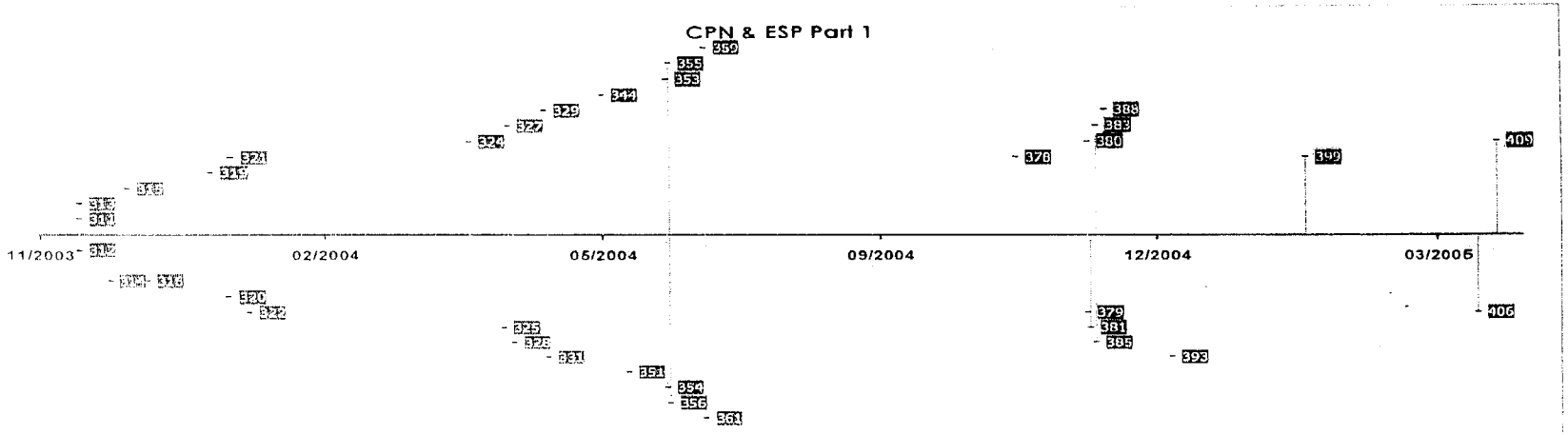
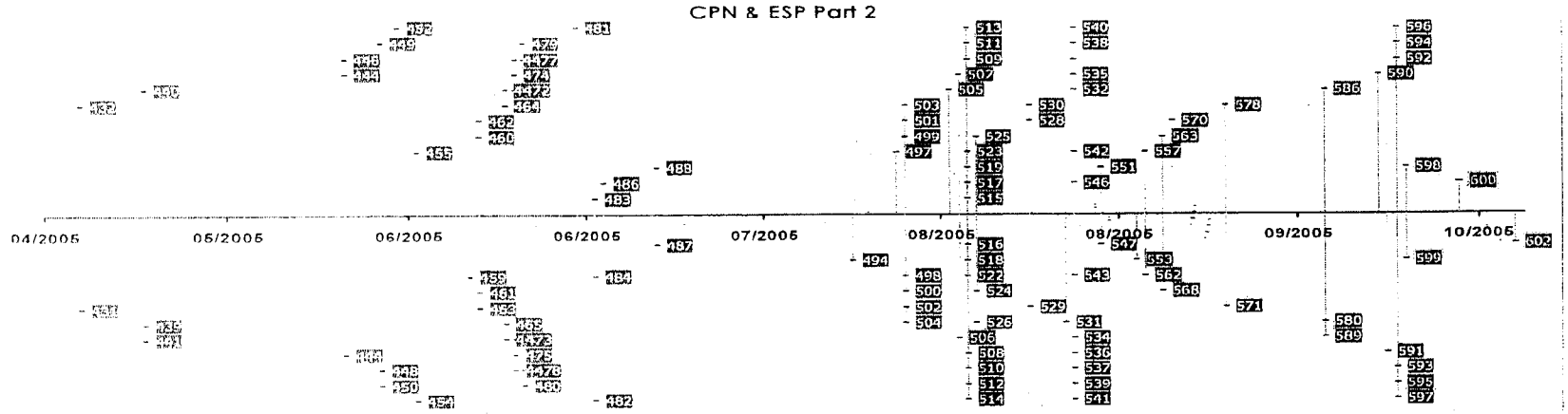

CPN & ESP Part 1
11/2003
02/2004
05/2004
09/2004
12/2004
03/2005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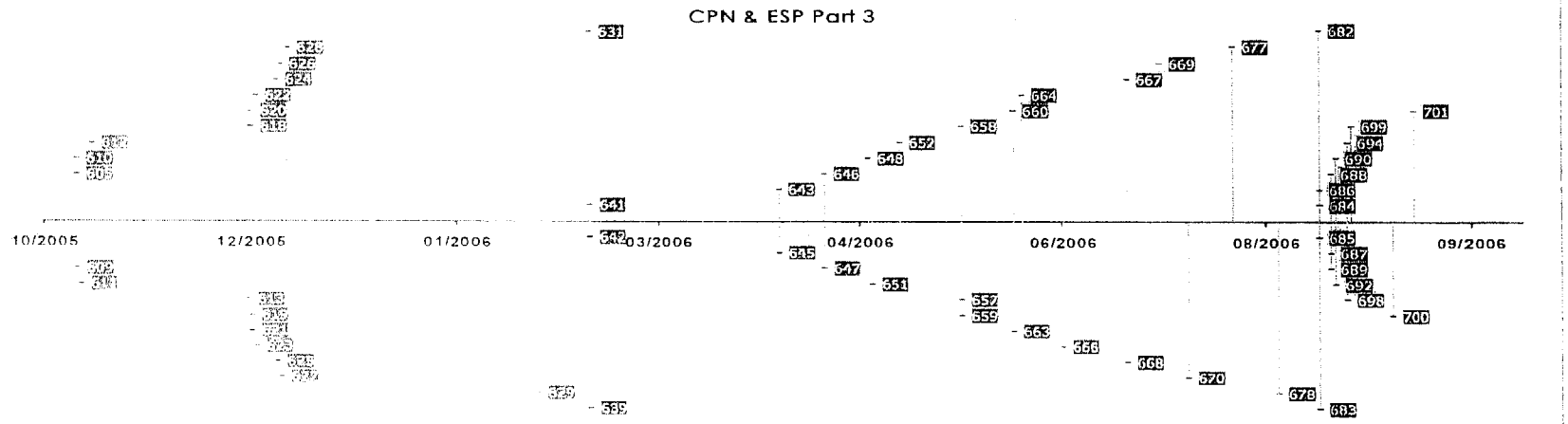
06/2005
06/2005
07/2005
08/2005
08/2005
09/2005
10/2005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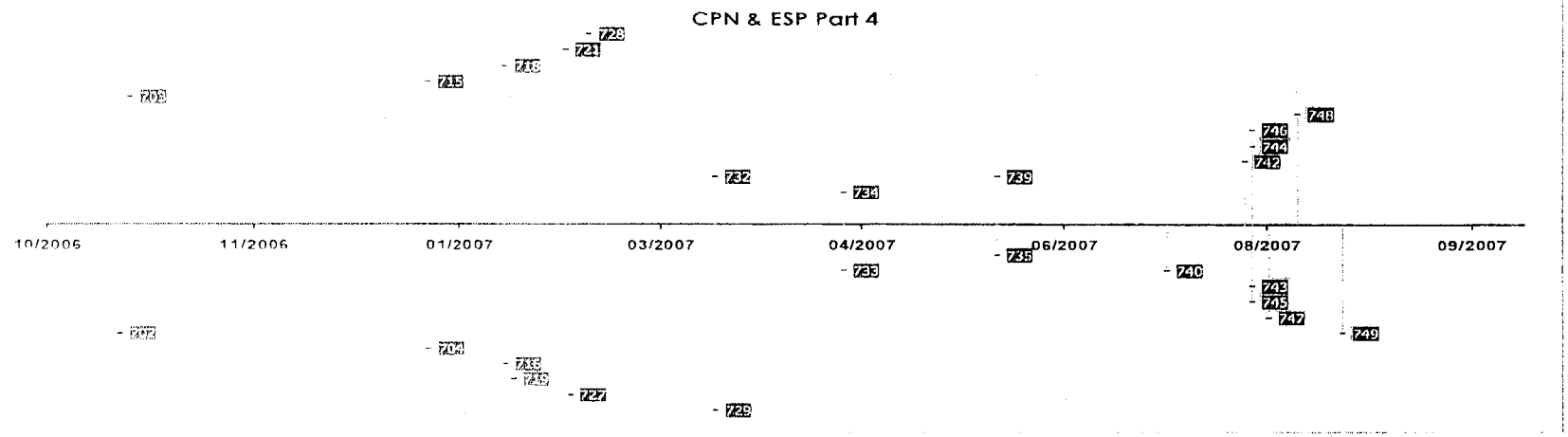
12/2005
01/2006
03/2006
04/2006
06/2006
08/2006
09/2006


