THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

In the Matter of Petition of IDT America, Corp. for Arbitration with Union Telephone Company Pursuant to the Communications Act of 1934, as Amended	Docket DT 09-048

ARBITRATOR'S REPORT AND RECOMMENDATIONS

I. PROCEDURAL HISTORY AND BACKGROUND

On March 11, 2009, IDT America, Corp. ("IDT") filed with the New Hampshire Public Utilities Commission (the "Commission") a petition for arbitration of rates, terms and conditions of interconnection with Union Telephone Company ("Union") pursuant to 47 U.S.C. Sections 251(a) and (b). According to the filing, IDT submitted a request to Union for interconnection pursuant to 47 U.S.C. Sections 251(a) and (b) in a letter dated October 8, 2008.

In a letter to IDT dated February 13, 2009, Union raised concerns about IDT's authorization to provide telecommunications service within Union's service area and declined to negotiate an interconnection agreement. Based on Union's alleged refusal to negotiate, IDT submitted its proposed interconnection agreement in its entirety as a set of unresolved issues for arbitration.

On April 7, 2009, Union filed a response to IDT's petition claiming, among other things, that interconnection negotiations could not be initiated before a company has

received proper authority from the Commission to begin operations in the territory of the incumbent. Union concluded, therefore, that 47 U.S.C. Section 252(b)(1) is not applicable.

On April 21, 2009, the Commission issued an Order of Notice scheduling a prehearing conference and technical session on May 7, 2009. In its Order of Notice the Commission stated that it had jurisdiction over the petition for arbitration pursuant to Section 252 of the Telecommunications Act of 1996 (the "Act" or "Telecom Act"). Section 252, the Commission observed, sets forth specific deadlines for each step in an arbitration proceeding, including the filing of a petition and conclusion of the arbitration.

In the Order of Notice, the Commission stated that the Telecom Act contains strict time limits on an arbitration process and allows liberal discretion for state commissions to define the process. In Order No. 22,236[1], the Commission delineated a general schedule applying to arbitrations. In the same order, the Commission reserved the right to consolidate proceedings, change the schedule, limit intervention, and take any other steps necessary to ensure that the deadlines of the Telecom Act are met. The Commission also indicated that, to fulfill its obligations, the Commission would hire such consultants as required. In that regard, the Commission appointed Victor D. Del Vecchio, Esq., as an arbitrator in this proceeding (the "Arbitrator"), acting as the Commission's agent and adhering to the same standards of conduct as are required of Commissioners by RSA 363:12.

On May 1, 2009, Union filed a motion to dismiss or, in the alternative, to stay the proceedings, supplemented by letter of May 12, 2009, to which IDT responded by letters

[1] *Re Implementation of the Telecommunications Act of 1996*, 81 NH PUC 549 (July 12, 1996)

of May 1 and 12, 2009, respectively. By Secretarial Letter dated May 5, 2009, the Commission determined that it would proceed with the prehearing conference and technical session as scheduled. Pursuant to RSA 363:17, the Commission appointed General Counsel F. Anne Ross to conduct the prehearing conference on May 7, 2009, at which time the parties presented oral argument on the pending motion.

At the technical session of May 7, 2009, the parties agreed to an expedited procedural schedule that, on May 8, 2009, the Arbitrator incorporated in a report to the Commission. The schedule, which was revised at the request of the parties on June 3, June 16 and July 9, 2009, reflected, among other things, the parties' agreement to:

- commit to negotiate an interconnection agreement in good faith, with the Arbitrator being available, at the request of the parties, to mediate any issues that arose between them[2]
- provide to the Arbitrator a revised, joint submission of contested issues by June 19 (later changed to June 26), 2009, where agreement was not reached on all terms and conditions, with a listing of those issues that would be subject to a hearing before the Arbitrator and those that would be appropriate for resolution on briefs submitted to the Arbitrator
- prefile direct testimony on July 1, 2009[3] regarding disputed issues that were to be subject to a hearing before the Arbitrator
- prefile reply testimony on July 3, 2009 regarding disputed issues that were to be subject to a hearing before the Arbitrator

[2] The parties negotiated in person and by telephonic conference on numerous occasions, including an extended session at the Commission's offices on June 23 under the supervision of the Arbitrator. As a result of their continued good faith efforts, the number of contract language issues was reduced from approximately 83 to 3 (pricing and what IDT describes as "re-opened" items discussed *infra*).

[3] Despite the scheduled availability of prefiled testimony and a hearing before the Arbitrator, the parties subsequently chose not to avail themselves of those opportunities, relying entirely on briefs.

- participate in a hearing before the Arbitrator on July 7, 2009 on issues that the parties identified as not appropriate for resolution on briefs

- file briefs on July 14, with the Arbitrator filing his report and recommendations to the Commission regarding disputed issues on July 27, 2009

- submit complete contract language for all arbitrated and non-arbitrated issues on July 31, 2009 (and where agreement cannot be reached on language comporting with the Arbitrator's report and recommendations, the Arbitrator will provide recommended arbitrated language to the Commission on August 4, 2009)

- A hearing before the Commission on the Arbitrator's report and recommendations on August 10, 2009, with a requested decision three weeks after hearing.

On May 20, 2009, the Hearing Examiner issued a report that, among other things, addressed Union's May 1 motion. The Hearing Examiner concluded (Report at 2-3) that "Section 251(a) requires all telecommunications carriers to interconnect either directly or indirectly with other telecommunications carriers. Section 251(b) requires all local exchange carriers to: provide for resale of services, port numbers, provide dialing parity, give access to rights of way for poles, ducts and conduits, and establish reciprocal compensation arrangements." She further observed (Report at 3) that Union "has a duty to provide the services required by section 251(a) and (b)" and recommended, in relevant part, that the Commission:

- find that Union and IDT's dispute is subject to Commission arbitration pursuant to section 252(b)

- not address potential arguments that IDT's request for interconnection is really a request for interconnection pursuant to section 251(c)(2)(A) until those arguments were raised and a record was developed

- defer ruling on IDT's status as a common carrier until additional facts were presented on this issue, and

- deny Union's motion to dismiss or stay the proceeding and find that Commission authorization of a carrier's provision of telecommunications services is not a prerequisite to that carrier's commencing arbitration of an agreement under 47 U.S.C. § 252(b).

By letter dated May 27 (filed on May 29), 2009, Union filed a second motion to dismiss. Union argued that IDT only sought interconnection under Sections 251(a) and (b), which did not afford IDT the right to interconnection for the purposes of exchanging local traffic. Since Union was only obligated to provide such interconnection pursuant to a Section 251(c) interconnection demand, Union further argued, Section 251(c) rights were not available to IDT because Union is a rural carrier and therefore exempt from Section 251(c) due to Section 251(f).

By Secretarial Letter of June 1, 2009, the Commission adopted the Hearing Examiner's report and, among other things, denied Union's May 1 motion to dismiss or stay the proceeding. The Commission deferred consideration of Union's May 27 motion until the parties had had a chance to respond to the issues raised. By letter of June 5, 2009, IDT filed a letter in opposition to Union's May 27 motion, to which Union replied by letter of June 8, 2009.

By letter dated June 5, 2009, the Arbitrator filed a report with the Commission, reflecting an approval of the parties' request for an extension of time to file the joint submission of contested issues.

By letter of June 9, 2009, Union filed a second motion to stay the proceeding until the Commission ruled on Union's May 27 motion to dismiss or, in the alternative, to revise the schedule to provide further time for negotiation.

On June 15, 2009, the Commission issued a Secretarial Letter denying Union's

June 9 motion to stay. Regarding Union's May 27 motion to dismiss, the Commission stated that, to the extent Union reasserts arguments concerning 47 U.S.C. §§ 25 1(a) and (b) and § 252(b), the Commission disposed of those arguments when it denied the first motion. To the extent Union's May 27 motion questioned whether IDT is requesting interconnection pursuant to 47 U.S.C. § 25 1(c) and whether IDT is a common carrier, however, the Commission determined that those issues required development of a factual record. The Commission thus directed the Arbitrator to recommend an appropriate resolution of those issues and deferred a ruling until it received the Arbitrator's findings and recommendations.

By letter dated June 16, 2009, the Arbitrator filed a report of the parties' continuing negotiations and their request for a further extension of the schedule, which the Arbitrator endorsed. In addition, the Arbitrator reported that he had advised the parties that, to the extent they did not reach a complete agreement on an interconnection agreement, they should address in more detail the factual and legal basis for their respective positions regarding the Section 251(c) and common carrier issues that the Commission referred to the Arbitrator in its June 15, 2009 Secretarial Letter. The Arbitrator also stated that he would, in turn, address those issues in his report and recommendations to the Commission.

By letter of June 22, 2009, Union responded to the Arbitrator's June 16 report by supplementing its earlier filings with additional support, renewing its request that the Commission grant its earlier motion to dismiss.

Finally, by Secretarial Letter of June 26, 2009, the Commission considered the arguments set forth in Union's June 22 letter and affirmed the Commission's decision contained in its June 15 Secretarial Letter.

II. RELATED COMMISSION PROCEEDINGS

A. IDT America, Corp. and MetroCast Cablevision of New Hampshire, LLC, Joint Petition for Expedited Relief in the Granting of Numbering Resources, *Order Approving Settlement Agreement No. 24,727* (Jan. 26, 2007) (the "*IDT/MetroCast Order*")

In the *IDT/MetroCast Order*, IDT and MetroCast jointly filed a petition seeking expedited relief regarding IDT's request for initial numbering resources, i.e., thousands-block assignments in nine New Hampshire exchanges. In approving the settlement agreement in the docket, the Commission described the "joint business arrangement" (Order at 3) between IDT and MetroCast. The Commission explained (Order at 2-3) that:

> IDT is a certified competitive local exchange carrier (CLEC) and toll service provider in New Hampshire. MetroCast, the principal subsidiary of Harron Communications L.P., is a relatively small cable television company serving cable television customers in 28 communities in central and eastern New Hampshire. The two companies have entered into an arrangement whereby they would, in effect, jointly provide local exchange service to end-users.
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> Specifically, IDT would use its resources as a CLEC to connect MetroCast to the Public Switched Telephone Network (PSTN), also providing the cable company with local number port-in and port-out, enhanced 911 interconnection, operator/directory assistance, directory listings, and numbering resources necessary to serve MetroCast customers in the cable company's New Hampshire service area. MetroCast would use its cable facilities to provision Internet Protocol (IP)-based telephony and would be the entity that maintains a customer-provider relationship with end-users, offering customer support and rendering bills for telephone service. Together, IDT and MetroCast would provide an end-to-end solution by integrating the IP platform to deliver a fully automated digital phone and high-speed data provisioning solution including PSTN service activation and interconnection.

The Commission further explained (Order at 5) that to receive numbering resources, a local exchange carrier must, directly or indirectly, provide local exchange telephone service to customers physically located in the exchange associated with the numbers assigned: "N.H. Code Admin. Rules Puc 402.28 defines a 'local exchange carrier' as 'the company that provides local telephone exchange service, whether directly or indirectly, and renders the telephone bill to the customer.'" Finally, in approving the settlement agreement, the Commission (Order at 5-6) underscored the "novel business arrangement" that IDT and MetroCast had formed:

> As explained at hearing, the petitioners have established a novel business arrangement unlike those for which numbering resources have been previously approved. The typical application for numbering resources involves a direct relationship between the official recipient of the numbering resources from the Pooling Administrator and the ultimate end-user of the assigned numbers. Typically, an ILEC or CLEC offering basic local exchange service obtains the number blocks from the Pooling Administrator, upon Commission Staff approval, and assigns those numbers to its end-user customers. In the IDT/MetroCast proposal, IDT would receive blocks of numbering resources and then assign individual numbers from those blocks to MetroCast end-user customers. IDT, in effect, proposes to administer and manage the numbering resources on behalf of MetroCast…. [T]he agreement permits the implementation of a business arrangement that offers a new competitive alternative in the local telecommunications market [citation omitted].

