frequency portion of the loop as a capability of the loop.[84] In order to gain access to the high frequency portion of the UNE loop, line splitting is required.[85] Such line splitting is accomplished by means of passive electronic equipment referred to as splitters.[86] A splitter is a device that splits the low and high frequency portion of the loop.[87]

Although, as noted by SWBT, the FCC has to date, not required ILECs to provide the splitter in either a line sharing or line splitting context, the Arbitrators believe this Commission has the authority to do so on this record. The FCC has clearly stated that its requirements are the minimum necessary, and that state commissions are free to establish additional requirements, beyond those established by the FCC, where consistent.[88] Indeed, in the *SWBT Texas 271 Order*, the FCC acknowledged that line splitting, a recent development, would be subject to potential arbitration before the Texas Commission.[89] The Arbitrators, therefore, believe on this record that it is sound public policy to require SWBT to provide AT&T with a UNE loop that is fully capable of supporting any xDSL service.

AT&T has opted into Attachment 6 of the T2A; the Arbitrators note that Attachment 6 allows AT&T to use one or more Network Elements to provide any technically feasible feature, function, or capability of such Network Element. Attachment 6 of the T2A further allows AT&T access to the loop. The FCC has previously stated that an ILEC must provide a requesting telecommunications carrier access to UNEs, along with all of the UNE's features, functions, and capabilities, "in a manner that allow the requesting telecommunications carrier to provide **any** telecommunications service that can be offered by means of that network element."[90] The FCC has held on numerous occasions that this duty applies to a CLECs' use of unbundled loops to provide DSL services.[91] The FCC reiterated in the *UNE Remand Order* that the loop includes

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[84] *Line Sharing Order* at para. 17; Arbitration Hearing Tr. at 257 (Aug. 1, 2000).

[85] *Id.* at 349, 359-60.

[86] *Id.* at 328.

[87] *Id.* at 257-58.

[88] *UNE Remand Order* at paras. 154-60; *Line Sharing Order* at paras. 223-25.

[89] *SWBT Texas 271 Order* at para. 329.

[90] 47 C.F.R. § 51.307 (emphasis added).

[91] *See, e.g., First Report and Order* at paras. 380, 382; *UNE Remand Order* at paras. 166-67.

"attached electronics" if such electronics are necessary to fully access the loops features, functions and capabilities in order to provide service to end users.[92]

The Arbitrators find that line splitting is necessary to gain access to the high frequency portion of the loop in order to allow AT&T to take advantage of the full functions, features, and capabilities of the loop. The Arbitrators find, consistent with the *UNE Remand Order*, that excluding the splitter from the definition of the loop would limit its functionality.[93] The Arbitrators further find that it is technically feasible for SWBT to furnish and install splitters to gain access to the high frequency portion of the UNE loop when purchased in combination with the switch port.

The Arbitrators recognize that the FCC specifically rejected DSLAMs as part of the "attached electronics" of the loop because of its determination that DSLAMS are used solely to provide advanced services.[94] Accordingly, the Arbitrators believe it would be inaccurate from a technical standpoint to analogize splitters to DSLAMs.[95] As noted above, a splitter is a passive device necessary to access both the voice and data portions of the loop in order to provide an end use customer with both voice and xDSL service. By contrast, a DSLAM is used primarily for the routing and packetizing of data.[96] The Arbitrators note that adding a splitter to the UNE-loop is no different than adding a circuit-enhancing device to the loop at the central office. As AT&T stated in the hearing, when SWBT is conditioning a loop to minimize loss, i.e., 8 db to 5 db, SWBT disconnects the cross-connect between the loop and port and inserts an enhancer, similar to a splitter.[97] As AT&T witness Steven Turner testified:

> It is indisputable that bridge taps are routinely installed in the ILEC's loop plant, and that the FCC has expressly recognized the right of a purchaser of a loop element to insist that bridged taps be removed, even where the ILEC does not

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[92] *UNE Remand Order* at para. 175.

[93] *Id.*

[94] *Id.*

[95] The FCC is currently addressing the issue of whether equipment that is multifunctional (i.e. used for both voice and date) should be included in the definition of a loop. Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket NO. 96-98*, at para. 122, CC Docket No. 98-147 and CC Docket No. 96098 (Rel. Aug. 10, 2000).

[96] *UNE Remand Order* at paras. 303-04.

[97] Arbitration Hearing Tr. at 334-35 (Aug. 1, 2000).

> ordinarily perform such removals for itself, because it is not providing advanced services to those customers. It is likewise indisputable that load coils – which in fact are nothing but low-pass filters – may be part of a loop, and the FCC has expressly recognized the right of a purchaser of a loop element to insist that load coils be removed.[98]

In Texas, SWBT has voluntarily agreed to provide data CLECs with a splitter when SWBT is the voice provider,[99] a situation known as line sharing.[100] A data CLEC is, therefore, not required to collocate in order to access a splitter,[101] although a data CLEC would need to collocate its DSLAM on SWBT's premises.[102] Instead, SWBT places the splitter in a common area constructed by SWBT.[103] The data CLEC can access the common area to do tests.[104]

The Arbitrators find that based upon the evidence in this record there is no technical distinction between line sharing and line splitting, as the splitter provides access to the same functionality of the loop in both contexts. The Arbitrators agree with AT&T that it is discriminatory for SWBT to provide the splitter in a line sharing context while not providing the splitter in a line splitting context. The Arbitrators believe that SWBT's policy will have the effect of severely limiting the number of data CLECs with which a UNE-P provider can partner in order to offer advanced services. Many data CLECs are relying upon SWBT to provide the splitter.[105] Although SWBT indicated in the hearing that some data CLECs are providing their own splitters, SWBT could not substantiate the number or percentage of data CLECs providing their own splitters.[106] Given the demand for advanced services, this could prove to be crippling

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[98] AT&T Ex. 11, Direct Testimony of Steven E. Turner at 16.

