8259 (2011) ("*CRC*"). The FCC expressly mentioned, and therefore overruled, the Commission's *Sprint* decision. 26 FCC Rcd at 8264, ¶10, n. 33.

[10] *See, e.g.*, 26 FCC Rcd at 8272-8273, ¶24: "... section 252(b) does not link state arbitration authority to 'negotiation' by an incumbent LEC, but to the incumbent LEC's receipt of 'a request for negotiation under this section.' Consequently, we reject arguments that the prerequisite for arbitration is that negotiations have taken place. Therefore, if a rural carrier were to decline or refuse to negotiate with a carrier that has requested to negotiate an agreement for 'interconnection, services, or network elements,' then the arbitration provisions in section 252(b)(1) would be triggered after the statutorily-prescribed time period has passed. In such case, either carrier could petition the state commission to arbitrate 'any open issues' relating to the request for interconnection and services made pursuant to sections 251(a) and (b). Such an interpretation is consistent with the language of sections 251 and 252, provides for a coherent relationship between these statutory provisions, and supports the overall pro-competitive and market-opening purposes of the Act. By contrast, if we were to construe the statute to compel arbitration only after an exempt rural incumbent LEC had entered into voluntary negotiations, that interpretation would provide a disincentive for such carriers to begin voluntary negotiations to fulfill their obligations under sections 251(a) and 251(b), which conflicts with these pro-competitive, market-opening purposes of the Act." (emphasis added)

(b) *CRC* holding regarding arbitrability of §251(a) duties extends to non-RLEC ILECs like AT&T.

AT&T is certain to argue that *CRC* is limited, and pertains only to RLECs that have a §251(f) exemption from §251(c) duties. It will claim that it does not address the situation when the ILEC *does* have §251(c) duties. AT&T may even claim that §251(c) supercedes §251(a), and the only "interconnection" duty AT&T has is direct §251(c) interconnection. They tried that argument in Ohio and it was a spectacular failure. The Ohio PUC, the District Court for the Southern District of Ohio and then the Sixth Circuit all held that *CRC* equally applied to AT&T, with the result that state commissions can and should be in charge of implementing and applying §251(a) duties. The courts in particular expressly rejected AT&T's argument that *CRC* did not apply, and ruled that state commissions can and should enforce §251(a) in lieu of §251(c)(2) in an arbitration. *Ohio Bell Tel. Co. v. PUC of Ohio*, 844 F. Supp. 2d 873, 889-893[11] (S.D. Ohio, 2012), *aff'd* 711 F.3d 637, 642-643 (6th Cir. 2013).[12]

AT&T cannot avoid a state commission arbitration dealing with AT&T's indirect interconnection obligations merely by denying they exist and/or adamantly refusing to negotiate over the topic. WCX raised the issue in negotiations and submitted indirect

[11] "If a competitor [non-incumbent carrier] can compel interconnection to another competitor [non-incumbent carrier] under Section 251(a) . . . it follows that an [incumbent carrier] can be compelled to interconnect with a competitor [non-incumbent carrier] under Section 251(a) as well. [Incumbent carriers], after all, have greater obligations to interconnect than competitor [non-incumbent carriers], not the other way around, as is well-established under the requirements of Section 251."

[12] "This omission, AT&T argues, evidences that 'Section 251(a) simply does not apply' to an incumbent carrier subject to Section 251(c)."; "AT&T, in support of its argument that Section 251(c) relieves incumbent carriers of the general interconnection duties set forth under Section 251(a), relies on ..." ... "However, we are persuaded that the district court's interpretation, that incumbent carriers are subject to Section 251(a)'s general interconnection duties, is the correct one. Simply stated, it makes little sense to read the Act in a way that imposes fewer duties on incumbent carriers than on less-established, nondominant carriers."

interconnection as an open issue, along with at least three §251(b)(5) open issues. These open issues are arbitrable.

> (c) State commissions can arbitrate indirect interconnection issues between ILECs and wireless carriers; wireless carriers cannot be compelled to do direct interconnection; FCC wants states to implement Rule 20.11 in §252 arbitrations.

> [W]hen carriers are indirectly interconnected pursuant to section 251(a)(1), as is often the case for LECs and CMRS providers, the carriers' interconnection arrangements can be relevant to addressing the appropriate reciprocal compensation, as the Commission recently recognized.[13]

> ... the Commission's mutual compensation rules were adopted in the context of addressing LEC-CMRS interconnection, against a backdrop where "interconnection" regulations were understood to encompass not only the physical connection of networks, but also the associated intercarrier compensation. In addition, as the Commission recently recognized, interconnection arrangements can bear on the resolution of disputes regarding reciprocal compensation under the section 252 framework. For example, while interconnection for the exchange of access traffic does not currently implicate section 251(b), an interconnection agreement for the exchange of reciprocal compensation traffic may contain terms relevant to determining appropriate rates under the statute and Commission rules. Moreover, section 20.11(e) of the Commission's rules does not supplant or expand the otherwise-applicable interconnection obligations for CMRS providers, as some contend. Thus, in response to a request by an incumbent LEC for interconnection under section 20.11(e), CMRS providers are not required to enter into direct interconnection, and may instead satisfy their obligation to interconnect through indirect arrangements.[14]

> Because of the cooperative federalism embodied by sections 251 and 252, and the role of the Commission in arbitrating interconnection disputes under the section 252 framework when states lack authority or otherwise fail to act, we also reject claims that the *T-Mobile Order* constituted an unlawful delegation to the states.[15]

> [A] state role in the context of LEC-CMRS interconnection issues can be "consistent with the dual regulatory scheme assumed in the Communications Act" notwithstanding concerns about a resulting "patchwork of regulatory schemes throughout the states [that could]

[13] *CAF*, 26 FCC Rcd at 17950, ¶828 (notes omitted) (citing to *CRC*).

[14] *CAF*, 26 FCC Rcd at 17952, ¶840 (citing to *inter alia*, *CRC*) (emphasis added).

[15] *CAF*, 26 FCC Rcd at 17953, ¶841.

undermine Congress's understanding that 'mobile services ... by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.'" *MetroPCS v. FCC*, 644 F.3d 410, 413-14, 396 U.S. App. D.C. 23 (D.C. Cir. 2011).[16]

Regarding the issue of interconnecting "directly or indirectly" with the facilities of other telecommunications carriers, we conclude that telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices. The interconnection obligations under section 251(a) differ from the obligations under section 251(c). Unlike section 251(c), which applies to incumbent LECs, section 251(a) interconnection applies to all telecommunications carriers including those with no market power. Given the lack of market power by telecommunication carriers required to provide interconnection via section 251(a), and the clear language of the statute, we find that indirect connection (*e.g.*, two non-incumbent LECs interconnecting with an incumbent LEC's network) satisfies a telecommunications carrier's duty to interconnect pursuant to section 251(a). We decline to adopt, at this time, Metricom's suggestion to forbear under section 10 of the 1996 Act from imposing any interconnection requirements upon non-dominant carriers. We believe that, even for telecommunications carriers with no market power, the duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives. Nothing in the record convinces us that we should forbear from imposing the provisions of section 251(a) on non-dominant carriers. In fact, section 251 distinguishes between dominant and non-dominant carriers, and imposes a number of additional obligations exclusively on incumbent LECs. Similarly, we also do not agree with the Texas Commission's argument that the obligations of section 251(a) should apply equally to all telecommunications carriers. Section 251 is clear in imposing different obligations on carriers depending upon their classification (*i.e.*, incumbent LEC, LEC, or telecommunications carrier). For example, section 251(c) specifically imposes obligations upon incumbent LECs to interconnect, upon request, at all technically feasible points. This direct interconnection, however, is not required under section 251(a) of all telecommunications carriers.[17]

AT&T retains its §251(a) duties, and they are arbitrable before state commissions under §252. WCX does not have §251(c)(2) duties; WCX's duties arise solely from FCC Rule 20.11 and §251(a). "CMRS providers are not required to enter into direct

[16] *CAF*, 26 FCC Rcd at 17953, ¶841, n. 1617.