CPN & ESP Part 4
10/2006
11/2006
01/2007
03/2007
04/2007
06/2007
08/2007
09/2007

SECTION 8: INTERLATA ACCESS CHARGES AND BILLINGS

70	interLATA Access Charges	UTEX 139	Does UTEX subscribe to dedicated transport access facilities or dedicated transport UNE facilities for purposes of the operation of Attachment 11 NIA § 1.3 and Attachment 11 ITR § 1.4?

Q: AT&T PLACES GREAT WEIGHT ON A PART OF THE WORDING IN ATTACHMENT 11 NIA § 1.3 TO JUSTIFY ITS POSITION THAT UTEX IS RESPONSIBLE FOR ACCESS CHARGES UNDER THE ICA. DOES THIS PROVISION APPLY TO UTEX?

A: No. First, UTEX has not subscribed to "dedicated transport access facilities" or "dedicated transport UNE facilities" to provision any trunk groups, and subscription to AT&T UNE or access facilities is a condition precedent to application of those provisions. Second the interconnection architecture that both parties agreed to use and implemented is not the type addressed by this section. UTEX has separate trunking to AT&T' access and local tandems. Third, § 1.3 relates to an optional interconnection architecture (which, again, we have not implemented). It does not say access applies to any particular traffic. It merely provides that exercise of the option cannot operate to deprive AT&T of any access charges to which it would otherwise be due. Fourth, AT&T' interpretation fundamentally ignores the history and purpose of the phrase they quote. I address the fourth point under DPL Items 71-83.

Q: DOES UTEX USE AT&T-PROVIDED DEDICATED TRANSPORT FACILITIES (ACCESS OR UNE) FOR INTERCONNECTION ANYWHERE IN TEXAS?

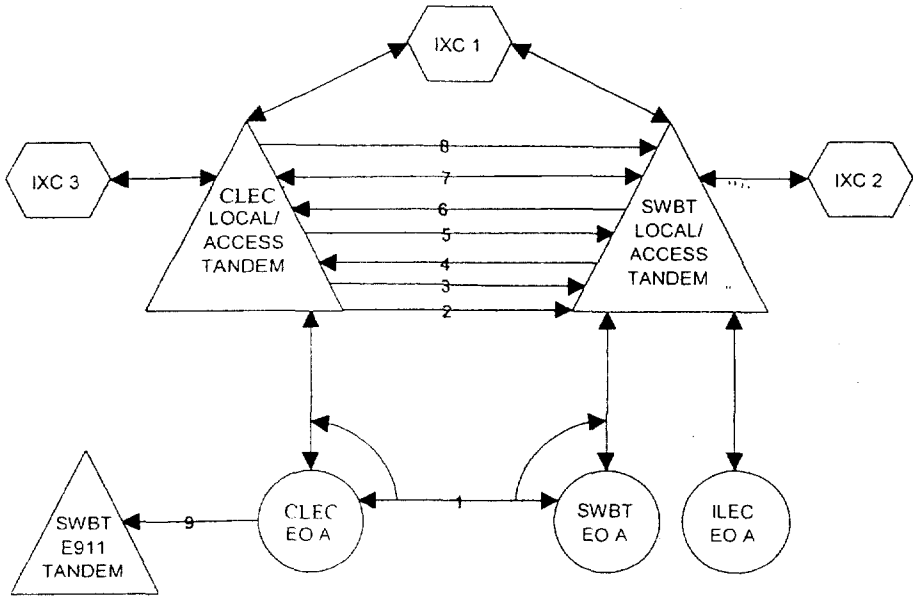
A: No. Instead, UTEX interconnects with AT&T at a collocation site or – in one instance – using meet-point facilities.[47] Hence NIA § 1.3 does not apply on its face, because the entire provision is dependent on use of AT&T dedicated transport facilities.

Q: ATTACHMENT 11 NIA § 1.3 DESCRIBES A SPECIFIC INTERCONNECTION ARCHITECTURE. DOES UTEX USE THAT ARCHITECTURE ANYWHERE IN TEXAS?

A: No. The Parties agreed to use – strangely enough – the interconnection architecture SWBT tried to have the PUC impose in the original Mega-Arbitration. UTEX did not implement the NIA § 1.3 option anywhere in Texas. The trunk designations used by the parties demonstrate that this is so. The application of NIA § 1.3 would be manifested in a combined INTRALATA / INTERLATA trunk group. This type of mixed use trunk is pictorially represented in the ICA, with notes that indicate how the trunks would be coded, on Appendix ITR, page 6 of 9 of the ITR. The picture and legend are reproduced below:

[47] We did try to use a UNE for interconnection in one case, and AT&T told us we could not do so. So we chose a different course to avoid extended delay over how we could interconnect. See my discussion of DPL Item 14.

