BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

POST-HEARING BRIEF OF NAVIGATOR TELECOMMUNICATIONS, LLC

COMES NOW Navigator Telecommunications, LLC ("Navigator"), pursuant to Section 252(b)(1) of the Communications Act of 1934, as amended (the "Act"), and 4 CSR 240-36.040, and files this Post-Hearing Brief in its arbitration with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC"), to establish a successor interconnection agreement to the expiring "M2A" (the "Agreement").

INTRODUCTION

This arbitration arises out of negotiations to replace the standard SBC Missouri interconnection agreement which many competitive local exchange carriers ("CLECs"), such as Navigator, have adopted. SBC filed the Petition which gave rise to the arbitration, which was consolidated with arbitration petitions filed by SBC involving several other CLECs. The parties filed direct and rebuttal testimony, and the case was heard before Arbitrator Kevin A. Thompson during the week of May 23, 2005. Navigator now files its Post-Hearing Brief in this arbitration, and prays that the Commission adopt its positions stated herein.

ARGUMENT

As a common theme throughout the Agreement, SBC's proposals would inject uncertainty into the contract terms, impose unnecessary costs onto CLECs, and allow SBC evade its regulatory responsibilities to suppress competition in Missouri. By and through this Post-

Hearing Brief, Navigator addresses SBC's anti-competitive proposals and urges the Commission instead to adopt Navigator's proposals with respect to each issue in this arbitration.

GENERAL TERMS & CONDITIONS

ISSUES 1 and 2: Whether the term UNEs should be modified with the word "lawful" or by substitution of "Section 251(c)(3)" for "lawful."

SBC proposes to insert the word "lawful" in front of the term "UNEs" as a means of unfairly and inappropriately reducing its obligation to provide access to network elements, and to inject uncertainty into the Agreement.[1] Its offer to substitute "Section 251(c)(3)" for "lawful" does not change the substance of its proposal. SBC's proposed language is particularly inappropriate in light of the extensive litigation that continues to take place over which network elements.[2] SBC must provide to CLECs on an unbundled basis. UNEs are UNEs, and if the FCC or a state commission determines that CLECs are no longer "impaired" without access to a particular network element, SBC must still provide access to the network element, but at "just and reasonable" rather than "TELRIC" based rates under the Agreement.

SBC confuses its obligations to provide access to network elements. Even if it is fairly and rightfully determined that a CLEC is no longer "impaired" without access to a network element, the CLEC should still have access to that network element, just not at TELRIC rates. SBC's proposal ignores its obligation to provide network elements to requesting carriers pursuant to section 271 of the Act[3] or at "just and reasonable rates" under the Agreement.[4]

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1 LeDoux Direct, at 4:1-6.

2 In this Post-Hearing Brief, Navigator uses the term "UNE" to refer to network elements that SBC is obligated to provide pursuant to the FCC's network unbundling rules, and the term "network element" to refer to those to which SBC has no unbundling obligation.

3 Indeed in the *Triennial Review Order*, the FCC reaffirmed its standing conclusion that "BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates." *Review of the Section 251 Unbundling Obligations of Incumbent Local*

Despite the simplicity of this regime, SBC seeks to inject uncertainty into the Agreement with its lawful/unlawful dichotomy. SBC's proposed language would give it *carte blanche* to impose its own unilateral and subjective interpretation of what is required to be provided, and should be eliminated throughout the Agreement.

At minimum, the proposed language will inevitably lead to substantial disputes.[5] Under SBC's proposed language, if it unilaterally determines that one of the FCC's "no impairment" thresholds has been met, it would issue an Accessible Letter advising CLECs to issue orders requesting that the UNE be converted to a special access or resale service within thirty days. CLECs taking issue with SBC's determination would have to follow the dispute resolution process under the Agreement and contest SBC's determination before the Commission. SBC's proposed language would require CLECs to litigate each time they were denied UNEs, or charged a non-TELRIC rate.

SBC's proposal is patently inappropriate given the untold amounts of litigation over which UNEs SBC must provide and at what prices.[6] The state regulatory commissions, the FCC, and federal courts have all considered the obligation to provide UNEs in numerous decisions.[7] As evidenced by the extensive litigation, it is clear that SBC will do anything within its means to reduce, if not eliminate, its obligation to provide network elements to CLECs.[8] Under its

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Exchange Carriers, CC Docket No. 01-338, FCC 03-227, at ¶ 652 (rel. Sept. 17, 2003) ("*Triennial Review Order*").