[17] *Local Competition Order* ¶997 (emphasis added).

interconnection."[18] This Commission has the power and duty to implement WCX's and AT&T's indirect interconnection obligations, in this arbitration. AT&T cannot plausibly avoid arbitration, nor can it ask the Commission to relieve AT&T of its §251(a) and Rule 20.11 duties by imposing a direct §251(c)(2) interconnection requirement on WCX.[19] The Sixth,[20] Eighth[21] and Tenth Circuit[22] have directly so held, and the Colorado PUC agrees.[23]

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[18] *CAF*, 26 FCC Rcd at 17952, ¶840.

[19] *Local Competition Order* ¶1006 ("We further note that, because CMRS providers do not fall within the definition of a LEC under section 251(h)(1), they are not subject to the duties and obligations imposed on incumbent LECs under section 251(c).")

[20] *Ohio Bell, supra.*

[21] See *Rural Iowa Independent Telephone Association v. Iowa Utilities Board*, 385 F. Supp.2d 797, 825 (S.D. Iowa 2005), *aff'd*, 476 F.3d 572 (8th Cir. 2007) (holding that state commissions may arbitrate indirect interconnection agreements between LECs and CMRS carriers); *Iowa Network Services, Inc. v. Qwest Corporation*, 385 F. Supp.2d 850, 893 (S.D. Iowa 2005) (holding that state commissions may arbitrate indirect interconnection agreements between LECs and CMRS carriers).

[22] *Atlas Tel. Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1265-1266 (10th Cir. 2005):

> ... The RTCs first contend that 47 U.S.C. § 251(c)(2) mandates that the exchange of local traffic occur at specific, technically feasible points within an RTC's network, and that this duty is separate and distinct, though no less binding on interconnecting carriers, from the reciprocal compensation arrangements mandated by § 251(b)(5). We simply find no support for this argument in the text of the statute or the FCC's treatment of the statutory provisions. Section 251(c)(2) imposes a duty on the ILECs to provide physical interconnection with requesting carriers at technically feasible points within the RTCs' networks. By its terms, this duty *only* extends to ILECs and is *only* triggered on request. The fallacy of the RTCs' argument is demonstrated in a number of ways. The RTCs contend that the general requirement imposed on all carriers to interconnect "directly or indirectly," 47 U.S.C. § 251(a) (emphasis added), is superceded by the more specific obligations under § 251(c)(2). Yet, as noted above, the obligation under § 251(c)(2) applies only to the far more limited class of ILECs, as opposed to the obligation imposed on all telecommunications carriers under § 251(a). The RTCs' interpretation would impose concomitant duties on both the ILEC and a requesting carrier. This contravenes the express terms of the statute, identifying only ILECs as entities bearing additional burdens under § 251(c). We cannot conclude that such a provision, embracing only a limited class of obligees, can provide the governing framework for the exchange of local traffic.
>
> We also find that the RTCs' interpretation of § 251(c)(2) would operate to thwart the pro-competitive principles underlying the Act. Although § 251(c)(2) interconnection is only triggered by request, the RTCs would make such interconnection obligatory to all carriers seeking to exchange local traffic. At the same time, however, the Act exempts RTCs from the application of § 251(c) until a request is made and the appropriate "State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent [with other provisions of the Act]." Id. § 251(f)(1)(A). If Congress had intended § 251(c)(2) to provide the sole governing means for the exchange of local traffic, it seems inconceivable that the drafters would have

2. The WCX terms were presented to AT&T during negotiations.

AT&T claims that WCX's proposed terms are not arbitrable because they were presented late in the negotiations. AT&T Response p. 15. That is not true, but even if it was they would still be arbitrable. AT&T admits it received them on March 4, "11 days before the close of the arbitration window." That is sufficient. *See Mich. Bell Tel. Co. v. Isiogu*, 2010 U.S. Dist. LEXIS 18182 *11, *13, *14 (E.D. Mich. Mar. 2, 2010).[24]

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simultaneously incorporated a rural exemption functioning as a significant barrier to the advent of competition. In sum, accepting the RTCs' interpretation of § 251(c) would compel us to assume too much and ignore altogether the express language of the statute. (notes omitted, emphasis added)

[23] *In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement With Union Telephone Company d/b/a Union Cellular Under Section 252 of the Federal Telecommunications Act of 1996*, Decision No. C07-0833; Docket No. 04B-491T, Colorado Public Utilities Commission, 2007 Colo. PUC LEXIS 795, *38, ¶65, *66, ¶118, (September 26, 2007) ("Qwest cannot require a direct interconnection with Union Cellular because, under current law, Union Cellular can meet its interconnection obligations through indirect interconnection and that, in a manner of speaking, Union Cellular has elected to use indirect interconnection.")

[24] As an initial matter, AT&T Michigan argues that the issue presented by Sprint Nextel to the MPSC – exttension of the Michigan ICAs – was not an "open issue" subject to arbitration. Specifically, AT&T Michigan maintains that Sprint Nextel effectively abandoned on-going negotiations in January 2009 when it decided that it no longer wanted to port the Kentucky ICA but would rather extend the Michigan ICAs. AT&T Michigan specifically refused to negotiate Sprint Nextel's new position stating that it considered the request "to be separate and apart from the parties' ongoing negotiations" and expressing its view that it has no duty to negotiate "merger commitment undertakings" under the 1996 Act. (MPSC Resp. Brief Ex. 3.) As to this latter point, the 1996 Act requires AT&T Michigan to negotiate so as to fulfill its duties in regard to resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation but makes no specific mention of merger commitment obligations. 47 U.S.C. § 251(b)(1)-(5), (c)(1). Having refused to negotiate extensions of the Michigan ICAs, AT&T Michigan asserts that the topic could not be an open issue for arbitration.

...

In further support of its position, AT&T Michigan relies on a Fifth Circuit case that held the only issues open for arbitration are those "that were the subject of voluntary negotiations" and that "[a]n ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act . . . ." *Coserv L.L.C. v. Sw. Bell Tel. Co.*, 350 F.3d 482, 487, 488 (5th Cir. 2003).

...

