BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of **Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for A Successor Agreement to the Missouri 271 Agreement ("M2A")**	Case No. TO-2005-0336

POST-HEARING BRIEF OF CHARTER FIBERLINK-MISSOURI, LLC

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EXECUTIVE SUMMARY

This document contains Charter Fiberlink's legal argument and record support for each of the currently unresolved issues between SBC and Charter in this proceeding. In addition, Charter provides herein a list of resolved issues between the Parties and agrees to supplement that list in the event that further issues between the Parties are resolved.

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I. INTRODUCTION

A. Charter Fiberlink's Operations in Missouri

Charter Fiberlink ("Charter") operates as a facilities-based telephone service provider in the State of Missouri. Utilizing the existing network facilities of its cable company affiliate, Charter is in a unique position vis-à-vis other competitive carriers in Wisconsin. Notably, Charter's reliance on and use of the existing local distribution network of its cable company affiliate means that Charter does not need to lease or purchase unbundled network elements (switching, loops, transport, etc.) from SBC. For this reason Charter is in the position of a co-carrier, with its own peer network, and does not require of SBC anything more than efficient and fair traffic exchange under reasonable terms and conditions.

Indeed, operating under the existing agreement between Charter and SBC (the expiring M2A agreement) Charter provides telephone service to Missouri's residential subscribers in direct competition with SBC and other incumbent carriers. Although Charter's operations in Missouri are still relatively new, Charter has already developed a subscriber base of approximately forty-five thousand (45,000) primarily residential customers. Charter is working to expand its subscriber base by competing with SBC on the basis of price, features and service.

B. Disputed and Resolved Issues Between Charter and SBC

Given Charter's unique status as a facilities-based competitive LEC in Missouri the disputed issues between SBC and Charter are in many respects quite different from those between SBC and other CLECs in Missouri. The most significant issues in dispute relate to the means by which Charter and SBC will interconnection their respective

networks and exchange traffic over such networks. In addition, the Parties dispute a number of general terms and conditions, which can broadly be categorized as "business issue" disputes (insurance, indemnification, assurance of payment, etc.). These are not as tightly bound to Charter's particular network architecture but nevertheless reflect Charter's perspective as an independent network rather than a purchaser of SBC services (either literally, for resale, or figuratively, via UNEs).

Fortunately, since this case began SBC and Charter have continued to negotiate, and resolve, a number of disputed issues. Specifically, the Parties have resolved the following disputed issues:

1. White Pages Appendix - All disputed issues concerning the White Pages Appendix.

2. 911 Appendix – Disputed issues 2(a) and 2(b).

3. General Terms and Conditions – Disputed GTC issues 1, 2, 3, 4, 5, 6, 7, 9, 10, 12,15, 16, 17, 19, 20, 23, 25, 31, 35, 37, 39, 43, 44, 45, 46.

4. Network Interconnection Methods Appendix - None.

5. Interconnection Trunking Requirements Appendix - Disputed issue 5(b) and 6.

C. Organization of Brief

This Brief is organized by both the major issue area and according to the various Final Joint DPLs filed by the Parties on May 20. Although the issues do not track the issues listed in the DPL precisely, they are largely presented in the order listed in each of the five DPLs that have disputed issues. Generally, the five DPLs are presented in this brief, in the following order:

1) Network Interconnection Methods Appendix/DPL
2) Interconnection Trunking Requirements Appendix/DPL
3) 911 Appendix/DPL
4) Intercarrier Compensation Appendix/DPL
5) General Terms and Conditions Appendix/DPL

In addition, attached to the brief is an appendix that identifies each DPL issue, and the Section and page of this brief that the disputed issues are addressed. Finally, with respect to each disputed issue the brief presents arguments which include the following elements: a statement of the issue; Charter's argument in support of its position; and Charter's recommendations to resolve the dispute.

II. NETWORK INTERCONNECTION METHODS ISSUES

A. Where Can Charter Interconnect with SBC (NIM Issues 1(a), 4(b))

NIM Issue 1(a): Should SBC be able to limit the places within its network at which point interconnection can occur *solely* to SBC's tandem and/or end office switches?

NIM Issue 4(b): Should Charter be required to interconnect with SBC within SBC's network?

This issue raises the question of whether SBC should be allowed to limit the points at which Charter can interconnect with SBC. The Parties agree that interconnection must occur "within" SBC's network. *See* 47 U.S.C. § 252(c)(2). The statute requires that SBC make interconnection available "at any technically feasible point" on its network. The FCC's rules make clear that this is not a restrictive criterion. 47 C.F.R. § 51.305(a)(2) states (emphasis added) that the ILEC must permit interconnection:

> (2) At any technically feasible point within the incumbent LEC's network ***including, at a minimum:*** (i) The line-side of a local switch; (ii) The trunk-side of a local switch; (iii) The trunk interconnection points for a tandem switch; (iv) Central office cross-connect points; (v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and (vi) The points of access to unbundled network elements as described in § 51.319.

SBC wants to write the highlighted language out of the rule, and to say that interconnection shall occur either at an end office (addressed by items (i) and (ii) in the

FCC's rule) or at a tandem (addressed by item (iii) in the FCC's rule). *See* Charter-SBC NIM DPL pp. 1-2 (SBC language stating that technically feasible points of interconnection "***are***" SBC's end office and/or tandem switches).

Charter, by contrast, proposes language that is consistent with the FCC's rule, stating that technically feasible points of interconnection "include" SBC's end office and/or tandem switches. *See* Charter-SBC NIM DPL pp. 1-2 (Charter language stating that technically feasible points of interconnection "include" SBC's end office and/or tandem switches). In practical terms, Charter proposes this language because it intends to interconnect with SBC under the new agreement as it does today, via a fiber meet point (or mid-span meet) interconnection arrangement. This form of interconnection is not novel to SBC, and in fact is the method of interconnection currently used between Charter and SBC in Missouri right now. *See* Tr. at 462, lines 12-25.

In legal terms, SBC's proposed language is simply indefensible. The statute itself requires interconnection "at any technically feasible point." The FCC's rule restates that requirement and then goes on state that technically feasible points "include[e], at a minimum," not only the end offices and tandems SBC proposes but other locations as well. It would constitute plain legal error to adopt SBC's limiting language in the face of this statutory and regulatory language.

It is no answer to this unambiguous language to complain (as SBC might) that allowing interconnection "at any technically feasible point" without specific limitation might lead to disputes about where interconnection can occur. The FCC and its rules specifically ***expect*** ILECs like SBC to resist interconnection, even at technically feasible points, and therefore provide standards for decision when the inevitable disputes arise.

47 C.F.R. § 51.305(d) expressly calls for "ratcheting up" the number of technically feasible points of interconnection. If interconnection has worked at a similar point in a network before (not even the network of the same ILEC), then interconnection at that point "or substantially similar" points is presumed to be technically feasible. Moreover, in a plain recognition that disputes on this point are inevitable, the FCC provided that "An incumbent LEC that denies a request for interconnection at a particular point must ***prove to the state commission*** that interconnection at that point is not technically feasible." 47 C.F.R. § 51.305(e) (emphasis added). The FCC not only expected ILECs to refuse to interconnect at technically feasible points, the FCC also expected CLECs to have to complaint about those ILECs to state commissions, and provided the rules for deciding those disputes.

The way for SBC to avoid disputes over interconnection is to, in fact, allow interconnection at any technically feasible point — not to limit interconnection to only two such points. There is, simply, no legal basis for SBC's position on this issue, and the Arbitrator should reject it.

B. Financial Responsibility for Facilities on Each Party's Side of the POI (NIM Issues 1(b), 2 and ITR Issues 2(b), 5(a))

NIM Issue 1(b): Should each party be financially responsible for facilities on its side of the point of interconnection ("POI")?

NIM Issue 2: Should the Network Interconnection Methods ("NIM") Appendix contain language which makes clear that the only compensation obligations arising out of the Parties' physical interconnection are established in the Reciprocal Compensation Appendix?

ITR Issue 2(b): Should the Agreement include language that makes clear that Charter's use of the "ASR" form does not create any obligation to pay SBC for facilities on SBC's side of the POI?

ITR Issue 5(a): Should Charter be responsible for issuing ASRs (subject to the same limitation regarding obligations to pay for SBC facilities on SBC's side of the POI)?

These have to do with allocating the cost of facilities on either party's side of the POI. At the outset, the FCC has held that SBC cannot require Charter to pay for facilities on SBC's side of the POI. In the *Local Competition Order*, the FCC found that ILECs are required to permit "interconnection at meet points."[1] The FCC understood that establishing a meet point would require some build-out by the ILEC, but found that to be appropriate, even though the ILEC would pay for it:

> In a meet point arrangement, the "point" of interconnection … remains on "the local exchange carrier's network" (*e.g.*, main distribution frame, trunk-side of the switch), and the limited build-out of facilities from that point may then constitute an accommodation of interconnection. ***In a meet point arrangement each party pays its portion of the costs to build out the facilities to the meet point.*** We believe that, although the Commission has authority to require incumbent LECs to provide meet point arrangements upon request, such an arrangement only makes sense for interconnection pursuant to section 251(c)(2) but not for unbundled access under section 251(c)(3). New entrants will request interconnection pursuant to section 251(c)(2) for the purpose of exchanging traffic with incumbent LECs. In this situation, the incumbent and the new entrant are co-carriers and each gains value from the interconnection arrangement. Under these circumstances, ***it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement.***

Local Competition Order at ¶ 553 (emphasis added). So SBC may not charge Charter for the facilities involved in establishing a meet point. It does not appear that the parties

[1] *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 at ¶¶ 6, 553 ("*Local Competition Order*"). The FCC's rules (47 C.F.R. § 51.5) define a "meet point" as "a point of interconnection between two networks, designated by two telecommunications carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends;" those rules define a "meet point interconnection arrangement" as "an arrangement by which each telecommunications carrier builds and maintains its network to a meet point."

disagree about this specific issue, as far as it goes.[2] Unfortunately, the issue is not quite so clear.

At the hearing, there was a certain amount of discussion about the difference between physical facilities and the trunks that ride on those facilities. *See, e.g.,* Hamiter Cross at 456-69. So even though there can be no ***facilities*** charges for establishing a meet point (*Local Competition Order* at ¶ 553), it does not necessarily follow from that ruling that there can be no charges to Charter for the ***service*** involved in getting traffic from SBC's network to the POI, or vice versa. Those types of charges, however, are expressly forbidden by a ***different*** FCC rule. 47 C.F.R. § 51.703(b) succinctly states: "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network."[3] So SBC may not charge Charter anything at all for the activity involved in getting SBC-originated traffic to the POI, or vice versa.[4]

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[2] Both parties agree that each party is responsible for facilities on its own side of the POI. (*See* Charter-SBC NIM DPL pp. 1 and 2 (SBC and Charter both state that each party is responsible for facilities on its side of the POI)). Indeed, SBC states in the NIM DPL that "each party should be responsible for facilities on its side of the POI." (*Id*.) And, SBC notes that current FCC rules create a "clear implication [] that the parties are to bear the expenses for their own networks on their respective sides of the POI." *Id*. *See also* Tr. at 418 (Hamiter testifies that Charter should not be charged for establishing direct end office trunks to SBC switches).

[3] Many courts have upheld this rule. *See, e.g., TSR Wireless v. US West Communications*, Memorandum Opinion and Order, 15 FCC Rcd 11166 (2000); and *Southwestern Bell Telephone Co. v. PUC of Texas*, 348 F.3d 482 (5th Cir. 2003). *See also MCI Metro Access Transmission Servs. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872 (4th Cir. 2003); *Qwest Corporation, et al. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

[4] On its face this rule would seem to eliminate the ability of a LEC to assess access charges for toll calls that originate on the LEC's network. That does not happen, however, because "telecommunications traffic," as used in that rule, is defined to exclude traffic that constitutes "exchange access." 47 C.F.R. § 51.701(b)(1). The question of whether any particular originating call falls into the "exchange access" category depends on the definition of that term, and arises between Charter and SBC in connection with their one dispute regarding the Intercarrier Compensation appendix. *See infra.*

If there can be no charges for the facilities used to establish a POI, and no charges for originating traffic, the only remaining issue is terminating traffic, *i.e.*, carrying traffic "inbound" from the POI to the customer being called. The law, of course does allow charges for such inbound traffic; this is what "reciprocal compensation" relates to. Charter and SBC, however, have agreed to a bill-and-keep arrangement for the delivery of non-access traffic, and to pay terminating access charges if one sends the other an intraLATA toll call for termination.