[99] Arbitration Hearing Tr. at 286 (Aug. 1, 2000).

[100] Arbitration Hearing Tr. at 253-54 (Aug. 1, 2000); *see also Petition of IP Communications Corporation to Establish Expedited Public Utility Commission of Texas Oversight Concerning Line Sharing Issues*, Docket No. 22168 and *Petition of Covad Communications Company and Rhythms Links, Inc. Against Southwestern Bell Telephone Company and GTE Southwest Inc. for Post-Interconnection Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line Sharing,* Docket No. 22469, Interim Arbitration Award (June 6, 2000).

[101] Arbitration Hearing Tr. at 350 (Aug. 1, 2000).

[102] *Id.*

[103] *Id.* at 354.

[104] *Id.* at 354-55.

[105] *Id.* at 352-53.

[106] *Id.* at 351-52.

from a competitive standpoint, especially if ASI, SWBT's DSL affiliate, has no obligation to continue providing advanced services to a customer who is using AT&T as its voice provider.

As noted above, the Arbitrators in this case find that SWBT is required to provide the splitter in order to allow AT&T to access the full functionality of the loop. Although not dispositive in this case, the Arbitrators also believe that this decision will promote more rapid deployment of advanced services to a broader cross section of customers, as required by Section 706 of the FTA. The evidence in this case shows that SWBT's proposal requiring UNE-P CLECs to collocate in order to gain access to the high frequency portion of the loop, (1) unnecessarily increases the degree of coordination and manual work and accordingly increases both the likelihood and duration of service interruptions; (2) introduces unnecessary delays for space application, collocation construction, and splitter installation; and (3) unnecessarily wastes central office and frame space.[107] Thus, the Arbitrators believe that SWBT's proposal significantly prohibits UNE-P providers from achieving commercial volume, not only because collocation is required but also because SWBT does not propose to prewire, or allow the CLEC to prewire, from the intermediate distribution frame (IDF) to the CLEC's splitter. Arbitrators presented with a scenario where the CLEC is not required to collocate and the ILEC is offering to prewire (or allow the CLEC to prewire) from the IDF to the CLEC splitter may very well reach a different conclusion than the Arbitrators reached in this case.

The Arbitrators further note that data CLECs that are exempt from 911 obligations under the Texas commission's waiver granted during certification will be required to maintain cross-connects for the voice portion if SWBT's proposal requiring the UNE-P provider to collocate its splitters at DLEC's collocation cage is adopted. From a public policy standpoint, the Arbitrators find this outcome problematic.

[107] AT&T Ex. 11, Direct Testimony of Steven E. Turner at 22.

2. Should AT&T be permitted to opt into Attachment 25 of the T2A, even though it proposed a new appendix to that Attachment 25?

SWBT's Position

Relying upon the MCIW Arbitration Award, SWBT asserts that AT&T should not be permitted to cherry pick only a portion of Attachment 25, and exclude the legitimately related appendix.[108]

AT&T's Position

AT&T argues that it is not attempting to avoid taking certain legitimately related provisions, but wants to opt into a separate proposed line splitting appendix.[109] AT&T maintains that nothing in the T2A prevents AT&T from opting into parts of the T2A, including the legitimately related provisions, while negotiating or arbitrating the rest of the agreement.[110]

Arbitrators' Decision

The MCIW Arbitration Award states as follows: "Simply speaking, if a CLEC wishes to opt into T2A language, or something striking similar (including the terms and conditions of an attachment or appendix), it should also be required to opt into legitimately related terms and conditions of the T2A."[111] In this instance, AT&T is not attempting to avoid an appendix but is attempting to add one. Line splitting is not covered in the T2A; it was not even an issue in mid-1999 when the Commission was considering the T2A. By requiring CLECs to take legitimately related provisions, the Commission attempted to prevent cherry picking in the sense that CLECs may not take portions of an attachment, while rejecting less favorable aspects of the attachment. In this case, AT&T is not attempting to reject a less favorable aspect of the attachment. AT&T is attempting to address something that is new in this dynamic telecommunications market. The Arbitrators recognize AT&T's ability to add line splitting provisions and still opt into

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[108] SWBT's Post-Hearing Brief at 44.

[109] Post-Hearing Reply Brief of AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications of Houston, Inc. at 28.

[110] *Id.*

[111] *Petition of Southwestern Bell Telephone Company for Arbitration with MCI Worldcom, Inc. Pursuant to Section 252(b)(1) of the Federal Telecommunications Act of 1996,* Docket No. 21791, Arbitration Award at 5 (May 26, 2000).