B. Comcast Phone of New Hampshire, Application for Authority to Serve Customers in the TDS Service Territories, *Order Granting Approval*, Order No. 24,938 (Feb. 6, 2009) (the "*Comcast Authorization Order*")

On December 12, 2007, Comcast Phone of New Hampshire ("Comcast") filed an application for authority to provide local exchange services pursuant to RSA 374:22 and to do business as a competitive local exchange carrier in the service territories of three rural local exchange carriers (ILECs). After suspending an earlier order *nisi*, and considering the parties' testimony and briefs, the Commission reviewed the request

under newly-amended RSA 374:22-g (and repealed RSA 374-22-f), granting Comcast CLEC authorization. The Commission explained (Order at 15-16) that when Comcast filed its application, the legislature had not yet amended RSA 374:22-f and 374:22-g to "make clear that telephone franchises are not exclusive in New Hampshire and to bring the New Hampshire statutes in line with the federal regime." The Commission (Order at 16) then outlined the requirements of all incumbent providers, including the rural ILECs:

> The 1996 Telecom Act established a framework of rights and obligations for telecommunications carriers in order to promote competition for local exchange service. Under the 1996 Telecom Act, telecommunications carriers, including both ILECs (TDS Companies) and CLECs (Comcast) have the obligation to interconnect either directly or indirectly with the facilities and equipment of all other carriers. *See*, 47 U.S.C. § 251 (a). Local exchange carriers, including ILECs (TDS Companies) and CLECs (Comcast), also have duties to allow resale of services, to port telephone numbers to other carriers, to provide dialing parity, to afford access to rights of ways and to establish reciprocal compensation arrangements for the transport and termination of telecommunications. *See*, 47 U.S.C. § 251 (b). Finally, ILECs have additional duties, including among others, providing competitors with access to certain unbundled network elements (UNEs) and allowing competitors to collocate within ILEC facilities for the purpose of interconnection. *See*, 47 U.S.C. § 251 (c). Certain rural ILECs, like the TDS Companies, are exempt from 251 (c) obligations, including UNEs and collocation, until their exemption from these requirements is terminated as a result of a bona fide request from a carrier. *See*, 47 U.S.C. § 251 (f).

Finally, the Commission (Order at 22-23) rejected the argument that the rural exemption barred Comcast from interconnecting with the rural ILECs or that the ILECs would not recover their related costs:

> The TDS Companies are currently subject to the rural exemption and are therefore not required to unbundle network elements to competitors. The TDS Companies are, however, required to provide interconnection to Comcast. Interconnection consists of the physical exchange of traffic between carriers. TDS will incur the cost of terminating traffic from its customers to Comcast customers and will be reimbursed for terminating calls from Comcast customers to TDS customers. These costs will be negotiated between Comcast and the TDS Companies and included in an interconnection agreement…. [W]e are

persuaded that the TDS Companies will recover any costs incurred in interconnecting with Comcast through fees implemented in a negotiated agreement.

C. MetroCast Cablevision of New Hampshire, Application for Certification as a Competitive Local Exchange Carrier, *Order Denying Motion to Rescind Authority and Motion for Rehearing*, Order No. 24,939 (Feb. 6, 2009) (the "*MetroCast Order*")

On September 19, 2008, MetroCast filed an application to amend its certification as a competitive local exchange carrier in New Hampshire to include, in addition to its existing service in the FairPoint Communications service territory, Union's service territory.

On September 30, 2008, pursuant to RSA 374:22-g and N.H. Code of Admin. Rules Puc 431.01, MetroCast was granted authority to operate as a CLEC in Union's service territory. On October 10, 2008, Union filed a motion to rescind MetroCast's authority to operate in Union's service territory. In its motion, Union argued, among other things, that "it was a mistake of law and fact for the Commission to utilize Puc 431.01 and the Puc Part 431 process to authorize MetroCast to operate in the Union service territory. Union maintains that Puc 431.01 only authorizes CLECs to operate in the service territories of non-exempt ILECs. Union asserts that it is an exempt ILEC pursuant to 47 U.S.C. §§ 153 (37) and 251 (f)." Order at 2.

The Commission denied Union's motion. The Commission observed (Order at 5) that the case called into question the Commission's authority to act "pursuant to RSA 374:22-g and Commission rules, Puc 431.01-431.02, to allow an existing cable provider to begin providing competitive telephone services within a small ILEC's service territory." In rejecting Union's arguments, the Commission (Order at 6) held in relevant part that:

> We begin by observing that the telecommunications landscape for small ILECs in New Hampshire is governed by the same federal statute that governs the largest ILEC. Both FairPoint and Union are required by federal law to open their networks to competitive providers. *See*, 47 U.S.C. §§ 251 (a) and (b). At the federal level, the essential distinction between small and large ILECs is that small ILECs are generally exempt from the obligation to unbundle portions of their networks to CLECs until they have received a bona fide request and the state regulator has considered any economic burdens associated with unbundling. *See*, 47 U.S.C. §§ 251 (c) and (f). Union and the Rural ILECs are not currently required to unbundle their networks to CLECs in New Hampshire.
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> At the state level, due to recent legislative changes, large and small ILECs are treated the same for purposes of competitive entry into their service territories. Both are now governed by RSA 374:22-g, which provides that all telephone service territories will be nonexclusive. RSA 374:22-g further allows the Commission to authorize multiple telecommunications carriers in any telephone service territory "*to the extent consistent with federal law and notwithstanding any other provision of law to the contrary*." RSA 374:22-g, I [emphasis in original].
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> We read RSA 374:22-g to grant us the discretion to permit competitive local exchange carriers to do business within the service territory of Union Telephone. We further conclude that RSA 374:22-g does not require a hearing in order to grant a CLEC application and, correspondingly, the necessary requirements of due process are satisfied by the procedures set forth in our rules [citations omitted].
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> Finally, the Commission (Order at 7) addressed the application of the Telecom

Act's rural exemption, 47 U.S.C. Section 251(f):

> We find no indication in the 1996 Telecom Act that ILECs subject to the rural exemption are protected from competitive entry. In fact, 47 U.S.C. § 251 (a) and (b) make clear that all local exchange carriers, regardless of size, must interconnect with other carriers operating in their service territory. The recent amendments to RSA 374:22-f and RSA 374:22-g make New Hampshire law consistent with federal law on this point. RSA 374:22-g treats all New Hampshire ILECs, whether large or small, equally concerning competitive entry. Finally, the 1996 Telecom Act specifically prohibits states from creating barriers to the entry of competition. 47 U.S.C. § 253. In an effort to support the important policy goal of promoting competitive telecommunications markets and to comply with federal statutes, the Commission's CLEC registration rules provide for an administratively efficient process for competitors to enter the local telecommunications market. *See*, Puc 431.01.

D. Comcast Phone of New Hampshire, Application for Authority to Serve Customers in the TDS Service Territories, *Order Denying Motion for Rehearing*, Order No. 24,958 (April 21, 2009) (the "*Comcast Order*")

On February 6, 2009, pursuant to RSA 374-22-g and N.H. Code of Admin. Rules Puc 431.01, the Commission issued Order No. 24,938 granting Comcast authority to operate as a CLEC in the TDS territories. On March 6, 2009, certain rural local exchange carriers (the "RLECs") filed a joint motion requesting that the Commission reconsider its order or grant a rehearing in the docket. The Commission denied the RLECs' motion and, citing 47 U.S.C. Sections 251(a) and (b), noted (Order at 8-9) the "general federal statutory requirement that local exchange carriers (LECs) interconnect with other carriers operating in their territories." The Commission (Order at 11) then explained the role of economic efficiency and competition within the scope of RSA 374:22-g:

> RSA 374:22-g also contemplates that competition and economic efficiency are factors relevant to the determination of public good. It begins by declaring that, absent federal prohibition, all telephone franchises shall be non-exclusive; that is, they may be subject to competition. Since barriers to entry by definition limit competition, we find that state law supports Commission efforts to minimize such barriers consistent with the public good, and within the confines of other governing laws and rules.

E. IDT America, Corp., Application for Certification as a Competitive Local Exchange Carrier, *Order Denying Motion to Rescind Authority and Motion for Rehearing*, Order No. 24,970 (May 22, 2009) (the "*IDT Authorization Order*")

On February 27, 2009, IDT filed an application to amend its certification as a competitive local exchange carrier in New Hampshire to include, in addition to its existing service in the FairPoint Communications service territory, Union's service

territory. As explained in the *MetroCast Order*, the Commission explained, IDT provides telecommunications services jointly with MetroCast pursuant to a settlement agreement reached in Docket No. DT 06-169, approved by Order No. 24,727. On March 3, 2009, pursuant to RSA 374:22-g and N.H. Code of Admin. Rules Puc 431.01, IDT was granted authority to operate as a CLEC in the Union service territory, conditioned on full compliance with the terms of the settlement agreement reached in DT 06-169. On March 6, 2009, Union filed a motion to rescind IDT's authority to operate in Union's territory, alternatively moving for a rehearing if IDT's authority was not rescinded.

Similar to the arguments Union raised in Docket No. DT 08-130 regarding the *MetroCast Order*, Union argued, among other things, that the Commission erred in relying on Puc 431.01 in authorizing IDT to operate in the Union service territory. Union maintained that Puc 431.01 only authorizes CLECs to operate in the service territories of non-exempt ILECs, and that it is an exempt ILEC pursuant to 47 U.S.C. §§ 153(37) and 251(f). *See* Order at 2. As in the *MetroCast Order*, the Commission rejected Union's arguments, including the contention that a hearing is required whenever the Commission considers an application for CLEC authorization.

The Commission first observed (Order at 3) that the case raised the question of the "Commission's authority to act pursuant to RSA 374:22-g and Commission rules, Puc 431.01-431.02, to allow an existing cable provider to begin providing competitive telephone services within a small ILEC's service territory." Reaffirming its earlier findings in the *MetroCast Order*, the Commission stated (Order at 3) that:

> Both FairPoint and Union are required by federal law to open their networks to competitive providers. *See*, 47 U.S.C. §§ 251 (a) and (b). At the federal level, the

> essential distinction between small and large ILECs is that small ILECs [citation omitted] are generally exempt from the obligation to unbundle portions of their networks to CLECs until they have received a bona fide request and the state regulator has considered any economic burdens associated with unbundling. *See*, 47 U.S.C. §§ 251 (c) and (f). Union is not currently required to unbundle its network to CLECs in New Hampshire.

The Commission (Order at 4-5) then rejected Union's claims that it was protected from competitive entry because of the Telecom Act's rural exemption:

> State and national policies encourage competition in local telecommunications service. Policy makers have chosen to encourage that policy because they believe it leads to economic efficiency. The only thing that distinguishes this CLEC application from the numerous others we have approved through our streamlined registration process under Puc Part 431 is that in this case the ILEC whose service territory is being entered is subject to the rural exemption under the federal statute. *See*, 47 U.S.C. § 251 (f). We find no indication in the 1996 Telecom Act that ILECs subject to the rural exemption are protected from competitive entry. In fact, 47 U.S.C. § 251 (a) and (b) make clear that all local exchange carriers, regardless of size, must interconnect with other carriers operating in their service territory. The recent amendments to RSA 374:22-f and RSA 374:22-g make New Hampshire law consistent with federal law on this point. RSA 374:22-g treats all New Hampshire ILECs, whether large or small, equally concerning competitive entry.

III. LEGAL AND FACTUAL ISSUES RAISED IN THE ARBITRATION

On June 27, 2009, the Arbitrator identified a list of briefing points (among others that the parties were free to raise) that were originally discussed during the settlement conference of June 23. The issues were:

A. Discuss the IDT-cited Vermont decision in detail.[4] What services, interconnection, etc., did the requesting carrier seek? Compare and contrast what was sought in Vermont to what is sought in New Hampshire. Discuss Vermont's treatment of Section 251(f).