The matter should be that simple: no charges for the facilities to establish the POI (per ¶ 553 of the *Local Competition Order*); no charges for delivery of "outbound" traffic to the POI (per 47 C.F.R. § 51.703(b)); and no charges for the delivery of "inbound" traffic to customers (per the parties' bill-and-keep agreement). The only potential problem — that is, the only potential end-run around these rules that Charter could see — relates to the establishment of trunk groups to route traffic to and from different SBC switches. The parties do not dispute that it makes sense to subdivide the traffic they will exchange into different trunk groups based on such factors as which specific SBC switch the traffic comes from or goes to. And Charter does not disagree that it will ***issue*** ASRs when additional trunks need to be established in order to properly route traffic between the parties. But, Charter wants language that makes clear that, while Charter will undertake the ***administrative responsibility*** of issuing ASRs, doing so will not result in "hidden charges," so to speak, as a result of the issuance of ASRs. *See* Charter-SBC DPL Issue 2, pp. 4-5.[5] This is where SBC gets squirrelly. Here is an exchange between

[5] This same concern is the basis for Charter's proposed language under ITR issue 2(b) and 5(a). In both instances, but specifically with respect to ITR Issue 2(b), Charter has proposed language that simply memorializes what the parties (with the possible exception of SBC Attorney Mr. Gryzmala; *see infra*) purported agree upon: that Charter's use of the "ASR" (access service

Charter's witness Mr. Cornelius and SBC's attorney that gets to the nub of the issue (Tr. at 681, lines 16-21, emphasis added):

> Q. But isn't it clearly understood in the industry that ***the submission of an ASR generally generates work for which SBC has applicable charges?***
>
> A. No. I disagree that it -- I disagree with the last part. If there are applicable charges, yes, but ***the ASR does not dictate what those charges are.***[6]

Statements of counsel are not evidence. Even so, the question from SBC's attorney shows why Charter wants the language it wants. Charter is concerned that SBC will want to argue later that since "everybody knows" that submitting an ASR "generates work for which SBC has applicable charges," SBC can send Charter a bill for establishing the trunks identified in the ASR. Since Appendix ITR (which stands for "Interconnection Trunking Requirements") calls for the use of the ASR form to set up trunks, Charter is concerned that — notwithstanding the FCC rules governing POIs and banning charges for originating traffic, and the bill-and-keep agreement for terminating traffic — SBC would argue that Charter has somehow "ordered" SBC trunking "services" for which SBC may properly charge Charter.[7]

Charter absolutely and unequivocally does ***not*** agree that SBC may charge Charter for trunking established under the parties interconnection agreement. Charter's language in both Appendix NIM (Network Interconnection Methods) and Appendix ITR, to which SBC objects, eliminates that possibility by making clear that the mere

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request) form does not create any payment obligations to SBC for facilities on SBC's side of the POI. (*See* Charter-SBC DPL ITR Issue 2(b), at 4-5. *See also* Charter-SBC DPL ITR Issue 5(a) (incorporating Charter's proposed language for ITR Issue 2(b)).

[6] An "ASR" is an "Access Service Request." *See* Cornelius Direct at 32.

[7] As noted above, this is inconsistent with the testimony of SBC's own witness Mr. Hamiter, who stated that there should be no charge to Charter for establishing direct end office trunks ("DEOTs") on SBC's side of the POI. Tr. 418.

submission of an ASR does not lead to payment obligations under the contract; any such obligations, if they exist at all, must be specified in Appendix Intercarrier Compensation.[8]

SBC, intentionally or not, obscures this issue by claiming that ***Charter*** is somehow trying to confuse things by dealing with compensation issues in Appendix ITR and Appendix NIM. *See* Charter-SBC ITR DPL Issue 2(b) (SBC position statement at pp. 4-5). Charter is not trying to confuse anything. Charter is trying to clear up a possibly ambiguity, and to close a possible loophole, by inserting language that guarantees that activity undertaken in connection with Appendix ITR and Appendix NIM does not lead to payment obligations that are not expressly spelled out in Appendix Intercarrier Compensation. The only logical conclusion from SBC's refusal to accept that language is that Charter has indeed caught SBC in an effort to build ambiguity on this point into the agreement.[9]

For these reasons the Commission should rule that neither Party is responsible for the cost of facilities on the other Party's network and order the Parties to adopt Charter's proposed language on NIM Issues 1(b) and 2, and ITR Issues 2(b) and 5(a).

C. Types of Trunks That May be Deployed Over the Parties' Fiber Meet Point Interconnection Facilities

NIM Issue 4(a): What types of trunk groups should be allowed to pass over the Parties' Fiber Meet Point?

Charter and SBC interconnect by means of a high-capacity OC-48 fiber optic facility in St. Louis. *See* Cornelius Rebuttal at 6. SBC's proposed language would limit

[8] The concern that SBC will seek to charge Charter for trunks established on SBC's side of the POI is heightened by SBC's position that Charter, not SBC, is responsible for establishing both trunks and facilities for ancillary traffic (mass calling, OS/DA, and 911 traffic). *See infra.*

[9] A similar concern underlies General Terms and Conditions Issue No. 28 where Charter seeks to include language that says that the only charges that can be assessed under the contract are charges actually specified in the contract. SBC's refusal to agree to that language is also very troubling in this regard. *See infra.*

the use of that facility so that many types of traffic could not be carried over it. Instead, under SBC's proposed language, only "Local Interconnection Trunk Groups" could be carried over this facility. *See* NIM DPL Issue 4(a). This language force at least the following types of traffic into exile: (a) so-called "meet point" access traffic (where, for example, a Charter customer receives an incoming long distance call from a long distance carrier connected to SBC's tandem switch); (b) so-called "mass calling" traffic (where, for example, a Charter customer calls a radio station served by SBC that wants to give away a trip to Mexico to the 97th caller); (c) 911 traffic (where a Charter customer dials 911 to call an emergency response agency served by SBC); and (d) so-called "OS/DA" (operator services/directory assistance) traffic, where a Charter customer might, hypothetically, call an SBC operator or directory assistance representative.[10]

SBC's proposal makes absolutely no technical sense. As SBC's witness Mr. Hamiter testified, there is no technical reason to refuse to allow certain types of traffic onto the facility.[11] As he said, "you know, technically speaking, pure and simple, there's on problem, because the [fiber optic] facility is a facility." Tr. at 428. *See also id.* at 439 ("as I mentioned before, a facility is a facility"). Indeed, an exchange between Mr. Hamiter and the Arbitrator (transcript pages 464-65) makes this perfectly clear:

> Q. … So theoretically speaking, if the pipe, the connection is big enough, this OC-48, can you run all this traffic through that one pipe?
>
> A. It is technically -- as I mentioned in my cross a moment ago, there's no distinction. A facility is a facility.

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[10] Charter does not use SBC operator services or directory assistance, so this type of traffic will be incidental as between Charter and SBC, if it exists at all.

[11] Tr. at 428. Charter again emphasizes that the dispute here is ***not*** about setting up separate trunk groups to facilitate routing and billing of different types of traffic. The parties are agreed on the trunks that will be established. The only dispute here is over SBC's proposal to arbitrarily require different physical ***facilities*** for certain types of traffic. (The parties have a separate dispute about charges for mass calling, and 911 trunks.)

Q. Right. So you could put it all onto one pipe?

A. Yes, sir.

…

Q. … Because you're going to have to program your switches and what have you to handle the different types of traffic to distinguish between them and route them appropriately –

A. Yes, sir.

Q. -- at your end of the pipe, right?

A. Yes, sir. We need the separate trunk groups for those.

Q. I understand that. And that's what makes that possible, right?

A. Yes, sir.

Q. Okay. But it can still all go over the same facility, assuming it's big enough?

A. Yes, sir.

Charter submits that it could not be clearer: SBC's own witness on network issues plainly testifies that there is no technical reason to exclude these various types of traffic from the OC-48 facility connecting SBC and Charter.

Charter submits that the lack of any technical justification for SBC's proposal to exile certain types of traffic from the fiber optic facility linking their networks is legally fatal to that proposal as well. First and foremost, 47 U.S.C. § 251(c)(2) requires that the terms and conditions established for interconnection be "just" and "reasonable." Imposing inefficient physical arrangements on Charter is, we submit, *per se* unreasonable. Moreover, the FCC has ruled that once a physical facility is established for interconnecting two networks under 47 U.S.C. § 251(c)(2), an ILEC may not require the CLEC to establish different, separate physical facilities for different types of traffic they

might exchange. *See Local Competition Order* at ¶ 995 (requiring ILECs to permit CLECs to send "information services" traffic over the same physical interconnection arrangements used to exchange traffic under Section 251(c)(2)).[12] So, even if SBC were to claim (wrongly) that calls to 911 or radio stations or long distance carriers are not covered by Section 251(c)(2), that would still not provide a basis for excluding the traffic from the physical facility linking the carrier's networks.[13]

SBC's language would impose the grossly inefficient requirement of separate facilities for certain types of traffic for no good technical reason. Given the clear testimony from SBC's own witness that there is no technical reason to have separate facilities, Charter submits that the only rational conclusion here is to reject SBC's language that would limit the use of the existing, high-capacity fiber optic facilities to carry all kinds of traffic.

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[12] If it is not lawful for an ILEC to exclude "information services" traffic from facilities used to carry Section 251(c)(2) traffic, then it cannot possibly be lawful to exclude calls to 911, or radio stations, that comes from or goes to long distance carriers. *See infra.*

[13] Charter is not sure what to make of SBC's claim that non-local traffic is somehow different enough from local traffic that it should be carried on a separate facility. Section 251(c)(2) requires interconnection for the exchange of "telephone exchange service" and "exchange access" traffic. "Exchange access" is defined as the use of local facilities for the origination or termination of telephone toll service. 47 U.S.C. § 153(16). As a result, so-called "meet point" traffic, connecting long distance carriers to Charter's network by means of SBC's tandem, is, without question, "exchange access" traffic, and therefore is directly and literally covered by Section 251(c)(2)'s interconnection requirement. "Telephone exchange service" is defined to include both (in effect) plain old traditional local service, *see* 47 U.S.C. § 153(47)(A), but also any "comparable" service, *see* 47 U.S.C. § 153(47)(B). Calls to radio stations are plainly "comparable" to traditional local exchange service, if indeed they are not literally a form of such service. Similarly, Exhibit 204 (SBC's 911 tariff for Missouri) shows that public service answering points ("PSAPs") are customers of SBC's services, as Mr. Hamiter agreed. *See* Tr. at 428-29. Mr. Hamiter also agreed that the separate 911 switch is part of SBC's network. Tr. at 467-68. So, again, if 911 calls are not literally, exactly a form of "telephone exchange service," they are clearly "comparable" to that service. But all that said, even if these types of traffic are ***not*** literally subject to Section 251(c)(2), ¶ 995 of the *Local Competition Order,* cited above, shows that SBC may ***still*** not require separate facilities.

Finally, in order to be excruciatingly clear, note again that Charter is ***not*** objecting to organizing the different kinds of traffic it will exchange with SBC onto separate ***trunk groups*** that would be ***carried on*** the OC-48 fiber facility. Charter and SBC agree that different types of traffic will be organized onto different trunk groups, in order to facilitate routing, allow for sound network management, etc.[14] The ***only*** dispute here is the whether SBC can require separate ***facilities*** based on traffic type. Clearly and unequivocally, the only rational answer to this question is "no." As a result, the Arbitrator should order the parties to adopt Charter's proposed language on this issue, as identified in NIM DPL Issue 4(a), at pp. 5-7.

D. Financial Responsibility for Facilities on SBC's Side of the POI That Carry "Ancillary" Traffic (Mass Calling, Operator Services/Directory Assistance, 911 and Meet Point Traffic)

NIM Issue 3: Should Charter be responsible for facilities ***on SBC's side of the POI*** that carry so-called "ancillary" traffic?

The discussion just above relates to carrying "ancillary" traffic (mass calling, OS/DA, 911, long distance "meet point" traffic) on the physical facility linking the two parties' networks. ***This*** issue relates to whether Charter should have to pay for the additional facilities and/or trunking on SBC's side of the POI that SBC uses to deliver this "ancillary" traffic to or from its destination.