Attachment 25; the Arbitrators' preference, however, would be to include the line splitting provisions as a separate attachment, if that is feasible from a legal perspective.

3. (SWBT's version) Should AT&T be permitted to unilaterally seek modification or deletion of any term of a line-sharing agreement upon 30 days notice?

3. (AT&T's version) Should AT&T be allowed to revise the terms and conditions of this Appendix in accordance with the dispute resolution provisions of the GT&Cs, in order to ensure that learnings from business knowledge can be incorporated in the agreement?

SWBT's Position

SWBT asserts that the Commission should reject AT&T's efforts to modify the Line Splitting Appendix to the Interconnection Agreement with 30 days' notice.[112] SWBT states that there is no reason this Appendix should be treated differently than the rest of the Agreement, which contains a change in governing law provision.[113]

AT&T's Position

AT&T asserts that the dynamic nature of data and data/voice services markets makes it necessary to have a more formal process for AT&T to seek modifications to the Interconnection Agreement as AT&T gains experience in the market.[114]

Arbitrators' Decision

The Arbitrators agree with SWBT. AT&T asserts that it needs certainty and wants this entire agreement to be in effect until October 13, 2003, yet wants the ability to revisit issues in this attachment. The Arbitrators find AT&T's arguments to be inconsistent and therefore reject AT&T's proposed language.

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[112] SWBT's Post-Hearing Brief at 44.

[113] Parties Ex. No. 3, Revised Decision Point List at 3.

[114] *Id.*

IV. GENERAL TERMS AND CONDITIONS

DPL Issue Nos. 1, 2, 3, 4, 5, 6, 7, 20, 21, and 22

1. Definition of Local Service Provider and applicability of definition.

SWBT's Position

The dispute surrounding this language is tied to the dispute in Docket No. 21425, the Essential Office Packages case.[115] SWBT asserts that this provision would allow AT&T to resell vertical services without offering local dial tone service.[116] SWBT further asserts that it does not offer CLEC's the ability to order vertical services on a standalone basis.[117] SWBT maintains that AT&T's position is prompted by its desire to blur the distinction between doing business with SWBT as an IXC or as a CLEC.[118] SWBT claims that this proposed interconnection agreement relates to AT&T as a CLEC.[119] SWBT argues that the FTA's primary purpose is to promote competition in the local exchange market.[120] SWBT further asserts that this issue is being considered in the OBF forum.

AT&T's Position

AT&T acknowledges that it desires to use this interconnection agreement to obtain vertical services for resale without also being required to be the underlying provider of local phone service.[121] AT&T's intent by seeking this language is to make as many options available to its customers as possible.[122] AT&T will offer customers the choice of having AT&T be the customer's local service provider; however, "[i]f the customer were to decline to take AT&T

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[115] *Complaint by AT&T Regarding Tariff Control Number 21311, Pricing Flexibility-Essential Office Packages*, Docket No. 21425 (Sept. 21, 1999).

[116] SWBT's Post-Hearing Brief at 24.

[117] SWBT Ex. No. 15, Direct Testimony of Robin L. Jacobson at 4.

[118] *Id.*

[119] SWBT Ex. No. 3, Direct Testimony of Sandra L. Lewis at 5.

[120] SWBT's Post-Hearing Reply Brief at 12.

[121] *See generally* Arbitration Hearing Tr. at 210–13 (July 31, 2000).

[122] *Id.* at 212.

local service, then we could offer them as a fall-back something less than the full panoply of AT&T services."[123]

AT&T asserts that the Commission has previously required SWBT EAS, toll and toll-like services such as Local Plus to be made available for resale to IXCs without the necessity of providing local dial tone.[124] AT&T asserts that its definition of local service provider appropriately recognizes AT&T's authority to resell services as an IXC.[125]

Arbitrators' Decision

Both AT&T and SWBT agree that the substantive issue of AT&T's ability to obtain vertical services for resale without also being required to be the underlying provider of local phone service is pending in Docket No. 21425. Given that the final decision has not been reached in that docket, the Arbitrators find that it is appropriate to defer to that decision. After the Order in Docket No. 21425 is issued, the parties shall agree upon terms to operationalize that Order, if necessary.

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[123] *Id.*

[124] AT&T Ex. No. 9, Direct Testimony of Daniel P. Rhinehart at 49-53; Initial Post-Hearing Brief of AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications of Houston, Inc. at 32; Post-Hearing Reply Brief of AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications of Houston, Inc. at n. 33.

[125] Initial Post-Hearing Brief of AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications of Houston, Inc. at 33.

2. Should the entire Interconnection Agreement have a termination date of two years or October 13, 2003 or three years from approval, which is later?