The Sixth Circuit has described the 1996 Act as allowing CLECs to initiate arbitration "if no agreement is reached *or if no negotiations commence* within 135 days after the competitor makes its initial request to enter into voluntary negotiations." *Verizon North Inc. v. Strand*, 367 F.3d at 582 (emphasis added). In this case, the parties negotiated from the time of Sprint Nextel's initial request through to the arbitration window. Although Sprint Nextel's final request came at a late stage of the negotiations, there is no reason to require that the parties start negotiations anew. It is to be expected that parties will change their positions through the course of negotiations, otherwise "negotiations" serve

The fact is, however, that AT&T saw these or very similar words early in the process, and the precise words on the seminal topics were presented to AT&T in the middle. WCX provided its first efforts regarding indirect interconnection on July 30. *See* Exhibit 1. AT&T erroneously asserts on Response, p. 10 that they were received on August 8, but AT&T goes on to admit the interim terms were actually received in July. *See* AT&T Response p. 10, note 13. WCX provided revised indirect interconnection and SIP terms (another topic AT&T refused to negotiate, but is nonetheless eligible for arbitration since it obviously pertains to §252(c)(2), a mandatory negotiation issue) on January 12 (Exhibit 2) and January 14, 2015 (Exhibit 3). *See also,* AT&T Response p. 11. The relevant provisions dealing with the substance of indirect interconnection were quite similar to the final terms WCX submitted to the Commission 11 days after they were shared with AT&T on March 4. AT&T consistently responded by striking the indirect interconnection and SIP interconnection terms, and/or refusing to discuss either of those topics.

AT&T's argument is that the language WCX filed came "too late" in the "negotiations." *Michigan Bell* explains why that is wrong. Besides, AT&T refused to negotiate over the entire topic; they would not consider ***anything***. It did not matter at all to AT&T what the actual implementing words said because AT&T would not even look at them. "Under these circumstances and given AT&T [Texas'] explicit refusal to engage in further negotiations, it was appropriate for [WCX] to initiate arbitration, raising [indirect

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no purpose. Under these circumstances and given AT&T Michigan's explicit refusal to engage in further negotiations, it was appropriate for Sprint Nextel to initiate arbitration, raising extension of the Michigan ICAs as an open issue. (italics in original, underline supplied)

interconnection and IP-based direct interconnection] as an open issue." *Michigan Bell, supra.*

AT&T wrongly asserts that ICA terms for indirect interconnection have never been filed with the Commission. Response p. 4.[25] The PUC routinely sees indirect interconnection agreements. That is the principal kind of agreement most RLECs have with wireless carriers, and even many CLECs. Not all ILECs try to foist §251(c)(2) duties on non-ILEC carriers. The current agreement between AT&T Mobility and Industry Telephone is a single example. General Terms and Conditions, § 4 on p. 3 of the AT&T Mobility/Industry agreement provides that "The Parties acknowledge that they currently indirectly connect to each other utilizing the Transit Services of third party carriers."[26]

AT&T is swimming against an overwhelming tide. The FCC recognizes indirect interconnection with ILECs is common, because it is. Most of the ILECs in Texas have indirect interconnection with CMRS providers and even CLECs. Verizon uses indirect as well in many parts of the state. These ILECs have ICAs with reciprocal compensation terms. This should not be a controversial matter. But with AT&T, nothing is ever easy. Any carrier that chooses to disagree with something AT&T has unilaterally decided to do or not do despite the rules is in for a long, hard slog. When litigation ensures the same obstructionist fusillade of denials and frivolous pleas in avoidance now before the Arbitrators inevitably follows.

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[25] "This is in large part because the WCX Proposal is first and foremost an agreement for indirect interconnection, i.e., for the exchange of traffic through a third party intermediary, rather than for direct interconnection between the parties' networks, like every other ICA this Commission has approved." (emphasis added)

[26] The main agreement was approved in Docket 33291. An amendment to implement the *CAF* was approved in Docket 40870.

These matters were "not negotiated" only because AT&T refused to negotiate. WCX raised the subjects, provided terms and then when it was obvious AT&T would not budge WCX filed for arbitration. These are open issues and the specific terms are surely eligible for consideration. This Commission cannot "construe the statute to compel arbitration only after an ... incumbent LEC had entered into voluntary negotiations[.] [T]hat interpretation would provide a disincentive for such carriers to begin voluntary negotiations to fulfill their obligations under sections 251(a) and 251(b), which conflicts with these pro-competitive, market-opening purposes of the Act."[27]

3. The Commission cannot mandate a result that is directly contrary to FCC rules, even those outside of Part 51. If an open issue requires interpretation and application of an FCC wireless rule, then it must be taken into account as part of the determinations.

The PUC should be wary of AT&T's contention that §332/20.11 issues are outside the scope of a §252 arbitration. AT&T Response p. 17, n. 39. The Colorado decision AT&T cites is inapposite. That decision pertained to the definition of interconnection, not whether a state commission has jurisdiction to oversee an arbitration involving indirect interconnection. The Illinois Commission has long acknowledged that it has jurisdiction to arbitrate indirect interconnection agreements, under §332.[28] The FCC has made it absolutely clear that it intends for states to oversee

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[27] *CRC*, 26 FCC Rcd at 8272-8273, ¶24.

[28] *See, e.g., Hamilton County Telephone Co-Op., LaHarpe Telephone Company, Inc., McDonough Telephone Cooperative, Inc., Mid-Century Telephone Cooperative, Inc., Metamora Telephone Company, The Marseilles Telephone Company, Grafton Tele-phone Company Petitions for Arbitration under the Telecommunications Act to Establish Terms and Conditions for Reciprocal Compensation with Verizon Wireless and its Constituent Companies*, Arbitration Decision, 05-0644; 05-0645; 05-0646; 05-0647; 05-0648; 05-0649; 05-0657 (Cons.), Illinois Commerce Commission, 2006 Ill. PUC LEXIS 5 *6 (January 25, 2006):

> Until recently, it was not clear that an ILEC could compel a wireless carrier to negotiate an agreement for reciprocal compensation for transport and termination of telecommunications traffic through arbitration under Section 252 of the Federal Act. Through a Declaratory Ruling and Report and Order released February 24, 2005, the FCC amended its rules to allow local exchange carriers to initiate negotiations with

indirect interconnection issues and expects them to make determinations that implement not only §§251/252 but also §332 and Rule 20.11.[29] For example, Rule 20.11(d) prohibits a LEC from imposing tariffed charges on a CMRS provider for the LEC's originating non-access traffic.[30] This Commission could not lawfully require WCX to pay tariffed charges for non-access traffic. If it were to do so a reviewing court would very likely reverse on the basis the result is contrary to federal law, and is thus arbitrary and capricious.

AT&T voted yes to state commission enforcement of Rule 20.11 before it figured out that a requirement that it engage in indirect interconnection would soon follow. SBC very strongly supported the FCC decision in the 2005 *T-Mobile Declaratory Ruling*[31] to require CMRS providers to submit to state commission §252 arbitrations – through an amendment to Rule 20.11 – meaning that the state commissions would be enforcing

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> CMRS carriers and, if no agreement was negotiated, to seek binding arbitration from the state commission. See *In the Matter of Developing a Unified Intercarrier Compensation Regime T-Mobile* et al. *Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, CC Docket No. 01-22, FCC 05-42 ("T-Mobile Order)* at P 16 and *47 C.F.R. § 20.11(e)*. The *T-Mobile Order* and resulting rules became effective April 29, 2005.
>
> In section 252(b)(1), Congress established a process by which telecommunications carrier can obtain an reciprocal compensation agreement through "compulsory arbitration." Through section 332 and the FCC's decision in the *T-Mobile Order*, the FCC extended that process to local exchange carriers seeking reciprocal compensation with CMRS carriers. Pursuant to such procedure, either party may petition a state commission for compulsory arbitration during the period from the 135th to the 160th day after the date on which an incumbent local exchange carrier receives a request for negotiation. Petitioners sought negotiation with Verizon Wireless on or after the effective date of the FCC's new rules. Each Petitioner filed its respective Petition for Arbitration within the appropriate time period after initiating the negotiations, and thus, the Petitions for Arbitration herein were timely filed. Therefore, the Commission **has jurisdiction over the Petitions** in this consolidated matter pursuant to §§ 252(b)(1) **and 332** of the Act. (emphasis added)

[29] *See, e.g., North County Communs. Corp. v. MetroPCS Cal., LLC*, Memorandum Opinion and Order, 24 FCC Rcd 3807 (Enf. Bur. rel. Mar. 30, 2009) ("*Bureau Merits Order*"), *aff'd*, 24 FCC Rcd 14036 ("*Bureau Merits Review Order*"), *rev. den. MetroPCS Cal., LLC v. FCC*, 644 F.3d 410 (D.C. Cir., 2011).