At the outset, note that the traffic at issue in this particular dispute is primarily mass calling traffic. First, Charter does not exchange OS/DA traffic with SBC, because Charter does not use SBC's operator services. Second, although there is a dispute about

[14] For example, it is important to keep mass calling traffic on separate trunk groups in order to ensure that sudden surges of calling to a mass calling number (as everyone tries to win the trip to Mexico) do not cause the rest of the network to "crater," *i.e.*, to become overwhelmed and fail to function. *See* Tr. 436-38. Everyone agrees that separate trunks for calls to mass calling numbers are necessary to avoid this result.

cost responsibility for 911 traffic, that dispute is covered separately under E911 Issue 2(b). Third, under the normal MECOD/MECAB rules applicable to jointly provided access services (that is, situations where two LEC such as Charter and SBC jointly provide a connection between Charter's end user and a long distance carrier), both the LECs charge the long distance carrier; neither one charges the other.[15] Indeed, precisely ***because*** each LEC — including, specifically, SBC — is recovering the costs of the access functions that it provides by means of charges to the long distance carrier, it would be arbitrary and irrational to establish a regime in which SBC ***also*** gets to charge Charter for the same functions and facilities.

So, the remaining category of traffic is mass calling. With regard to that traffic, the example at the hearing was a radio station that urges listeners to call to try to win a trip to Mexico. *See, e.g.*, Tr. 434-35. SBC's position is that even though it sells services to the radio station that does the mass call-in promotion, somehow getting traffic to the radio station is Charter's responsibility, not SBC's. SBC's rationale, such as it is, is that this type of traffic does not benefit SBC's customers. *Id.* Based on this rationale, SBC argues that Charter should pay for the physical facilities on SBC's side of the POI that carry this traffic because this traffic benefits only Charter subscribers, not SBC subscribers. (Hamiter Direct at 66-74, Hamiter Rebuttal Testimony at 35-26).

This is clearly wrong. The only facilities at issue here are facilities used to deliver traffic to the SBC subscriber — the radio station — that wants to receive the calls.

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[15] Tr. 1011-1012. SBC's witness Mr. Read confirmed that in a meet-point-billing scenario, each LEC charges the long distance carrier for the functions that LEC provides. So, SBC would charge the long distance carrier for: the connection from the long distance carrier to the SBC tandem; tandem switching; and the portion of the transport link between the SBC tandem switch and the Charter switch that SBC actually provides. Charter would charges the long distance carrier for the portion of transport to its switch that Charter provides, and then charge the long distance carrier for end office access elements.

Charter agrees that it is prudent to isolate mass calling traffic onto separate "choke" trunks to maintain the reliability of the rest of the network.[16] But that does not change the fact that the traffic at issue is local exchange traffic from Charter's subscribers (those trying to win the trip to Mexico) to an SBC subscriber (the radio station giving away the trip). There is no legal basis for treating calls to SBC subscribers who happen to be radio stations differently from other SBC subscribers who receive a lot of calls, such as taxicab dispatch services, pizza delivery services, etc. Each of those types of SBC subscribers, like the radio station, is in a business that causes it to benefit from receiving lots of inbound traffic. More prosaic subscribers — residential customers, dry cleaning businesses, real estate offices — doubtless receive less traffic, and also originate traffic roughly in balance with the traffic they send. But that does not mean that radio stations (or other entities that generate mass calling) are not SBC subscribers or that they do not benefit from receiving calls.

There is simply no reason to carve out the facilities and/or trunks used to route mass calling traffic from Charter to SBC for any special charging. SBC has said that this traffic is different, but plainly that is not true, in any meaningful sense. As a result, it would be patently unreasonable and unfair to require Charter to pay for these facilities. For that reason the Commission should adopt Charter's proposed language with respect to this issue. *See* Charter-SBC DPL NIM Issue 3 at p. 5.

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[16] *See* note 14, *supra.*

E. Traffic Threshold (or Trigger) for Establishing Additional POIs (NIM Issue 1(c)).

NIM Issue 1(c): Where Charter establishes a single POI per LATA, at what point (traffic threshold) should Charter be required to establish additional POIs?

The parties agree that Charter may begin with a single POI in a LATA and that at some point, if traffic to another SBC tandem serving area gets large enough, Charter will establish a second POI. The question is, at what level of traffic should this expense and investment be required? SBC proposes volume of 24-DS1s. Charter, in light of the large capacity of optical fiber, proposes an OC-12, one-fourth the size of its existing OC-48 connection with SBC in St. Louis.

Although he was SBC's witness on this topic, Mr. Hamiter forthrightly agreed that "I have no engineering analysis behind" SBC's 24-DS1 proposal. Tr. 421. Instead, SBC's figure was, apparently, a compromise between SBC and MCI in Texas. *See* Tr. at 668 (Mr. Gryzmala questioning Mr. Cornelius). As Charter witness Mr. Cornelius explained, however, a number of different technical factors go into deciding when a new POI might reasonably be established, and if the Texas Commission thought that establishing a separate POI would help relieve stress on SBC tandem switches, it was simply mistaken. Tr. at 689 (Cornelius testifying on basis for Texas decision).

The relevant statutory standard is that terms and conditions of interconnection be "reasonable." 47 U.S.C. § 251(c)(2). Interpreting this standard, current FCC rules permit Charter to insist on a single POI per LATA if that is Charter's preference: an ILEC "must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA."[17] So Charter is

[17] In the Matter of Developing a Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking*, FCC 01-132 (released April 21, 2001) at ¶ 112 (footnote omitted).

already taking steps to accommodate SBC's preference for multiple POIs by not insisting on an absolute right to send all traffic via a single, LATA-wide POI.

Since Charter is accommodating SBC beyond what is legally required, it would not be lawful to insist that Charter provide new POIs more frequently than it proposes; legally, Charter is not required to provide new POIs at all. Moreover, as an evidentiary matter it is clear that Charter's position is much better supported. . Cornelius has testified that a number of factors affect the appropriate traffic level at which a separate POI makes sense from an engineering perspective, and that in light of the huge capacity of fiber optic connections, an OC-12 is an appropriate traffic level for this purpose. *See* Cornelius Direct at 13-16; Cornelius Rebuttal at 3-6 (discussing engineering and network architecture factors supporting his judgment that an OC-12 is the appropriate traffic volume for a new POI). On the other hand, Mr. Hamiter frankly admitted that his recommendation was not based on any engineering analysis at all.

Given the underlying legal standard — Charter's right to insist on only one POI per LATA had is so chosen — and the fact that there is no cogent evidence supporting SBC's proposal (other than the fact that another commission in another state in a case involving other parties adopted it), clearly the only reasonable conclusion here is to adopt Charter's proposed language and establish OC-12 as the traffic level at which a new POI must be established.[18]

The only arguably technical point raised by Mr. Hamiter is the prospect that establishing new POIs might help SBC avoid the problem of "tandem exhaust." This

[18] In this same connection, because optical fiber meet points are more complicated to establish than lower-capacity connections, it is not reasonable to require, as SBC proposes, that the new POI, should one ever be required, be established in 90 days. SBC's Mr. Hamiter admitted that putting a fiber meet point into operation "can get quite involved." Tr. 422.

term refers to situations where tandem switches reach capacity due to increased amounts of traffic delivered over such switches. *See* Tr. at 689 (Cornelius on SBC's tandem exhaust rationale). But this issue is a red herring: Charter has already agreed to establish direct trunks to switches that serve distant calling areas, and it is the establishment of separate trunks, not new POI facilities, that solves the tandem exhaust problem. *See* Tr. at 665 (Cornelius).

For these reasons the Commission should rule that the appropriate traffic volume threshold that will trigger the obligation upon Charter to establish an additional POI is an OC-12, rather than SBC's proposed 24 DS1s. The Commission should also order the Parties to adopt Charter's proposed language as reflected in NIM DPL Issues 1(c).

F. Each Party's Obligation to Provide Information to the Other Party

NIM Issue 5(a): Should Charter be required to provide information concerning ***SBC's network*** that may be needed to establish interconnection for the mutual exchange of traffic.

Charter accepts responsibility for providing all information to SBC about Charter's network that is reasonably necessary to establish interconnection. That is not in dispute, and Charter has every incentive to do so in order to ensure efficient and effective interconnection between the two Parties. The dispute here is whether Charter's obligations to provide information should be limited in a reasonable manner. Specifically, Charter has proposed language which makes clear that Charter is in no way responsible for providing information about SBC's network. This language would make clear that the processing of any forms or procedures used by SBC to collect such information would not be delayed by the fact that information concerning SBC's network was not included. That obligation is properly borne by SBC not Charter.

In addition, Charter's proposed language makes clear that Charter will provide all necessary information about its network necessary to interconnection, except for any information which is deemed competitively sensitive as between the two companies. This limitation is reasonable and appropriate given the Parties' dual status as co-carriers and competitors.

For these reasons the Commission should find that Charter's proposed language constitutes a reasonable limitation on its obligation to provide information to SBC and order the Parties to incorporate Charter's proposed language as identified in NIM DPL Issue 5(a).

G. Inclusion of Provisions in the ICA Concerning Leased Facilities

NIM Issue 6: Should the agreement include provisions that permit the use of SBC tariffed facilities ("leased facilities") for the purposes of interconnection?

This is essentially a contractual issue, not an evidentiary one. The issue here is whether the agreement should include language that sets forth the terms and conditions by which Charter may use facilities leased from SBC to interconnect. Charter is not proposing to substantively require SBC to provide leased facilities as a means of interconnection. Charter is simply proposing that the agreement recognize that it is possible that such facilities might be used as a means of interconnection.

Charter's proposed language clarifies that the agreement permits the use of SBC tariffed facilities (most likely special access circuits) to connect from Charter's location to SBC's location if Charter chooses to use such facilities. SBC's objection seems to be that this language would ***require*** SBC to provide interconnection facilities on Charter's side of the POI. Charter-SBC NIM DPL at p. 9. But that is simply not the case. Instead, the language merely clarifies that ***if*** SBC does so, then it is okay for Charter to buy them

and use them for interconnection. *See* Charter proposed Section 3.3.1 "Where facilities are available, …" Charter-SBC NIM DPL at p. 9.

Moreover, Charter's language makes clear that ***if*** the parties can agree on terms under which SBC will provide non-tariffed "leased" facilities to Charter, then such facilities can be used for interconnection. Nothing in the proposed language purports to impose on SBC an obligation to reach agreement with respect to such facilities or to impose any particular pricing regime with respect to them. In other words, no obligation arises if SBC and Charter can not agree upon terms for the provision of such facilities.[19]

SBC's final objection is that Charter's language seeks to impose TELRIC rates for a "service" that is not required under Section 251. Charter-SBC NIM DPL at p. 9. This is a *non sequitur*. There is ***no language*** in Charter's proposal which sets any rates for such facilities, let alone TELRIC rates. To the contrary, language in Charter's proposed Section 5.1 specifically states that "the Parties have no agreement as to the costing or pricing methodologies that may or should apply to any such Leased Facilities." (NIM DPL at p. 10). Further, the next sentence of Charter's proposed language makes clear that the Parties must agree upon any rates prior to the use of such facilities. NIM DPL at pp. 10-11. So SBC's contention that Charter's language attempts to impose TELRIC rates (or any rates) is simply false.

For these reasons the Commission should adopt Charter's proposed language as identified in NIM DPL Issue 6, pp. 9-12.

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[19] In both cases, the point of Charter's proposed language is to clarify that in either situation — a tariffed SBC offering or an independent agreement for SBC to provide non-tariffed facilities — it shall be acceptable to use such facilities for purposes of Interconnection. This explains why this issue is arbitrable: it is a proposed "term" or "condition" of "interconnection" under Section 251(c)(2).

III. INTERCONNECTION TRUNKING ISSUES

A. Charter's Obligation to Establish Trunks to Every Local Calling Area

ITR Issue 1: Should Charter be required to establish local interconnection trunks to every local calling area in which Charter offers service?

NIM Issue 5(a): Should Charter be required to trunk to every local exchange area in which it offers service?