SINGLE RATE AREA - COMBINED SWBT LOCAL/ACCESS TANDEM INTERCONNECTED WITH CLEC LOCAL/ACCESS TANDEM (WITH SOME DIRECT END OFFICE TRUNKING)



TRAFFIC USE/MODIFIER	DESCRIPTION
1. TEJ	LOCAL, INTRALATA & INTERLATA (SS7 SIGNALING) -2-WAY
2. TOCRJ	MASS CALLING (MF SIGNALING)
3. DD800J	INTRALATA 800 (MAXIMIZER 800)(SS7 SIGNALING)#
4. DD800J	INTRALATA 800 (SS7 SIGNALING)%
5. ITJ	LOCAL, INTRALATA and INTERLATA (SS7 SIGNALING)
6. ITJ	LOCAL, INTRALATA and INTERLATA (SS7 SIGNALING)
7. ITJ	INTRALATA and INTERLATA (SS7 SIGNALING)
8. ITJ	INTRALATA and INTERLATA (MF SIGNALING)@
9. ESJ	EMERGENCY SERVICE (MF SIGNALING)

\# Required if SWBT does not perform the database query for CLEC.
% Required if CLEC does not perform the database query for SWBT.
@ Required at the Dallas 4ESS switch only for 10XXXX# cut through and Feature Group B over D.
Note: When Local, IL & LD traffic is combined on the same truck group, the Traffic Use Code will be ITJ.

The notes at the bottom of the agenda show that when the NIA § 1.3 option is taken, the trunks involved carry a "traffic use modifier" of "**ITJ**." UTEX has never provisioned such a trunk group with AT&T. The "Trunk Forecasts" that AT&T required UTEX to submit as a

precondition to accepting and turning up any interconnection trunk are contained in Exhibits listed at the end of this section. Careful study will show that UTEX has consistently asked for ISDN Interconnection and for B-link Signaling (which have been ignored by AT&T), but this aside, these trunk forecasts show that the "traffic use codes/modifier" code ITJ is not present in any of them. Simply put, UTEX has never interconnected with AT&T nor have we ever attempted to interconnect using a combined INTRALATA/INTERLATA or a combined LOCAL/ INTRALATA/INTERLATA trunk. NIA § 1.3 has no application to the parties' actual interconnection architecture.

Q: DOES ATTACHMENT 11 NIA EVEN PURPORT TO AUTHORIZE AT&T TO RECOVER ACCESS CHARGES FROM UTEX?

A: No. NIA § 1.3 pertains to physical interconnection and routing and is not an inter-carrier compensation rating or billing process provision. Section 1.3 does not say access applies to any particular traffic type, and merely indicates that interconnection facilities may be used to carry mixed jurisdictional traffic but such mixed use cannot be a way to avoid any access charges that may be due on traffic under the inter-carrier compensation terms in Attachment 12. Attachment 12 governs rating and billing, not Attachment 11. Unless Attachment 12 authorizes InterLATA access charges to be billed, then the condition set out in NIA § 1.3 never comes in to play because there are no "access charges" to be avoided.

71	Did UTEX route and deliver to AT&T' local interconnection trunks any PSTN originated calls destined for NPA-NXXs assigned to AT&T end-users in local exchange areas that differed from the local exchange area of the originating callers' NPA-NXXs?
72	If answer to AT&T DPL No. 8 above is "Yes", is UTEX responsible for the intercarrier compensation due to AT&T on such calls?
73	Is it proper that AT&T bill UTEX interLATA access charges on calls that are: (a) originated in TDM format on the PSTN; (b) routed by UTEX over local interconnection trunks acquired out of the Parties

	ICA; and (c) ultimately terminated to Enhanced Service Providers (as that term is defined in the ICA)?
74	If answer to AT&T DPL No. 10 above is "Yes", is UTEX responsible for providing AT&T with data to facilitate AT&T' billing appropriate intercarrier compensation on all these calls?
75	Is it proper for AT&T to bill UTEX interLATA access charges on calls that are: (a) originated in TDM format on the PSTN; (b) routed by UTEX over local interconnection trunks acquired out of the Parties ICA; and (c) ultimately terminated to end users who were not customers of UTEX?
76	If answer to AT&T DPL No. 12 above is "Yes", is UTEX responsible for providing AT&T with data to facilitate AT&T' billing appropriate intercarrier compensation on all these calls?
77	What amount does UTEX owe AT&T for traffic terminated to AT&T' network as described in AT&T DPL Nos. 10 and 12?
78	Does the phrase "interLATA traffic" as used in Attachment 11 NIA § 1.3, Appendix NIM § 1.6, Appendix ITR §§ 1.0 and 1.4 and Attachment 12 Compensation § 6.1 pertain to traffic sent or received as part of an interLATA service as defined in § 153(21) of the Communications Act?
79	Is the traffic AT&T asserts is "interLATA traffic" originated by or does it terminate to a UTEX exchange service customer?
80	Does the traffic AT&T asserts is "interLATA traffic" flow from or terminate to a UTEX customer that has a presence in the same LATA as the calling or called AT&T customer?
81	If the alleged "interLATA" traffic is subject to access charges, does UTEX have any responsibility for access charges in those circumstances where it is not the subscriber's IXC and is a joint access provider?
82	For wholesale billing and compensation purposes, does the current ICA envision the possibility of "InterLATA charges" to UTEX for any traffic to or from an ESP or ISP?
83	If access charges are due, should intrastate or interstate charges apply?

Q: WILL YOU BE COMPREHENSIVELY ADDRESSING EACH OF THE DISCRETE DPL ITEMS SET OUT IMMEDIATELY ABOVE IN THIS PART OF YOUR TESTIMONY?

A: No. Several of these DPL Items relate to AT&T' direct claims. Nonetheless, some of our factual assertions that relate to other of the DPL Items are also relevant to AT&T' direct claims. But we will focus on AT&T' direct case in our rebuttal.

Q: IS UTEX A LOCAL EXCHANGE CARRIER?

A: Yes. UTEX is an LEC.[48] That is all we do. We do not provide Telephone Toll Service[49] as defined in the Act to any customer as part of IGI-POP. IGI-POP is a Telephone Exchange Service[50] as defined in the Act because it meets the definition of § 153(16)(B). We purposefully designed it to be telephone exchange service rather than exchange access,[51] which is the other function of the two functions that LECs exclusively provide.[52] UTEX has never sent an exchange

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48 "[§ 153(26) Local exchange carrier.--The term 'local exchange carrier' means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

49 [§ 153](148) Telephone toll service.--The term 'telephone toll service' means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." This statutory definition is incorporated into the ICA under GTC § 53.1.

50 "[§ 153](47) Telephone exchange service.--The term 'telephone exchange service' means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."

51 "[§ 153](16) Exchange access.--The term 'exchange access' means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."

52 Under the Communications Act, there are only two kinds of services that LECs provide in their capacity as a Local Exchange Carrier. Every LEC service must be, and can only be, one of these two kinds. LECs can, of course, provide other non "LEC" services. For example, an LEC is also an IXC if it provides "telephone toll service" as defined in § 153(48). An LEC can provide enhanced and/or information services (when it does so it is acting as an ESP) and it can use an interconnection arrangement to do so, so long as it is offering telecommunications

access bill even though we have a separate set of tariffed access terms in our federal tariff, and a state access price list. UTEX does not provide information service or enhanced service. That role is filled by one of our affiliates.

AT&T' complaint never states a position on whether UTEX's service to ISPs is "telephone exchange service" or is instead "exchange access." But it does not matter which of the two possible theories is used, however, because AT&T cannot charge UTEX exchange access charges under either of them.

Q: ASSUME FOR JUST A MOMENT THAT, CONTRARY TO WHAT YOU SAY ABOVE, THE SERVICE UTEX PROVIDES TO ISPs IS "EXCHANGE ACCESS." IF THAT WERE THE CASE, WOULD UTEX BE RESPONSIBLE FOR THE PORTION OF THE ACCESS SERVICE JOINTLY PROVIDED BY AT&T?