4 If a CLEC is "impaired" without access to a network element, it should be priced at TELRIC pursuant to section 251(d) standards. If, however, there is a finding of "no impairment," CLECs should still have access to the network element ,but a just and reasonable rates pursuant to sections 201 and 202 of the Act.

5 LeDoux Direct, at 4:7-8.

6 LeDoux Direct, at 3:15-16.

7 LeDoux, Direct at 3:16-20.

8 LeDoux Direct, at 3:20-22.

proposed language, however, SBC would be able to establish its own list of UNEs -- *based on its own interpretation of relevant law* -- despite the FCC's, state commissions', and the D.C. Circuit's tireless efforts to settle this long-standing issue.

Through its proposed contract language, SBC attempts to limit its contractual obligations and inject uncertainty into the Agreement.[9] In the event that SBC believes that its statutory obligations to provide UNEs has changed, its proposed contract language would allow it to unilaterally impose its interpretation of its obligations on signatory CLECs.[10] Navigator has expended a great deal of time and resources into negotiating and arbitrating its interconnection agreements with SBC. Having done so, at minimum, the Agreement should provide Navigator some degree of certainty as to its contractual obligations with SBC.[11] Under SBC's proposed language, the Agreement would do no more than restate SBC's current interpretation of its obligation to provide UNEs.[12]

SBC's proposed language turns the contract into a guessing-game, and does not allow Navigator to properly plan provisioning orders and network deployment plans.[13] SBC's proposed language is a transparent attempt to circumvent network sharing obligations, and would allow it to unilaterally impose its interpretation of relevant law on Navigator.[14] SBC's proposed language should be rejected.

ISSUE 3: Whether the insurance limits requested by SBC are reasonable.

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9 LeDoux Direct, at 3:22-4:1.

10 LeDoux Direct, at 4:4-6.

11 LeDoux Direct, at 5:14-16.

12 LeDoux Direct, at 5:2-5.

13 LeDoux Direct, at 5:16-18.

14 LeDoux Direct, at 6:4-7.

SBC would like to dictate certain types and amounts of insurance that Navigator would be required to maintain under the Agreement. Specifically, SBC's proposed language would require Navigator to maintain a comprehensive regime of insurance, including workers' compensation, employers liability, commercial general liability, and automobile liability insurance, and to compel all of its subcontractors to have similar coverage.[15] SBC seeks to impose insurance requirements that would impose unnecessary costs on Navigator, and which are not necessary to protect SBC's interests under the Agreement.

SBC argues that the insurance requirements are necessary to protect its investments and related equipment, as well as to protect its respective employees from losses resulting from potential injuries and third party liability.[16] While Navigator does not dispute the need to protect SBC's investment and employees, each party should also retain discretion to quantify the amount of risk it is willing to assume and procure the necessary amount of insurance according to such risk assessment calculations.

The insurance limits SBC requests far exceed any conceivable liability to it under the Agreement.[17] While Navigator appreciates SBC's interest in protecting the public switched network, in the seven years that the companies have done business together, SBC has never made any claims against Navigator as a result of Navigator's actions in Missouri.[18] SBC witness Quate further confirmed at the hearing that SBC has never suffered any damage to its network in Missouri as a result of Navigator's actions.[19]

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15 General Terms & Conditions, § 2.3.

16 Tr. at 185:20-23.

17 LeDoux Direct, at 7:1-2.

18 Tr. at 185:7-10.

19 Tr. at 185:11-13.

There have been no damages or claims as a result of Navigator's actions, and it is inconceivable that Navigator could cause damage to the network given its business model. Navigator provides services to its end users on a pure resale and UNE-P strategy.[20] Navigator does not itself collocate in SBC's facilities, rather it relies entirely on SBC for interconnection and exchange of traffic with other carriers, as well as for maintenance and repair activities. Navigator is incapable of causing damage to the network or SBC's collocation facilities. At the hearing, SBC witness Quate acknowledged that there is a significant difference in risk to SBC between a collocated and a non-collocated CLEC, which should be reflected in the insurance requirements,[21] yet SBC's proposed contract language would appear to impose the requirements for collocated CLECs on non-collocated resellers like Navigator.