There does not appear to be a substantive dispute about this issue. Charter has stated that it accepts the obligation to establish local interconnection trunk[20] groups between tandem switches that serve the applicable local exchange areas. *See* Tr. 689 (Charter Witness Cornelius). SBC has stated that when it stated in its proposed contract language that local interconnection trunks would be established to calling "areas," what it really meant was the switches serving those areas. *See* Tr. at 414-15 (SBC Witness Hamiter). Given the extensive testimony in this case about the importance of maintaining the distinction between "trunks" and "facilities," and given that it is undisputed that trunks connect different switches, Charter submits that its proposed language — which specifies that trunks will be established between its switch and the SBC ***switch*** serving a local calling area — is more precise and should be adopted. Specifically, the Commission should resolve this issue by affirming that Charter is obligated to establish trunks between Charter's switch and SBC's tandem switches that serve applicable local exchange area. Furthermore, the Commission should order the Parties to adopt Charter's proposed language on this issue, as identified in ITR DPL Issue 1, at pp. 1-3.

[20] A trunk is a transmission path between two switching systems.

B. Use of One-Way or Two-Way Trunks

ITR Issue 2: Should the Parties utilize two-way trunking or should the Agreement reflect Charter's rights under federal law to elect to use either two-way or one-way trunking?

This issue must be resolved in Charter's favor as a matter of law. SBC proposes language that would require the parties to utilize two-way trunking in all instances, regardless of specific circumstances that may obviate the need for two-way trunks and require one-way trunks instead. Charter proposes language that would allow Charter to choose the circumstances when it would employ two-way or one-way trunks. As Charter Witness Cornelius testified, Charter expects that it will routinely order two-way trunks, *see* Cornelius Direct at 17, which is indeed, an appropriate architecture for this type of interconnection. The FCC's rules — 47 C.F.R. § 51.305(f) — state that the ILEC (SBC) is to provide two-way trunking "upon request" of the CLEC. It is impossible to square that rule with SBC's proposal to require two-way trunking at the demand of the ILEC. Nothing in SBC's presentation suggests that this is not the law or explains why Charter should be deprived of the right to select one-way or two-way trunks as appropriate in its own engineering judgment.

For that reason the Commission should resolve this issue by affirming that Charter has the right, consistent with federal law, to select the use of two-way or one-way trunks. Furthermore, the Commission should order the Parties to adopt Charter's proposed language on this issue, as identified in ITR DPL Issue 2, at pp. 4-5.

D. SS7 Signaling Obligations of the Parties

ITR Issue 5(b): Should the originating SS7 signaling information be provided by Charter?

Charter has agreed to SBC's language on this point.

E. SBC's Obligation to Process and Respond to ASRs from Charter Pending a Joint Meeting

ITR Issue 7: When a joint planning discussion is necessary should SBC be required to process ASRs prior to such discussions?

SBC's proposed language gives it the right to place a Charter trunk order into "held" status based on its conclusion that the order is unreasonable. Charter's proposed language requires SBC to process Charter's orders while any questions regarding whether Charter really meant to submit the order it submitted are worked out. Cornelius Direct at 34-36; Cornelius Rebuttal at 14-15. SBC's response to Charter's concern about SBC delaying Charter's operations by placing orders on hold is, basically, that Charter doesn't need to worry because SBC does not do that, unless there is a really good reason. Tr. 452-55 (Hamiter).

Notably, SBC offered little justification for its proposal and at the same time claimed that Charter Witness Cornelius did not address this issue in his testimony. However, that is in fact not true. As Mr. Cornelius testified, in both direct and rebuttal testimony, *see* Cornelius Direct at 34-36 *and* Cornelius Rebuttal at 14-15, Charter has every expectation that the vast majority of trunk service requests will be handled as routine matters. On occasion, there may be a circumstance where the size or specific circumstances of a particular trunk order raise questions in the minds of SBC's engineers. Under such circumstances it is appropriate for Charter to provide additional information in response to SBC inquiries, and may it also be necessary for the two sides to hold further discussions over the trunk request. That does not mean, however, that SBC should have the authority to unilaterally determine whether Charter's orders are

"reasonable" and hold up processing those orders on that basis. This is particularly the case because "major projects" are already subject to a special procedure.

It is conceivable that a clerical-type error could result in an erroneously large order (hypothetically, ordering 1,000 DS0 trunks between two switches when in fact the need is for 100). Charter's proposed language provides for catching these kind of errors, and requires only that any applicable "review or inquiry" not "result in a commercially unreasonable delay."

Charter submits that SBC should not be entitled to contract language that gives it absolute discretion to hold Charter's trunk orders and then defend that language on the grounds that it will not act unreasonably. Charter has proposed language that specifies that SBC may not unreasonably place orders in held status. Charter submits that its proposed language is actually closer to what Mr. Hamiter testified to than is SBC's own language. For these reasons, the Commission should resolve this issue by affirming that the Parties must work cooperatively to resolve any questions raised by SBC in response to a trunk service request from Charter. However, the Commission should also rule that SBC may not place the service request in "hold" status or otherwise delay the implementation and processing of such request. Furthermore, the Commission should order the Parties to adopt Charter's proposed language on this issue, as identified in ITR DPL Issue 7, at pp. 12-13.

IV. 911 ISSUES

A. Charter Responsibility for Providing 911 Trunks from the POI to SBC's Selective Router

ITR Issue 6: Should Charter be required to trunk to every 911 tandem in each Local Exchange Area in which it offers service?

After further discussion with SBC, Charter accepts SBC's language on this point.

911 Issue 2(a): Should Charter use the terms facilities and trunking as if they were synonymous?

911 Issue 2(b): Is Charter responsible for providing adequate 911 trunking from its POI to the SBC E911 Selective Router?

The parties agree that facilities are different from trunks. The parties agree that they will interconnect their networks in a manner that permits Charter customers seeking to reach PSAPs that subscribe to SBC's "911" service will have their calls go through. The parties also agree that 911 traffic needs to be on separate trunk groups to ensure that it is properly directed to the specialized 911 switch – the "selective router" – that SBC uses to get calls to the PSAP. The parties disagree about whether separate facilities are needed and about who should be financially responsible for establishing the trunks and facilities to connect Charter's switch to the selective router.

The first disagreement is SBC's proposal that Charter be required to pay for separate physical facilities from its switch to the selective router. Charter believes that, 911 bound traffic should be carried over the parties' existing optical meet point facility (which SBC opposes) and that SBC should provide the trunking (over SBC facilities) to the selective router. From a technical perspective there is on evidence that this would be a problem and plenty of evidence that is would be technically feasible. *See* Tr. 429 (Hamiter) ("technically speaking, pure and simple, there's not problem because the

facility is a facility."); Tr. 466-67 (Hamiter) (no technical issues in running 911 traffic over the fiber meet point facility on separate trunks and then to the 911 switch; 911 switch is part of SBC's network). *See also* Cornelius Direct at 25-26; Cornelius Rebuttal at 8-10. There is simply no basis in this record for requiring Charter to establish separate physical facilities to carry 911 traffic to SBC's selective router.[21]

The next issue is whether Charter should be financially responsible for the trunking (and associated facilities) used to get the 911 traffic from the POI to the selective router. SBC argues that 911 traffic is for some reason not subject to the normal rules that governing traffic exchange. However, this makes no sense. SBC's 911 tariff makes clear that PSAPs are purchasers — customers — of SBC. These entities subscribe to this service in order to fulfill their governmental function, which is to receive calls from people with medical, crime or other emergencies. Although it is obviously important that 911 traffic be routed on separate trunks that will allow all calls to go through, this is not fundamentally different, from a network perspective, from calls to the motor vehicle bureau or calls to the department of animal control. The basic function of many governmental agencies entails receiving calls from the public. 911 calls are dialed in a special manner, obviously, but at the end of the day they are just telephone calls to a particular government agency. *See* Cornelius Rebuttal at 9.

There is, in short, no reason to treat calls to 911 as outside the pale of SBC's obligations for the "transmission and routing" of telephone exchange service. From this

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[21] In this regard, SBC Witness Chapman suggested that Charter had already agreed in the E911 Appendix to establish the SBC selective router as a POI for purposes of 911 traffic. Tr. 853-54. This is simply not true. Section 4.1.1 of Appendix E911 makes specific reference to connections ***from*** "each" POI ***to*** the selective router. The dispute is over cost responsibility for those connections, but this language clearly reflects a ***distinction*** between the POI (for purposes of interconnection) on the one hand, and the selective router on the other.

perspective, calls to PSAPs are not fundamentally different than calls to any other government agencies. As a result, there is no reason to isolate this type of traffic from the same legal regime that applies to all other local traffic — specifically, each party is responsible for facilities on its side of the POI, subject to specific intercarrier compensation arrangements set out in Appendix Intercarrier Compensation. In the case of 911 calls in particular, these would be "local" traffic subject to bill-and-keep.

B. Limitations on Charter's Access to SBC's Selective Router and DMBS

This issue (E911 Issue 1) has been settled between the Parties and will therefore not be addressed in this brief.

V. INTERCARRIER COMPENSATION ISSUE

Intercarrier Compensation Issue 1: For compensation purposes, should the definition of a mandatory local calling area be governed by SBC 13-STATE's local exchange tariffs?

ITR Issue 8: SAME.

The disputed issue here is how to define the term "Switched Access Traffic." The broader issue behind the definitional dispute is whether the parties should be able not only to define their own local calling areas (subject to the authority of the Commission), but also to have an intercarrier compensation mechanism that is economically consistent with that freedom. Barber Direct at 5-10; Barber Rebuttal at 2-4. *See* Tr. 643-44 (Barber). From a legal perspective, moreover, Charter's proposal is completely consistent with the relevant definitions in the Communications Act.

In arbitrating the disputed terms between Charter and SBC the Commission is obligated to "ensure" that the arbitrated agreement contains conditions that "meet the requirements of section 251, including the regulations prescribed by the Commission

pursuant to section 251."[22] The Commission has no discretion to grant the competitor different or lesser rights than the law provides, if the competitor insists on its right. That is what Charter is doing here.

As to the specific language in dispute, Charter's proposal conforms the agreement's language to the statutory definitions "telephone toll service," "telephone exchange service," and "exchange access" — all terms defined by Congress itself.[23] SBC, however, objects to this approach and asks the Commission to affirm language that is inconsistent with prevailing federal law. *See* Tr. 401-04 (Douglas) (criticizing statutory definitions in favor of SBC's definitions); Tr. 446-48 (Hamiter) (witness unaware that "telephone exchange service," term used in Section 251(c)(2), is specifically defined in the Communications Act); Tr. 751-53 (McPhee) (claiming to want to conform definitions with federal law but then diverging from it).[24]

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[22] *See* 47 U.S.C. § 252(c)(1) (prescribing standards for PSC arbitrations).

[23] *See* 47 U.S.C. § 153(16) (defining "exchange access"); 47 U.S.C. § 153(43) (defining "telecommunications"); 47 U.S.C. § 153(47) (defining "telephone exchange service"); 47 U.S.C. § 153(48) (defining "telephone toll service"). These terms are all used by Congress and the FCC to define the traffic that the parties must exchange and the subset of exchanged traffic to which reciprocal compensation applies. *See* 47 U.S.C. § 251(a)(1) (requiring direct or indirect interconnection for the exchange of all "telecommunications"); 47 U.S.C. § 251(c)(2) (requiring direct interconnection for the exchange of "telephone exchange service" and "exchange access" [which is defined in terms of "telephone toll service"]); 47 U.S.C. § 251(b)(5) (requiring reciprocal compensation for "telecommunications").

[24] As noted above, "exchange access" is a term specifically defined in the Communications Act. FCC rule 47 C.F.R. § 51.701(b)(1) states that all traffic is subject to reciprocal compensation (essentially as local traffic) unless it is either "information access" — essentially, calls to ISPs, not relevant here — or "exchange access." The statutory definition of "exchange access" ***requires*** that the underlying service offered to the end user be a "telephone toll service." If the underlying service is not a toll service, then the traffic is ***not*** excluded from treatment as a normal local call. The definition of telephone toll service, moreover, ***requires*** that there be a "separate charge" for the call in question; *see* 47 U.S.C. § 153(48); otherwise the call is simply a form of telephone exchange service. So as a matter of law, as described below, if the carrier originating the call does not assess a toll on the end user, the function of terminating that call ***cannot be*** "exchange access," and the call ***is not*** excluded from reciprocal compensation under 47 C.F.R. § 51.701(b)(1).

Switched Access Traffic as normally understood is a form of "exchange access," which is defined in 47 U.S.C. § 153(16). "Exchange Access" is defined as the use of local facilities to originate or terminate toll calls, or, in statutory terms, calls which constitute "telephone toll service."