A: No. AT&T is attempting to collect access charges from UTEX for traffic that AT&T deems to be linterLATA" in nature in derogation of UTEX's position that it is "no compensation" ESP/ISP traffic.[53] Even if one accepts *arguendo* that this traffic is subject to exchange access charges, the ICA cannot be read to authorize the result sought by AT&T. This is evident from both the plain meaning of the terms of the ICA as well as its formative history and UTEX's status as an LEC rather than an IXC. The FCC spoke precisely to this point in the *AT&T*

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services through the arrangement as well. 47 C.F.R. § 51.100(b). AT&T has not asserted in this case that UTEX has undertaken any function other than LEC functions, however.

[53] AT&T has said it intends to litigate the questions whether UTEX's customers are actually ISPs and whether they are exempt from exchange access charges under the so-called "ESP Exemption." UTEX has claimed AT&T waived any right it may have to assert such a challenge, since UTEX has consistently claimed its customers are ISPs and their traffic is non access traffic, and AT&T never contested these assertions during informal dispute resolution and only raised the issue when it filed its complaint. The point of this part of my testimony is that even if AT&T is correct that this is exchange access traffic UTEX is still not the "access customer" and is therefore not responsible for access payments to AT&T.

Declaratory Ruling.[54] AT&T' attempt to recover access charges from UTEX is precluded by the terms of the ICA and the FCC's decision.

AT&T' position is that UTEX's customers[55] are not ISPs and their traffic is not enhanced/information service traffic.[56] UTEX vigorously disagrees with this assertion and AT&T' right to litigate the question. That issue is addressed elsewhere, however. The point I want to make here is that even if AT&T is correct that UTEX's customers are not ISPs UTEX still cannot be held liable for access. The reason is that if these customers are not ISPs then they must be IXCs.[57] Under the FCC's rules only IXCs are subject to access charges. *See* 47 C.F.R. §

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[54] Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, 19 FCC Rcd 7457; 2004 FCC LEXIS 2030 (rel. April 21, 2004) ("*AT&T Declaratory Ruling*"). The traffic for which AT&T seeks to recover access from UTEX is not "IP in the Middle" traffic, since UTEX's customers are not IXCs and each one represents that the traffic they send to UTEX does not fit within the type of service set out in ¶ 1 of the *AT&T Declaratory Ruling* and therefore, access does not apply to the traffic at all. Under the *AT&T Declaratory Ruling*, UTEX still can not be held responsible under note 92 to that decision: "We note that, pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. 47 C.F.R. § 69.5(b). To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise." The reason is that UTEX and AT&T are engaged in the joint provision of exchange access, and under the ICA each LEC must independently bill the access customer – not the other LEC.

[55] AT&T has not asserted in this case that UTEX is an IXC or in any way providing telephone toll service and is therefore responsible as an IXC for the access charges AT&T claims are due. The question concerns the status of UTEX's customers and whether UTEX – acting as an LEC – somehow owes AT&T access charges when the two LECs jointly provide exchange access service.

[56] AT&T complaint ¶¶ 19-20.

[57] AT&T obviously is not claiming that UTEX's customers are "end users" of any kind since "end users" are not subject to exchange access charges. Therefore, AT&T must be claiming that UTEX's customers are IXCs because that is the only other possible customer type and the only kind of customer that must pay exchange access charges, since only IXCs provide "telephone toll service."

69.5. Under the ICA,[58] when UTEX and AT&T jointly collaborate to handle IXC traffic (*e.g.*, when neither LEC is providing telephone toll service, but both are providing exchange access service) then neither LEC is responsible to the other for any access that is due. Instead, each LEC individually bills the IXC and only the IXC is liable.[59] There is no provision in the ICA that allows AT&T to send an access bill to UTEX for third party IXC traffic. If the traffic in issue is "exchange access" traffic, then UTEX is not liable to AT&T for payment of AT&T' portion of the jointly provided access service it provides.

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[58] *See, e.g.*, Attachment 11 NIA § 2.2 and Attachment 12 § 6.5:

> [Attachment 11 NIA §] 2.2 Access Toll Connecting Traffic: Access Toll Connecting Traffic will be transported between the SWBT access tandem and CLEC over a "meet point" trunk group separate from local, intraLATA toll, and interLATA toll trunk group. This trunk group will be established for the transmission and routing of Exchange Access traffic between CLEC's end users and interexchange carriers via a SWBT access tandem. When SWBT has more than one access tandem within an exchange, CLEC may utilize a single "meet point" access toll connecting trunk group to one SWBT access tandem within the exchange. This trunk group will be set up as two-way and will utilize SS7 protocol signaling or ISDN PRI signaling. Traffic destined to and from multiple interexchange carriers (IXCs) can be combined on this trunk group. This arrangement is subject to the timeframes referenced in Section 1.0. Further, if SWBT's tandem is not ISDN equipped, CLEC may, upon its election, receive such traffic from a SWBT End Office utilizing ISDN PRI signaling.
>
> [Attachment 12 Compensation §] 6.5 Initially, billing to interexchange carriers for the Switched Access Services jointly provided by the parties via the MPB arrangement will be according to the multiple bill single tariff method. As described in the MECAB document each Party will render a bill in accordance with its tariff for its portion of the service. Each Party will bill its own network access service rates to the IXC. The residual interconnection charge (RIC), if any, will be billed by the Party providing the End Office function. However, For ISDN Interconnection, SWBT will bill for Tandem Switching, Transport and End Office Switching and will remit CLEC's portion to CLEC as described in Attachment 25.

[59] "Access charges were developed to address a situation in which three carriers – typically, the originating LEC, the IXC, and the terminating LEC – collaborate to complete a long-distance call. As a general matter, in the access charge regime, the long-distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service." First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 and 95-185, FCC 96-325, 11 FCC Rcd 15499, ¶ 1034 (rel. Aug. 1996)("*Local Competition Order*") (subsequent history omitted). *See also, AT&T Declaratory Ruling* note 92.

Q: IF, AS YOU CONTEND, THE SERVICE UTEX PROVIDES TO ISPs IS "TELEPHONE EXCHANGE SERVICE" CAN UTEX BE HELD RESPONSIBLE FOR ACCESS CHARGES UNDER THE ICA?

A: Again, no. AT&T did not cite to any of the meet-point provisions set out above. I therefore assume that AT&T is not really claiming that UTEX is somehow liable under some bastardized "meet-point" approach. AT&T, instead, asserts that §§ 1.3[60] and 2.1.1[61] of Attachment 11 NIA, §§ 1.1,[62] 1.4[63] and 2.1.1[64] of Appendix ITR to Attachment 11 NIA and §§

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60 1.3 SWBT will allow CLEC to use the same physical facilities (e.g., dedicated transport access facilities, dedicated transport UNE facilities) to provision trunk groups that carry Local, intraLATA and interLATA traffic, provided such combination of traffic is not for the purpose of avoiding access charges, and facility charges associated with dedicated transport used to carry interLATA and intraLATA traffic originated by or terminated to a customer who is not CLEC local exchange service customer. Within 20 business days of establishment of facilities, and upon order, SWBT and CLEC will establish a single two-way trunk group provisioned to carry intraLATA (including local) and interLATA traffic where technically feasible. CLEC may have administrative control (e.g., determination of trunk size) of this combined two-way trunk group to the extent that it does not require SWBT to redesign its network configuration. When traffic is not segregated according to a traffic type the Parties will provide a percentage of jurisdictional use factors or an actual measurement of jurisdictional traffic.