[4] *Petitions of Vermont Telephone Company, Inc. ("VTel") and Comcast Phone of Vermont, LLC d/b/a Comcast Digital Phone ("Comcast"), for Arbitration of an Interconnection Agreement Between VTel and Comcast, Pursuant to Section 252 of the Telecommunications Act of 1996, and Applicable State Laws,* (Feb. 2, 2009) ("*Vermont Order*").

B. Discuss the Union-cited Maine decision in detail (same as with the Vermont decision).[5] Also, discuss subsequent history of related Maine dockets.

C. Discuss how IDT provides service to MetroCast. Discuss in what ways, if any, this arrangement represents the "joint provision" of service. Include a network diagram of the contemplated arrangement with Union. Provide a copy of the NH MetroCast stipulation and related order.

D. Discuss the application of prior PUC decisions (including Secretarial Letters) in this proceeding and the related MetroCast and Comcast dockets. If you contend they are or are not controlling, at least in part, please explain. Please explain, also, the PUC's treatment or application of RSA 374:22-g in the relevant orders.

E. For IDT: If you are making a Section 251(a) and (b) request, what more (other than unbundling, collocation and discounted resale), could IDT have sought under 251(c)?

Conversely, for Union: What sections of the proposed agreement do you contend fall under Section 251(c)?

F. To what degree, if any, does RSA 374:22-g address the protections afforded by Section 251(f), given 374:22-g's delineation of factors?

G. Does the PUC have authority in this proceeding (pursuant to state or federal law), on its own motion, to make findings relevant to Section 251(f)?

H. If IDT is in fact claiming services or interconnection under Section 251(c), what bars the PUC from treating IDT's notice of its request to arbitrate as a request to terminate the exemption under Section 251(f), as the Maine PUC apparently chose to do?

I. Why are (or are not) wholesale providers of communications services "telecommunications carriers" for Section 251(a) and (b) purposes, making specific reference (among other things you may choose to discuss) to the March 2007 Time Warner Wireline Competition Bureau decision?[6]

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[5] *CRC Communications of Maine, Inc. Petition for Consolidated Arbitration with Independent Telephone Companies Towards an Interconnection Agreement Pursuant to 47 U.S.C. 151, 252*, Docket No. 2007-611 (May 5, 2008) ("*Maine Order*").

[6] *Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the*

J. Does the PUC have the authority to enforce the requirements set forth in Section 251(a) and (b) by virtue of RSA 374:22-g and the PUC's findings in the relevant MetroCast case that the standards of 374:22-g have been met (and that no hearings are necessary to make findings under RSA 374:22-g)?

IV. ISSUES, POSITIONS OF THE PARTIES AND THE ARBITRATOR'S RECOMMEDATIONS

A. ISSUE 1: IS IDT A TELECOMMUNICATIONS CARRIER ELIGIBLE FOR AN INTERCONNECTION AGREEMENT WITH UNION UNDER SECTIONS 251(A) AND (B) OF THE TELCOM ACT?

1. IDT'S POSITION

IDT asserts that this issue should not be addressed further because it has already been addressed and rejected. IDT Brief at 2. Nonetheless, "IDT hereby confirms that it will operate as a common carrier in Union's territory." *Id.* Furthermore, IDT asserts that Union has no right to impose, or request that the Commission impose, disclosure obligations on IDT. But if the Commission decides to address the common carrier issue, it must conclude that IDT is a common carrier, according to IDT. *Id.*

Wholesale providers of communications services are "telecommunications carriers" for Section 251(a) and (b) purposes, IDT observes. Citing the 2007 *Time Warner Order*, IDT argues that the Wireline Competition Bureau of the FCC issued a declaratory ruling that wholesale providers of telecommunications services are telecommunications carriers for purposes of Section 251(a) and (b) and that they "are entitled to interconnect and exchange traffic with incumbent LECs pursuant to Section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications

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Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55, 22 FCC Rcd 3513 (2007) ("*Time Warner Order*").

services." *Id.* Wholesale telecommunications carriers are entitled to interconnect with incumbent local exchange carriers under Sections 251(a) and (b) of the Act, IDT further agues, when providing services to voice-over-internet- protocol service providers: "This principal was further supported in the Vermont decision. Quite simply, there is no legal basis for a position to the contrary." IDT Brief at 26.

IDT also confirms that it will operate as a common carrier in Union's territory. *Id*. IDT represents that its commercial relationship with MetroCast is not contractually exclusive and that, "if presented with a feasible commercial opportunity, IDT will serve additional customers. Moreover, IDT has testified that it has virtually identical commercial relationships in fourteen additional states and no other state commission has ever concluded that IDT is a private carrier" (citation omitted). IDT Brief at 28-29.

Finally, discussing *Iowa Telecom v. Iowa Utilities Board* and *Verizon California v. F.C.C*[7], IDT claims that the key factor in finding common carriage is the offering of "'indiscriminate service to whatever public [the carrier's] service may legally and practically be of use,'" and Union has never presented any facts to suggest that IDT fails to meet this factor. IDT Brief at 29-30.

2. UNION'S POSITION

Union explains that interconnection under Section 251 of the Act is available only to common carriers and that, under Section 251, Union is required to interconnect with "telecommunications carriers." Union Brief at 7. Quoting from Section 153(44) of the Act (defining the term "telecommunications carrier" and

[7] *Iowa Telecommunications Services, Inc. v. Iowa Utilities Board*, 563 F.3d 743 (Eighth Cir. 2009) ("*Iowa Utilities*") and *Verizon California, Inc. v. F.C.C.*, 555 F3d 270 (D.C. Cir. 2009) ("*Verizon California*"), *aff'g*, *Bright House, infra.*

referencing "telecommunications services"), Union notes that the term "telecommunications services, in turn, is defined by Section 153(46) of the Act to mean 'the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.'" Union Brief at 8.

Section 251 of the Act, Union continues, only entitles an entity that is acting as a "common carrier" – an entity that holds itself out as offering service indiscriminately to the public on non-discriminatory terms – to demand interconnection:

> It has been long settled that the key feature of common carriage is that the service provider undertakes to provide service "indifferently" to all potential customers, whereas a private carrier "make[s] individualized decisions, in particular cases, whether and on what terms to deal" with customers [citation omitted]. In short, the widespread, general solicitation of customers from the general population, *i.e.*, the indiscriminate offering of service on generally applicable terms, constitutes common carriage. [Union Brief at 8.]

According to Union, IDT will exclusively serve MetroCast and has no current intention of acting as a common carrier in Union's territory in New Hampshire.[8] Union asserts that IDT does not propose to make its service available on a non-discriminatory basis, to seek to draw its customer base out of the general public or even to service all customers indifferently:

> Rather, IDT currently proposes to serve only a single entity in Union's territory, MetroCast, on specialized terms and conditions. Furthermore, not only has IDT thus far not agreed to hold itself out to provide service to other third parties, to Union's knowledge, IDT has not even made public the rates,

[8] Referencing the *Vermont Order*, IDT also states that Comcast has not "fully established" that it has met the requirement of being a telecommunications carrier offering a common carrier service that is eligible for interconnection. Union Brief at 5.

> terms and conditions under which it intends to provide service to MetroCast. In short, IDT seeks to provide private carrier service [Union Brief at 8-9].

Consequently, Union claims, since IDT is a private carrier, IDT is not entitled to demand interconnection under Section 251 of the Act. Union Brief at 9.

3. ARBITRATOR'S RECOMMENDATION

Under Section 251(a) of the Act, a telecommunications carrier has a duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Each local exchange carrier has additional duties as detailed in Section 251(b) of the Act. 47 U.S.C. § 251. Under the Act, a "telecommunications carrier" generally means any provider of telecommunications services which, in turn, are defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. §§ 153(44) and (46). The Act further defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

Under the "common carrier" standard applicable to determining whether a service provider is a telecommunications carrier for purposes of the Act, a service provider must hold itself out indiscriminately or indifferently to the public. *Nat'l Ass'n of Regulatory Util. Comm'r v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC I*"). A carrier whose service is of possible use to only a small percentage of the general public may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users. *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608

(D.C. Cir. 1976) ("*NARUC II*").

The FCC has held that wholesale competitive local exchange carriers that provide services only to their affiliates may be "telecommunication carriers" offering "telecommunications services" for purposes of Section 222(b) of the Act. *Bright House Networks, LLC v. Verizon California, Inc., Memorandum Opinion and Order,* 23 FCC Rcd 10704, ¶¶ 37-41(2008) *("Bright House").*[9] In its determination, the FCC gave significant weight to self-certifications of common carrier status and to the carrier's willingness to serve similarly situated customers equally. The possession of a certificate of public convenience or comparable approval from the state in which the company operated also was cited approvingly. *Id.* at ¶ 39. While the *Bright House* decision interpreted Section 222 of the Act rather than Section 251, the FCC's logic would apply equally to IDT's provision of service. *See also Time Warner Order*, 22 FCC Rcd 3513 ¶¶ 1, 8, 9, 11 and 15 (2007) (where the FCC Wireline Competition Bureau issued declaratory ruling that wholesale providers of telecommunications services are telecommunications carriers for the purposes of Section 251(a) and (b) and that they "are entitled to interconnect and exchange traffic with incumbent LECs pursuant to Section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services").

Two recent cases that provide useful guidance are *Iowa Utilities*[10] and *Verizon*

[9] *Aff'd sub nom. Verizon California, supra*.

[10] Slip op. at http://www.ca8.uscourts.gov/opndir/09/04/082140P.pdf

California.[11] In *Iowa Utilities*, the Eight Circuit Court of Appeals found that Sprint, which markets its telecommunications services to cable companies like MetroCast, was a common carrier under circumstances similar to the arrangement between IDT and MetroCast. *See Iowa Utilities* at 747. ("Sprint provides the facility to interconnect calls to and from other carriers, the switch that gathers and distributes the telephone traffic, and various back-office functions. The local cable company provides the system of wires and cables which takes a phone call from the user's premises to the connection point…. Sprint has no direct relationship with the customers and does not provide any retail services…. The terms, conditions, and prices of Sprint's contract with [its partner] are considered confidential, and its rates are not available to the public."). Slip op. at 5-6. As the Eight Circuit explained (slip op. at 4-5):

> The Federal Communications Commission (FCC) has held that the term "telecommunications carrier" has essentially the same meaning as the term "common carrier" under the Communications Act of 1934. AT&T Submarine Sys., Inc., 13 F.C.C.R. 21585, 21587-88 ¶ 6 (1998); Cable & Wireless, PLC, 12 F.C.C.R. 8516, 8522 ¶ 13 (1997); *see also* V.I. Tel. Corp. v. F.C.C., 198 F.3d 921, 925 (D.C. Cir. 1999). The Communications Act defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire" and imposed upon local telephone companies certain common carrier obligations.[12] 47 U.S.C. § 153 (10); Time Warner Telecom, Inc. v. F.C.C., 507 F.3d 205, 210 (3d Cir. 2007). "The primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently." Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C., 533 F.2d 601, 608 (D.C. Cir. 1976) (NARUC II) (internal quotations omitted).
>
> A two-prong test has emerged to determine whether a carrier is a common carrier

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[11] Slip op. at http://pacer.cadc.uscourts.gov/docs/common/opinions/200902/08-1234-1164087.pdf

[12] "The common carrier doctrine arose from common law rules which historically "impose[d] a greater standard of care upon carriers who held themselves out as offering to serve the public in general." *Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.*, 525 F.2d 630, 640 (D.C. Cir. 1976)." *Id.*

> under the Communications Act: "(1) whether the carrier holds himself out to serve indifferently all potential users; and (2) whether the carrier allows customers to transmit intelligence of their own design and choosing." United States Telecom Ass'n v. F.C.C., 295 F.3d 1326, 1329 (D.C. Cir. 2002) (internal quotations omitted); *see also* Sw. Bell Tel. Co. v. F.C.C., 19 F.3d 1475, 1481 (D.C. Cir. 1994); NARUC II, 533 F.2d at 608-09; NARUC I, 525 F.2d at 641-42. The key factor in determining common carriage is whether the carrier offers "indiscriminate services to whatever public its service may legally and practically be of use." United States Telecom Ass'n, 295 F.3d at 1334 (quoting NARUC I, 525 F.2d at 642).