"Telephone toll service" is the statutory term that corresponds most closely to the colloquial term "long distance" service.[25] Telephone toll service is defined under the Communications Act of 1934 as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[26] Thus, for a call to properly be classified as "telephone toll service," it must meet two criteria: (1) the call must begin and end in different "exchange areas;" and (2) the call must be subject to a separate charge that is not included in the charge for telephone exchange services.

Similarly, under the Communications Act, traffic is only properly classified as "exchange access" traffic when there is an underlying toll call that is originated or terminated using local exchange facilities.[27]

Charter's proposal is fully consistent with these definitions. Specifically, Charter proposes to define the term "switched access traffic" (i.e. "exchange access" traffic) as traffic that originates and terminates in different local calling areas, as defined by the carrier that originates the call.

In practical terms this means that if either SBC or Charter wish to compete with each other by establishing different local calling areas (e.g., by establishing a large area,

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[25] While the colloquial use of these terms is sufficient for many purposes, it is not sufficient for purposes of defining traffic types (and corresponding obligations) under this agreement.

[26] 47 U.S.C. § 153(48).

[27] *See* 47 U.S.C. §§ 153(16).

perhaps at a higher price, or by establishing smaller areas, but at a lower price), whether the function of originating and terminating a call meets the statutory definition of "access" depends on the local calling areas established by the originating party. In other words, under this proposal either SBC or Charter could decide to define their calling areas broadly and in turn forego the right to collect toll charges on calls that would otherwise have qualified as telephone toll service. As a consequence, calls that would have previously been classified as toll calls (which in turn raise obligations to pay access charges) no longer meet the legal definition of a toll call. As a result, such a call would no longer be subject to access charges since exchange access (i.e. switched access traffic for purposes of this agreement) only applies to telephone toll traffic.

In this way Charter's proposed language will build in to the agreement incentives for both Parties to offer broader local calling scopes, which in turn reduces the number of toll or long-distance charges that subscribers are exposed to. Overall, this approach will likely result in more options, ***at less cost***, for Missouri's telecommunications subscribers.

This definition makes economic as well as legal sense. In cases where the originating caller is being charged a toll, the carrier handling the toll call (which may be the originating LEC or may be a third party) will receive a toll payment which will provide the wherewithal to pay an "access" charge. However, where the originating caller is not being charged a toll, the only money available to pay the terminating carrier is the caller's normal local service charge. In that case, payment of reciprocal compensation (or treatment as a bill-and-keep call) is appropriate.

During the hearing SBC's attorney raised questions about the impact of Charter's proposal vis-à-vis exchange of traffic between Charter and other independent telephone

companies in Missouri.[28] But those questions (and implicit objections) are easily answered by the fact that Charter's proposal only applies to the two signatories to *this agreement*. Indeed, the very first clause of the proposed definition of Switched Access Services states: "for purposes of this Agreement only."[29] Therefore, there is no risk that Charter's proposal would unfairly affect or undermine access revenues of other independent telephone companies.

SBC also suggested that Charter's proposal would lead to administrative problems, if other CLECs adopted the same definition and in turn offered expanded local calling to Missouri residents. This objection is a red herring. As Charter Witness Barber testified, there are current billing systems in place at this time that could accommodate any changes brought about by Charter's proposal. *See* Barber Rebuttal at 3.

The Commission is duty-bound, under 47 U.S.C. § 252(c)(1), to adopt Charter's proposed contract language. For that reason the Commission should resolve this issue by ruling that the Parties may define their own local calling area boundaries (for purposes of defining Switched Access Traffic) and order the Parties to adopt Charter's proposed language on this issue, as identified in Intercarrier Compensation DPL Issue 1, at pp. 1-3.

VI. GENERAL TERMS AND CONDITIONS ISSUES

A. Definition of Exchange Area

GTC Issue 8: Which Party's definition of "Exchange Area" should be used?

This is essentially entirely a legal issue. For the same reasons identified in the previous section, the agreement should make clear that each Party may define its their

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[28] *See, e.g.*, Tr. 647 (Barber).

[29] *See* Charter-SBC DPL Intercarrier Compensation Issue 1 at p. 1 (defining Section 16, Switched Access Services).

own local service area boundaries, for purposes of providing service to their own end users. Charter's language accomplishes that purpose. In addition, Charter's language is sufficiently flexible to allow for any subsequent changes in the law, technology, or both, such that either Party can continue to have the flexibility to offer new and innovative services without being tied to the other Party's conventions, or conceptions, of what constitutes a local or toll call.

SBC opposes this approach, and suggests that Charter's proposal somehow undermines this Commission's authority to establish exchange area boundaries. *See* McPhee Direct at 72. SBC's objections are meritless because Charter's proposal in no way undermines the Commission's authority over local exchange area boundaries. This is supported by the fact that Charter's language refers to Exchange Areas established "in accordance with Applicable Law." *See* Charter-SBC GTC DPL Issue 8 at p. 5. Clearly the Commission's rules and regulations governing the establishment of exchange area boundaries fall within the scope of "Applicable Law." Therefore, this language anticipates the establishment of local calling areas in accordance with this Commission's requirements.

For that reason the Commission should resolve this issue by ruling that the Parties may define their own local calling area boundaries (for purposes of defining Switched Access Traffic) and order the Parties to adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 8, at p. 5.

B. Definition of Foreign Exchange Traffic

GTC Issue 11: Which Party's definition of Foreign Exchange traffic should be used?

SBC is attempting to expand the traditional definition of Foreign Exchange ("FX") service in an apparent effort to characterize certain traffic as falling within the definition of telephone toll, or interexchange, traffic. The reason for doing so is clear, such traffic is normally subject to access charges, which SBC collects from other carriers (in this case Charter) that send traffic to SBC's network. Thus SBC is attempting to broaden the scope of traffic upon which it can collect access charges.

SBC Witness McPhee suggests that the definition is tied to certain "call characteristics" instead of the retail service that the end user purchases. McPhee Direct at 73. This approach assumes that such underlying "call characteristics" are, in fact, of consequence. Charter's definition rejects that approach and simply states the standard industry-accepted definition of such traffic. Moreover, as Charter Witness Barber explained, in practical terms there is little difference between a minute of traffic that SBC hands off to Charter to deliver to a Charter customer that comes from a third party long distance carrier, or a minute of traffic that comes directly from SBC's network. Barber Rebuttal at 6. In both instances Charter generally incurs the same costs of getting those calls to the called party. Charter's proposed language, however, relies upon the fairly ubiquitous, and now standard, definition of such traffic.[30]

[30] For the reasons discussed above, Charter's proposal to tie the definition of FX service to retail offerings is entirely consistent with the federal-law definitions of "telephone exchange service" and "telephone toll service" in 47 U.S.C. §§ 153(47) and (48). Both of those statutory definitions depend directly on the retail charging arrangements established between the telephone company providing service and the end user. "Telephone exchange service" requires the service to be "covered by the exchange service charge" and "telephone toll service" requires that there be a "separate charge." So the connection to retail offerings is not something Charter is making up; it is built into the federal law that governs this case.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 11, at p. 6-7.

C. Definition of IntraLATA Toll Traffic

GTC Issue 13: Which Party's definition of IntraLATA Toll Traffic should be used?

As discussed above, *see* Section V *supra*, Charter's proposed definitions of telephone toll traffic conforms to the language of the federal statute that governs the obligations of both SBC and Charter with respect to the exchange of this traffic. The statute contains a specifically defined term, Telephone Toll Service,[31] which Charter has incorporated into its proposed definition. Therefore, use of Charter's definition will ensure conformity with governing federal law and reduce the possibility that the term could be construed in a manner that is inconsistent with federal law.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 13, at p. 8.

D. Definition of Local Traffic

GTC Issue 14: Which Party's definition of Local Traffic should be used?

For the reasons stated above Charter believes that the definition of "local traffic" in the agreement should correspond to the term used in the Communications Act, which is "telephone exchange service."[32] Doing so ensures that the obligations under this agreement will conform with governing law, and will reduce the possibility that the term will be misconstrued.

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31 47 U.S.C. § 153(48).

32 47 U.S.C. § 153(47).

SBC objects to the use of the statutory term and suggests that the statute is to broad. McPhee Direct at 73 ("Charter's language is overly broad"). This response is peculiar in that SBC is obviously bound by the definitions of the Communications Act (as those terms are used and applied through the substantive provisions of the Act). So, it is not clear to Charter how SBC can credibly argue that a statutory definition which clearly applies to SBC is to broad to use in an agreement that reflects SBC's obligations under the same statute. The only explanation for that position is that SBC is somehow trying to reduce or eliminate some portion of its obligations, and/or Charter's rights, under the Act. If so, the Commission should not allow SBC to avoid or undermine affirmative duties under the Act through the use of definitions which do not mirror federal law.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 14, at p. 8.

E. Definition of Local Number Portability

GTC Issue 15: Which Party's definition of Local Number Portability should be used?

Charter agrees to accept SBC's language on this issue.

F. Should Transit Traffic Be Defined in the ICA?

GTC Issue 18(a): Should "Transit Traffic" be defined in the Agreement?

Charter's position is yes, this form of traffic should be defined in the agreement because the Parties will likely be exchanging such traffic and it is prudent to identify and define the traffic to ensure that each Party's obligations are clearly established.

SBC's position is that "transit traffic is not addressed in the ICA, therefore this definition should not be included." *See* McPhee Direct at 74; *see also* Charter-SBC GTC

DPL at 10. But SBC is simply wrong on this point. Transit traffic is addressed – repeatedly—in the agreement. As detailed in Charter Witness Barber's Rebuttal testimony, Barber Rebuttal at 10, there are almost a dozen different provisions in a variety of different appendices that refer directly or indirectly to transit traffic. *See* SBC's proposed Appendix Intercarrier Compensation (§§ 3.1, 3.5, 5.8.1, 5.8.3, 9, 11.5, 14.1.3, & 16.2) and Appendix ITR (§§ 5.4.8, 12.1, & 12.2). Although the term "transit traffic" may not be literally used in such provisions, those provisions clearly address traffic involving a third party carrier, such that either SBC or Charter could be the so-called transiting carrier.

Thus, SBC is clearly wrong that transit traffic is not addressed in the agreement. It is addressed in the agreement, and therefore it is appropriate to define the term in the manner proposed by Charter. For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 18(a), at p. 10.

G. Definition of Out of Exchange Traffic

GTC Issue 18(b): Which Party's definition of "Out of Exchange Traffic" should be used?

This is a very narrow disagreement, related to the issue just discussed. Charter seeks to include "transit traffic" within the types of traffic that might constitute "OE-LEC" traffic — which is basically traffic where one end is inside SBC's service territory and the other is outside of it. *See* Charter-SBC GTC DPL Issue 18(a) at p. 10. This would arise in a case where, for example, a third-party LEC, with territory next to SBC's, might send SBC a call destined for a Charter customer, or vice versa. The fact that three

LECs are involved instead of two does not change the classification of the traffic as "OE-LEC" or not.

SBC also relies on the factually inaccurate statement that transit traffic is not addressed in this Agreement to support its position on this issue as well. *See* McPhee Direct at 74. Again, SBC is plainly wrong and its position is therefore not credible. Transit traffic is addressed in the agreement, repeatedly, and it is therefore appropriate to define such traffic in the manner proposed by Charter.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 18(b), at p. 10.

H. Use of Outside Documents to Materially Change Terms of the Agreement

GTC Issue 21: If either party seeks to modify or update their reference documents in a manner that will ***materially change*** the underlying terms of the Agreement, should it seek approval from the other party before doing so?

At issue here is whether SBC should be obliged to seek Charter's assent in those situations where SBC seeks to modify one of its own referenced documents in a manner that could materially alter the terms of the contract. These reference documents can pertain to a number of different matters, ranging from technical specifications to standard procedures or processes that SBC uses when interacting with CLECs.

Charter's position is yes, if there are changes to such reference documents which materially change either Party's obligations then SBC should seek Charter's assent prior to the change. SBC objects to Charter's position because it contends that under Charter's proposal SBC's ability to modify such documents will be dramatically impaired. SBC asserts that Charter's language would have the effect of requiring SBC to seek Charter's

consent prior to ***every change*** made to reference documents. *See* Quate Direct at 59-63; Quate Rebuttal at 45-46.