61 2.1.1 CLEC Originating (CLEC to SWBT): Subject to Section 1.0 above, interLATA toll traffic and intraLATA toll traffic may be combined with local traffic on the same trunk group when CLEC routes traffic to either a SWBT access tandem which serves as a combined local and toll tandem or directly to a SWBT end office. When mutually agreed upon traffic data exchange methods are implemented as specified in Section 5.0 of this Appendix, direct trunk group(s) to SWBT end offices will be provisioned as two-way and used as two-way. When there are separate SWBT access and local tandems in an exchange, a separate local trunk group will be provided to the local tandem and a separate intraLATA toll trunk group will be provided to the access tandem. When there are multiple SWBT combined local and toll tandems in an Exchange Area, separate trunk groups will be established to each tandem. Such trunk groups may carry both local, intraLATA toll, and interLATA toll traffic. Trunk groups to the access or local tandem(s) will be provisioned as two-way and used as one-way until such time as it becomes technically feasible to use two-way trunks in SWBT tandems. Upon CLEC's election, trunks will utilize Signaling System 7 (SS7) protocol signaling or ISDN PRI signaling when such capabilities exist within the SWBT network. Multifrequency (MF) signaling will be utilized in cases where SWBT switching platforms do not support either SS7 or ISDN PRI.

62 1.1 The Interconnection of the CLEC and SWBT networks would be designed to promote network efficiency as long as CLEC does not combine traffic in order to avoid payment of access charges for intraLATA and interLATA traffic originated by or terminated to a customer who is not a CLEC local exchange customer.

63 1.4 SWBT will allow CLEC to use the same physical facilities (e.g., dedicated transport access facilities, dedicated transport UNE facilities) to provision trunk groups that carry Local, intraLATA and interLATA traffic,

7.1-7.2.4[65] of Attachment 12 Compensation are the applicable terms[66] and those provisions somehow justify AT&T' attempt to bill UTEX. AT&T is wrong.

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provided such combination of traffic is not for the purpose of avoiding access charges, and facility charges associated with dedicated transport used to carry interLATA and intraLATA traffic originated by or terminated to a customer who is not CLEC local exchange service customer. By December 31, 1997, SWBT and CLEC may establish a single two way trunk group provisioned to carry intraLATA (including local) and interLATA traffic where technically feasible. CLEC may have administrative control (e.g., determination of trunk size) of this combined two way trunk group to the extent that it does not require SWBT to redesign its network configuration. Prior to December 31, 1997 as referenced above, when traffic is not segregated according to a traffic type the Parties will provide a percentage of jurisdictional use factors or an actual measurement of jurisdictional traffic.

[64] 2.1.1 CLEC Originating (CLEC to SWBT):

Subject to Section 1.0 above, InterLATA toll traffic and IntraLATA toll traffic may be combined with local traffic on the same trunk group when CLEC routes traffic to either a SWBT access tandem which serves as a combined local and toll tandem or directly to a SWBT end office. When mutually agreed upon traffic data exchange methods are implemented as specified in Section 5.0 of this Appendix, direct trunk group(s) to SWBT end offices will be provisioned as two-way and used as two-way. When there are separate SWBT access and local tandems in an exchange, a separate local trunk group will be provided to the local tandem and a separate intraLATA toll trunk group will be provided to the access tandem. When there are multiple SWBT combined local and toll tandems in an Exchange Area, separate trunk groups will be established to each tandem. Such trunk groups may carry both local intraLATA toll and interLATA toll traffic. Trunk groups to the access or local tandem(s) will be provisioned as two-way and used as one-way until such time as it becomes technically feasible to use two-way trunks in SWBT tandems. Trunks will utilize Signaling System 7 (SS7) protocol signaling when such capabilities exist within the SWBT network. Multifrequency (MF) signaling will be utilized in cases where SWBT switching platforms do not support SS7.

[65] 7.0 Billing Arrangements for Compensation for Termination of IntraLATA, Local, Transit, and Optional Calling Area Traffic.

7.1 The Parties agree to the measuring and billing procedures in Section 7.1 through 7.5 of this Attachment. In any circumstance not addressed in those Sections, or where the Parties are unable to agree upon a measurement and billing method, the Parties will report the Percentage Local Usage (PLU) to each other for the purposes of measurement and billing for Local Traffic as defined in Section 1.2. SWBT and CLEC will work together to determine the appropriate PLU method. If the audit process associated with the PLU method becomes problematic, the Parties will use the dispute resolution method set out in Section 9.4.2 of the General Terms and Conditions of this Agreement.

Q: PLEASE EXPLAIN WHY YOU SAY AT&T'S USE OF ATTACHMENT 11 NIA § 1.3 TO ARGUE ACCESS APPLIES IS WRONG.

A: As I already indicated above, Attachment 11 NIA § 1.3, for example, cannot apply to this case since UTEX is not using "dedicated transport access facilities" or "dedicated transport UNE facilities" for interconnection and UTEX did not implement that optional architecture. I have also already explained that all of our ESP IGI-POP customers receive telephone exchange service, so the traffic in issue is originated by UTEX telephone exchange service customers.[67] Therefore, the qualifying criterion for accepted use in the second part of the sentence in § 1.3 is

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> 7.2 Other than for traffic described in Section 6 above, each Party will deliver monthly settlement statements for terminating the other Party's traffic based on a mutually agreed schedule as follows:
>
> 7.2.1 On a monthly basis, each Party will record its originating minutes of use including identification of the originating and terminating NXX for all intercompany calls.
>
> 7.2.2 Each Party will transmit the summarized originating minutes of use from Section 7.2.1 above to the transiting and/or terminating Party for subsequent monthly intercompany settlement billing.
>
> 7.2.3 Bills rendered by either Party will be paid within 30 days of receipt subject to subsequent audit verification.
>
> 7.2.4 Detailed technical descriptions and requirements for the recording, record exchange and billing of traffic are included in the Technical Exhibit Settlement Procedures (TESP), a copy of which has been provided to CLEC by SWBT.

[66] I am actually being charitable to AT&T. In fact, AT&T did not cite to all of these provisions, and mis-cited and/or misquoted others. Nonetheless, the above quoted provisions are the ones that pertain to routing "interLATA traffic" over what AT&T calls "local" trunks and in one way or another are relied on by AT&T. Strangely, AT&T also cites to Attachment 12, § 6.1 for support, even though that provision (set out below) does pertain to meet point billing for jointly provided access service to IXCs. This is clear from its placement in Attachment 12:

> 6.0 Compensation for Origination and Termination of Switched Access Service Traffic to or from an Interexchange Carrier (IXC) (Meet-Point Billing (MPB) Arrangements).
>
> 6.1 For interLATA traffic and intraLATA traffic, compensation for termination of intercompany traffic will be at access rates as set forth in each Party's own applicable interstate or intrastate access tariffs. When such traffic is contained in Optional Calling Areas, compensation will be applied pursuant to Section 5.0 above.