Moreover, workers' compensation insurance would serve only to protect against potential liability or injury to Navigator's employees under the state-specific agreement.[22] Indeed, at the hearing, SBC witness Quate acknowledged that Navigator's workers' compensation would not afford any protection to SBC.[23] Navigator has no employees in Missouri,[24] and thus workers' compensation insurance in the limits proposed by SBC is clearly beyond the scope of what is required to protect SBC's interests under the Agreement.

SBC's proposed insurance limits bear no rational relation to actual risk -- and would require Navigator to pay out annual premium payments well into the hundreds of thousands of dollars per year.[25] At the hearing, SBC witness Quate admitted that in calculating the risk that

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20 LeDoux Direct, at 6:24-7:1.

21 Tr. at 186:13-17, 187:17-21;

22 LeDoux Direct, at 7:9-12.

23 Tr. at 184:3-7.

24 LeDoux Direct, at 7:1.

25 LeDoux Direct, at 7:5-8.

SBC believes it is exposed to in Missouri, it did not take into account the amount of premiums that Navigator would have to pay to purchase the insurance.[26] Thus, SBC cannot argue that its one-size-fits-all approach to insurance requirements properly reflects the risk that it bears as a result of its relationship with Navigator under the Agreement.

Navigator understands and appreciates the value of liability insurance, and is quite capable of determining for itself the types and levels of insurance that it needs to conduct business. The types and amount of coverage requested by SBC, on the other hand, are not necessary or appropriate in the context of its dealings with small CLECs like Navigator.[27] SBC's proposed limits would impose unduly burdensome costs on CLECs in doing business, and serve as a clear barrier to competitive entry in Missouri.[28] SBC's proposed insurance requirements should be rejected in favor of the language proposed by Navigator.

ISSUE 4: What form and amount is appropriate for adequate assurance of payment?

SBC's language requires a deposit or letter of credit in an amount of three months' anticipated charges (including recurring, non-recurring, termination charges and advance payments).[29] SBC's proposed language far exceeds any reasonable amount that may be required to protect its interests in the event of termination. Navigator should not be required to pay an unreasonable deposit amount under the timeframes proposed by SBC under the Agreement.[30]

A. <u>SBC's Proposed Deposit Amount is Excessive</u>

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26 Tr. at 187:22-188:1.

27 LeDoux Direct, at 7:2-6.

28 LeDoux Direct, at 7:8.

29 General Terms & Conditions, at § 3.4.

30 LeDoux Direct, at 7:14-18.

The amount of the deposit requested by SBC is unfair and unnecessary.[31] If SBC requires a deposit as an assurance that it will be paid in the event the contract relationship is terminated, the amount of the deposit should be calculated to reflect SBC's exposure after it has exercised its right to terminate the Agreement.[32] SBC overstates its potential financial exposure under its proposed terms and seeks a deposit equal to three months' charges for all services rendered, including all recurring, non-recurring, termination charges, and advance payments.

SBC claims that the reason for the three months' deposit amount is that it is exposed from the bill date to the bill due date, through the time that a first and second notice of non-payment is sent, and then a thirty day transition period in the event it terminates for continued non-payment.[33] Under SBC's proposed language, however, once SBC makes a request for assurance of payment, it will provide Navigator only ten business days to respond before invoking its right to discontinue performance under the Agreement.[34] Assuming that the Commission adopts Navigator's proposal that SBC provide it twenty business days to provide the assurance of payment before discontinuing services under the Agreement, one month's deposit is sufficient to protect SBC's interests in light of the broad rights it has to suspend orders and discontinue services.

SBC seeks the right to suspend completion of pending orders and reject any new service orders upon the tenth day following the initial letter asking a non-paying CLEC to pay or dispute. In addition, SBC has the right to terminate the Agreement on short notice in the event the assurance is not paid within ten days following the initial notice.[35] SBC's proposed

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31 LeDoux Direct, at 8:2-3.

32 LeDoux Direct, at 8:6-8.

33 Tr. at 197:7-14.

34 General Terms & Conditions, at § 3.9.

35 General Terms & Conditions, at §§ 3.4 and 3.9; LeDoux Direct, at 8:3-6.

assurance of payment amount is in excess of its potential post-termination exposure and is, therefore, excessive. In light of SBC's broad termination rights under the Agreement, simple math illustrates that the assurance of payment amount under the Agreement should equate to one month's deposit.[36] Navigator's proposed deposit amount better reflects SBC's potential financial exposure to unpaid charges under the Agreement, and should be adopted.