SBC's claim is without support. Of course Charter recognizes that SBC will, on occasion, need to modify its referenced documents to reflect changes in SBC's processes or procedures. For the most part, Charter would not expect that SBC would be required to seek Charter's consent before making those changes. That is precisely why Charter proposed language that required SBC to seek consent only when there are modifications to the reference document that would ***materially alter*** either Party's duties, obligations or rights under the Agreement.

Indeed, a simple review of Charter's proposed contract language, *see* Charter-SBC GTC DPL Issue 21, at pp. 12-13, shows that Charter's proposal allows SBC to update and modify minor, ongoing, routine administrative activities, but at the same time recognizes that changes which materially increase or decrease either Party's obligations must be discussed and agreed upon. In this way Charter's language did not supersede SBC's proposed language which gives SBC the right to incorporate procedures manuals and the like by reference. The only addition to that concept offered by Charter is that there should be a limit on how far SBC could go with changes to those types of incorporated documents.

Charter's proposal is reasonable because it recognizes that routine, ordinary-course-of-business modifications to SBC procedural manuals and so on would not normally have any material impact on either party's obligations under the contract. On the other hand, it would eliminate the possibility that a change to an SBC-controlled document could include a provision that (say) purported to impose a $100,000 charge for

any new trunk orders, or suddenly declared that SBC would have 9 months or a year to increase the capacity of the interconnection between the two companies. As SBC's language reads now, nothing in its proposed contract language about incorporating documents by reference would forbid SBC from taking such a step.

Thus, as Charter witness Barber succinctly stated: "the point of Charter's proposed language here is to force SBC, if it wants to materially increase Charter's obligations, or to materially reduce its own, to sit down with Charter and negotiate over any material changes. I have no sympathy at all for Ms. Quate's claim that somehow SBC should have the right to make such material, unilateral changes. It has no such right." Barber Rebuttal at 11-13.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 21, at p. 12-13.

I. Use of Tariffs to Materially Change Terms of the Agreement

GTC Issue 21: If either party seeks to modify its tariffs in a manner that will ***materially change*** the underlying terms of the Agreement, should it seek approval from the other party before doing so?

As with Issue 21, Charter's proposed modification is designed to close a loophole. Of course SBC and Charter both have tariffs, and Charter recognizes that it would be impractical to require either party to seek consent of the other any time that tariff is filed or modified. It is also clear to Charter (but maybe not to SBC) that with respect to the matters addressed by the agreement being arbitrated, it is the ***agreement,*** not unilaterally-filed tariffs, that controls the parties' obligations. For example, Charter and SBC have agreed on many aspects of how they will handle physical interconnection arrangements.

SBC's witnesses did not purport to defend a result under which SBC could modify or supersede its interconnection agreement by filing a tariff purporting to cover the same subject matter. *See* Tr. 211-12 (Quate) (indicating SBC's view that in cases where tariff and contract conflict, contract controls). Yet all that Charter's proposed language on this point does is make clear that modifications of material obligations ***under the agreement*** cannot be accomplished by tariff filings.

SBC's proposed language, however, would allow such a result. Given that the Parties have already dedicated significant resources in to establishing the terms of ***this agreement***, it would be inappropriate and reckless to allow one Party to include a loophole language that would allow that Party to materially alter any of the obligations under the Agreement. This is not a purely hypothetical issue, there is in fact sufficient litigation in the industry over the relative precedence of interconnection agreement terms and seemingly contrary tariff terms such that the outcome of this issue could have a real impact on the Parties' operations. Charter's language is intended to avoid such problems as between Charter and SBC, while at the same time reserving SBC the necessary flexibility to make changes to its own tariff.[33]

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 22, at p. 13-14.

J. Identification of Terms That SBC Claims Have Not Been "Voluntarily Negotiated"

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[33] Charter's language would not operate to prevent SBC from filing any tariff, and would not interfere with the effectiveness of any tariff. Moreover, to the extent that Charter is purchasing services out of a tariff, then changes in tariff terms would not reasonably be viewed as affected parties' obligations ***under the agreement.*** SBC, in short, has not presented testimony that negates what Charter has proposed with regard to tariff language.

This issue has been settled.

K. Scope of Obligations

GTC Issue 24: Which Party's scope of obligation language should be included in this agreement?

The underlying dispute here relates to SBC's obligations to interconnect with respect to, and exchange traffic, that originates or terminates with Charter, but where the Charter customer is located in another ILEC's territory (normally adjacent to SBC's territory). Charter and SBC agree that SBC is not obliged to establish facilities or physical interconnection arrangements outside the geographic area within which it is an ILEC. Moreover, after extensive discussions, SBC and Charter have agreed on the specific language to appear in the "OE-LEC" Appendix to handle such traffic.

That agreed-to language, however, is intended to elide an underlying conceptual disagreement between the two parties. Charter believes that as long as Charter and SBC physically exchange traffic within SBC's territory ("within" SBC's network, in the words of Section 251(c)(2)), then the only question is whether the traffic exchanged is properly classified as Telephone Exchange Service or Exchange Access, in the words of Section 251(d)(2). This question will be resolved for purposes of intercarrier compensation based on other definitions in the agreement.

SBC, however, apparently believes that it is not obliged to interconnect under Section 251(c)(2) with respect to traffic that originates or terminates on Charter's network, outside of SBC's territory, even though the physical interconnection occurs "within" SBC's network. Silver Direct at 128-129; Silver Rebuttal at 13-14.

Charter's proposed language in ***this*** part of the agreement (the General Terms and Conditions) is designed to make it unnecessary for the Commission to actually rule on the parties' underlying conceptual disagreement. *See* Charter-SBC GTC DPL at p. 16-17. Charter believes it is obvious that SBC cannot limit its obligation to interconnect for the exchange of "Telephone Exchange Service" or "Exchange Access" based on the origination or termination point of the traffic; rather, the origination and termination points of the traffic will likely be relevant to its classification as "Telephone Exchange Service" (local) or "Exchange Access" (toll). Charter has no understanding whatsoever of why SBC appears to have a different view of its interconnection obligation.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 24, at p. 16-18.

L. Insurance Coverage

GTC Issue 26: Should SBC be allowed to dictate the type of insurance carrier that Charter uses to secure necessary insurance coverage?

The Parties agree that certain levels of insurance coverage should be specifically included in the agreement. This ensures that both Parties will have adequate insurance coverage in the event that the actions of one Party lead to damage of equipment or facilities of the other Party. Thus, both Parties have an interest in securing such insurance and avoiding any possibility that would require the Party (as opposed to their insurance provider) to have to pay for such damages directly.

In other words, it is in the interests of both Parties to make sure that the insurance provider they buy from will be able to pay any claims that may arise. SBC does not, indeed can not, dispute that fact.

This is the heart of the dispute on this issue in that SBC wants to dictate to Charter the characteristics of the insurance companies from which Charter may buy insurance. SBC offers a lot of testimony about the supposed benefits of requiring Charter to buy from companies that fall into the rating categories that SBC proposes, Quate Direct at 59, but fails to explain why Charter would ever want to buy insurance from an entity that cannot actually deliver payments if called for under the policy.

This is one of many issues between Charter and SBC where SBC has not given adequate thought to the fact that Charter has its own network and is not relying on SBC to offer its own services. Because Charter has its own connections to its end users and its own switching plant it has a very strong incentive to obtain and retain adequate insurance on that plant. *See* Barber Rebuttal at 16-17. As a result, Charter's own self-interest will drive it to obtain insurance from a reliable and efficient insurance provider. Whether in all cases that insurance provider will meet the specific criteria SBC wants to impose is not clear. Nevertheless, that does not provide a basis for SBC to constrain Charter in its choice of insurance company, particularly where, again, SBC has provided no explanation of how an entity like Charter would place SBC's plant or personnel at risk ***at all.***

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 26, at p. 22.

M. Assignment

GTC Issue 27(a): What are the appropriate terms and conditions regarding restrictions on the assignment of the agreement?

This issue raises three separate disputes between SBC and Charter. First, SBC claims the right to assign its obligations under the contract to other entities without Charter's consent. Charter's position is that neither party should be permitted to assign the contract without consent. *See* Charter-SBC GTC DPL Issue 27 at p. 22-23.

Second, SBC wants to be able to assess a "service charge" of some sort upon Charter if, in fact Charter assigns the contract. Charter does not believe that this is necessary or appropriate. *See id*.

Third, the parties agree that withholding consent to assignment might be appropriate if there are ***undisputed*** charges outstanding. However, SBC's proposed language would allow SBC to hold up an assignment of the contract simply because there are pending billing disputes. In other words, SBC will not agree to grant consent to an assignment even if Charter has properly disputed improper bills from SBC.

Taking the last dispute first, the consequence of SBC's position is the possibility of an unjust and unreasonable restriction on Charter's ability to assign the agreement. Specifically, SBC's proposal could lead to a situation whereby SBC has improperly billed Charter (and Charter has not paid such bills) which in turn leads to a billing dispute between the Parties. For example, if SBC improperly billed Charter for some service arrangement under the Agreement, and Charter properly disputed such bills, then Charter would not pay those bills. But under that scenario SBC would apparently take the position that a "billing dispute" had arisen between the Parties and would then withhold consent from the assignment. *See* Charter-SBC GTC DPL Issue 27 at p. 24 (language

indicating that SBC's consent to an assignment would be contingent "upon cure of any outstanding charges"). This result is possible even where it is determined that SBC was at fault in the first place. Such a result is unreasonable and should not be endorsed by this Commission.

Charter's language, in fact, makes it explicit that it is ***only*** undisputed charges that must be paid prior to assignment. *See* Charter-SBC GTC DPL Issue 27 at p. 24 (Charter proposed language indicating that SBC's consent to an assignment would be contingent "upon cure of any ***undisputed*** charges"). SBC's language does not contain this limitation and therefore could be read to allow SBC to refuse to consent to an assignment simply because there is an ongoing billing dispute at the time.

As to the second issue, SBC's proposal that Charter should have to pay a service order charge to SBC when and if the contract is assigned to a third party is an example of SBC trying to impose a "death of a thousand cuts" on Charter and other CLECs. There are a large number of administrative activities that each party must undertake in the course of performing an interconnection agreement. It is not sensible to allow either party to export those routine business administrative costs onto the other party. Permitting this kind of provision is an invitation to foot-dragging and inefficiency by SBC, which can rely on this type of provision to refuse to handle the normal administrative tasks associated with interconnection arrangements until it has been paid. SBC should simply be required to handle its contract obligations, getting paid for the items that contain a specific price. *See* discussion of Issue 28 below.

Finally, with respect to the first issue, it is manifestly unfair and unreasonable to allow SBC to assign the contract to some third party without Charter's consent, while

requiring SBC's consent before Charter can assign its contract. SBC Witness Quate asserts that there is no reason for Charter's consent to be required for an assignment by SBC, because any SBC activity that would lead to an assignment would require regulatory approval. Quate Direct at 17-18. But that argument ignores the fact that regulatory approval (whether at the federal or State level) may not consider or address the specific contract issues between Charter and SBC. Instead, regulatory review of the assignment would most likely focus on the impact on subscribers and any other macro-level competitive concerns. Therefore, regulatory review of an assignment is no substitute for Charter's specific right to consent to any SBC-proposed assignment, as a mechanism for ensuring that Charter's contractual rights are fully protected.

Charter Witness Barber has already testified that Charter will not unreasonably refuse to permit the contract to be assigned by SBC — the contract says that agreement will not be unreasonably withheld. Barber Rebuttal at 18-19. What this means is that if for some reason it is ***reasonable*** for Charter to refuse to permit assignment of the contract by SBC, it may do so. Under Charter's language, SBC would be required to negotiate with Charter in order to resolve whatever problems make it unreasonable for such an assignment to be made. This would be a business-to-business discussion that would likely be able to be handled quickly and efficiently. SBC's alternative, however, would require Charter to spend time and money participating in some regulatory proceeding trying to get its specific issues addressed as part of an overall regulatory review of whatever SBC transaction is making the assignment necessary.

Finally, on a related point, Charter proposes to delete language permitting SBC to require additional "assurances of payment" as a condition of assignment. As discussed

below, *see* Issue No. 30 *supra*, SBC's proposed "assurance of payment" language is unreasonable and oppressive and it should therefore be deleted for those reasons.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 27, at p. 22-25.