[67] If the customer is not a "telephone exchange service" customer, then it must be an "exchange access" customer. Exchange access is addressed immediately above.

clearly met. Hence, there are not any access charges to be "avoided." There is another set of reasons as well.

Q: WHAT IS THE OTHER SET OF REASONS?

A: AT&T completely forgets the origin of these provisions, which were prescribed in the original SWBT/AT&T ICA flowing from the first Mega-Arb (Docket 16226): these terms were designed to allow AT&T to use the same facilities and arrangements (which could be "local" interconnection trunks or access facilities) to support both its IXC telephone toll operations and its LEC exchange access and telephone exchange operations. Where – as here – UTEX is not providing telephone toll service to any party, but is instead solely fulfilling its LEC role of providing telephone exchange service or exchange access service to third party customers, there is no justification for access charge liability to AT&T under these terms. The litigation history and the PUC's Mega-Arbitration orders demonstrates that the provisions cited by AT&T cannot be stretched to support AT&T' theory of liability.

As a result of the merger between the old AT&T Southwest and the then-SWBT, both of the parties that litigated these provisions in 1996 and 1997 are now one entity. One has to wonder why AT&T does not even mention the arbitration that gave rise to these terms. The answer is simple: if you review the issues presented to the Commission and how they were resolved when this language was imposed, it becomes crystal clear that AT&T is using selective words on an isolated basis and out of context. The complete sections that contain those words and the ICA as a whole yield the converse of the result AT&T seeks.

The Arbitrators will recall that UTEX adopted the Waller Creek ICA, and that the Waller Creek ICA predates the original T2A. In fact, the Waller Creek ICA was based in very large part on the original arbitrated agreement between SWBT and AT&T Communications of the

Southwest that was approved in 1997, in the first Mega-Arbitration (Dockets 16189, *et al*). *See*, *Southwestern Bell Telephone Co. v. Waller Creek Communications*, 1 F.3d 812 (5th Cir., 2000). With the exception of the references to ISDN interconnection which were added in the Waller Creek arbitration, the provisions in Attachment 11 and its appendices all source back to the original 1997 arbitrated AT&T agreement. The same is true for Attachment 12 Compensation § 6.1.

I have reviewed the relevant pleadings (briefs and DPL) by the then-SWBT and the then-AT&T-Southwest in the original Mega-Arbitration, Phase II.[68] I also reviewed the portion of AT&T-Southwest's prefiled testimony on the issues and the parts of the Award that prescribed the terms in issue. Extensive quotation from them is unnecessary. One immediately sees that the language AT&T selectively reads was crafted to deal with a different situation and that when the situation at hand is applied to the ICA AT&T is simply wrong.

Q: WHY DO YOU SAY THAT?

A: AT&T-Southwest and SWBT were litigating three related issues, and those issues permeate virtually every word in the sections now misused by AT&T. First, AT&T-Southwest and SWBT were fighting over the UNE-Platform and one of the sub-issues in that argument pertained to the facilities cost and inter-carrier compensation rules that applied when a UNE-P carrier supplied telephone toll service to an end user over the UNE Platform.[69] Second, AT&T-

[68] The AT&T-SW portion of the Mega-Arbitration was Docket 16226. AT&T filed a Request for Continuing Arbitration in another proceeding (Docket 17579) that was consolidated with Docket 16226. For some reason the parties did not always file a particular document in both dockets. When referring to a particular document, UTEX will identify the Docket in which it was filed and the Interchange Item number.

[69] *See* Docket 17579, Interchange Item 53 (consolidated with Docket 16226), July 28, 1997 Comprehensive Revised Decision Point Matrices, I. IntraLATA Toll/Access, Issues 1-7; Docket 16226, Interchange Item 566, SWBT Post-Hearing Brief, pp. 42-49 (Sept. 5, 1997); Docket

Southwest desired to subscribe to § 251(c)(3) UNEs and use them for § 251(c)(2) interconnection as well as other things.[70] Third, AT&T-Southwest was an IXC attempting to enter the local market, and it wanted to be able to use the same facilities to support both "local" service and telephone toll services. Indeed, AT&T-Southwest wanted to use existing FGD access arrangements and dedicated transport it was obtaining from access tariffs to support its new local customers' traffic, and it sought a downward ratchet to access charges in proportion to all non-access traffic (*e.g.*, traffic that originated from or terminated to an AT&T-Southwest telephone exchange service customer). AT&T argued, and the Commission ruled – over SWBT's objection – that AT&T-Southwest did not have to pay SWBT's switched access charges for interLATA telephone toll traffic that originated from or terminated to an AT&T-Southwest local customer. Further, the Commission ruled – again, over SWBT's objection – that AT&T-Southwest was required to pay access rates for dedicated facilities used to interconnect AT&T-Southwest and SWBT only to the extent those facilities carried traffic that was not either originated from or terminated to an AT&T-Southwest local customer.[71]

16226, Interchange Item 567, AT&T-SW Post Hearing Brief, pp. 5-17, 39-46 (Sept. 5, 1997); Docket 16226, Interchange Item 629, Arbitration Award, Appendix B, p. 1 (Sept. 30, 1997).

[70] Docket 17579, Interchange Item 52, AT&T-SW Testimony of Falcone and Turner, pp. 77-78 (Jul. 28, 1997); Docket 17579, Interchange Item 53 (consolidated with Docket 16226), July 28, 1997 Comprehensive Revised Decision Point Matrices, II. Network Efficiency, Issues 1-3; Docket 16226, Interchange Item 566, SWBT Post-Hearing Brief, pp. 93-96 (Sept. 5, 1997); Docket 16226, Interchange Item 567, AT&T-SW Post Hearing Brief, pp. 70-74 (Sept. 5, 1997); Docket 16226, Interchange Item 629, Arbitration Award, Appendix B, pp. 22-25. (Sept. 30, 1997).

[71] Docket 17579, Interchange Item 52, AT&T-SW Testimony of Falcone and Turner, pp. 77-78 (Jul. 28, 1997); Docket 17579, Interchange Item 53 (consolidated with Docket 16226), July 28, 1997 Comprehensive Revised Decision Point Matrices, II. Network Efficiency, Issues 1-3; Docket 16226, Interchange Item 566, SWBT Post-Hearing Brief, pp. 93-96 (Sept. 5, 1997); Docket 16226, Interchange Item 567, AT&T-SW Post Hearing Brief, pp. 70-74 (Sept. 5, 1997); Docket 16226, Interchange Item 629, Arbitration Award, Appendix B, pp. 22-25. (Sept. 30, 1997).

Q: DOES UTEX USE THE UNE-PLATFORM?

A: No. We do not have a single AT&T-provided UNE switch port, much less one provided in combination with other elements. We do not have a commercial "Local Wholesale Complete" "commercial" arrangement.

Q: DOES UTEX USE ANY § 251(c)(3) DEDICATED TRANSPORT UNEs OR SPECIAL ACCESS DEDICATED TRANSPORT FOR § 251(c)(2) INTERCONNECTION?

A: Again, no.

Q: DOES UTEX PROVIDE TELEPHONE TOLL OR INTERLATA SWITCHED TELECOMMUNICATIONS SERVICES?