SWBT's Position

SWBT advocates a two-year term for non-T2A portions of the agreement, because SWBT states that the telecommunications industry is changing rapidly and both SWBT and AT&T need to develop business plans that allow them to be flexible.[126]

AT&T's Position

AT&T advocates that the entire agreement, the T2A portions, the negotiated portions, and the arbitrated portions should all expire at the time the T2A is scheduled to expire: October 13, 2003.[127] AT&T indicates that its overriding concern is predictability and stability.[128] Additionally, "[p]iecemeal initiation and expiration of the agreement, particularly where, as here, the agreement is derived from multiple sources, greatly increases the possibility of gaps and ambiguities in the agreement."[129] AT&T also points out that, under the terms of the agreement, AT&T would be forced to begin renegotiating a successor agreement just 18 months after this Interconnection Agreement takes effect.[130] AT&T further noted that in the recent FCC *UNE Remand Order*, the FCC noted that the typical period of interconnection agreement across the nation was three years. As a result, for purposes of establishing required UNEs, the FCC adopted a three year period to provide "reasonable certainty to permit parties to execute their business plans."[131]

Arbitrators' Decision

The Arbitrators find AT&T's arguments to be compelling, and, therefore, find that an expiration date of October 13, 2003 is reasonable, given the need for certainty and to minimize the possibility of gaps and ambiguities.

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[126] SWBT Ex. No. 3, Direct Testimony of Sandra L. Lewis at 5.

[127] AT&T Ex. No. 7, Direct Testimony of William L. West at 4-5.

[128] *Id.* at 4.

[129] *Id.*

[130] *Id.* at 5.

[131] *Id.* at para. 151; AT&T Ex. No. 7, Direct Testimony of William L. West at 5.

3. Should SWBT be able to assign the IA and/or sell an exchange affected by the IA without having to ensure that AT&T is protect in several specified ways by contract rights with the Assignee?

SWBT's Position

SWBT's proposal requires prior written consent by the other party in order for a party to sell or assign a telephone exchange subject to the Interconnection Agreement, unless this Commission approves the assignment or sale.[132] Citing Section 54.252 of PURA, SWBT asserts that regulatory provisions control the sale or transfer of an exchange.[133] In the event the sale or transfer was not approved by the Commission, SWBT's proposal requires AT&T's consent if the transfer has a negative effect on AT&T's ability to offer service to its existing customers, not including cost.[134]

AT&T's Position

AT&T proposes terms that would require SWBT to negotiate terms in a sale or assignment requiring the purchaser to abide by the terms of its Interconnection Agreement for at least the remainder of the term of the Agreement.[135] AT&T's proposed language would also prevent any carrier that buys a SWBT exchange from attempting to invoke the "rural exemption" provisions of the FTA.[136]

Arbitrators' Decision

The Arbitrators find SWBT's arguments to be more compelling; therefore, SWBT's proposed language should be included in the Interconnection Agreement between the parties.

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[132] SWBT's Post-Hearing Brief at 28.

[133] *Id.* at 13 *citing* Public Utility Regulatory Act, TEX. UTIL. CODE ANN. § 54.252 (Vernon 1998 & Supp. 2000).

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

[135] AT&T Ex. No. 7, Direct Testimony of William L. West at 8.

[136] *Id.* at 9.

4. Should the term "combinations" be deleted from § 6.3 of the Agreement?

SWBT's Position

SWBT believes that the insertion of the word "combinations" in Section 6.3[137] of General Terms and Conditions creates unnecessary ambiguity and the potential for future MFN disputes.[138] In other words, SWBT is concerned that a CLEC could MFN into this general provision without MFNing into the UNE section and be able to require SWBT to provide combinations.

AT&T's Position

AT&T believes that the removal of the word creates an ambiguity.[139] AT&T asserts that SWBT should fight those MFN "interpretive" battles when they arise with another CLEC instead of creating ambiguity in this Agreement.[140]

Arbitrators' Decision

In the context of Section 6.3 of General Terms and Conditions and the Proposed Interconnection Agreement as a whole, the Arbitrators find that the removal of the word "combinations" is unnecessary. The term "combinations" in Section 6.3 **in and of itself** does not create an obligation on the part of SWBT to combine UNEs for a CLEC, unless that obligation exists elsewhere in the agreement or under relevant law.

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[137] AT&T's proposed Section 6.3 reads: "In addition, by way of example and not limitation, information regarding orders for Resale Services, Network Elements or *Combinations* placed by AT&T pursuant to this Agreement, and information that would constitute Customer Proprietary Network Information of AT&T's customers pursuant to the Act and the rules and regulations of the Federal Communications Commission (FCC), and Recorded Usage Data as described in Attachments 5 and 10 concerning Recorded Usage Data, whether disclosed by AT&T to SWBT or otherwise acquired by SWBT in the course of the performance of this Agreement, will be deemed Confidential Information of AT&T for all purposes under this Agreement." Parties Ex. No. 3, Revised Decision Point List (emphasis added).

[138] SWBT's Post-Hearing Reply Brief at 14.

[139] AT&T Ex. No. 7, Direct Testimony William L. West at 10.

[140] Initial Post-Hearing Brief of AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications of Houston, Inc. at 36.