N. Name Changes

GTC Issue 27(b): Should SBC Missouri be allowed to recover reasonable costs from Charter in the event that Charter requests changes in its corporate name, its OCN or ACNA, or makes any other disposition of its assets, or its End Users and/or makes any other changes in its corporate operations?

Similar to Issue No. 27(A) above, SBC wants to be able to assess a service order charge on Charter for the routine task of updating its records if Charter changes its name or obtains a different industry identification number. Quate Direct at 13-14. Charter believes that this is simply a routine administrative matter for SBC to handle. Barber Rebuttal at 30.

It is certainly true that it costs SBC *something* to keep its records and systems updated if and when CLECs change their names or operating numbers. What SBC seems not to realize is that any time two businesses enter into a contract, each party will have a variety of administrative activities it must undertake to fulfill its obligations under the contract. It is not appropriate to permit either party to assess charges on the other for these normal administrative tasks.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 27, at p. 22-25.

O. Name Changes

GTC Issue 27(c): What are the appropriate terms and conditions related to the types of changes identified above?

See discussion above regarding GTC Issue 27(a) and (b).

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 27, at p. 22-25.

P. OSS Obligations

GTC Issue 28: Should Charter be required to utilize the standard and nondiscriminatory OSS' provided by SBC Missouri, reviewed by the Commission and utilized by the Missouri CLEC Community?

SBC seriously misstates this issue. Charter is seeking to include language in the contract that makes clear that, while SBC may indeed send bills to Charter for services and functions for what a charge is specifically identified in the agreement, SBC may not otherwise charge Charter for SBC's activities (and vice versa). The point of this language is to make it impossible for SBC to claim after the fact that some language in the agreement implicitly obliges Charter to pay SBC for certain functions that are not expressly identified as being "chargeable" under the agreement. Barber Rebuttal at 21-23.

Charter has had problems with SBC seeking to impose charges for activities that are simply not chargeable under the Parties' current agreement. For example, at times SBC has failed to program its network to properly route calls from its customers to Charter customers who have left SBC and ported their numbers to Charter. When Charter has complained about SBC's failure to properly comply with its number portability obligations, SBC has responded by sending Charter a bill for investigating the

supposed "trouble" and failing to find any trouble on the affected loop. As far as Charter can tell this is a charge that some CLEC that might buy a UNE loop might incur in some circumstances; it has nothing to do with Charter's operations. *Id.* Moreover, SBC's unwillingness to agree that the submission of an ASR to establish trunking ***does not*** give rise to a payment obligation, *see* discussion of ITR Issue 2(b), *supra.*

What these situations illustrate is that Charter has reason to be concerned that SBC will look for ways to export to Charter the costs that SBC is properly called upon to bear in performing its obligations under the contract. The point of Charter's language is to make completely clear that neither party has the right to impose charges on the other for any and all activities undertaken to make the contract work. *See* Barber Rebuttal at 31-32 *and* Charter-SBC GTC DPL Issue 28 at 26. Instead, many activities are undertaken mutually and with no charge.

From a broader perspective, Charter has its own network and its own customers, and is entitled to be treated by SBC as a co-carrier. Charter is not using SBC's network facilities to provide Charter's services. Charter does send traffic to SBC for delivery to SBC's customers, but SBC's customers send traffic to Charter, too, and the parties have agreed to a bill-and-keep arrangement for that traffic. SBC and Charter have independent networks and independent operations. While it is appropriate for the parties to charge each other for certain functions performed under the contract, it is not appropriate for either party to assess any charges that are not specifically called for in the contract. Charter is concerned that without the limiting language it has proposed, SBC will assert the right to send Charter bills for any number of routine activities required under the contract.

What SBC seems not to recognize is that in the case of Charter, which has its own independent network and independent customers, there are ***mutual*** benefits from the contract, and from the interconnection of their networks. *Cf. Local Competition Order* at ¶ 553, *supra.* While SBC might benefit by imposing costs on Charter and thereby making it harder for Charter to operate, the public — SBC's customers and Charter's customers — benefit by the two carriers' interconnection.

SBC seems to be inclined to view some CLECs as, essentially, customers of SBC rather than co-carriers. But that approach is not appropriate for Charter, which does not depend on SBC to serve its customers. Charter serves its own customers using facilities Charter obtains completely independently from SBC. While SBC might tend to lump all CLECs into a single group, in fact a facilities-based competitor like Charter is different, and I believe is entitled to different consideration that reflects its investment in and commitment to the market and to serving its own customers.

As to the specific contract language at issue here, the only change Charter suggested regarding OSS was to make clear that whatever OSS functionality SBC might have regarding Interconnection activities (as opposed to resale or UNEs) would be available to Charter. The key language Charter included, in Section 4.14 of the contract, makes clear that nether party may impose charges on the other party for any activity or item for which a price is not specified. *See* Charter-SBC GTC DPL Issue 28 at 26. In other words, Charter believes that the contract should contain language that allows parties to charge prices stated in the contract, but forbids either party demanding payment for activities for which no price is set. As far as Charter can see, SBC has no response to this proposal.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 28, at p. 25-27.

Q. Successor Agreements

GTC Issue 29: Should successor language be added to Section 5.6, even though it is stated in Section 5.7?

Charter proposes that the new agreement include language that clearly state that the agreement will remain in effect until it is replaced by a successor agreement. SBC, in the direct testimony of SBC Witness Quate, Quate Direct at 56, proposes to generally accept Charter's proposed language. The problem is that SBC's proposed modification re-introduces the difficulty that led to Charter's proposal in the first place.

Basically, SBC's proposed language says that, once renegotiation has begun, the agreement will remain in effect until the earlier of (a) 10 months from the start of renegotiation or (b) the effective date of the new agreement. This means that if for some reason the conclusion of the renegotiation/arbitration is delayed beyond the 10 month period (which could occur for various reasons), the agreement would technically stop being in effect during any such interim period. One can imagine, for example, some unforeseen delay in finalizing contract language after an arbitration ruling that might create a "gap" in contract effectiveness.

Charter's proposed language would prevent the occurrence of such a "gap." Unfortunately, by adding the words "subject to this Section 5" to the end of Charter's language for Section 5.6, SBC's proposal effectively incorporates its own language in Section 5.7 — which is what creates the "gap" problem in the first place. *See* Charter-SBC GTC DPL at p. 27-28.

Consequently, while Charter appreciates SBC's proposal on this matter, Charter continues to believe that its own language is more effective at ensuring an orderly transition from the contract currently under arbitration to whatever successor contract is put into place.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 29, at p. 27-28.

R. Assurance of Payment

GTC Issue 30: Should Charter be required to give SBC an Assurance of Payment?

Charter understands that if it (or any other CLEC) fails to pay its bills SBC can reasonably require a deposit to ensure that it gets paid. Specifically, Charter proposes a deposit sufficient to cover two months' bills. *See* Charter-SBC GTC DPL Issue 30 at p. 28 (Charter proposed language for Section 7.1). Thus, it is important to understand that Charter does not oppose a deposit requirement in reasonable circumstances. This rebuts SBC's claims (Ms. Quate's observations) about CLECs that have gone out of business since the height of the telecom boom in 2000, Quate Direct at 47, and also shows how SBC's rationale are not appropriately applied in this instance.

Charter's issue with SBC is not really about deposits. The problem is that SBC's proposed contract gives SBC the right to require elaborate and oppressive "assurances of payment" without any showing that Charter has not paid its bills. SBC's proposed language says that Charter shall provide such assurances "upon request." Charter-SBC GTC Issue 30 at 28 (SBC proposed language for Section 7.1). Ms. Quate tries to argue that this right is meaningfully restricted, but it is not: SBC, for example, can demand

assurances of payment based on its interpretation of articles it reads in the newspaper. *See id.* (SBC proposed GT&C § 7.2.2). When Ms. Quate discusses this section, *see* Quate Direct at 50, she claims that this is actually an "objective" standard, but neglects to mention the full scope of the material SBC claims to be able to rely upon.

This is undoubtedly the result of SBC's attempt to force all CLECs to conform to SBC's single uniform approach to doing business in Missouri. Although SBC's generic contract terms might make some sense when applied to CLECs that do not operate their own networks, they do not make sense when applied to Charter. If a CLEC is (for example) a pure reseller, then all the underlying service is really being provided by SBC. Such a CLEC collects money from its customers and then remits payment to SBC for the service that SBC has provided. If such an entity looks like it is in financial trouble, SBC is at risk of providing service and not getting paid. Charter, however, is in a totally different situation.

Charter has its own network and will basically be exchanging traffic with SBC. While SBC provides "services" to Charter in some cases under this arrangement (for example, if Charter delivers an intraLATA toll call to SBC for completion), in every case SBC's own end user customer benefits directly, by (for example) receiving a call that he or she wants to receive. SBC's relationship with Charter, therefore, is not a situation, in which SBC is at risk of providing significant services for which it does not get paid. Giving SBC a broad-ranging right to demand extra "assurances of payment" from Charter based on newspaper articles, etc. is neither necessary nor fair.

It bears repeating that Charter fully recognizes SBC's right to get paid, and Charter's language provides for cash deposits if for some unforeseen reason Charter does

not pay its bills on time. *See* Charter-SBC GTC DPL Issue 30 at p. 28 (Charter proposed language for Section 7.1). It is only the oppressive and discretionary "assurance of payment" language that Charter objects to.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 30, at p. 28-29.

S. Escrow

GTC Issue 32: Is it appropriate to require Party's to escrow disputed amounts?

Charter does not believe that escrow requirements are appropriate given the nature of the interconnection relationship between Charter and SBC, discussed above. SBC asserts the right to require escrow of disputed amounts, unless certain criteria are met. Quate Direct at 26-29. Ms. Quate basically complains that CLECs in general are bad credit risks and so escrows are reasonable.

Again, though, Charter will not be reselling SBC's services or using the piece-parts of SBC's network to serve customers; Charter will simply be exchanging traffic with SBC, mainly on a bill-and-keep basis. While billing disputes can and will arise between SBC and Charter, the nature of this interconnection relationship inherently mitigates the risks that SBC seems concerned about in Ms. Quate's testimony. SBC is simply trying to use a one-size-fits-all approach when the nature of Charter's business dealings with SBC is really very different from a reseller or a UNE-based CLEC.

Ms. Quate claims that SBC will not require an escrow in the case of a "material billing error." Quate Direct at 28. This sounds fine. The problem is that as far as Charter can tell there is nothing in SBC's actual contract language that addresses this

issue. Moreover, reading Ms. Quate's testimony, what she really seems to be saying is that no escrow is required if ***SBC admits up front*** that a bill might be materially wrong. Of course, in the case of a bona fide billing dispute, Charter will be asserting, because it believes, that SBC's bill is materially wrong, but SBC might well have a different view.

That said, Ms. Quate's discussion of this point highlights precisely the problem that Charter has with the escrow requirement, particularly given the fact that our relationship with SBC is basically limited to exchanging traffic. SBC should not be able to require us to undertake the time and expense of setting up escrow accounts, and tying up our cash in them, when SBC makes billing errors. Again, whatever may be true with other CLECs, with Charter this will not be a case of SBC trying to protect its right to collect for "services" that it has provided in the normal sense. SBC and Charter exchange traffic for the mutual benefit of both of their customers, and most of that traffic is exchanged on a bill-and-keep basis. Requiring the escrow of disputed funds for the kinds of fees that might be in dispute between Charter and SBC does not make sense.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 32, at p. 36-37.

T. Credits or Refunds

GTC Issue 33: Should CLEC expect to receive monetary credits for resolved disputes (in their favor) if Charter has outstanding and or other past due balances due to SBC?

Charter believes that if a billing dispute has been resolved in its favor — that is, if it has been determined that SBC owes Charter money — that SBC should be required to actually pay what it owes. Charter's concern is that SBC not have the right to offset

money it ***actually owes*** Charter following the resolution of one billing dispute, against money that SBC ***claims it is owed*** in another, unrelated billing dispute.

A hypothetical example helps to explain the situation. Suppose SBC erroneously bills Charter access charges on some local traffic, and erroneously says that Charter owes SBC $1 million for that traffic. Suppose also that Charter paid, subject to protest, a charge of $200,000 for the construction of some interconnection facility that SBC was really responsible for. If Charter prevails on its claim for the $200,000, Charter actually wants the $200,000 back. It does not want SBC to declare that Charter "only" owes SBC $800,000 in (erroneous) access charges.