B. SBC's Criteria for Creditworthiness are Unfair

SBC's proposed language would allow it to demand the excessive three months' deposit in the event that a CLEC fails to pay a bill -- any bill -- on a timely basis.[37] SBC proposed no minimum amount of the unpaid bill to trigger its proposal, so a small bill could result in a demand for three months' deposit, and Navigator would have no contractual recourse.[38] And the potential consequence for failing to make the deposit would be discontinuance of all services -- "if SBC Missouri makes a request for assurance of payments in accordance with the terms of this Section, then SBC Missouri shall have no obligation thereafter to perform under this Agreement until such time as CLEC has furnished SBC Missouri with the assurance of payment requested."[39]

Even if Navigator were to make timely payments of all required amounts under the Agreement, in the event that Navigator were to lose four or more of such disputes in a twelve month period, it would likewise be required to pay the deposit.[40] However, as a Kansas arbitrator recently found, "[c]onsidering the number of billing disputes lodged by the CLECs, the

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36 LeDoux Direct, at 8:6-10.

37 General Terms & Conditions, at § 3.2.3; LeDoux Direct, at 8:11-14.

38 LeDoux Direct, at 8:13-15.

39 General Terms & Conditions, at § 3.9.

40 Quate Direct, at 28:1-9.

standard of four or more losses of disputes in the previous twelve months is unbalanced and unfair."[41] The decision was affirmed by the Kansas Commission.[42]

If SBC's proposed remedy -- to discontinue provision of services -- is allowed to stand, the Commission should, at minimum, allow twenty business days (rather than the ten days proposed by SBC) to pay the deposit before SBC may be permitted to discontinue services to Navigator (and, in turn, Navigator's subscribers) under the Agreement.[43] As a small CLEC with limited resources, there are times when a single responsible party for Navigator is out of the office for two weeks. A twenty business day deadline to provide the assurance of payment allows for these circumstances without severe repercussions by SBC.

SBC's proposed assurance of payment language requires excessive deposit amounts to be paid in an unreasonable timeframe. Navigator's proposed language which better reflects SBC's potential financial exposure under the Agreement should be adopted.

ISSUE 5: What constitutes a "material" breach of the agreement?

SBC proposes language under which either party may terminate the Agreement for failure to perform a "material obligation," or breach of a "material term," of the Agreement.[44] It is unclear from SBC's proposed language, however, what constitutes a "material" obligation or term of the Agreement, as that term is not defined. The Commission should reject SBC's proposed language, and accept Navigator's proposal to clarify the meaning the "material" under the Agreement.

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41 In the Matter of Petition of Navigator Telecommunications, LLC for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996, Docket No. 05-NVTT-370-ARB ("Kansas Arbitration"), Arbitrator's Determination of Issues, at ¶ 53 (Feb. 16, 2005) ("Arbitrator's Determination of Issues").

42 Kansas Arbitration, Order No. 13: Commission Order on Phase I, at ¶¶ 12-13.

43 LeDoux Direct, at 8:20-22.

44 General Terms & Conditions, at § 4.8.

Navigator's concern is that, because the Agreement does not define "material," SBC is provided too much discretion and would be essentially free to declare Navigator in breach of an obligation or term, and proceed to terminate the Agreement and related services thereunder. In such an event, Navigator's sole remedy would be to seek relief from a court, the FCC, or this Commission.[45] Navigator requires greater contractual certainty.

The fact that Navigator is provided a cure period in the event SBC alleges a "material" breach does not alleviate Navigator's concern.[46] In fact, if SBC notifies Navigator that it is in breach of a material term, Navigator could take all actions that it believes necessary to cure the breach, and yet SBC could unilaterally decide that the actions are inadequate and terminate the Agreement.[47]

Also troublesome is the notion that SBC's termination "shall take effect immediately upon delivery of written notice to the other Party that it failed to cure such nonperformance or breach within forty-five (45) calendar days…"[48] Thus, SBC not only has the *unilateral* ability under its proposed language to determine whether a material breach has occurred, and that it remains uncured, it could theoretically wait until the forty-fifth day to provide notice that the breach has not been cured to SBC's satisfaction and proceed to *immediately* terminate the Agreement, and Navigator would have no contractual recourse.