5. **Should SWBT be required to warrant that services, facilities, equipment and software provided under the ICA are free from infringement claims?**

6. **Should SWBT be obligated to provide intellectual property rights and protections where a state commission or other regulatory, judicial or legislative body has deemed that it is not so obligated?**

7. **(SWBT's Version) Should SWBT be held to have conveyed intellectual property licenses via this IA, and should AT&T be required to indemnify SWBT for intellectual property infringement resulting from its use of SWBT's network?**

7. **(AT&T's Version) Should SWBT be permitted to procure, accept or maintain from equipment vendors restrictions on intellectual property embedded in SWBT's UNEs that prohibit or could affect AT&T's obtaining co-extensive rights with SWBT to use UNEs?**

SWBT's Position

SWBT states that, as required by the FCC's *Intellectual Property Order*, SWBT will use its best efforts to obtain intellectual property licenses for AT&T.[141] SWBT maintains, however, that AT&T is ultimately responsible for obtaining the right to use third parties' intellectual property. SWBT argues that neither the *Intellectual Propery Order*, nor the *SWBT Texas 271 Order* required ILECs to indemnify CLECs for intellectual property liability associated with the CLEC's use of UNEs.[142] SWBT further asserts that the arbitrators in the Level 3 Arbitration rejected Level 3's attempt to require SWBT to guarantee coextensive intellectual property rights.[143]

SWBT recognizes that "best efforts" is a stringent standard.[144] Because of the risk of potential co-infringement liability, SWBT asserts that it has significant incentives to meet the standard.[145] SWBT witness Donald Palmer testified that SWBT has taken the following steps to meet the best efforts standard: (1) SWBT has created an updated list of third party vendors;[146]

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[141] Petition of MCI for Declaratory Ruleing that New Entrants Need Not Obtain Separate License of Right-to-use Agreements Before Purchasing Unbundled Elements, *Memorandum Opinion and Order*, CC Docket No. 96-98 (Rel. April 27, 2000) ("*Intellectual Property Order*").

[142] SWBT's Post-Hearing Brief at 33.

[143] *Id.* at 15.

[144] Arbitration Hearing Tr. at 239 (Aug. 1, 2000).

[145] *Id.* at 236-37, 239; SWBT's Post-Hearing Brief at 34.

[146] Arbitration Hearing Tr. at 241(Aug. 1, 2000).

(2) SWBT has established an intellectual property team, including network engineering and procurement personnel, in an effort to identify the features and functionalities of each UNE, including associated intellectual property rights;[147] and (3) SWBT has already successfully obtained agreements with its most significant switch vendors that SWBT represents largely eliminate intellectual property risks associated with access to unbundled switching.[148] SWBT indicated that it would take a couple of months to do a complete inventory of all UNEs implicated in the FCC's order.[149] SWBT also indicates that AT&T has presented no evidence indicating that SWBT has failed to exercise "best efforts."[150]

AT&T's Position

AT&T construes the FCC's *Intellectual Property Order* as requiring SWBT to "ensure that the licenses it has or obtains from [existing third party] vendors gives AT&T and any other CLEC the right to use those UNEs in the same manner as SWBT."[151] SWBT should indemnify AT&T against infringement claims brought by SWBT's vendors in order to ensure that SWBT complies with this obligation.[152] AT&T asserts that "best efforts" is a stringent standard.[153] SWBT should satisfy the "best efforts" standard by negotiating with vendors; if vendors do not agree that the original license encompasses equivalent use by CLECs, SWBT can either negotiate amendments to cover such use or litigate the issue with the vendor.[154]

AT&T proposes language that (1) requires SWBT to provide AT&T with warranties and indemnities; (2) requires SWBT, to the extent that it has been unable to secure an intellectual property right, to establish a proceeding to show that SWBT has used its "best efforts;" (3) leave in place the warranty/indemnity until such determination has been made; (4) provide an adjustment in the UNE rate in the event of such determination; (5) requires SWBT to disclose

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[147] *Id.* at 243-44.

[148] Arbitration Hearing Tr. at 247(Aug. 1, 2000).

[149] *Id.* at 237–39.

[150] SWBT's Post-Hearing Brief at 34.

[151] AT&T Ex. No. 9, Direct Testimony of Daniel P. Rhinehart at 8.

[152] *Id.*

[153] *Id.* at 8-9.

[154] *Id.* at 9.

license agreements to AT&T; and (6) forbids SWBT from entering into future agreements unless the agreement provides coextensive rights for AT&T.[155] AT&T further asserts that AT&T should be granted the same rights SWBT was granted by contract to use the particular UNE and should not be limited to the same uses SWBT is making of the UNE.[156] AT&T asserts that the FCC order states that CLECs can determine the permitted use of the UNE by referring to the contracts; the contracts govern the permitted use, irrespective of what SWBT is actually doing.[157]

Arbitrators' Decision

In the FCC's *Intellectual Property Order*, the FCC found that Section 251(c)(3) requires ILECs to "use their best efforts to provide all features and functionalities of each unbundled network element they provide, including any associated intellectual property rights" necessary for CLECs "to use the network element in the same manner" as the ILEC.[158] The FCC reasoned that, because ILECs control the choice of third party vendors and the scope of the contracts, the ILECs are in the best position to determine whether existing contracts allow CLECs to use UNEs without modifying or renegotiating new contracts.[159] Without access to the actual contracts, CLECs would not be able to determine which additional rights need to be obtained.[160] The FCC also expressed skepticism that ILECs will not succeed in meeting these standards through the use of their best efforts.[161]

Given the facts adduced at the hearing, SWBT seems to be exercising its "best efforts" to obtain coextensive rights for CLECs from third party vendors.[162] AT&T did not assert otherwise. The Arbitrators find, however, that if AT&T believes that SWBT is not using its

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[155] AT&T Ex. No. 9, Direct Testimony of Daniel P. Rhinehart at 11.