In other words, the point of Charter's language is to ensure that SBC does not have a contractual right to offset its losses in one billing dispute with Charter against other pending, unresolved disputes. *See* Charter-SBC GTC DPL Issue 33 (Charter proposed language for Section 8.7.1). Nothing in SBC's testimony or position statements addresses this concern, which suggests that SBC does not understand the purpose or effect of Charter's proposed language.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 33, at p. 40-42.

U. Billing Disputes

GTC Issue 34: Which Party's billing dispute language should be used?

This is another issue that illustrates the difference between Charter's position as an interconnected facilities-based competitor and the position of CLECs who basically buy services or facilities from SBC to serve end users. SBC's generic bill dispute

language parallels what SBC might reasonably impose on a customer of SBC's services. If a customer disputes a bill, SBC has to investigate to decide whether the customer is right and let the customer know. *See*, *e.g.*, Charter-SBC GTC DPL Issue 34 at 43 (SBC proposed language for Sections 9.3.3 and 9.3.4). This will normally depend on what services the customer is buying, whether SBC has actually provided them, etc.

But in Charter's case, again, Charter does not buy "services" from SBC in the normal sense. Charter exchanges traffic with SBC, mainly on a bill-and-keep basis. There will undoubtedly be situations in which Charter and SBC might send each other erroneous bills that need to be sorted out. But it cannot be assumed that SBC's standard forms or standard end-user-like procedures will make any sense when sorting out who is responsible for the cost of a particular run of fiber, or whether particular traffic is properly classified as local or access.

Given this, Charter's proposal is flexible enough to deal with the kinds of disputes that might actually arise in its relationship with SBC: a requirement that the party objecting to a bill provide a commercially reasonable explanation of the problem, including, ***if reasonable in the circumstances,*** the specific information SBC has identified in its one-size-fits-all contract. *See* Charter-SBC GTC DPL Issue 36 at 48 (Charter proposed language for Section 10.3.1).

Ms. Quate claims, Quate Direct at 33, that somehow Charter's language will excuse Charter from providing enough information to resolve a billing problem. This is obviously wrong. Charter has every incentive to fully explain why an erroneous bill from SBC is, in fact, wrong. But the precise information that is needed will vary from case to

case given the nature of Charter's relationship with SBC. This is why Charter's more flexible "commercially reasonable" language is appropriate.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 34, at p. 42-43.

V. Dispute Resolution

GTC Issue 36: Should SBC's language for Dispute Resolution that has been established for all CLECs be included in the Agreement?

Again, Charter's unique position as a facilities-based competitor is implicated here. Charter is not an SBC customer, buying services for resale or UNEs to serve end users. Charter has its own network and serves its own customers; it does, however, exchange traffic with SBC.

This means that the kinds of disputes that are likely to arise between Charter and SBC will not be garden variety problems like billing for 375 UNE loops when the CLEC-customer really only bought 357 UNE loops, or billing for resale service for 1091 end users when the CLEC-customer really only resold service to 1019 end users. Barring gross billing errors by SBC (such as, for example, sending Charter a bill for UNE loops at all), the disputes between Charter and SBC will be more complicated and dependent on contract interpretation. They will require real business-to-business attention.

This has a couple of consequences. First, the information that must be supplied to explain a billing dispute cannot be determined in advance on some form. It is necessary that the contract generally require that the information reasonably necessary to deal with the issue be provided. This is what Charter's language proposes. Second, determining whether a billing error has occurred will never be a unilateral decision by SBC. So, it

does not make sense for the contract to provide that SBC gets to declare when and whether a billing dispute is "resolved." To the contrary, given the nature of Charter's relationship with SBC (again – exchange of traffic, largely on a bill-and-keep basis), no dispute can properly be viewed as "resolved" for or against either party unless both parties agree. (Of course, if the parties can't agree, they can bring the matter to the Commission for resolution.)

Ms. Quate's direct testimony, Quate Direct at 39-40, supposedly dealing with this language, actually says nothing about it. SBC seems totally oblivious to the real issue here, which is that the ***nature*** of disputes that will arise between SBC and a stand-alone, facilities-based competitor like Charter are simply different from the kinds of disputes in which SBC will undoubtedly find itself with resellers and UNE-based CLECs. Like other provisions, this aspect of SBC's template contract does not fit the relationship between Charter and SBC, and there is no reason to try to cram that relationship into the same cookie-cutter contract that might reasonably apply to resellers and UNE-users.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 36, at p. 48-53.

W. Audits

GTC Issue 38(a): Which Party's audit requirements should be included in the Agreement?

See consolidated discussion of Audit issues below.

X. Audits

GTC Issue 38(b): Which Party's aggregate value should be included in the agreement?

See consolidated discussion of Audit issues below.

Y. Audits

GTC Issue 38(c): Should either Party's employees be able to perform the audit?

Charter objects to SBC's proposal that its own employees should be permitted to "audit" Charter; and Charter also objects to SBC's proposal that the audited party bear some of the costs of the audit if an error of 5% or more is found. A more appropriate number, given the nature of Charter's relationship with SBC, is 10%.

Ms. Quate claims that it is hard for SBC to find qualified outsiders to understand a CLEC's records; and claims that a 5% error is sufficient to warrant shifting the costs of the audit to Charter. Quate Direct at 75-76.

Where a CLEC uses SBC's own facilities to offer services to end users and/or simply reselling SBC's services, it may be appropriate for SBC to use its own employees to conduct an audit of the CLEC in the case of a dispute. SBC's employees would know exactly what the CLEC was doing and selling, and so might be the best people for the job (although, frankly, I think SBC's claim that qualified outside auditors are not available is overblown).

But Charter does not use UNEs and does not resell SBC's services. It has its own operations and its own records. It uses switching and network equipment that is different from the equipment SBC uses. Barber Rebuttal at 32-33. There is no reason to think that SBC's employees would have any particular expertise in conducting any sort of "audit" of Charter, were one to be necessary. Indeed, because Charter is an independent, facilities-based competitor, SBC has much to gain competitively by "training" its

employees in how Charter actually conducts its business. *Id*. Thus, in Charter's case, an "audit" performed by SBC employees would be particularly inappropriate and intrusive.

Nothing in Ms. Quate's testimony addresses these concerns at all. Again, SBC is oblivious to the differences between Charter's interconnection relationship with SBC and the way in which UNE-based CLECs or resellers relate to SBC.

As to the specific percentage at which the cost of an audit might fairly be shifted, Charter understands the point of this provision to be that non de minimis errors might reasonably result in the erroneously billing (or erroneously failing to pay) party bearing the costs of the audit. The problem from Charter's perspective is that much of Charter's relationship with SBC takes place on a non-cash basis, so the level at which a billing error is considered de minimis has to go up, because cash billings are themselves only a small part of the parties' relationship. Barber Rebuttal at 33.

Again, the vast majority of the business done between the companies — the exchange of local traffic — will occur on a bill-and-keep basis. *Id*. In other words, the total amount of money billed by Charter to SBC or vice versa will be de minimis. Moreover, it actually reflects a fairly small proportion of the overall business relationship between the parties, which occurs on a mainly "barter" basis. Of course there may be some incidental administrative activities that are properly subject to payment under the agreement, and occasional construction-related charges that might be negotiated in connection with setting up or expanding an interconnection facility.

But beyond those two categories the main charging back and forth between Charter and SBC will be access charges on non-local traffic that goes one way or the other between them. For that reason it is quite possible that an error of 10% or even more

(one way or another) might exist in terms of amounts billed, even though the activity affected by the error reflects only 5% or 1% or even less of the total activity between the parties under the contract. Because so much of the parties' relationship is conducted on a non-cash basis, the standard of what counts as a *de minimis* error not warranting shifting the cost of the audit must be adjusted as well.

This is yet another example of SBC's cookie-cutter contract containing provisions that don't really make sense when applied to a stand-alone, facilities-based competitor like Charter. It is not reasonable to force Charter to accept contract terms that do not make sense, and are not necessary to protect SBC, in light of Charter's own business operations, just because SBC deals with a lot of resellers and UNE-users. As we understand it, the purpose of the 1996 Act is to encourage the growth and development of independent, facilities-based, intermodal competitors to the ILEC. That is just what we are doing. Yet SBC wants to treat us just like entities that have not established their own networks and that depend on SBC for their very ability to offer service.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 38, at p. 55-58.

Z. Indemnification

GTC Issue 40: Is it appropriate to replace a commercially reasonable capped indemnification exposure with non-capped damages.

SBC suggests that that the scope of the parties' disagreements is not fully captured in the brief statement of the issue. Quate Direct at 64.

Ms. Quate testifies that Charter's proposed language does not allow for the effect of tariff provisions in limiting liability and the obligation to indemnify. Quate Direct at

65. This is a situation where again, SBC's language relates mainly to resellers and UNE-users, not to Charter.

Ms. Quate also claims that SBC's language protects SBC against damages to its facilities that arise from "Charter, its agents, subcontractors, and end users." Quate Direct at 64. Charter agrees that this is a reasonable concept, but notes that SBC's actual proposed language does not properly effectuate that concept.

Under SBC's proposed Section 14.2 language, Charter is on the hook for damages to SBC's facilities "due to malfunction of any facilities, functions, products, services or equipment provided by ***any person or entity than SBC-13STATE***" (emphasis added). See Charter-SBC GTC DPL Issue 40 at 62-63 (SBC proposed Section 14.2). Charter corrects this language to actually effectuate what Ms. Quate says she means, by stating that Charter is responsible for damages to SBC's facilities arising "due to malfunction of any facilities, functions, products, services or equipment provided by any person or entity ***at CLEC's direction and under CLEC's control*** other than SBC-13STATE." *See id*. (Charter proposed Section 14.2).

It logical and sensible for Charter to be responsible for things that happen as a result of third parties operating at Charter's direction. That is not what SBC's language achieves though. Instead, SBC seems to make Charter responsible for problems arising from ***any*** third party, whether they are related to or under the direction of Charter or not. This seems to me to simply be a drafting error on SBC's part, given what SBC says they mean.

Ms. Quate's objection to Charter's language in Section 14.3, Quate Direct at 65, is based on a misreading of Charter's language. Ms. Quate suggests that Charter is trying

to create a loophole in the limitation of liability clause, when, in fact, Charter is trying to simply ensure that the indemnification provision – which relates to one party protecting the other from claims brought by 3rd parties – does not affect the liability (including limitations on liability) of the two parties directly to each other.

With respect to Ms. Quate's final point (whether a gross negligence or mere negligence standard should apply), upon consideration Charter will accept SBC's proposed language for that aspect of Section 14.6. Quate Direct at 65-66.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 40, at p. 62-65.

AA. Advertisements

GTC Issue 41: Should the Parties be allowed to use the Party's name in advertisements?

As Charter Witness Barber testified, Charter wants to be able to use SBC's name in truthful comparative advertising. Barber Rebuttal at 36-37, Barber Direct at 41-42. SBC Witness Quate's testimony on this issue, Quate Direct at 79, does not seem to address Charter's specific proposal and is somewhat confusing overall. It is hard to understand how SBC can say that head-to-head competition between facilities-based competitors, including head-to-head advertising of comparable products and services, does not enhance consumer choices and competitive alternatives for Missouri residents.

For these reasons the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 41, at p. 65.

BB. Challenges to Carrier Selection Changes

GTC Issue 42: Is it appropriate that only and End User have the ability to initiate a challenge to a change in its LEC?

As Charter Witness Barber testified, it is possible to envision difficulties with end user selections of local carrier that are best resolved on a carrier-to-carrier basis rather than on a customer-by-customer basis. Barber Rebuttal at 37, Barber Direct at 42-43. For example, suppose that Charter marketed to and won the business of a large number of SBC customers in a large apartment building. Suppose further that SBC, due to some error, went back to the apartment building and re-connected the end users' specific loops to SBC plant, *en masse.* While end users could certainly be expected to object, there is no reason for the contract to contain language that would forbid Charter from directly raising this matter with SBC.

SBC never provided any testimony that meaningfully addressed this issue. As a result, the Commission should resolve this issue by ruling that the Parties must adopt Charter's proposed language on this issue, as identified in GTC DPL Issue 42, at p. 66.

VII. CONCLUSION

For the foregoing reasons Charter respectfully requests that the Commission rule in its favor on the issues identified above and order the Parties to implement an Agreement utilizing Charter's proposed contract language.

Respectfully submitted,
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