In *Verizon California*, the D.C. Circuit likewise upheld the FCC under circumstances similar to the instant case, and rejected Verizon's argument that "two carriers affiliated with and serving Comcast and Bright House" were not telecommunications carriers within the meaning of the Act because they "do not hold themselves out as common carriers, 'undertak[ing] to carry for all people indifferently.'" Slip op. at 8-9. In finding common carriage, the Court made reference to factors similar to those identified by the Court in *Iowa Utilities*, including the carriers' having self-certified that they operated as common carriers and that they gave public notice of their intent to act as common carriers. Slip op. at 9. *See also Vermont Order* at 76 ("Comcast Phone may still constitute a common carrier even if there are only a limited number of non-affiliated providers who can use the service.").

IDT has also declared its willingness to serve as a common carrier. *See, e.g.*, IDT Brief at 30 ("IDT has asserted each of the three aforementioned principals and does so again in this filing."); IDT Brief at 26 ("IDT hereby confirms that it will operate as a common carrier in Union's territory."). While IDT's service may not be useable by most service providers, that fact alone does not alter its status as a "telecommunications provider" for the reasons stated above. As IDT further represents in its Brief (at 28-29, citations omitted): "IDT has made it clear that its commercial relationship with

Metrocast is not contractually exclusive and that, if presented with a feasible commercial opportunity, IDT will serve additional customers. Moreover, IDT has testified that it has virtually identical commercial relationships in fourteen additional states…."

Related Commission precedent, discussed *supra*, supports the conclusion that IDT is a telecommunications carrier for purposes of Sections 251(a) and (b). In the 2007 *IDT/MetroCast Order* (at 1), for example, the Commission explained that "IDT is a certified competitive local exchange carrier (CLEC) and toll service provider in New Hampshire…. The two companies [IDT and MetroCast] have entered into an arrangement whereby they would, in effect, jointly provide local exchange service to end-users." The Commission further stated that: "N.H. Code Admin. Rules Puc 402.28 defines a 'local exchange carrier' as 'the company that provides local telephone exchange service, whether directly or indirectly, and renders the telephone bill to the customer.'"[13] IDT and MetroCast's "novel business arrangement," the Commission opined, "permits the implementation of a business arrangement that offers a new

[13] Additional, relevant definitions in the 400 Rules are: Puc 402.13 "'Customer' means any person, firm, corporation, cooperative marketing association, utility, governmental unit, or subdivision of a municipality, or of the state or nation supplied with telephone service by any telephone utility;" Puc 402.16 "'End user' is the business or residential customer who purchases telecommunications services for its own use and does not resell it to others;" and Puc 402.60 "'Utility' means any 'public utility' owning, operating, or managing any plant or equipment, or any part of the same for the conveyance of telephone messages for the public, pursuant to RSA 362:2."

As the Commission stated, IDT as a CLEC (one type of utility authorized by the Commission in New Hampshire) jointly provides service with MetroCast to end-user customers.

competitive alternative in the local telecommunications market [citation omitted]." *See IDT/MetroCast Order* at 5-6.

In the *IDT Authorization Order*, discussed *supra*, the Commission reiterated the finding that IDT provides service jointly with MetroCast, pursuant to the settlement agreement reflected in the *IDT/MetroCast Order*. The Commission (Order at 1) underscored that on March 6, 2009, pursuant to RSA 374:22-g and Puc 431.01, IDT was "granted authority to operate as a CLEC in the Union service territory, conditioned on full compliance with the terms of the settlement agreement reached in DT 06-169."

Finally, a review of the IDT/MetroCast Platform diagram (demonstrating the joint provision of service to end-user customers in New Hampshire) and the IDT/MetroCast/Union Network diagram (demonstrating the contemplated end-to-end interconnection arrangement among the end-user customers and the carriers) – attached to IDT's Brief as Exhibits B and C – further establishes the reasonableness of the finding that IDT is a telecommunications carrier within the meaning of the Telecom Act and, specifically, for purposes of Sections 251(a) and (b). By virtue of the variety of activities that IDT provides in concert with MetroCast (as enumerated in IDT's Brief at 16-19), IDT and MetroCast jointly provide competitive voice services to end-user customers in New Hampshire. As IDT represented in its Brief (at 16-17):

> Prior to the IDT/MetroCast business arrangement, MetroCast provided only video and internet services to end-users. MetroCast had no experience, resources, capital or legal authority to deploy voice services. Additionally, Metrocast's cable-network, personnel (operations, sales, customer care, etc), operating support systems (OSS), billing support systems (BSS), methods and procedures, and end-user interfaces (web portals, invoices, etc) were not capable of supporting voice services. Under business arrangement with IDT, MetroCast found a timely, efficient, cost-effective, competitive way to fill these "missing" portions and provide New Hampshire end-users greater choice.

> IDT uses its resources as a CLEC to connect MetroCast to the Public Switched Telephone Network (PSTN), provide the cable company with local number port-in and port-out, enhanced 911 interconnection, operator/directory assistance, directory listings, and numbering resources necessary to serve MetroCast customers in the cable company's New Hampshire service area. MetroCast uses its cable facilities to provision Internet Protocol (IP)-based telephony and would be the entity that maintains a customer-provider relationship with end-users, offering customer support and rendering bills for telephone service. Together, IDT and MetroCast provide an end-to-end solution by integrating the IP platform to deliver a fully automated digital phone and high-speed data provisioning solution including PSTN service activation and interconnection.

For the reasons stated above, I conclude that IDT is a telecommunications carrier eligible for an interconnection agreement with Union under Sections 251(a) and (b) of the Telecom Act.

B. ISSUE 2: IS IDT ENTITLED TO AND SEEKING AN INTERCONNECTION AGREEMENT WITH UNION UNDER SECTIONS 251(A) AND (B), INCLUDING INTERCONNECTION FOR THE PURPOSE OF PROVIDING COMPETITIVE LOCAL SERVICE, AND, IF SO, DOES THAT VIOLATE UNION'S RIGHTS UNDER SECTION 251(F)?

1. IDT'S POSITION

IDT asserts that it does not seek terms or services that otherwise would only be available under 251(c). IDT Brief at 1. Citing the *IDT Authorization Order*, IDT states "it is undeniable – and previously recognized by this Commission – that '47 U.S.C. § 251(a) and (b) make clear that all local exchange carriers, regardless of size, must interconnect with other carriers operating in their service territory.'" If, however, any services requested by IDT fall under Section 251(c), IDT requests that the Commission initiate on its own motion a proceeding to eliminate Union's rural exemption under Section 251(f). Union Brief at 3.

IDT claims that Union already exchanges telecommunications traffic – including

local exchange traffic – with IDT and other local exchange and interexchange carriers – "so it would appear on its face that what IDT is seeking to do should not be exceptionally unique, difficult or, as Union would have it, unlawful." IDT Brief at 4. The difference now, according to IDT, is it will not just be exchanging local and toll traffic with Union, it will be competing against Union for customers. "So, what this proceeding is really about is competition. Can IDT compete with Union? Can IDT originate and terminate exchange telecommunications traffic to consumers located within the incumbent Union region without first having Union's rural exemption under Section 251(f) lifted? IDT asserts that it can, pursuant to Section 251(a) and (b) as well as in accordance with RSA § 374:22-g." IDT Brief at 4.

IDT presented a draft interconnection agreement to Union, IDT represents, which Union rejected, presenting instead an alternative that serves as the template for the agreement before the Commission. This template, IDT argues, is actually the basis of "countless agreements, including agreements: (1) entered into under Section 251(a) and (b) and not Section 251(c); (2) entered into between CLECs and RLECs; and (3) subject to arbitration," citing like agreements with rural ILECs in Vermont and South Carolina. IDT Brief at 5.

IDT then responds to the questions the Arbitrator posed during the proceeding. The *Vermont Order* is particularly relevant, IDT asserts, because:

> Comcast is similar to IDT in that it provides telecommunications services to a third party which subsequently bundles the telecommunications services with its interconnected VoIP, cable television and high speed internet services to provide a bundled service offering to its end users. Consequently, the services sought by Comcast in its interconnection agreement with VTel are virtually identical to those sought by IDT. Both agreements seek interconnection between two parties for the exchange of local and interexchange traffic. Likewise, both agreements contain appendices covering Number Portability, Network Interconnection Methods,

> Numbering, Pricing and Reciprocal Compensation. In fact, the template agreement used in the Comcast/VTel interconnection agreement is the same template as used between IDT and Union. To the best of IDT's knowledge, there are no meaningful differences between the services contemplated in the Comcast/VTel agreement and the proposed IDT/Union agreement. [IDT Brief at 7].

IDT also argues that the *Vermont Order* concluded that Section 251(f)(1) does not exempt a rural ILEC from its duties under Sections 251(a) and (b). IDT believes that this point is critical because Union has argued that no such duties exist and/or that any request under 251(a) and (b) is "simply a 251(c) request in disguise and, as such, must be barred under Section 251(f)(1)." IDT Brief at 9.

IDT claims the application of prior PUC decisions (including Secretarial Letters) in this proceeding is controlling. To the extent that Union reasserts arguments concerning 47 U.S.C. §§ 251(a) and (b) and §252(b), the Commission disposed of those arguments when it denied the first motion, IDT proffers. Accordingly, it is IDT's position that any previously-raised arguments concerning 47 U.S.C. §§ 251(a) and (b), and § 252(b) cannot be addressed in this arbitration and that it would be impermissible to raise any new arguments concerning 47 U.S.C. §§ 251(a) and (b) and § 252(b). IDT Brief at 19-20.

IDT then distinguishes the *Maine Order*, *supra*, citing the procedural history of this arbitration. IDT argues that "On June 15, 2009, New Hampshire Public Utilities Commission Executive Director Howland stated '[T]o the extent that Union reasserts arguments concerning 47 U.S.C. §§ 251(a) and (b), and § 252(b), the Commission disposed of those arguments when it denied the first motion[.]'" IDT Brief at 6. It asserts that, as a result of Commission action in this proceeding, the *Maine Order* is not relevant; that is, the proposition adopted in Maine – that rural carriers are exempt from

interconnection demands under Section 251 unless the rural carrier's exemption has been lifted – has already been addressed and rejected by the Commission when it concluded "[T]o the extent that Union reasserts arguments concerning 47 U.S.C. §§ 251(a) and (b), and § 252(b), the Commission disposed of those arguments when it denied the first motion." IDT Brief at 10. Thus, IDT argues, it is irrelevant whether the Maine Commission, which relied on the *Texas Order*[14], concluded that a CLEC cannot request interconnection with an RLEC "unless and until the RLEC's exemption has been lifted because the New Hampshire Commission has already concluded that interconnection is required under Section 251(a) and (b)." *Id.*

Arguing that the *North Dakota* decision[15], upon which Union relies, is also incorrect, IDT asserts that the simple transmission and routing of telephone exchange service and exchange access does not necessarily make the transmission fall under Section 251(c)(2)(A). According to IDT, Section 251(c)(2)(A) contemplates the transmission and routing of telephone exchange service and exchange access as being "subject to specific requirements pertaining to technical feasibility, quality and rate, term and conditional non-discrimination." IDT Brief at 11. None of those issues, IDT represents, are present in IDT's request. *Id.*

The only open question according to IDT is whether any services IDT seeks under Section 251(a) and (b) are, in fact, only available under Section 251(c), which IDT represents is not the case. Unlike Sections 251(a) and (b), "Section 251(c) mandates

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[14] Public Utility Commission of Texas*, Order Denying Sprint's Appeal of Order No. 1*, PUC Docket No. 31038 (December 2, 2005) ("*Texas Order*"). This decision was subsequently upheld on appeal.