[156] Arbitration Hearing Tr. at 245 (Aug. 1, 2000).

[157] *Id.* at 246.

[158] *Intellectual Property Order* at para. 9.

[159] *Id.* at para. 10.

[160] *Id.*

[161] *Id.* at para. 13.

[162] In its Post-Hearing Reply Brief, AT&T asserts that SWBT would not begin using "best efforts" until the FCC's *Intellectual Property Order* has survived appeal. **CITE** The Arbitrators find that SWBT's obligations to use "best efforts" begin immediately and may not wait until the FCC decision has made it through the appellate process.

"best efforts" to obtain those rights in the future, AT&T should file a complaint under the Commission's expedited complaint process.

The Arbitrators agree with SWBT that neither the FCC's *Intellectual Property Order* nor the *SWBT Texas 271 Order* require SWBT to provide AT&T with a guarantee or immunity. In fact, in the *SWBT Texas 271 Order*, the FCC specifically rejected the notion that the *Intellectual Property Order* requires SWBT to protect AT&T from liability.[163]

AT&T has proposed language that would require SWBT to promptly inform AT&T of any pending or threatened intellectual property claim.[164] AT&T has also proposed language that would require SWBT to disclose to AT&T the name and other information of third party vendors.[165] The Arbitrators believe both of those provisions should be contained in the agreement between the parties because they are required under the FCC's *Intellectual Property Order*.

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[163] *SWBT Texas 271 Order* at paras. 229-30.

[164] AT&T Ex. No. 9, Direct Testimony of Daniel P. Rhinehart at 17-18.

[165] *Id.* at 22.

20. (SWBT's Version) Should SWBT be required to provide notice to AT&T every time it modifies its internal practices, systems or business rules?

20. (AT&T's Version) How should SWBT notify AT&T of SWBT changes that are likely to affect AT&T's performances, ability or provide service or rights under the ICA?

SWBT's Position

SWBT objects to AT&T's request for language that would require SWBT to provide 90-days notice of any "change in SWBT's work processes, business rules, internal practices, support systems, products, promotions, discounts. . . ."[166] SWBT asserts that the language is so broad that it could encompass every operational aspect of SWBT's business.[167] Further, SWBT states that it already provides CLECs adequate notice of changes through Accessible Letters that CLECs access through SWBT's website.

AT&T's Position

AT&T acknowledges that the Accessible Letter process "could work," but AT&T is concerned that SWBT has no obligation to provide notice a certain number of days before making a change that will materially impact AT&T.[168] AT&T asserts that its proposed language will bring detail and certainty to the notice requirements.[169]

Arbitrators' Decision

Both AT&T and SWBT have operated under the Accessible Letter procedure for the past several years. Although AT&T complains about the need to provide SWBT with a definitive requirement in terms of number of days, the Arbitrators find SWBT's arguments about the vagueness of AT&T's proposal to be compelling, especially in view of the fact that AT&T did not raise any specific examples to show that this has been a problem in the past. Accordingly, the Arbitrators find that SWBT's proposed provisions should be included in the Agreement between the parties.

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[166] SWBT's Post-Hearing Brief at 35.

[167] *Id.*

[168] Arbitration Hearing Tr. at 229 (Aug. 1, 2000).

[169] Initial Post-Hearing Brief of AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications of Houston, Inc. at 40.

21. Should SWBT be permitted to require that AT&T will not send to SWBT local traffic destined for a third party network without authority to exchange traffic with the third party?

SWBT's Position

SWBT's proposed language requires AT&T to have authority to exchange transit traffic or indemnify SWBT for delivery or termination charges imposed on SWBT by third parties.[170] SWBT asserts that its language appropriately places the burden of paying reciprocal compensation on the originating party.[171]

AT&T's Position

AT&T complains that SWBT has used the "proof" requirement to refuse to provide interconnection facilities in the past; for example, during 1999, SWBT refused to provide trunking in San Antonio until AT&T could aver that it held executed terminating traffic agreements with three CLECs in the San Antonio vicinity.[172] AT&T further states: "Because of the transaction costs associated with negotiating and administering individual interconnection agreements, and the relatively trivial amount of traffic involved, . . . CLECs are virtually unanimous in adopting a 'defacto bill & keep' regime for the exchange of local traffic with other non-ILEC carriers via transit over the ILEC network."[173]

Arbitrators' Decision

By itself, the Arbitrators would find the "proof" requirement to be problematic, especially in view of AT&T's allegations. As the Arbitrators understand SWBT's proposal, however, SWBT would not insist on "proof" as long as AT&T agreed to indemnify SWBT for delivery or termination charges imposed on SWBT by third parties in the event that AT&T did not provide SWBT with proof. In view of AT&T's admission that the traffic amounts are usually trivial and that CLECs generally adopt a bill and keep regime, the Arbitrators have difficulty understanding AT&T's opposition to SWBT's proposal. The Arbitrators therefore find that SWBT's provision

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[170] SWBT's Post-Hearing Reply Brief at 19.

[171] *Id.*

[172] AT&T Ex. No. 7, Direct Testimony of William L. West at 12.

[173] *Id.*

as described herein should be included in the language of the parties' Interconnection Agreement.