[30] *See also* Rule 51.703(b). AT&T is trying to do that very thing with regard to WCX's 5YY numbers. *See* WCX Petition Issue 5; AT&T Response p. 120 (DPL, AT&T Position on WCX Issue 5).

[31] *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005) ("*T-Mobile Declaratory Ruling*").

Rule 20.11.[32] AT&T "liked" state enforcement of Rule 20.11, but has since decided to "unlike" it. They were right the first time.

There are other FCC rules "of special concern to CMRS" that this Commission cannot abridge merely by asserting it has no ability to enforce them and will look the other way if ICA terms contravene them. CMRS providers have the right to provide fixed wireless service on a co-primary basis, for example.[33] When they do so the service is still CMRS, and the CMRS rules still apply. This Commission could not lawfully prohibit WCX from providing fixed wireless and supporting its interconnected services by receiving calls originated by AT&T, or sending calls to AT&T, nor could the PUC exclude that traffic from coverage in any ICA or hold that WCX's fixed wireless traffic is not subject to the intraMTA rule.[34] Yet that is precisely what AT&T's terms would do through its tightly and restrictively drafted terms that require a certain kind of mobile station. AT&T's terms make fixed service traffic not "Authorized" and are carefully drafted so that fixed service traffic is not either access or non-access.

The FCC's wireless rules are relevant to the results that must obtain in this arbitration and any determinations made in this case must honor and respect those rules. To the extent the FCC's wireless rules bear on an open issue, then they govern

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[32] *See* Docket 01-92, SBC Opposition to Petition for Reconsideration (June 30, 2005), available at http://apps.fcc.gov/ecfs/document/view?id=6517999316.

[33] *See In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1424, ¶36 (1994); *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965, 8968, ¶69 (1996) ("*CMRS Flex First Report and Order*") (holding that mobile or fixed incidental services offered by CMRS carriers fall within the definition of mobile service and are subject to CMRS regulation).

[34] Rule 51.701(b)(2) says that the intraMTA rule applies to "traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area." The rule speaks to traffic to or from "a CMRS provider" not to or from a "mobile station." Therefore, when WCX provides fixed service and is acting as a CMRS provider then the associated traffic is subject to the intraMTA rule.

and must be implemented, or at least not transgressed. AT&T wants to honor them only in the breach, and is asking the PUC to do the same.

C. Threshold Issue 2: Is the proposed ICA provided with AT&T Texas's response to WCX's petition (the "AT&T Texas Agreement") eligible for arbitration in this proceeding?

1. AT&T's terms are not arbitrable under the plain terms of §252(b).

Order No. 3 directs the parties to include in their briefing on this issue an identification of "the open issues associated with each ICA that are or are not eligible for arbitration." Again, and with all due respect, the apparent intent to work from ICA terms up to open issues is precisely backwards, and is not consistent with what the statute contemplates and requires. The Act limits the arbitration to resolution of ***issues***. Section 252(b)(4)(A) requires the Commission to "limit its consideration of any petition under paragraph (1) (and any response thereto) to the ***issues*** set forth in the petition and in the response." AT&T has proposed terms that are wholly disconnected from any **open issue** identified in WCX's petition or AT&T's response. A host of AT&T's terms relate to issues *not* set forth in either the petition or response. Thus, WCX's position is that most of AT&T's terms are not arbitrable under the plain terms of §252(b).

(a) 911 terms.

AT&T's proposed agreement has an "Appendix Emergency Service Access (E-911). WCX did not ask for 911 terms. WCX has arranged to fulfill its 911 obligations without relying on AT&T, and WCX does not want AT&T's "help." 911 is not mentioned in any of the open issues submitted by WCX, nor was it raised as an open issue in AT&T's reply. Those terms cannot be considered.

(b) GTC provisions not listed in Petition or Response as related to an open issue.

WCX requests that the Arbitrators turn to the AT&T General Terms and Conditions and contemplate all of the matters addressed in that document. A convenient method to itemize those matters would be to scrutinize the Table of Contents on AT&T Response pp. 37-38. WCX challenges both AT&T and the Arbitrators to find any specific listing of the topics covered by the following AT&T GTC sections, as identified in the Table of Contents, in AT&T's Response:

3. GENERAL RESPONSIBILITIES OF THE PARTIES
5. ASSURANCE OF PAYMENT
7. REQUIREMENTS TO ESTABLISH ESCROW ACCOUNTS
8. NONPAYMENT AND PROCEDURES FOR DISCONNECTION
9. DISPUTE RESOLUTION
11. DISCLAIMER OF REPRESENTATIONS AND WARRANTIES
12. LIMITATION OF LIABILITY
13. JOINT AND SEVERAL LIABILITY
14. INDEMNITY
15. INTELLECTUAL PROPERTY
17. PUBLICITY AND USE OF TRADEMARKS OR SERVICE MARKS
18. CONFIDENTIALITY
19. INTERVENING LAW
22. COMPLIANCE AND CERTIFICATION
23. LAW ENFORCEMENT AND CIVIL PROCESS
24. RELATIONSHIP OF THE PARTIESANDEPENDENT CONTRACTOR
25. NO THIRD PARTY BENEFICIARIES; DISCLAIMER OF AGENCY
26. ASSIGNMENT
27. SUBCONTRACTING
28. ENVIRONMENTAL CONTAMINATION
29. FORCE MAJEURE
30. TAXES
31. NON-WAIVER
32. NETWORK MAINTENANCE AND MANAGEMENT
34. END USER INQUIRIES
35. EXPENSES
36. CONFLICT OF INTEREST
37. SURVIVAL OF OBLIGATIONS
39. AMENDMENTS AND MODIFICATIONS
40. AUTHORIZATION
41. ENTIRE AGREEMENT
42. MULTIPLE COUNTERPARTS

43. DIALING PARITY
44. REMEDIES

None of the foregoing topics are covered by any express open issue stated in either the Petition or Response. As a matter of law §252(b)(4)(A) prohibits consideration or imposition of the language associated with each of the AT&T GTC sections set out above.[35]

2. AT&T's terms are not abitrable because they are flatly inconsistent with "the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251."

AT&T argues that the Commission must limit its decisions to the duties imposed on AT&T under §251(b) and (c). The result, according to AT&T, is that the Commission's "interconnection" determinations must necessarily be limited only to §251(c)(2) "direct" interconnection, and the PUC has no power to consider, much less order, indirect interconnection under §251(a). As shown above, the FCC, several state commissions and the courts have rejected ILEC arguments that states are precluded from arbitrating carriers' duties to indirectly interconnect under §251(a).