[15] *North Dakota Public Service Commission Order*, Case No. PU-2065-02-465 (May 30, 2003) ("*North Dakota Order*").

critical components of the interconnection process and these critical components must be read as *outside* or *in addition to* the obligations that exist under Section 251(a), which are less burdensome." IDT Brief at 13, emphasis in original. Union's position is thus puzzling, IDT states, since IDT and other carriers presently operate within the local calling areas of Union and, accordingly, exchange local and access traffic. *Id.* While IDT does not believe Union's rural exemption must be waived in order to support its request for interconnection, if the Commission ultimately concludes that IDT's request falls in whole or in part under Section 251(c), IDT would support an undertaking to eliminate Union's exemption. IDT Brief at 15.

IDT then provides details, including diagrams, about its joint arrangement with MetroCast, it retail service partner, explaining that prior to the arrangement MetroCast provided no telephone service to end users in New Hampshire. *See* IDT Brief at 16-19. This arrangement "leverages the core competencies and efficiencies of both MetroCast and IDT: MetroCast's ability to manage and support retail offerings (video, internet, voice) and connectivity (cable network to the home, similar to the telephony 'local loop'), and IDT's expertise in wholesale telephony and ability to leverage a volume-based cost structure." IDT Brief at 17.

2. UNION'S POSITION

A threshold issue that must be determined, according to Union, is whether IDT is legally entitled to force Union into binding arbitration. In essence, Union reiterates in its Brief a position that it articulated throughout this proceeding: namely, that Union has an exemption from the duties of 251(c) unless and until its

rural exemption is terminated. Union Brief at 1-2.[16] Union asserts that it is well established that such interconnection can only be demanded through Section 251(c)) and cannot be obtained through Section 251(a), by virtue of Section 251(f). As a rural carrier, Union again points out, Union is exempt from the requirements of Section 251(c). Union Brief at 3. IDT therefore has no legal basis to require Union to enter into a binding interconnection agreement pertaining to local exchange traffic. *Id.*

Union's rural exemption under 251(f)(1) cannot be terminated until the state commission finds that such interconnection is not unduly economically burdensome, is technically feasible, and is consistent with Section 254. Since, Union argues, IDT has not requested the Commission to make such a finding, Union has no obligation to negotiate under the terms of 251(c)(1). *Id.*

In support of the position that other states have found that interpreting Section 251(a) to require such negotiation would substantially undermine the Act's interconnection regime, Union discusses in detail (Union Brief at 3-5) the *Maine*, *Texas* and *North Dakota Orders*, *supra*, summarizing that:

> IDT simply does not have the right to force interconnection through an arbitrated agreement for local exchange traffic under Section 251(a). These cases also make it clear that IDT can not simply ask for interconnection under certain subsections of Section 251 without addressing other subsections. Simply put, when dealing with carrier with a rural exemption, IDT must also address Section 251(c) and (f) when requesting local interconnection [Union Brief at 5].

Union also distinguishes the *Vermont Order*, *supra*. Union Brief at 6. Union asserts

[16] In further support of its position, Union attaches as Exhibit B to its Brief the filing Union made by cover letter of May 27, 2009, supplementing Union's arguments concerning Section 251.

that the Vermont Board found that Comcast was not entitled to relief pursuant to Section 251(c) because VTel was exempt from Section 251(c) obligations under Section 251(f) of the Act, and the Board never addressed whether a new entrant can demand interconnection because VTel was one of the carriers requesting arbitration. *Id.*

3. ARBITRATOR'S RECOMMENDATION

There is no dispute that Union is a rural carrier as defined by the Act. As a rural telephone company, Union is exempt from the duties of an incumbent local exchange carrier under Section 251(c) unless and until the Commission terminates that exemption as provided in Sections 25l(f)(1)(A) and (B).[17] To date, IDT has not filed a request asking the Commission to remove the exemption. Accordingly, the exemption under Section 251(f) continues to apply and precludes the Commission's arbitration of an interconnection agreement between IDT and Union under Section 251(c) of the Act.

That said, the Commission has held in prior orders, *see supra* at 7-14 – and I agree – that Section 251(f)(1) does not exempt a rural carrier from its duties under Sections 251(a) and (b). *See also*, Telephone Number Portability, *First Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd. 7236, ¶¶ 119 and 121 n.401 (1997) ("Because Sections 251(b) and 251(c) are separate statutory mandates, the requirements of Section 251(b) apply to a rural LEC even if Section 251(f)(1) exempts

[17] "Subsection (c) of this section [251] shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and(ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with Section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)." 47 U.S.C. § 251(f)(1)(A).

such LECs from a concurrent Section 251(c) requirement…. Rural LECs are not exempt from Sections 251(a) or (b) requirements under Section 251(f)(1)")). As the Commission noted, for example, in the *Comcast Authorization Order* (at 22): "The TDS Companies are currently subject to the rural exemption and are therefore not required to unbundle network elements to competitors. The TDS Companies are, however, required to provide interconnection to Comcast. Interconnection consists of the physical exchange of traffic between carriers. TDS will incur the cost of terminating traffic from its customers to Comcast customers and will be reimbursed for terminating calls from Comcast customers to TDS customers. These costs will be negotiated between Comcast and the TDS Companies and included in an interconnection agreement…."; *see also Comcast Order* (citing Section 251(a) and (b) and noting the "general federal statutory requirement that local exchange carriers (LECs) interconnect with other carriers operating in their territories.").

The Commission's rulings have also applied specifically to Union. In the *MetroCast Order* (at 6), the Commission stated:

> We begin by observing that the telecommunications landscape for small ILECs in New Hampshire is governed by the same federal statute that governs the largest ILEC. Both FairPoint and Union are required by federal law to open their networks to competitive providers. *See*, 47 U.S.C. §§ 251 (a) and (b). At the federal level, the essential distinction between small and large ILECs is that small ILECs are generally exempt from the obligation to unbundle portions of their networks to CLECs until they have received a bona fide request and the state regulator has considered any economic burdens associated with unbundling. *See*, 47 U.S.C. §§ 251 (c) and (f).

Similarly, in the *IDT Authorization Order* (at 3), the Commission ruled:

> Both FairPoint and Union are required by federal law to open their networks to competitive providers. *See*, 47 U.S.C. §§ 251 (a) and (b). At the federal level, the essential distinction between small and large ILECs is that small ILECs [citation omitted] are generally exempt from the obligation to unbundle portions of their

networks to CLECs until they have received a bona fide request and the state regulator has considered any economic burdens associated with unbundling. *See*, 47 U.S.C. §§ 251 (c) and (f). Union is not currently required to unbundle its network to CLECs in New Hampshire.

In the course of this arbitration, the Commission reiterated its rejection of Union's continuing arguments regarding IDT's right to arbitrate an interconnection agreement under Sections 251(a) and (b), given Union's status as a rural carrier. *See* Secretarial Letter of June 1, 2009, adopting the Hearing Examiner's Report (in which the Commission denied Union's first motion to dismiss or in the alternative to stay and concluded that Union "has a duty to provide the services required by sections 251(a) and (b)."); Secretarial Letter of June 15, 2009 ("Regarding Union's May 29th [i.e., second] motion to dismiss, to the extent that Union reasserts arguments concerning 47 U.S.C. §§251(a) and (b), and § 252(b), the Commission disposed of those arguments when it denied the first motion."); and Secretarial Letter of June 26, 2009 ("The Commission has considered the arguments raised in Union's June 22nd letter and has affirmed its decision set out in the June 15th secretarial letter.").

Moreover, the *Texas*,[18] *Maine* (which relied in part on the Texas court decision

[18] The Texas Commission disagreed with Sprint's contention that it can receive interconnection by way of Section 251(a) to offer and provide "telephone exchange," i.e., local, service. The Texas Commission decided that an ILEC's duty to provide interconnection for purposes of exchanging telephone exchange traffic is solely a Section 251(c) obligation. The Texas Commission was upheld in *Sprint Communications Company v. Public Utilities Commission of Texas and Brazos Telephone Cooperative*, A-06-CA-065-SS, 2006 U.S. Dist. LEXIS 96569 (W.D. Tex. Aug. 14, 2006). The court there held that, because a rural ILEC has no duty to negotiate or arbitrate under Section 251(c) unless the rural exemption has been lifted, it had no duty to enter an interconnection agreement under Section 251(a) and (b).

affirming the Texas Commission)[19] and *North Dakota*[20] *Orders*, *supra*, are not persuasive and do not compel a conclusion different than what the Commission has reached in this arbitration. Nor are the circumstances that resulted in the *Vermont Order* materially different than those in New Hampshire.[21] Among other things, the Commission in this matter and in other instances has found that a rural ILEC, such as Union, "has a duty to provide the services required by sections 251(a) and (b)," holding, moreover, that "Union and IDT's dispute over an ICA based on sections 251(a) and (b) is subject to this Commission's arbitration pursuant to section 252(b)." Hearing Examiner's Report at 3 adopted by Secretarial Letter of June 1, 2009. Furthermore,

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[19] The Maine Commission (Order at 14) recognized that a rural "ILEC is not exempt from the obligations set forth in §251(a) and §251(b)," but felt unable to fashion a remedy, i.e., without authority to enforce by way of arbitration the requirements of Section 251(a) and (b). However, on its own motion, the Maine Commission then treated the requesting carrier's request for arbitration as a bona request to terminate the rural exemption under Section 251(f) and to require interconnection under Section 251(c). A subsequent proceeding is now underway in Maine to consider that request. *See* Union's Brief at 4, n.6.

[20] The North Dakota Commission, after allowing arbitration of the dispute, found that since the requesting party intended to offer local exchange service, the provisions of Section 251(c) necessarily applied, in which case the rural carrier exemption must first be lifted.

[21] Union argues that in Vermont the rural ILEC, unlike Union, petitioned for arbitration along with the requesting carrier, thus distinguishing the *Vermont Order*. But that assertion is a distinction without a difference. More to the point, VTel like Union participated in the arbitration and took positions in opposition to the Board's assertion of jurisdiction – similar to those articulated by Union in this case. By way of illustration, much as Union asserts in New Hampshire, the rural ILEC in the *Vermont Order* (at 15) argued:

> On the other hand, VTel contends that Comcast Phone does not offer its services on a common carrier basis and, thus, is not a telecommunications carrier under the Act…. Furthermore, even if Comcast Phone is a telecommunications carrier under the Act, VTel asserts that its rural telephone company exemption under Section 251(f) of the Act would preclude arbitration by the Board. VTel Brief at 29-33.