22. How and to what extent should changes in governing law be incorporated into the parties' ICA?

SWBT's Position

SWBT supports a provision that would allow either party to automatically modify or stay the provisions of the Interconnection Agreement if any laws or regulations that form the basis for the provisions of the agreement are modified or stayed.[174]

AT&T's Position

AT&T proposes language that provides that if there is a change of law, the parties may renegotiate and if the renegotiation fails, the dispute shall be resolved through the Commission's expedited dispute resolution procedure.[175] However, AT&T also proposes that if a governmental authority or agency orders SWBT to provide any service, interconnection or network element that is different than is what is contained in the parties Interconnection Agreement, AT&T shall have the ability to immediately amend the Interconnection Agreement.[176]

Arbitrators' Decision

While the Arbitrators are somewhat sympathetic to AT&T's desire to obtain new UNEs, services or interconnection terms, the Arbitrators find that both parties should be controlled by the same provisions. AT&T strenuously objects to the automatic modification in the event of a change of law and seems to favor the approach historically taken by the Commission,[177] while SWBT seems more concerned that the same provision apply equally to both parties.[178] The Arbitrators, therefore, find the Interconnection Agreement should contain a provision such as Section 45.2 advocated by AT&T; however, in the interest of treating both parties equally, the Arbitrators find that the Interconnection Agreement should not contain AT&T's proposed 45.3.

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[174] Parties Ex. No. 3, Revised Decision Point List at 38-39.

[175] *Id.*

[176] *Id.* at 39.

[177] AT&T Ex. No. 7, Direct Testimony of William L. West at 14.

[178] SWBT's Post-Hearing Reply Brief at 19. ("AT&T's proposal and explanation offend equity and reason. First, it is only equitable that both parties have equal rights to incorporate beneficial changes in law, whether the right to do so is unilateral and immediate, or a timely process requring the party to exhaust all avenues of appeal.")

V. INTERCARRIER COMPENSATION

DPL Issue Nos. 5, 6, 9, 10 and 11

5. (SWBT's version) Should AT&T be permitted to bill SWBT for terminating traffic that SWBT does not originate, but which merely transits SWBT's network?

5. (AT&T's version) Should IA include language on the proper billing of Transit Traffic without CPN?

SWBT's Position

SWBT avers that the company originating traffic compensates the company terminating that traffic.[179] The transiting company does not pay the terminating company.[180] SWBT, therefore, should not be billed for transit traffic. SWBT agrees that the calling party number (CPN) should be passed when traffic is terminated to another party.[181] SWBT argues, however, that it is not appropriate to hold SWBT financially responsible for passing the CPN of third parties when it is not within SWBT's control.[182]

SWBT argues that this issue was addressed in the Commission's decision in Docket No. 21982.[183] SWBT cites to the Commission's language arguing that the Commission ordered the use of terminating records to bill reciprocal compensation, "unless both the originating and terminating carriers agree to use originating records," and that terminating carriers must bill the originating carrier for the transit traffic, while recognizing that only originating records are capable of identifying multiple parties within a call path.[184] SWBT believes that AT&T's proposal would require SWBT to maintain two billing systems, while AT&T would be allowed to maintain only a terminating billing system.[185] Finally, SWBT maintains that AT&T fails to show how SWBT would identify the originating carrier in certain circumstances.[186]

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[179] SWBT Ex. No. 5, Direct Testimony of Joe B. Murphy at 9.

[180] *Id.*

[181] *Id.* at 12.

[182] *Id.* at 12-13.

[183] *Proceeding To Examine Reciprocal Compensation Pursuant to Section 252 of The Federal Telecommunications Act of 1996*, Docket No. 21982, Revised Arbitration Award (Aug. 31, 2000).

[184] SWBT's Post-Hearing Brief at 19.

[185] *Id.*

[186] *Id.* at 10; Arbitration Hearing Tr. at 184 (July 31, 2000).

AT&T's Position

AT&T believes that the Commission's decision in Docket No. 21982 does not address the complete issue presented with respect to the use of terminating records.[187] AT&T points out that its language specifically addresses the situation when the originating carrier's CPN is not passed to the terminating carrier. In fact, AT&T stated that it is not its intention to bill SWBT for another carrier's traffic, but rather it seeks additional information so that it can bill the correct party.[188] AT&T believes that if traffic is received without any CPN, AT&T is hard pressed to know if the traffic is not SWBT's unless SWBT provides some information to demonstrate that the traffic originated with another carrier.[189]

AT&T will agree not to bill SWBT for transit traffic if the following conditions are met: (1) SWBT must pass CPN if it receives CPN. (2) If SWBT does not receive CPN, SWBT must provide "other identifying information" that would allow AT&T to identify and bill the call originator. (3) If the volume of calls without CPN become substantial, AT&T and SWBT will work together to explore solutions to minimize unidentifiable transit traffic so that AT&T can bill the appropriate carrier.[190]

Arbitrators' Decision

The Arbitrators find that the issue relating to billing of transit traffic was addressed by the Commission's Revised Arbitration Award in Docket No. 21982.[191] In that Award, the Commission held that transit traffic was not eligible for reciprocal compensation.[192] The Arbitrators, however, find AT&T's need for the originating carrier's CPN to be compelling in instances where that information is not passed to AT&T as the terminating carrier by the originating carrier. In that limited instance, SWBT should provide any CPN information within its control to AT&T, especially to the extent SWBT claims certain traffic is not its own.