There is a second half to the story, however. AT&T's terms rule out indirect interconnection, and therefore mandate direct interconnection. AT&T wants to avoid its §251(a) duty, which means it wants the Commission impose a duty on WCX to directly interconnect under §251(c)(2). But WCX has no such duty, and the Commission cannot impose §252(c) duties on CMRS carriers.[36] The Sixth, Eighth and Tenth Circuits have

[35] AT&T mentions "Change of Law," "Billing/Bill Payment/Consequences of Late Payment or Non-Payment" and "Dispute Resolution" in its DPL Position Statement on Issue 13 (AT&T Response pp. 128-129). WCX asserts that AT&T's mere listing of some topics as part of its DPL Position Statement on Issue 13 is not sufficient to create an "open issue." But if that mere specific mention of a topic is adequate, the subsequent off-hand and global reference to "dozens of provisions that ... should be in the parties' ICA" is clearly inadequate to constitute an "issue set forth in ... the response" for the unnamed "dozens." *See* §252(b)(4)(A) and (C).

[36] The FCC considered whether CMRS providers should suffer LEC duties in the *Local Competition*

both directly rejected the notion that state commissions can or should refuse to implement an ILEC's §251(a) duty and instead impose §251(c)(2) on a non-ILEC. *Atlas, supra, INS/RIITA, supra, Ohio Bell, supra.*

The Commission is charged with prescribing "appropriate conditions" and when it does so the Commission must "ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title." §252(c)(1). A federal court reviewing the Commission's arbitrated result is to "determine whether the agreement or statement meets the requirements of section 251 of this title and this section." §252(e)(6). Notice that the "meets" requirement extends to **all** of §251, not just §251(b) and (c). Thus, the Commission must ensure that the terms it imposes "meet the requirements" of and implement the duties imposed by §251(a). AT&T's terms would allow AT&T to avoid its §251(a) duty. AT&T's terms would also impose ILEC direct interconnection duties (§251(c)(2)) on a non-ILEC. Neither of these results can possibly be said to be "meet the requirements of section 251." This is precisely what the Sixth, Eighth and Tenth Circuits were talking about in *Atlas*, *Ohio Bell*, and the *INS/RIITA* cases.

There are other provisions in AT&T's proffered arbitrated agreement that simply cannot be squared with "the requirements of section 251" or "the regulations prescribed by the [FCC] pursuant to section 251." As further detailed below, the AT&T agreement

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Order, ¶¶1001-1006. It held they should not. The statute exclusively reserves this question to the FCC, so the states cannot separately or independently decide that a CMRS should be a LEC or ILEC or bear LEC or ILEC duties. *See* §153(26) (definition of LEC, allows FCC to decide if CMRS should be LEC and therefore have LEC duties). Nor can the PUC usurp the FCC's exclusive power to decide whether an entity should be assigned ILEC treatment pursuant to §251(h)(2). The FCC already determined that CMRS providers should not be assigned ILEC treatment or burdens. *Local Competition Order* ¶1006 ("Similarly, we do not find that CMRS providers satisfy the criteria set forth in section 251(h)(2), which grants the Commission the discretion to, by rule, provide for the treatment of a LEC as an incumbent LEC if certain conditions are met.").

has a large number of restrictions and prohibitions that are so baked-in they cannot be entirely identified and then changed to be consistent with the Act. Some violative terms could, perhaps, be fixed once identified, but not all of the bomblets with secret intent could realistically ever be found and repaired.

AT&T is attempting to strike WCX's terms and leave only AT&T's terms available for use. The hope is that the "baseball" approach will leave only AT&T's terms as an option, with the result that the Commission will effectively be required to impose AT&T's terms despite the fact they are not consistent with the Act and FCC rules. This is not permissible.

(a) AT&T's terms impose access charges on AT&T originated non-access traffic and wrongly exclude intraMTA traffic from bill and keep treatment.

AT&T's Appendix Intercarrier Compensation suffers from several fundamental inconsistencies with the FCC's intercarrier compensation rules flowing from *CAF*. They are ineligible for consideration, and cannot be imposed.

(i) AT&T's terms limit intraMTA treatment to traffic to or from a "mobile station."

AT&T's Appendix Intercarrier Compensation §2.3.1.1 excludes intraMTA (bill and keep) treatment if a call is not to a "mobile station using CMRS frequency." This exclusion would mean that traffic to WCX's fixed services customers is not subject to bill and keep.[37] An intraMTA call from AT&T to a WCX fixed service customer would be subjected to access treatment, even though the traffic is clearly "[t]elecommunications

[37] WCX will be providing fixed service. The device at the customer premise will receive the "CMRS frequency" from WCX's transmitter, and will then have a Wi-Fi router. WCX's customers will have Wi-Fi capable mobile stations with WCX's VoLTE client installed. This arrangement is excluded from bill and keep treatment under §2.3.1.1, even though it ***is*** CMRS traffic. AT&T's terms wrongly deem it "non-CMRS."

traffic exchanged between a LEC and **a CMRS provider** that, at the beginning of the call, originates and terminates within the same Major Trading Area." *See* Rule 51.701(b)(2). The rule applies to traffic involving "a CMRS provider." WCX-originated traffic from a fixed service user that terminates on AT&T's network in the MTA, will involve "the calling party initiating the call [doing] so through a CMRS provider." *CAF* ¶1006. The intraMTA rule is not restricted to calls only to or from "mobile stations." WCX's fixed service is still CMRS, so the traffic is still covered by 51.701(b)(2) and must be bill and keep.

(ii) AT&T's terms exclude "IXC" traffic from intraMTA treatment even if both end-points are in the same MTA.

AT&T's Appendix Intercarrier Compensation §§2.3.1.5 excludes "IXC Traffic" from intraMTA treatment. This provision is not consistent with the FCC's ruling in *CAF* ¶1007 that "all traffic exchanged between a LEC and a CMRS provider that originates and terminates within the same MTA, as determined at the time the call is initiated, is subject to reciprocal compensation regardless of whether or not the call is, prior to termination, routed to a point located outside that MTA or outside the local calling area of the LEC. Similarly, intraMTA traffic is subject to reciprocal compensation regardless of whether the two carriers are directly connected or exchange traffic indirectly via a transit carrier." The dialing pattern and routing AT&T uses is irrelevant to the required intercarrier compensation as between WCX and AT&T. If AT&T requires its end user to dial 1+ for some reason, and if AT&T decides to route the call to an IXC, it is nonetheless still an intraMTA call and it is still bill and keep. AT&T's exclusion is flatly and obviously not consistent with the FCC's compensation rules.

(iii) AT&T's terms exclude "5YY" traffic from intraMTA treatment even if both end-points are in the same MTA.

AT&T's Appendix Intercarrier Compensation §2.3.1.2 exclude "500" calls from intraMTA treatment even if both end-points are in the same MTA. The dialing pattern is irrelevant. ***ALL*** traffic exchanged between a LEC and a CMRS provider that originates and terminates within the same MTA, as determined at the time the call is initiated, is subject to reciprocal compensation under the intraMTA rule codified in 51.701(b)(2). AT&T cannot exempt the call from intraMTA bill and keep treatment. "Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs." Rule 20.11(d). "A LEC may not assess charges on any other telecommunications carrier for Non-Access Telecommunications Traffic that originates on the LEC's network." Rule 51.703(b). 5YY traffic that begins and ends in the same MTA is "non-access" traffic and cannot be excluded from non-access traffic treatment, particularly since AT&T is trying to subject the traffic to access tariff treatment notwithstanding the express prohibition in Rules 20.11(d) and 51.703(b).