Union's contention – that if a requesting carrier seeks interconnection under Section 251(a) and (b) for the purpose of offering local exchange service, the provisions of Section 251(c) necessarily apply – is not convincing.[22]

Union's argument, in part, appears to stem from the belief that local exchange and exchange access traffic can only be exchanged under Section 251(c). But Section 251(c)(2) does not simply control a carrier's rights and obligations regarding "the transmission and routing of telephone exchange service and exchange access." Read in context and in its entirety, Section 251(c)(2) requires that non-exempt ILECs provide certain features or components in addition to the less-burdensome obligations contained in Section 251(a) and (b). Specifically, Section 251(c)(2) provides:

> (c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS
> In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
>
> (2) INTERCONNECTION - The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--
> (A) for the transmission and routing of telephone exchange service and exchange access;
> (B) at any technically feasible point within the carrier's network;
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

The subsections of Section 251(c)(2) are each connected by semicolons, not

[22] Nor do the cases Union cites appear to reference a state statute with the forceful competition-enabling provisions like that of RSA 374:22-g.

periods. A semicolon is a form of punctuation generally used to connect clauses that suggest a closer relationship between the clauses than does a period.[23] The plain language of the provision connects each of the conditional subsections to form an interrelated and coherent whole. As IDT argues in its Brief: "[T]he simple transmission and routing of telephone exchange service and exchange access does *not* necessarily make the transmission fall under Section 251(c)(2)(A). Section 251(c)(2)(A) contemplates the transmission and routing of telephone exchange service and exchange access as being subject to specific requirements pertaining to technical feasibility, quality and rate, term and condition[s of] non-discrimination" (emphasis in original). I find the logic of IDT's position reasonable and persuasive.[24]

Moreover, IDT's representations (Brief at 14) are relevant to the type of interconnection it seeks:

> IDT has not asserted that it has a right to the condition-laden interconnection set forth under Section 251(c)(2). IDT has not asserted the right to interconnection at any technically feasible point within Union's network nor has IDT asserted the right that the interconnection be at least equal in quality to that provided by Union to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection nor has IDT asserted the right to rates, terms, and

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[23] Webster's New World College Dictionary defines a semicolon as: "a mark of punctuation (;) indicating a degree of separation greater than that marked by the comma and less than that marked by the period: used chiefly to separate units that contain elements separated by commas, *and to separate closely related coordinate clauses*." Emphasis added.

[24] *See also* Telephone Number Portability, *First Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd. 7236, ¶ 121 (1997) (where the FCC, highlighting the interrelatedness of the additional Section 251(c) conditions in the context of number portability stated: "[T]o provide number portability, carriers can interconnect either directly or indirectly as required under Section 251(a)(1). Section 251(c), in contrast, imposes an additional requirement on incumbent LECs to provide "equal" interconnection at 'any technically feasible point within the carrier's network,' which a carrier does not need to provide number portability" [citations omitted].

> conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and Section 252 [footnote omitted].[25] When you examine the type of interconnection requested by IDT under Section 251(a) with the interconnection mandated under Section 251(c)(2), it becomes even more clear that IDT's request to route telephone exchange service and exchange access does not fall under Section 251(c)(2).

Nor are the types of interconnection provisions that IDT and Union negotiated in this arbitration materially different than those addressed in the *Vermont Order*, in which the Vermont Board ordered an interconnection agreement under Section 251(a) and (b). *See* IDT Brief, Exhibit A. Significantly, as in the proposed IDT/Union agreement, the Vermont interconnection agreement includes a reciprocal compensation appendix that pertains to the "TRANSMISSION AND ROUTING OF TELEPHONE EXCHANGE SERVICE TRAFFIC" (Section 2) and "LOCAL TRAFFIC COMPENSATION" (Section 4), i.e., traffic between two carriers in which each receives compensation from the other carrier "for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier" (47 C.F.R. Section 51.701(e)) – *the exchange of local traffic*.

As here, the requesting carrier only sought interconnection in Vermont under Sections 251(a) and (b), not Section 251(c), and the *Vermont Order* only required interconnection under (a) and (b). The result is not surprising because Section 251(b)(5) specifically imposes on all incumbents, rural or otherwise, the "duty to establish reciprocal compensation arrangements for the transport and termination of

[25] *See also* IDT Brief at 32 ("IDT does not take the position that it has the right to rates that are just, reasonable and non-discriminatory, as such a right falls under Section 251(c)(2)(d), and IDT does not assert the right to Section 251 rights.). IDT's representation in regard to non-discrimination, referenced above and elsewhere in its Brief, is relevant to an open issue discussed later in this report.

telecommunications." The FCC rules, in turn, apply the reciprocation compensation provisions of the Act to the exchange of local traffic. *See* 47 C.F.R. Section 51.701(a) and (b).[26]

In addition, the Commission's 400 rules set forth a series of duties on all ILECs, whether or not rural. *See, generally*, N.H. Code of Admin. Rules Puc 418 (Intercarrier Obligations), Puc 418.01 (Intercompany Cooperation); Puc 418.02 (Switching and Signaling Obligations); Puc 418.04 (Rights of Way); Puc 418.05 (Exchange of Billing Name and Address Information); Puc 418.06 (Carrier to Carrier Migrations); Puc 418.08 (Accessing, Maintaining and Updating of Databases); Puc 418.09 (Directory Obligations); Puc 419.01 (Resale Requirements - much of which applies to non-exempt ILECs); and Puc 421.03 (Network Changes). A rural ILEC's duty to comport with these requirements exists notwithstanding the rural exemption afforded by Section 251(f). As the Commission further explained in the *IDT Authorization Order* (at 8):

> Consistent with the enabling legislation, RSA 374:22-g, as well as federal law, we have developed an administratively efficient process for CLEC registration to compete in ILEC service territories. We find Union's arguments concerning the process of registering IDT in its service territory unpersuasive, and we find IDT's application to comply with the requirements of Puc 449.07(d). We further conclude that IDT's expansion of service into the Union service territory will be for the public

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[26] Subpart H_Reciprocal Compensation for Transport and Termination of Telecommunications Traffic:
Sec. 51.701 Scope of transport and termination pricing rules.
(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.
(b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:
(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access [i.e., relating to the origination or termination of telephone toll services], information access, or exchange services for such access….

good.[27]

Finally, although requested by the Arbitrator,[28] Union did not identify with particularity the sections of the proposed interconnection agreement that it claimed fell squarely within the scope of section 251(c), other than to continue to argue that "IDT has no basis to demand an arbitration for an interconnection agreement for the exchange of local access by virtue of Section 251(a) and that as a result, IDT can only demand such interconnection (if at all) under Section 251(c) of the Act." Union Brief at 6. While the Commission's rules generally require a moving party to "bear the burden of proving the truth of any factual proposition by a preponderance of the evidence," N.H. Code of Admin. Rules Puc 203.25, the burden of production reasonably shifts where, as here, the moving party meets the initial burden of establishing its prima facie case.[29] This result seems especially reasonable in the instant case, since Union "presented an agreement to IDT and it is this agreement that serves as the template for the agreement before the Commission." IDT Brief at 4-5. *See also*, *Comcast Authorization Order* at

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[27] The Commission concluded similarly regarding IDT's joint partner, MetroCast. *MetroCast Order* at 10 ("We find Union's arguments concerning the process of registering MetroCast in its service territory unpersuasive and we conclude that MetroCast's expansion of service into the Union service territory will be for the public good.").

[28] *See supra* at page 15 ("Conversely, for Union: What sections of the proposed agreement do you contend fall under Section 251(c)?").

[29] *See, by way of background, In re Rockingham County Sheriff's Dept.,* 144 N.H. 194, 197 (1999); *Mahoney v. Town of Canterbury,* 150 N.H. 148, 151 (2003)); *Appeal of Cote,* 139 *NH.* 575, 578 (1995) (holding that once the moving party satisfies its burden of proving its prima facie case, the burden of production shifts to rebut the claims made); *Wilton Telephone Company and Hollis Telephone Company, Investigation of Companies*, DT 00-294/295, Prehearing Conference Order No. 23,744 at 22-25 (July 26, 2001).

18.

Union thus has responsibility to provide interconnection under Sections 251(a) and (b) of the Act – which is what IDT represents it is seeking – including the exchange of local traffic. As discussed, this duty, which is not affected by the rural exemption, includes the responsibility for providing interconnection, resale, number portability, dialing parity, access to rights of way and reciprocal compensation. *See* Hearing Examiner's Report at 2 adopted by Secretarial Letter of June 1, 2009; *see also Comcast Authorization Order* at 16. Under the Act, the triggering event for Commission jurisdiction is "a request to negotiate" an interconnection agreement, not actual negotiations. *See* 47 U.S.C. 252(b)(1)(A).[30] The statutory language further supports the position that, contrary to the findings of the decisions cited by Union, the right to conduct an arbitration for the purpose of enforcing obligations under Sections 251(a) and (b) is not barred by Section 251(f), as the Vermont Board so held ("Section 251(f)(1) does not exempt VTel from its duties under Sections 251(a) and (b)"). *Vermont Order* at 21. This result is reasonable since, in the absence of an ability to seek such relief, a carrier such as IDT may be unable to obtain interconnection under Sections 251(a) and (b) for the purpose of providing local service, notwithstanding its right to such interconnection.

In short, I conclude that IDT is entitled to an interconnection agreement with Union for purposes of Sections 251(a) and (b) of the Telecom Act and that the terms and

[30] Even granting Union's assertion that it has no duty to negotiate the terms of interconnection due to the rural exemption, this would not strip the Commission of its jurisdiction to arbitrate an interconnection agreement under Section 252(b), which is what the Commission has already found.

conditions of the agreement that the parties have negotiated fall within the scope of Sections 251(a) and (b).

C. ISSUE 3: PRICING DISPUTES

1. IDT'S POSITION

In general,[31] IDT claims that Union has based its prices on certain National Exchange Carrier Association ("NECA") tariff rates as well as "cherry-picked" rates from IDT interconnection agreements. The approach should be rejected, IDT posits, because Union has not presented any cost basis for its proposed rates. Union Brief at 30-31. Most notably, rates in an interconnection agreement are part of the give and take of the negotiation process, IDT states, while NECA rates "are the product of no negotiation whatsoever" and have "long been the province of a 'charge as much as possible' approach." IDT Brief at 32. Moreover, IDT claims, paying NECA rates in the tariff "contemplates access to all the services available under the tariff, which is not the present case." IDT Brief at 32.

Likewise, to the extent Union relies on rates to which IDT has previously agreed with other carriers, IDT argues, this reliance should be rejected. Rates from other IDT agreements "exist within the context of the agreements in which they are within. For example, if Union proposes a rate based on an IDT agreement whereunder IDT receives indirect interconnection, it is unreasonable to take the position that the rate for a particular service should be included because IDT is receiving a service of critical importance (indirect interconnection) in that agreement which it is not receiving from

[31] The specifics of the parties' contentions regarding particular rate elements are contained in the following sections of the Arbitrator's pricing recommendations.

Union." *Id.* Negotiated rates, IDT continues, are "part of a *quid pro quo* and Union should not be allowed to take advantage of the concessions IDT has made in other agreements when it refuses to provide the benefits we received in those agreements in return." *Id.*

Union's rates, if implemented, could have a chilling effect on the introduction of competition in Union's incumbent territory, IDT further asserts. "When costs simply to switch a customer from one carrier to another are as high as those proposed by Union, it becomes prohibitively difficult to acquire customers because the time to recover the costs associated with the mechanics of the customer transfer – let alone the carrier-specific costs for advertising, etc. are so great." IDT Brief at 33.

Finally, IDT argues that it has proposed rates that better reflect the "real world" and reciprocally apply to both parties. IDT's represents that its proposed charges are based on rates "taken from IDT agreements or comparable documents and are consistent with the rates IDT pays (and receives) from other carriers." IDT Brief at 33-34. And, IDT concludes, its proposed charges, to the degree they are from IDT agreements, are "not necessarily from agreements that cover services under Section 251(c)." IDT Brief at 34.