A: Again, no.

Q: SO DO THE DISPUTED ISSUES THAT GAVE RISE TO THE LANGUAGE CITED BY AT&T APPLY IN THE WAY SUGGESTED BY AT&T WHEN APPLIED TO THE CONTEXT OF THIS CASE?

A: No. The context is entirely different. But to the extent the cited language does apply, it not only fails to impose any switched access obligation but instead expressly provides that there is no such obligation once the physical interconnection arrangement that we use and the nature of the service we provide are put in context with the language.

Q: IS THERE YET ANOTHER REASON THE LANGUAGE DOES NOT APPLY OR REACH THE RESULT ADVOCATED BY AT&T?

A: Yes. Another contested issue in the Mega-Arbitration was the extent to which separate trunks had to be established to different kinds of SWBT tandems. SWBT wanted AT&T-Southwest to establish trunks to every "local," "intraLATA" and "access" tandem so as to fully

segregate traffic between "local," "intraLATA toll" and "interLATA toll." In 1996 the parties partially resolved this dispute by stipulation when SWBT conceded that AT&T-Southwest could use the same facilities for both "local" and AT&T-Southwest's "intraLATA" traffic. In the second phase of the case the parties arbitrated the open issue of whether AT&T-Southwest could also use the same facilities to carry AT&T-Southwest local customers' "interLATA toll" traffic. AT&T-Southwest made it clear it was only asking to pay cost-based prices (rather than switched or special access) for traffic originated by or terminated to an AT&T local customer and it would still pay pro-rated switched and special access rates when it was acting only as an IXC (and not performing an LEC function). The Commission adopted AT&T-Southwest's position, but inserted the clarifying phrase "provided such combination of traffic is not for the purpose of avoiding access charges, and facility charges associated with dedicated transport used to carry interLATA and intraLATA traffic originated by or terminated to a customer who is not CLEC local exchange service customer."[72]

The largest irony is that UTEX chose to implement the architecture SWBT tried to convince the Commission should be imposed, but which the Commission decided not to impose. AT&T is twisting all meaning out of these terms and their history. And then it wrongly tries to apply this contorted interpretation to a different architecture – the one it tried to make people use in 1996.

Q: WAS VOIP ADDRESSED IN THE ORIGINAL MEGA-ARBITRATION?

[72] Docket 17579, Interchange Item 52, AT&T-SW Testimony of Falcone and Turner, pp. 77-78 (Jul. 28, 1997); Docket 17579, Interchange Item 53 (consolidated with Docket 16226), July 28, 1997 Comprehensive Revised Decision Point Matrices, II. Network Efficiency, Issues 1-3; Docket 16226, Interchange Item 566, SWBT Post-Hearing Brief, pp. 93-96 (Sept. 5, 1997); Docket 16226, Interchange Item 567, AT&T-SW Post Hearing Brief, pp. 70-74 (Sept. 5, 1997); Docket 16226, Interchange Item 629, Arbitration Award, Appendix B, pp. 22-25. (Sept. 30, 1997).

A: AT&T-Southwest expressly mentioned VoIP – in 1997 – as justification for its position on interconnection:

> The telecommunications industry is experiencing a collapsing of all sorts of borders and categories: customers are now making long distance calls over the Internet; in the near future flat rates may be charged for all calls, regardless of arcane "LATA" boundaries. Any continued retention of these boundaries works to SWBT's favor; the reality is that the elimination of these boundaries creates more opportunities for effective network design and creative solutions.[73]

The PUC adopted AT&T-Southwest's position and language, and it had notice that this language would be applied and interpreted even with regard to VoIP. And, of course, this whole case involves "calls over the Internet" and UTEX's creative solutions for this traffic, using an efficient network design. The language and history of the parts of the ICA cited by AT&T simply do not support AT&T' tortured reading of them. They lead to the exact opposite result.

Q: IS UTEX's TRAFFIC "INTERLATA"?

A: If you focus on the end-points of these enhanced/information service communications, then yes. That is why the FCC has held that all ESP traffic is jurisdictionally inter-state. That is how the FCC asserted the exclusive power to prescribe and maintain the ESP Exemption and the inter-carrier compensation regime when two LECs handle ESP traffic. But the service provided by UTEX is not "interLATA."[74] To take LEC exchange access as an example, when an

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[73] Docket 17579, Interchange Item 52, AT&T-SW Testimony of Falcone and Turner, p. 77 (Jul. 28, 1997); Docket 17579, Interchange Item 53 (consolidated with Docket 16226), July 28, 1997 Comprehensive Revised Decision Point Matrices, II. Network Efficiency, Issue 2 (AT&T-SW Justification).

[74] Section 153(21) of the Communications Act provides a definition of "InterLATA service": "InterLATA service – The term 'interLATA service' means telecommunications between a point located in a local access and transport area and a point located outside such area." This definition is incorporated into the ICA pursuant to GTC § 53.1

interLATA telephone toll call terminates over the LEC's exchange facilities, the LEC is not providing an interLATA service. The LEC is providing an intrastate or interstate exchange access service that allows interLATA communications to reach their destination. There are interstate and interstate telephone exchange services too. UTEX's IGI-POP is a jurisdictionally interstate telephone exchange service. But it is not an "interLATA" service. UTEX is not providing an "interLATA" service when it comes to the traffic in issue.

Q: WHAT IS IT THAT ENSURES THAT IGI-POP IS NOT AN INTERLATA SERVICE?

A: IGI-POP is configured like AT&T' TIPToP service in this one respect. AT&T, of course, could not provide interLATA services when TIPToP was rolled out. If IGI-POP is deemed part of an interLATA service, then TIPToP is also an interLATA service, and AT&T the RBOC ILEC was violating the Communications Act and FCC rules.

Q: PLEASE FURTHER EXPLAIN.

A The traffic in issue is originated by UTEX ISP IGI-POP customers that have a point of presence in the LATA. Each IGI-POP customer must establish a presence in the LATA where it will originate traffic and deliver it to UTEX, which is providing PSTN connectivity and where necessary hands traffic off to AT&T for termination to the called party. Just like with TIPToP, the customer is responsible for all transport to and out of the LATA where the service is provided. All calls to the gateway originate in that LATA and go to the gateway for hand-off to the customer, or the customer secures a means to get to the gateway and hand off traffic addressed to an end-point in the LATA where the gateway is located. For purposes of the ICA the traffic in issue is originated by an ESP customer in a LATA and terminates to a PSTN user in

the same LATA. UTEX is not providing any switched interLATA service, since UTEX does not provide circuit switching services between LATAs as part of IGI-POP.

Q: DOES THE ESP EXEMPTION APPLY?

Because of the "ESP Exemption" ISPs obtain "telephone exchange service" and are not required to procure PSTN connectivity out of exchange access tariffs.[75] A call is "exchange access" if offered "for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16). Telephone toll is a telecommunications service, however, and ISPs are not acting in a carrier capacity and they provide information service rather than telecommunications service, which only carriers can provide. Despite the present lack of a specific holding that ISPs purchase telephone exchange service, it is clear that they do; the only alternative is "exchange access service" and that option does not apply on its face.