(b) AT&T's terms provide for a non-tariffed access price for intraLATA interMTA traffic.

AT&T's terms also depart from the FCC's *CAF* rules for traffic that is not intraMTA. Traffic between LECs and CMRS providers that is not within the MTA is access traffic (because it is not non-access). Rule 51.903(h). The FCC's transitional Access Pricing Rules prescribe specific rates for access traffic, and they decline over time. AT&T's Appendix ITR, however, provides for a specific, non-declining price for "intraLATA interMTA Traffic" (8.3.2.1) and "Originating Landline to CMRS Switched Access Traffic" (8.3.4.2). Both of these provisions point to "the rate stated in Appendix

Pricing – Wireless." The price stated in the pricing appendix is $0.012345. Rule 51.905, however, requires that access traffic be priced out of the state and interstate access tariffs, not an agreement.[38] Rule 51.907(d)(1) requires that originating and terminating charges for access traffic be segregated and specifically identified, and a particular method is prescribed. If the call is VoIP at either end, then Rule 51.913(a)(2) has a specific set of requirements, for both originating and terminating. AT&T's "special" $0.012345 rate for certain types of interMTA traffic violates the FCC's rules.

(c) AT&T's terms impose non-TELRIC special access pricing for dedicated interconnection facilities.

AT&T's proposed Appendix NIM §3.4 provides that WCX can lease interconnection facilities from AT&T "pursuant to access services tariff." This requirement is flatly illegal. The FCC has clarified, and the U.S. Supreme Court has affirmed, that interconnection facilities must be provided at TELRIC rates. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254 (2011). AT&T's contract is riddled with efforts to avoid FCC rules and obligations. They are so deeply embedded and intertwined they cannot be fixed. The entire contract is not arbitrable.

3. AT&T's terms are not arbitrable because the Commission cannot impose terms that violate provisions in the Communications Act outside of §251 or FCC Rules outside of Part 51.

AT&T asserts that the Commission cannot interpret and apply statutory provisions and FCC rules outside of §251 and Part 51. AT&T Response p. 17, n. 39. This is patently incorrect. The Commission cannot impose terms that would be inconsistent with, or take away a party's rights, duties or obligations under, other law. Many state commissions have recognized that they cannot impose terms that would

[38] It is true that carriers can voluntarily agree to a non-tariff price. WCX is not inclined to agree to a voluntary variance from *CAF* since AT&T has been unwilling to budge on any issue of consequence.

violate FCC Rule 20.11, for example. The PUC cannot consider, much less approve, ICA terms that "impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs." *See* 20.11(d).

The PUC could not consider or approve an ICA provision requiring a CMRS provider to file a tariff, especially if AT&T could cancel the ICA if the CMRS provider failed to do so. *But see* FCC Rule 20.15(c). Yet, AT&T's Appendix Meet Point Billing §§1(b) and 4 purport to require that WCX have a tariff. Similarly, the PUC could not consider or approve an ICA provision conditioning interconnection on a CMRS provider's consent to state entry/exit or rate regulation, especially if the ICA would allow AT&T to cancel the ICA if it fails to do so. *But see* §332(c)(3)(A); *See also Local Competition Order* ¶1025 (emphasis added):

> 1025. Our decision to proceed under section 251 as a basis for regulating LEC-CMRS interconnection rates should not be interpreted as undercutting our intent to enforce Section 332(c)(3), for example, where state regulation of interconnection rates might constitute regulation of CMRS entry. In such situations, state action might be precluded by either section 332 or section 253. Such circumstances would require a case-by-case evaluation. We note, however, that we are aware of numerous specific state requirements that may constitute CMRS entry or rate regulation preempted by section 332. For example, many states, such as California, require all telecommunications providers to certify that the public convenience and necessity will be served as a precondition to construction and operation of telecommunications services within the state. Some states, such as Alaska and Connecticut, also require CMRS providers to certify as service providers other than CMRS in order to obtain the same treatment afforded other telecommunications providers under state law. Hawaii and Louisiana, in addition to imposing a certification requirement, require CMRS providers and other telecommunications carriers to file tariffs with the state commission. We will not permit entry regulation through the exercise of states' sections 251/252 authority or otherwise. In this regard, we note that states may not impose on CMRS carriers rate and entry regulation as a pre-condition to participation in interconnection agreements that may be negotiated and

> arbitrated pursuant to sections 251 and 252. We further note that the Commission is reviewing filings made pursuant to section 253 alleging that particular states or local governments have requirements that constitute entry barriers, in violation of section 253. We will continue to review any allegations on an ongoing basis, including any claims that states or local governments are regulating entry or imposing requirements on CMRS providers that constitute barriers to market entry.

AT&T's terms have a series of immutably baked-in and irreparable evils woven throughout its proposed terms that expressly and implicitly prohibit WCX from providing services it is patently allowed to provide under the Act and FCC rules. AT&T wants the Commission to ***impose*** "[in]appropriate conditions" that – if approved by the Commission[39] – would constitute entry/exit and rate regulation, be patently discriminatory and unlawfully prohibit or prevent WCX from engaging in activity that is allowed by federal law.

AT&T wants the Commission to then include a provision stating that if WCX engages in a Communications Act authorized activity that is banned by the ICA then AT&T can cancel the ICA and once again block all traffic. This you cannot do; indeed the Commission cannot even consider whether to do so. AT&T's anti-competitive and unlawful conditions are simply not arbitrable. AT&T's terms prohibit WCX from providing a number of interconnected services that CMRS providers are authorized to provide, and WCX's competitors are providing or will be providing, if AT&T's network is in any way involved.

In order to understand the crushing limitations you have to start with AT&T's carefully-crafted definitions. Those are the bricks in AT&T's wall of woe. Sometimes a defined term appears in another definition, so in order to understand the result you must

[39] WCX could, of course, voluntarily accept these conditions. That is allowed by §252(a). But the Commission cannot impose them over WCX's objection because they would deprive WCX of rights guaranteed by federal law.

grasp the full meaning of the parts and then the sum. Then we can begin the hunt for places in the substantive parts of the agreement where the defined terms show up. The result is a straight-jacket that allows little or no movement. Some activities are functionally banned because the defined terms end up excluding the activity. That activity is therefore not allowed, because it is not covered by the ICA as a result of GTC §2.12.1.2 and §38 (Scope of Agreement). If WCX were to use interconnection to support an activity that is excluded, then that would be a breach and AT&T can cancel the entire agreement. AT&T GTC §4.3. This is so even if WCX has fully paid AT&T every penny AT&T has ever claimed is due. The disapproved use alone would be sufficient for AT&T to cancel. The problem is *not* how any traffic would be rated for compensation purposes.[40] The problem is that the activity is prohibited altogether through exclusion.

The definitional bricks are the main part of AT&T's wall of woe. Then those bricks are masoned hard and fast into place through the remainder of AT&T's terms. The substantive concrete, however, supports additional weight along with the brick as will be explained below.

> 1.2 "Access Tandem" means a local exchange carrier switching system that provides a concentration and distribution function for originating and/or terminating traffic between a LEC end office network and IXC points of presence (POPs).
>
> Appendix Meet Point Billing has a different definition:
>
> For purposes of this Appendix, "Access Tandem Switch" means a tandem switch in AT&T TEXAS' network equipped to provide interconnection between Carrier and an Interexchange Carrier (IXC) that is used to connect and switch traffic for

[40] Appropriate call rating is of course important. But what the parties' real disagreement is not about "how" or "how much" We don't even get there. The dispute is a "whether." AT&T wants to prohibit a wide range of lawful activities altogether.

the purpose of the Parties' joint provision of Switched Access Services to the IXC.