2. UNION'S POSITION

Union takes a contrary view of the world. It points out that there is no specific pricing standard designated under Sections 251(a) and (b). Union Brief at 9. Since Union will be required to offer the same rates to other carriers, Union asserts that "the rates proposed by the incumbent carrier should be weighed more heavily." *Id.* Union proposes charges "that are the same or very similar rates as offered under its tariffs to

other carriers. These rates are just and reasonable and non-discriminatory. The rates proposed by IDT have no relation to the rates other Union customers pay so by definition would be discriminatory." *Id.*

Union's NECA tariff rates, Union continues, "have been fully vetted and are subject to oversight by the FCC and the many carriers purchase services from the tariff across the nation. For certain services, NECA classifies carriers (rate banding), to designate prices, according to the carrier's operations and costs. Therefore, Union's NECA prices take into consideration Union's relative size and operations." Union Brief at 10. These rates, Union further asserts, are current and cost based. *Id.*

Finally, Union claims that IDT's reliance on a "blend of rates" with other incumbents is unsupported and, even if supported, misplaced. *Id.* This is so because:

> IDT should not expect Union's rates to be comparable to those of the RBOCs and large incumbents like Embarq and FairPoint. Those carriers have economies of scale and mechanized structures in place devoted to interconnection and the responsibilities contained in the agreements. The interconnection process and services required is completely new to Union and Union will have to complete many of its responsibilities manually. [Union Brief at 10.]

Even comparisons to mid-sized incumbents, Union observes, is inappropriate because they also may have mechanized systems in place and are much larger than Union. *Id.*

3. ARBITRATOR'S RECOMMENDATION

a. General Observations

As discussed above, Union is a rural carrier and, under Section 251(f) of the Act, is presently exempt from the interconnection obligations set forth in Section 251(c). This would extend to any of the pricing provisions specified in that section and in most of Section 252(d) of the Act (although the pricing provisions of subsection 252(d)(2) for termination of traffic do apply to Union). IDT has not requested that the Commission

remove Union's rural exemption, rather petitioning for arbitration of this agreement pursuant to Sections 251(a) and (b). Accordingly, the cost-based standards of Sections 252(d)(1) and (3) do not apply.

At the same time, a price advocated by either party, without presentation of support in the form of a market-based price or an alternative cost basis (i.e., other than the Section 252(d)) standard), may not constitute an appropriate basis for establishing a rate. Some of the parties' pricing proposals, for example, raise concerns over the dated nature of the information or its specific relevance to the rate element at issue. I am, in some instances, left with either recommending rates from other agreements, based on some indication of a prevailing rate agreed to by negotiating parties, recommending NECA access rates, or some combination of the above. Moreover, the relationship between NECA[32] and other proposed rates – and the cost standards of Section 252(d)(1), from which Union is exempt – is not entirely clear.

The parties only first presented specific pricing proposals on brief, having waived the filing of prefiled direct and reply testimony or the holding of an evidentiary hearing before the Arbitrator. Throughout this report, and the pricing section in particular, I have attempted to provide conclusions that are as clear and direct as possible, within the

[32] *See* NECA Access Service Tariff F.C.C. No. 5. NECA administers the FCC's access charge plan. (Access charges are the fees long distance companies pay to access the local phone network to complete calls). About 1,150 local telephone companies participate in NECA's access charge revenue pools. NECA prepares a tariff that includes averaged rates - based on the participating companies' costs of providing interstate access service and forecasted demand quantities. NECA members participate in revenue pooling as either cost companies or average schedule companies. *See generally*, https://www.neca.org/portal/server.pt/gateway/PTARGS_0_0_307_206_0_43/https%3B/prodnet.www.neca.org/source/NECA_Home.asp.

limitations of the record. I have attempted to do so to help resolve the various issues and minimize the room for further disputes in finalizing the interconnection agreement. In some instances that follow, I have recommended specific rates or proposals offered by one party or another; in other instances, I have not. That said, I have generally found inadequate support in the record to be fully confident that either of the respective pricing proposals, in their entirety, are completely correct or appropriate to the circumstance of this arbitration.

Consequently, without sufficient evidence to show otherwise, I am concerned that the IDT proposals sometimes appear too low, given Union's continuing rights under the rural exemption, while Union's proposals sometimes appear too high. I have, therefore, in some cases concluded that taking a simple average of the two proposals is an appropriate way to balance the interests, given the state of the record. In the face of a limited record for proposed rates that may not entirely or even largely be based on relevant and timely costs, this approach seems reasonable. Needless to say, if the parties desire to negotiate different or revised charges when the term of the present agreement expires, they are free to do so. Similarly, if IDT wishes to establish pricing that applies the standards of Section 251(c), IDT can petition the Commission to remove the rural exemption and provide the necessary support.

B. Specific Pricing Issues and Recommendations[33]

1. Local Service Order (LSR) and Customer Service Record (CSR)

Union represents that the LSR process "will be a manual process for the

[33] The parties' enumeration of the disputed pricing issues is largely, but not entirely, the same, discussed *infra*.

foreseeable future requiring the updating and review of records to confirm the customer information, change existing records, update E911 and other databases, etc." Union Brief at 12. Union proposes as a surrogate to use the NECA Service Date Change Charge, which it states "seemed like a reasonable rate" (Union Brief at 12), of $60.00 per LSR.

Union should be reasonably compensated for its efforts, while at the same time provided an incentive to reduce its reliance on manual processes to the extent practicable. A $60.00 rate, when added to Union's proposed CSR rate of $30.00 (which in turn is based on its Supplemental Order Rate), appears to be very high and could well chill competitive migration, contrary to the Commission's pro-competitive policies and RSA 374:22-g. This conclusion is especially appropriate, given the Commission's prohibition on ILECs' charging customers "exit fees" when switching to competitors.[34] While Union does incur an expense in providing an LSR for which it should reasonably be compensated, and the rate element is not an "exit fee" per se, establishing these prices as high as Union proposes may have the same effect, representing a barrier to entry. When considering that FairPoint charges IDT $0.00 for the same service (IDT Brief at 35), permitting Union to charge approximately 50% above what IDT describes as a "more manual" rate of $14.00 (and which it reluctantly proposes as an alternative), seems reasonable. I therefore recommend the LSR rate be set at $20.00.[35]

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[34] *See* Puc 412.14 Exit Fees ("(a) ILECs shall not charge retail customers any exit fees.
(b) Exit fees shall not include: (1) Contractual obligations; or
(2) Termination fees for early termination of services purchased under a term agreement.")

[35] I would note that the recommended LSR rate of $20.00 is less than the $30.00 charge the Vermont Board established in the VTel/Comcast *Vermont Order*. But, as IDT notes,

With respect to the CSR charge, Union proposes a $30.00 rate – 50% of its proposed $60.00 LSR rate – which it stated was lower than its $50.94 NECA Supplemental Order rate, while IDT argues for a 50% discount off of its proposed, lower LSR charge. No meaningful support was provided by either party in defense of its proposal. Taking the record as presented, I recommend that a 50% discount off of the recommended $20.00 LSR rate apply, namely, $10.00 per CSR.

2. Supplemental Order and Cancelled Order

Union proposes $30 Supplemental Order and Cancelled Order rates, based, again, on 50% of the LSR charge. IDT agrees that the rate should be set at 50% of the LSR charge, but argues for a far lower rate. The parties also disagree on when a Supplemental Order charge should apply. IDT argues that the rate should apply only when an original service order has received its firm order commitment, and not simply when supplemental orders are placed.

Apart from the logistical issues Union reasonably raises (Union Brief at 11), it appears undisputed that Union may incur expense each time a Supplemental Order is sent, regardless of whether a firm order commitment has been received. Nor do I find IDT's concern persuasive that Union could needlessly reject orders to permit it to "charge additional sup fees" (IDT Brief at 38), thus acting in bad faith. In the event of bad faith conduct, if any, the proper recourse is for IDT to invoke the dispute resolution mechanism in the agreement and, if necessary, seek Commission resolution – not to prematurely assume improper conduct on the part of Union, especially since Union has

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the *Vermont Order* permits indirect interconnection, something that may, under certain circumstances, be less costly for a CLEC and can offset a higher LSR rate. *See* IDT Brief at 35.

been put on notice of IDT's concern with such possibility. I therefore find that when a cost-causing Supplemental Order is placed, Union should reasonably be compensated.

Regarding the rate for a Supplemental Order, both parties agree that it should be set at 50% of the initial LSR. In this instance, I defer to the parties and recommend the charge be set at 50% of the recommended $20.00 LSR charge, i.e., $10.00. This may also assuage, to some extent, IDT's concern that Union may unnecessarily reject orders, since the rate is lower than Union contends is reasonable. To the extent the Cancelled Order rate is at issue (it is, for example, referenced in Union's Brief but not IDT's), no information was presented to suggest that the rate should not similarly be set at 50% of the LSR charge, as Union proposes. I therefore recommend the rate be set at $10 per Cancelled Order.

3. Expedited Charge

Both parties agree that a premium should apply when an expedited order is placed, since these types of orders typically require additional resources and added inconvenience. They differ, however, on the level of the premium. Union proposes a $40.00 increment above its LSR rate (approximately 167% of its LSR rate or $100 per order), while IDT proposes a rate of 167% of its initial order rate (or $11.67). I agree that a premium is appropriate and defer to the parties as to the recommended 67% premium, for an Expedited Charge of $33.40 (167% x $20.00).

4. Hourly Rates

Union proposes rates that "are almost identical to its NECA rates (Union Brief at 13), which hourly rates are $32.50 (basic), $47.50 (overtime on a scheduled work day) and $62.50 (premium outside of scheduled work day). IDT's proposal is $21.93, $32.89

and 43.86, respectively. IDT asserts that "Union was not willing to counter-offer (i.e. adjust downward) their initial labor pricing after IDT had modified it's pricing and attempted to 'meet in the middle.'" IDT Brief at 40. No further elaboration was provided by the parties in support of their positions.

Under the circumstance, I recommend that the Commission adopt Union's proposal. While Union may not have counter-offered, as IDT claims, it is not clearly established in the record why a counter-offer in this instance was necessarily appropriate. Union's proposed NECA labor rates do not on their face appear to be unreasonable and provide a reasonable benchmark for establishing the labor rates that should apply here. Without a better understanding of the basis why IDT believes materially lower rates are appropriate, I am concerned that IDT's rates may be inappropriate, particularly in light of Union's rural exemption. I therefore recommend that the Commission require that the labor rates reflect the rates proposed by Union as listed above.

IDT also raises the issue of pre-approval of labor charges and requests that a statement ("only chargeable upon prior pre-approval by the charged Party") and asterisks be added next to each labor type. As IDT explains, "IDT's position is this is needed to remove the moral hazard for both Parties to invoice labor charges where the charged Party was unaware they were to be charged." IDT Brief at 40. Union doesn't identify the issue in its Brief.

To the extent that the IDT proposal is in dispute, I find IDT's suggestion reasonable, particularly in light of the proposed adoption of Union's higher labor rates.

5. **N-1 Routing Service**

IDT represents that Union proposes that N-1 Routing Service should be listed in the pricing section with the notation "TBD (per tariff)." IDT Brief at 40-41. Union's brief, by contrast, is silent on the issue. IDT further claims that it is Union's position that, "since both Parties commit to perform N-1 LNP dipping before send[ing] calls to the other, this line item on the Pricing list is moot. IDT's position is this should not be on the Pricing list at all and feels only items with actual pricing should be on this list." IDT Brief at 42. IDT's position seems reasonable, particularly given that the issue was not identified as in dispute by Union, and I recommend its adoption.

6. Direct Interconnection Facilities

The parties dispute both the structure and pricing of direct trunking facilities. Regarding rate structure, Union proposes to charge per direct trunk termination (the path between two points has two terminations, one at each end), that is, to apply the rate element twice per circuit. Charging per termination, Union argues, is consistent with the NECA tariff. Union Brief at 11-12. IDT proposes that the charge apply only once, i.e., "fixed" per circuit, citing FairPoint' NHPUC Tariff No. 85, Section 30. If the Commission adopts Union's structure (a charge per termination), IDT further argues, the rates should be adjusted by 50% to reflect the pricing equivalent to a "per circuit" calculation.