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[187] Initial Post-Hearing Brief of AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications of Houston, Inc. at 25.

[188] *Id.*; AT&T Ex. No. 4; Rebuttal Testimony of Shannie Marin at 6.

[189] Post-Hearing Reply Brief of AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications of Houston, Inc. at 18.

[190] AT&T Ex. No. 3, Direct Testimony of Shannie Marin at 9.

[191] *Proceeding To Examine Reciprocal Compensation Pursuant to Section 252 of The Federal Telecommunications Act of 1996*, Docket No. 21982, Revised Arbitration Award (Aug. 31, 2000).

6. (SWBT's version) Should the IA include language on the compensation of traffic from an ILEC exchange area that traverses a tandem switch?

6. (AT&T's version) Which language should the Interconnection Agreement include on the compensation of traffic to and from a LEC exchange area that traverses a tandem switch?

SWBT's Position

SWBT believes that it is not required to transit traffic that originates and terminates in a non-SWBT exchange.[193] Because SWBT is not both transporting and terminating the traffic at issue, SWBT avers that it is not subject to the "transport and termination" requirements of section 251(b)(5) of the FTA.[194] Accordingly, SWBT believes it is not restricted to charging TELRIC-based rates, and that its proposed rates for transiting out-of-region traffic are appropriate.[195]

AT&T's Position

AT&T argues that SWBT has interjected an inappropriately narrow reading of its obligations under the FTA.[196] AT&T submits that indirect interconnection through an RBOC's network is contemplated by the FTA.[197] In addition, AT&T states that there is no physical difference between out-of-region transit traffic and transit traffic.[198] AT&T is willing to compensate SWBT for transit traffic that AT&T sends over SWBT's network, but only at a TELRIC rate per minute of use.[199]

Arbitrators' Decision

The Arbitrators agree with AT&T that the Commission previously established a TELRIC based rate in the Mega-Arbitration for transporting and terminating transit traffic. That rate was carried over to the T2A at Attachment 6, Appendix-Pricing-UNE, Schedule of Prices at page 15.

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[192] *Id.*

[193] SWBT Post-Hearing Brief at 20; SWBT Ex. No. 7a, Rebuttal Testimony of Bryan Gonterman at 3-4.

[194] SWBT Post-Hearing Brief at 20.

[195] *Id.*

[196] Initial Post-Hearing Brief of AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications of Houston, Inc. at 28.

[197] AT&T Ex. No. 5, Direct Testimony of Javier Rodriguez at 8-9.

[198] *Id.* at 5.

9. (SWBT's version) Is AT&T permitted to pick and choose an appendix to the T2A when it declined to adopt Attachment 12 of the T2A to which that appendix relates?

9. (AT&T's version) SWBT has proposed 13-State Generic Appendix FGA. AT&T wants to adopt T2A Appendix FGA, but SWBT says must take all of Attachment 12 Compensation to get FGA?

SWBT's Position

SWBT believes that AT&T cannot "cherry pick" an attachment of the T2A, by refusing to accept a related appendix. SWBT cites to the Commission's decision in the Level 3 Arbitration to support its contention that the Interconnection Agreement must contain SWBT's proposed appendix on FGA.[200]

AT&T's Position

AT&T does not believe that language regarding FGA is appropriate as AT&T will buy this service from SWBT's Access Tariff as necessary.[201] AT&T believes that this situation is analogous to Feature Group D (FGD) access service. In that situation, the parties do not have an agreement although the parties "jointly provide" FGD.[202] AT&T argues that language concerning FGA is therefore unnecessary, and that SWBT's insistence on inclusion of this language merits consideration of SWBT's motives.[203]

Arbitrators' Decision

The Arbitrators do not understand this issue as stated and briefed by the parties. In spite of the fact that AT&T says in its version of the issue that it wants to "adopt T2A Appendix FGA," AT&T states in its Brief, "To be clear, AT&T does not want to adopt the Feature Group

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[199] AT&T Ex. No. 6, Rebuttal Testimony of Javier Rodriguez at 5.

[200] *See Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(B) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and PURA for Rates, Terms, and Conditions with Southwestern Bell Telephone Company*, Docket No. 22441, Arbitration Award at 18 (Aug. 11, 2000).

[201] AT&T Ex. No. 3, Direct Testimony of Shannie Marin at 10.

[202] Initial Post-Hearing Brief of AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications of Houston, Inc. at 29; SWBT Ex. No. 4, Rebuttal Testimony of Sandra L. Lewis at 7.

[203] *See* Initial Post-Hearing Brief of AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications of Houston, Inc. at 29.

A ("FGA") Appendix to Attachment 12 of the T2A."[204] The Arbitrators, therefore, conclude that there is no dispute on this issue.

SIGNED AT AUSTIN, TEXAS THE 13th day of September 2000.

PUBLIC UTILITY COMMISSION OF TEXAS

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DONNA L. NELSON
ARBITRATOR

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NARA V. SRINIVASA
ARBITRATOR

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[204] *Id.*