What it means: The GTC definition is restricted to LECs. A CMRS provider, by definition, cannot have an Access Tandem. Further, the definition speaks only to "LEC end office" connections to the Access Tandem. There is no provision for a CMRS provider to connect to the Access Tandem, even though AT&T's ITR terms require WCX to have Trunks to AT&T's Tandem. WCX does not know why AT&T feels the need to have one definition for facilities-related provisions and a different one for the billing related provisions.

Where it shows up: Definitions §1.36, ITR §§2.4, 3.5.2.1, 8.2.1, MPB §3.

1.5 "Ancillary Services" means optional supplementary services such as directory assistance, N11, operator services, Service Access Codes (600, 700, 800 and 900 services, but not including 500 services) and Switched Access Services. Enhanced 911 ("E911") is not an Ancillary Service.

1.6 "Ancillary Services Connection" means a one-way, mobile-to-land Type 1 interface used solely for the transmission and routing of Ancillary Services traffic.

What it means: The definition excludes "500 services." The wording also implies that 5YY is also not "Switched Access Services" even though AT&T asserts in Response p. 120 (DPL Issue 5) that 5YY is a switched access offering, and can only be obtained through the access tariff.

Where it shows up: Definitions §1.6, ITR §2.1. The result is that anything deemed to be an "Ancillary Service" must be placed on separate one-way Trunks, and use TDM Type 1 interfaces. Type 1 is an end-office (not tandem) line side connection, similar to Feature Group A. *See* ITR §2.1. The result is that anything deemed to be an "Ancillary Service" must be placed on separate Trunks, and use TDM Type 1 direct interconnection.

1.7 "Answer Supervision" means an off–hook supervisory signal sent by the receiving Party's Central Office Switch to the sending Party's Central Office Switch on all Completed Calls after address signaling has been completed.

What it means: "Answer Supervision" is something provided in TDM networks. Several of the terms ("off-hook," "sent by receiving Party's Central Office Switch to the sending Party's Central Office Switch," "Completed Calls," "address signaling has been completed") require TDM. There is no mention of a CMRS provider's "MSC" (roughly equivalent to a Central Office) which under that definition includes only AT&T Class 5 switches and not other LECs or CMRS providers. WCX is all IP and its voice is supported through VoLTE. "VoLTE" means Voice over LTE, as defined by GSMA PRD IR.92 and successor specifications. It is distinguished from other VoIP applications allowing voice calls over IP-based networks because the voice application capabilities are managed inside WCX's LTE Network. It is a managed service and is not an "over the top" service. VoLTE is in large part SIP-based. SIP, in turn, does not provide "answer supervision." The "supervisory signaling" is not "off-hook." The SIP equivalent to "answer supervision" is "200 OK" but AT&T's definition does not comprehend or allow for this equivalent.

Where it shows up: GTC §§1.26, 1.28.

1.8 "Applicable Law" means all laws, statutes, common law, regulations, ordinances, codes, rules, guidelines, orders, permits, tariffs and approvals, including without limitation those relating to the environment or health and safety, of any Governmental Authority that apply to the Parties or the subject matter of this Agreement. (emphasis added)

What it means: This definition seems innocuous enough until one realizes that the "order" "approving" the ICA, and the ICA itself, becomes part of the "Applicable Law." Therefore any restriction in the agreement – all the ones identified herein and the others so deeply buried they are not yet known – become part of the "Applicable Law." Given

the use of this term in 1.14, the contract itself becomes a regulation that prohibits WCX from providing services the FCC otherwise permits because of the contract does not allow a service it is prohibited, and thus not "Authorized." The ICA would overrule the FCC regulations and operate to limit WCX's rights in numerous ways.

Where it shows up: GTC §§1.14, 1.65, 3.4.2, 3.5, 6.1.3, 6.2, 8.6.2, 8.9, 10.1.4, 12.3, 14.2, 18.2.7, 20.1, 22.1, 26.1.2, 18.1, 28.1, 28.3, 28.4, 30.2, 30.7, 30.8, 44.1.

> 1.14 "Authorized Services" means those services that the CMRS provider may lawfully provide pursuant to Applicable Law.

What it means: This definition, in conjunction with the circular and reinforcing definition of Applicable Law, collapses into the result where WCX can only do those things expressly covered by and allowed by the ICA. If the ICA does not expressly allow it, so that it is within GTC §2.12.1.2 and the "Scope of Agreement" (GTC §38), then it is not an Authorized Service and it is therefore prohibited, because only "Authorized Services Traffic" may go on the Trunks, or be exchanged between the parties. The ICA becomes a form of entry/exit regulation. Since it would be approved by the Commission, it is state entry/exit regulation. AT&T's terms ask the Commission to engage in regulation of CMRS entry, "through the exercise of states' sections 251/252 authority or otherwise." AT&T's terms would therefore "impose on CMRS carriers rate and entry regulation as a pre-condition to participation in interconnection agreements that may be negotiated and arbitrated pursuant to sections 251 and 252." *Local Competition Order* ¶1025.

Where it shows up: GTC §§1.51, 1.88, 2.12.1.2, NIM §1.2, 2.1.1, 3.2, 3.5.6.

> 1.16 "CCS" ("Common Channel Signaling") means an out-of-band, packet-switched, signaling network used to transport supervision signals, control signals, and data messages. It is a special network, fully separate from the transmission path of the public switched network. Unless otherwise agreed by the Parties, the CCS protocol used by the Parties shall be SS7.

What it means: This is another "TDM" definition. WCX is all-IP. WCX does not have or use an "out-of-band" network to transport supervision signals, control signals and data messages. SIP session control messaging is not "fully separate" from the bearer "transmission path." WCX does not have SS7, and cannot be required to install a backwards-compatible SS7 capability. This definition decides an open issue in AT&T's favor.

Where it shows up: GTC §1.71, 33.2, Appendix 911 §§2.1.3, 4.2.5.

> 1.17 "Cell Site" means a transmitter/receiver location, operated by Carrier, through which radio links are established between a wireless system and cellular phones.

What it means: WCX has transmitters and receivers that establish radio links with radio-based fixed and mobile stations. But not all of the radio stations will be "Cellular Phones" as defined in AT&T's 1.17. Those radio stations that are not "Cellular Phones" are excluded from coverage in the agreement. If WCX were to send a call to AT&T or receive a call from AT&T and the user was employing a fixed or mobile station that did not meet the "Cellular Phone" definition then AT&T could claim breach and cancel.

In addition, some communications between WCX and AT&T may not involve use of a Cell Site. WCX – just like AT&T Mobility and most other CMRS providers – will support "off-load" using Wi-Fi or other means. When this occurs there may be no "Cell Site" involvement. There may not be any "CMRS frequency."[41] The AT&T terms mandate that there always be a "Cell Site"; communications that do not involve a Cell Site are not covered by the AT&T terms, which means they are prohibited. If WCX were to exchange traffic with AT&T that does not involve a Cell Site then AT&T could claim breach and cancel.

[41] *But see* AT&T Appendix Compensation §2.3.1.1.