It appears that the crux of the structural argument is not so much whether to charge on a per-termination or per-circuit basis but rather whether the price should be higher (Union) or lower (IDT). Accordingly, in the absence of compelling reasons to the contrary, I recommend that Union be permitted to mirror the NECA "per termination"

rate structure to allow Union to be consistent with past practice and experience.

The more difficult question is the appropriate rate level. In support of a lower number, IDT cites to FairPoint's access tariff, NHPUC No. 85. Comparing Union's proposal (adjusted to reflect a "per circuit" rather than "per termination" basis) with FairPoint's rates, IDT argues that "Union's adjusted 'per circuit' rates, relative to Fairpoint's, are quite excessive at a premium of between 222% to 712%." IDT Brief at 42. A chart comparing the two adjusted numbers (IDT Brief at 42) is set forth below.

	Union Revised for "per circuit"		Verizon NH	
	Monthly Recurring	Non Recurring	Monthly Recurring	Non Recurring
Direct Interconnection Facilities				
1) Direct Trunk Transport Termination (per circuit / per month)				
a) DS1	$ 242.74	$ 660.00	$ 66.00	$ 125.00
b) DS3	$ 1,558.78	$ 890.00	$ 702.00	$ 125.00

Again, without a better understanding of the basis that underlies the establishment of the NECA (nationwide-averaged) and FairPoint (former RBOC) rates, I am concerned that each set of proposed rates may be inappropriate in this instance, particularly in light of Union's rural exemption. It may not be reasonable, for example, to expect Union's rates to be comparable to those of large incumbents like FairPoint, which arguably have a materially different cost structure. On the other hand, it is critical that the prices not be anti-competitive and a barrier to entry, discouraging the introduction of competition to customers in Union's service territory. Accordingly, I

recommend that the Commission adopt direct trunk transport termination rates at a premium to FairPoint's rates but lower than Union's proposed rates, adjusted to reflect a "per termination" (rather than "per circuit") rate structure and an arithmetic average between the NECA and FairPoint extremes. While the nonrecurring rate is higher than the adjusted "high premium" figure IDT indicated a reluctant willingness to accept (IDT Brief at 44), the recurring rate is not significantly different than IDT's "high premium" recurring rate.[36]

7. DS1 and DS3 Direct Trunk Transport Facility Rates

IDT's position is that, since the DS1 and DS3 transport facilities will be leased interconnection facilities by means of FairPoint, i.e., a circuit ordered by IDT from FairPoint to connect to a Union end office, the rate per mile charged by Union should be the same as the rate per mile charged by FairPoint. Stated otherwise, both FairPoint and Union will be charging IDT for their respective mileage portions of the same circuit. IDT Brief at 44. IDT thus proposes that the monthly recurring DS1 and DS3 rates should be the same as FairPoint's per mile rates shown below:

2) Direct Trunk Transport Facility (per mile / per month)		
a) DS1	$	21.25

2) Direct Trunk Transport Facility (per mile / per month)		
b) DS3	$	120.00

[36] Specifically, the recommended recurring and non-recurring charges are those that result by averaging (i) the FairPoint and NECA recurring rates and (ii) the FairPoint and NECA non-recurring rates (contained in the chart on the prior page of this report), each reduced by 50% to reflect a "per termination" rate structure. For example, the recurring rate for a DS1 facility would be the average of $66 and $242.74, divided by 2 for each termination, i.e., $77.19 for each end.

Union proposes the NECA DS1 rate of $23.38 and DS3 rate of $203.77 per mile/per month (Union Exhibit A.6), but does not otherwise provide supporting arguments (beyond what was discussed above regarding direct interconnection facilities generally) on the merits on these specific rate elements. IDT's logic is persuasive, and I find that its proposed direct trunk transport DS1 and DS3 facility rates are reasonable.

8. **Multiplexing per Arrangement DS3 to DS1**

A monthly rate of $708.99 for this rate element is both highlighted in Union's Exhibit A.7 and referenced in IDT's "Direct interconnect Facilities" chart on page 41 of its Brief. Neither party specifically discusses the rate element as being in dispute. In light of no alternative having been proposed by IDT, I find that the charge is acceptable and recommend its adoption by the Commission.

D. ISSUE 4: DISPUTES REGARDING "PREVIOUSLY CLOSED" ITEMS THAT IDT ARGUES UNION HAS SOUGHT TO RE-OPEN

THE POSITIONS OF THE PARTIES AND THE ARBITRATOR'S RECOMMENDATIONS

1. Network Interconnection Methods ("NIM") Section 1.3

During negotiations, Union provided IDT with a draft interconnection agreement. Section 1.3 of the NIM Appendix that the parties exchanged in May and June reflected the following:

> UNION shall provide Interconnection for CLEC's facilities and equipment for the transmission and routing of telephone exchange service and exchange access, at a level of quality equal to that which UNION provides itself, a subsidiary, an affiliate, or any other party to which UNION provides Interconnection and on rates, terms and conditions that are just, reasonable and non-discriminatory.

Union acknowledges that it agreed to the provision during negotiations in May

and June, *see* Union Brief at 17, but asserts that that "it subsequently raised an objection based upon the fact that IDT has continually stated that it is not seeking Section 251(c) rights and this language is taken directly from Section 251(c)." Union Brief at 17.

IDT argues that sometime after June 26, 2009 – the final date for advising the Arbitrator of open issues subject to arbitration – Union first objected to inclusion of the language. IDT Brief at 46.[37] Consequently, IDT claims, Union's attempt to re-open the item and strike it from the NIM is untimely and acting in bad faith, particularly since the language was initially proposed by Union in its draft and subsequently accepted by both parties. IDT Brief at 47. Alternatively, IDT states, if the Arbitrator or the Commission decides that Union can "re-open" the issue, IDT's position is the language should read:

> 1.3 UNION shall provide Interconnection for CLEC's facilities and equipment for the transmission and routing of telephone exchange service and exchange access, at a level of quality equal to that which UNION provides itself, a subsidiary, an affiliate, or any other party to which UNION provides Interconnection and on rates, terms and conditions that allow free and open competition consistent with NH RSA 374:22-g.

IDT is correct that the deadline for submitting open issues to the Arbitrator was June 26, 2009. At that time, neither party specifically identified this section as in dispute. However, Union also is correct that it had, throughout the arbitration, reserved its right to argue that it was not agreeing and would not agree to interconnection terms and conditions made available under Section 251(c). Moreover, the language at issue appears strikingly similar to language contained in Section 251(c)(2), which provides

[37] IDT further argues: "On July 1, 2009 (which was after the initial timeline for briefs), Union emailed IDT demanding this section be removed from the agreement. IDT refused to agree to this nor did IDT accept this as an item to, at this late date, add to the 'open items' list. This section, as an issue was *never* included in an issues list or email sent to the Arbitrator." *Id.* Emphasis in original.

that "incumbent local exchange carriers have "the duty to provide, for the *facilities and equipment* of any requesting telecommunications carrier, interconnection for the local exchange carrier's networks… (C) *that is at least equal in quality to that provided by the local exchange carrier to itself or any subsidiary, affiliate or any other party to which the carrier provides interconnection*…."[38] Equally important, in support of the proposition that IDT is not seeking Section 251(c) interconnection, IDT has represented unequivocally and more than once (Brief at 14) that it has not

> asserted that it has a right to the condition-laden interconnection set forth under Section 251(c)(2). IDT has not asserted the right to interconnection at any technically feasible point within Union's network *nor has IDT asserted the right that the interconnection be at least equal in quality to that provided by Union to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection nor has IDT asserted the right to rates, terms, and conditions that are just, reasonable, and nondiscriminatory*, in accordance with the terms and conditions of the agreement and the requirements of this section and Section 252 [footnote omitted].[39] When you examine the type of interconnection requested by IDT under Section 251(a) with the interconnection mandated under Section 251(c)(2), it becomes even more clear that IDT's request to route telephone exchange service and exchange access does not fall under Section 251(c)(2). [emphasis added].

The Arbitrator takes IDT at its word and thus recommends that the Commission strike the relevant Section 1.3 of the NIM and not adopt the largely similar, though not identical, IDT alternative. However, to provide useful guidance to the parties consistent with the Commission's rules, I recommend that the Commission adopt a new Section 1.3 that reads:

> Union shall cooperate with CLEC to ensure a ubiquitous and seamless

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[38] 47 U.S.C. § 251(c)(2) (*emphasis added*).

[39] *See also* IDT Brief at 32 ("IDT does not take the position that it has the right to rates that are just, reasonable and non-discriminatory, as such a right falls under Section 251(c)(2)(d), and IDT does not assert the right to Section 251 rights.").

telecommunications network in New Hampshire. A "seamless telecommunications network" means one in which customers do not perceive any transition from one carrier to the next.

The recommended language is consistent with the provisions of N.H. Code of Admin. Rules Puc 418.01.

2. Reciprocal Compensation ("RC") Appendix Section 2.1

IDT represents that on May 22, 2009, Union provided to IDT the first draft of the RC Appendix. During the negations between June 18 and June 23, 2009, IDT further argues, both parties agreed to the following sections:

2.1 The traffic exchanged between CLEC and UNION will be classified as Local Traffic, intraLATA Toll Traffic, or interLATA Toll Traffic.

2.1.1 "Local Traffic," is traffic originated in an exchange and terminated within the same exchange or other non-optional extended local calling area associated with the originating exchange as defined by UNION's applicable local exchange tariff. Local Traffic does not include ISP-Bound Traffic where the call is not terminating to another non-dialup end user. Local Traffic is determined to be local under this definition regardless of protocol or transmission method.

2.1.2 "ISP Bound Traffic" means traffic that originates from or is directed, either directly or indirectly, to an information or internet service provider (ISP) who is physically located in an exchange within the local calling area of the originating end user. Traffic originated from, directed to an ISP physically located outside the originating End User's local calling area will be considered toll traffic and subject to access charges. ISP Bound Traffic does not include traffic that terminates to a non-dialup end-user.

According to IDT, this section "was heavily negotiated, with IDT providing concessions in other areas of the Agreement to attain joint agreement between the Parties on the language shown above" (IDT Brief at 48). Because Union did not claim that the issue was an "open item" until July 1 – after the June 26 deadline for submitting disputed issues to the Arbitrator – IDT asserts that the language should not now be subject to revision as Union seeks. IDT Brief at 48-49. "Including this item at this 'late

stage' in the negotiations/arbitration is, in IDT's view, bargaining in bad faith by Union, something both Parties agreed not to do…." IDT Brief at 48.

Union, in turn, contends that "both parties agree to the principle that traffic should be rated according to the end users' physical locations and not the protocol used." Union Brief at 14. To clarify this point, Union has requested the inclusion of two definitions in the RC Appendix directed at Voice Over Internet Protocol and IP-Enabled Traffic. Union further contends that it "wants to avoid any conflict in interpretation by clearly identifying" VoIP traffic as traffic that is "exchanged and subject to the terms of the agreement," concerned that IDT may avoid "enforcement." Union Brief at 15.

Union has raised its request to add clarifying language in an untimely manner, the period for identifying disputed issues having passed when first raised by Union. Equally important, there does not appear to be any critical need to add the language that Union requests, as the terms of RC Sections 2.1.1 and 2.1.2 already expressly provide, among other things, that "Local Traffic is determined to be local under this definition regardless of protocol or transmission method." IDT Brief at 47. Finally, while clarifying language is not necessary, I agree with Union's general observation that "all traffic exchanged with Union is subject to the terms of the agreement including the terms that require the jurisdiction of the traffic to be based on the physical location of the customer." Union Brief at 15. Under the circumstances, and in light of my understanding of the terms of the relevant RC provisions, no revisions to the negotiated language of the RC Appendix are necessary or appropriate.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 27th day of July 2009, a copy of the foregoing was forwarded by electronic mail to the service list in this proceeding.