IGI-POP is an approved, effective tariff, designed specifically to support wholesale service to enhanced/information service providers that in turn provide VoIP services. UTEX's customer is the ISP. The ISP must certify to UTEX that it is not a carrier and *is* entitled to the benefits of the FCC's "ESP Exemption"[76] from access charges.

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[75] *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 22023, ¶ 248 (1996). The FCC later clarified that "noncarriers may be purchasers of those services (*e.g.*, services from access tariffs)." *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-413, at 21 (¶ 43) (rel. Dec. 1999). But it is clear that ISPs cannot be *required* to subscribe to exchange access, since that would not fit with the applicable law embodied in the ESP Exemption. *See also, Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, Case No. 4:05-CV-1264 CAS (U.S.D.C. ED Mo, Sept. 14, 2006), slip op. at 41.

[76] *See, e.g.*, (in chronological order) *MTS and WATS Market Structure*, 93 F.C.C.2d 241 (1983) ["*Access Charge Order*", modified on reconsideration 97 F.C.C.2d 682 (1983) ["*Access Charge Reconsideration Order*"], modified on further reconsideration, 97 F.C.C.2d 384, 17 (1984), aff'd in part and remanded in part, *National Association of Regulatory Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), modified on second further reconsideration, 101 F.C.C.2d 1222 (1985), *aff'd sub nom. AT&T v. FCC*, 832 F.2d 1285 (D.C. Cir. 1987); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Services Providers*, 2 F.C.C.R. 4305, 4306 (1987); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced*

UTEX is providing telephone exchange service to its ESP customers. ISPs are not carriers: they are end users. Since these end users are not providing telephone toll service then the LEC service UTEX provides to them is not exchange access service. Hence, under the PUC's decisions and holdings and the language it prescribed in the original AT&T-Southwest/SWBT arbitration, exchange access charges do not apply to the ISP traffic exchanged between UTEX and AT&T.

Q: DOES UTEX PROVIDE "TELEPHONE TOLL" TRAFFIC IN THE SAME WAY AT&T SOUTHWEST WAS ATTEMPTING TO OPERATE DURING THE FIRST MEGA-ARBITRATION?

A: UTEX does not provide circuit-switched telephone toll service. The traffic in issue is not related to "telephone toll" services provided by UTEX; instead, UTEX is fulfilling an LEC – rather than an IXC – function. Under § 153(148) of the Communications Act, "the term 'telephone toll service' means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." UTEX is not an IXC and does not provide any long distance services, nor does it subscribe to any access service of any ILEC, in terms of the Feature Group D or Feature Group B that is necessary to support "1+" or "dial around" toll. UTEX does not assess any "separate charge" to its customers other than the charges associated with IGI-POP exchange service. *Id.* UTEX is not providing telephone toll service – whether "intraLATA" or "interLATA."

Services Providers, 3 F.C.C.R. 2631 (1988) ["*Enhanced Services Access Order*"]; *In the Matter of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 6 FCC Red 4524, 4534 (¶ 54) (1991); *In the Matter of Access Charge Reform*, CC Docket No. 96-262, FCC-97158,12 FCC Red 15982, ¶ 344 (released May 16, 1997) ["*Access Charge Reform Order*"]. *See also, Bell Atlantic Telephone Companies v. FCC*, 206 F.3d, at 7-8.

The services provided by UTEX's ISP customers is also not "telephone toll." Hence, UTEX cannot be held responsible for access charges to AT&T based on what it is that UTEX provides or what it is that UTEX customers' provide.

Q: HOW MUCH OF UTEX's TRAFFIC FALLS WITHIN THE COVERAGE OF ATTACHMENT 12 §§ 1.2 AND 1.4.1?

A: All of it. 100%. The entirety of our traffic is the result of IGI-POP. All of our traffic is to or from an ESP.

Q: AT&T' HAS BILLED BOTH INTRASTATE ACCESS CHARGES AND INTERSTATE ACCESS CHARGES. IF ONE ASSUMES THAT ACCESS CHARGES APPLY, ARE INTRASTATE ACCESS CHARGES THE PROPER CHARGES TO APPLY FOR ANY OF THIS TRAFFIC?

A: I have already addressed this issue. While UTEX's service is completely telephone exchange service (and is not "interLATA") it is also jurisdictionally interstate. We do not have any jurisdictionally intrastate traffic. If the Commission decides to eliminate the ESP Exemption, overrule the FCC, and ignore the plain meaning of § 1.2 and 1.4.1 with the result that UTEX is wrongly determined to be somehow responsible for access charges, then any such access charges must come from interstate rates.

84	What kinds of records are to be used to determine whether a call is passed "with" or "without" CPN?
85	Does the ICA contemplate that AT&T can base "no CPN" and "interLATA traffic" billings on terminating, rather than originating, records?
86	If AT&T can premise "no CPN" and "interLATA" billings on terminating records, what kinds of terminating records are to be used under the ICA?

Q: ARE AT&T's BILLS FOR "NO CPN" AND "INTERLATA ACCESS" PREMISED ON ORIGINATING OR TERMINATING RECORDS?

A: AT&T' "no CPN" and "interLATA access" bills to UTEX are premised entirely on terminating records. AT&T admitted without qualification in its response to UTEX's Request for Admission No. 1-1 that this was true. The contract, however, expressly requires use of originating records. Attachment 12 §§ 7.0-7.5. AT&T' invoices cannot form the basis for any liability.

Attachment 12, §§ 7.0 – 7.5 provide:

> **7.0 Billing Arrangements for Compensation for Termination of IntraLATA, Local, Transit, and Optional Calling Area Traffic.**
>
> 7.1 The Parties agree to the measuring and billing procedures in Section 7.1 through 7.5 of this Attachment. In any circumstance not addressed in those Sections, or where the Parties are unable to agree upon a measurement and billing method, the Parties will report the Percentage Local Usage (PLU) to each other for the purposes of measurement and billing for Local Traffic as defined in Section 1.2.[77] SWBT and CLEC will work together to determine the appropriate PLU method. If the audit process associated with the PLU method becomes problematic, the Parties will use the dispute resolution method set out in Section 9.4.2 of the General Terms and Conditions of this Agreement.
>
> 7.2 Other than for traffic described in Section 6 above,[78] each Party will deliver monthly settlement statements for terminating the other Party's traffic based on a mutually agreed schedule as follows:

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[77] Attachment 12 § 1.2 provides:

> 1.2 Calls originated by CLEC's end users and terminated to SWBT's end users (or vice versa) will be classified as "Local Traffic" under this Agreement if: (i) the call originates and terminates in the same SWBT exchange area; or (ii) originates and terminates within different SWBT Exchanges that share a common mandatory local calling area, e.g., mandatory Extended Area Service (EAS), mandatory Extended Local Calling Service (ELCS), or other like types of mandatory expanded local calling scopes. Local traffic includes traffic to or from enhanced service providers.
>
> 1.2.1 The definitions in Section 53 of the General Terms and Conditions apply to this Attachment.

[78] Section 6 and its subparts do not apply to charges between UTEX and AT&T for termination of the other LEC's traffic, but instead unambiguously address jointly provided access to IXCs:

> 6.0 Compensation for Origination and Termination of Switched Access Service Traffic to or from an Interexchange Carrier (IXC) (Meet-Point Billing (MPB) Arrangements).