Where it shows up: GTC §§1.45, 1.51(b), 1.62, 1.80, 1.81, ITR §8.3.4.3, Appendix 911 §§ 2.5, 2.10, 2.12, 2.16, 2.23, 2.34, 2.35, 2.37, 4.1.2.

> 1.18 "Cellular Phone" means a device that can make and receive telephone calls over a radio link while moving around a wide geographic area by connecting to a CMRS provider's network.

What it means: This definition requires that the radio station be capable of moving around a "wide geographic area while connecting to" WCX's network. The definition is purposefully different from and far more restrictive than the statutory definition of "mobile station" in §153(34).[42] We don't know what AT&T's notion is of a "wide geographic area" but it is clear that this part of the definition requires mobility. WCX, however, will support fixed services in addition to mobile. Another problem is that WCX will – like many wireless companies – be supporting managed services using Wi-Fi offload. The user will connect the station to a Wi-Fi router,[43] not directly to WCX's transmitter. The router may or may not in turn connect to WCX's radio network. This definition therefore rules out several functionalities and capabilities WCX will support. If a WCX user made a call to an AT&T user while employing a device that does not meet the definition of "Cellular Phone" AT&T could claim that is a breach and cancel the ICA. This is obvious from the 4th "Whereas" clause in AT&T's terms.[44]

Where it shows up: Fourth Whereas clause; GTC §§1.17, 1.62, 1.80(b), 1.81.

> 1.20 "Central Office Switch" means a switch, including, but not limited to an End Office Switch, a Tandem Switch and a Remote End Office switch.

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[42] "The term 'mobile station' means a radio-communication station capable of being moved and which ordinarily does move." This does not have a "wide area" criterion.

[43] The router will also have Ethernet jacks, and if the device has an Ethernet port it may choose to use that rather than the unlicensed radio link to the router.

[44] "WHEREAS, **this Agreement shall apply only to traffic that originates from or terminates to a Cellular Phone** via Carrier acting in its capacity as a CMRS provider." (emphasis added)

What it means: AT&T's definitions exclude WCX switching entities. WCX will not have an "End Office" as defined, a "Tandem Switch" as defined or a "Remote End Office Switch" as defined.

Where it shows up: GTC §§1.17, 1.34, 1.69, 1.75, 1.89, 1.90, NIM §3.5.1, 3.5.1.1.

> 1.23 "CLASS Features" ("Custom Local Area Signaling Service Features") means certain Common Channel Signaling based features available to End Users, including: Automatic Call Back; Call Trace; Distinctive Ringing/Call Waiting; Selective Call Forward; and Selective Call Rejection.

What it means: WCX supports several features that are equivalent to those listed in this definition, but they are not "common channel signaling based." Thus, they are not "CLASS Features" as defined. Also, notice that under this definition it is only a "CLASS Feature" when it is offered to an "End User." The "End User" restriction and definition is addressed below. This definition is applied only once, in GTC §33.2,[45] but the usage is important because this definition, along with the use of other problematic defined terms, are entirely SS7/CCS based. AT&T would not be required to send the SS7/CCS signaling used to support "CLASS Features" to WCX's intermediate provider, or to WCX. This is so because the obligation to deliver the TCAP messages only applies when the other carrier also uses SS7/CCS to drive CLASS features provided to End Users. WCX has similar SIP-based features, and they will work if AT&T sends the TCAP messages to WCX's intermediate provider, who would then convert to SIP and deliver to WCX. But AT&T would have no obligation to do so since under the definition WCX is not providing "CLASS Features" given that they are not SS7/CCS based. This is

[45] "33.2 Parties directly or, where applicable, through their Third Party provider, will cooperate on the exchange of Transactional Capabilities Application Part ("TCAP") messages to facilitate interoperability of CCS based features between their respective networks, including all CLASS Features and functions, to the extent each Party offers such features and functions to its End Users. Where available, all CCS signaling parameters will be provided including, without limitation, Calling Party Number ("CPN"), originating line information ("OLI"), calling party category and charge number."

so even though under WCX's proposals AT&T would be directly interconnected with the intermediate provider using TDM and SS7.

Where it shows up: GTC §33.2.

> 1.26 "Completed Call" means a call that is delivered by one Party to the other Party and for which a connection is established after Answer Supervision.

What it means: WCX has SIP-based call control. But not "Answer Supervision" as defined. Therefore there cannot ever be a "Completed Call."

Where it shows up: GTC §1.7, 1.28, 1.33, 1.51, 6.6.6, ITR §§2.4, 8.2.1.

> 1.28 "Conversation MOU" means the minutes of use that both Parties' equipment is used for a Completed Call, measured from the receipt of Answer Supervision to the receipt of Disconnect Supervision.

What it means: This definition requires both Answer Supervision and Disconnect Supervision as defined. WCX does not have those capabilities because VoLTE is SIP-based. Thus, under this definition there can never be any "Conversation MOU." Therefore the entire billing construct in AT&T's terms is cratered because they key off of the number of "Conversation MOU" as defined.

Where it shows up: GTC §6.6.6, 6.6.7, Compensation §3.2.1.

> 1.29 "CPN" ("Calling Party Number") means a Signaling System 7 "SS7" parameter whereby the ten (10) digit number of the calling Party is forwarded from the End Office.

What it means: This definition requires SS7. And an End Office. WCX has neither of those things. AT&T's terms require delivery of "CPN" as defined. Failure to provide "CPN" as defined would constitute a breach and AT&T could cancel. WCX can, does and will comply with FCC Rule 64.1601(a)(1). That rule takes into account IP-based call control signaling and is not inextricably tied to SS7. The definition must be changed, or a new definition consistent with Rule 64.1600(d) and (h) must be included.

Where it shows up: GTC §33.2, ITR §§9.4.3, 9.5.2, Compensation 4.2, 4.3.

> 1.33 "Disconnect Supervision" means an on–hook supervisory signal sent at the end of a Completed Call.

What it means: This is another TDM-centric definition. SIP does not have "Disconnect Supervision"; the SIP equivalent is "Bye." Radio stations, by the way, do not go "on" or "off" "hook." There is no "hook." The devices are not loop start or ground start. There is often not any "dial-tone."

Where it shows up: GTC §1.28. Since WCX sends "Bye" rather than TDM-based "Disconnect" there can never be a Conversation MOU. Or, a call might be deemed to never end (even though it did), in which case AT&T could send a huge bill to WCX, demand payment and if not forthcoming then force escrow and ultimately cancel the ICA.

> 1.34 "End Office Switch" is a AT&T TEXAS Central Office Switch that directly terminates traffic to and receives traffic from End Users of local Exchange Services.

What it means: WCX cannot have an "End Office Switch" under this definition.

Where it shows up: GTC §§1.2, 1.20, 1.29, 1.31, ITR §§2.1, 2.2, 2.5, 3.4, 3.4.1, 3.5.2.1, 4.2, 4.4, 6.8.

> 1.35 "End User" means a Third Party subscriber to Telecommunications Services provided by any of the Parties at retail, including a "roaming" user of Carrier's CMRS and CMRS network. As used herein, the term "End Users" does not include any of the Parties to this Agreement with respect to any item or service obtained under this Agreement.

What it means: This definition is used quite a bit. The consistent result is that WCX can only use interconnection to provide or support a retail service. There is no provision for WCX to have a wholesale customer that in turn has the relationship with an End User. The definition requires that the "End User" be WCX's retail customer, so the "End User" cannot be the customer of a WCX customer. There is no provision for WCX's customer