Thus, under the Agreement, SBC may disconnect all services under the Agreement, regardless of the relationship, or lack thereof, between the would-be disconnected service and any breach that SBC may allege.[49] SBC's incentives to engage in such behavior are two-fold --

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45 LeDoux Direct, at 9:11-16.

46 LeDoux Direct, at 9:20-21.

47 LeDoux Direct, at 9:21-24.

48 General Terms & Conditions, at § 4.8.

49 LeDoux Direct, at 10:1-4.

first, SBC would enjoy having one less competitor in a given service territory; and *second*, SBC may be able to pick up Navigator's customers.

Navigator proposes to minimize these incentives by either eliminating references to SBC's right to terminate for "material" breach, or including language in the Agreement to better define a "material" obligation or term. An example of such language would be to clarify that a "material" breach occurs when three or more substantial and significant violations of an obligation or term of the Agreement occur within a calendar year. In addition, if a party believes it has cured a breach of which it is accused, Navigator proposes a mechanism which would allow for determination by a neutral third-party in the event SBC is not satisfied with the remedial measure.

Navigator wholly relies on SBC under the Agreement to provide services to its end users. Thus, it is not realistic to claim that, since the termination right is reciprocal, it is fair. Navigator will never be in a position to seek termination of the Agreement, regardless of SBC's performance thereunder. SBC is sufficiently protected under the Agreement in the event of any breach by Navigator through broad assurance of payment and termination rights.[50] Thus, in order to balance the relative inequities under the Agreement, the Commission should require the deletion of SBC's proposed section 4.8, or adopt a more objective criteria for a "material" obligation or term, such as the criteria proposed by Navigator.

ISSUE 6: Whether the limits on assignment are unduly restrictive and lack mutuality.

SBC proposes one-sided language that would impose unnecessary costs and delays on the contract assignment process, and unnecessary delays on merger and acquisition ("M&A") activity and internal reorganizations.[51]

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50 LeDoux Direct, at 10:6-9.

51 General Terms & Conditions, at §§ 5.1.1.1 and 5.1.1.2.

A. Navigator Should not be Restricted in its Ability to Assign to Non-Affiliates

As an initial matter, SBC proposes one-sided assignment restrictions such that only Navigator would have to seek written consent from SBC for assignments, whereas SBC may freely assign the Agreement. Navigator simply proposes to make the assignment provision reciprocal, such that either SBC or Navigator may assign the Agreement to non-affiliated entities with prior written consent of the other party.[52] Navigator's proposed language which would allow either party to assign the Agreement to non-affiliates with prior written consent is a typical provision used in commercial agreements, and should be adopted under this Agreement.

SBC's proposed one-sided restriction on assignments to non-affiliates is unfair and introduces a commercially unreasonable restraint on Navigator's business affairs. Specifically, SBC's proposed assignment language would have an adverse impact on possible merger and acquisition activity, either in the case where Navigator is acquiring another CLEC or is itself being acquired.[53] In acquisition situations, the need to generate operational efficiencies requires consolidation, and that would be hampered, if not outright prevented, by a provision which would restrict an acquired entity from terminating its interconnection agreement and assuming operation under the Navigator Agreement.[54] To the extent SBC finds that consent is required to engage in such activity, however, Navigator proposes that such a provision should be fair, balanced, and reciprocal.

Navigator's approach acknowledges the importance that each party be provided notice of M&A activity. Navigator submits that it too should be notified in the event SBC intends to assign the Agreement to another party. In such a case, a non-affiliated entity to SBC would then

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52 LeDoux Direct, at 10:14-16.

53 LeDoux Direct, at 11:1-2.

54 LeDoux Direct, at 11:2-5.

become the service provider that Navigator would wholly rely upon to purchase critical services that it will then resell or re-package to its customers. Navigator's proposed language requiring that both parties be alerted to assignment of the Agreement, and that either Party's consent would not be unreasonably be withheld to such an assignment, is fair and balanced. SBC's one-sided proposal should be rejected in favor of Navigator's proposed reciprocal assignment language.

B. Navigator Should Not Be Restricted in its Ability to Assign to an Affiliate

SBC has expressed concern that CLECs might arbitrage the system by assigning the Agreement to affiliates which have less favorable interconnection agreements.[55] SBC's concern is without basis.[56] As an initial matter, the FCC's "pick-and-chose" rules essentially eliminate a CLEC's ability to arbitrage contract terms -- clarifying that a requesting CLEC must take all-or-nothing, and may not cherry-pick contract terms. And, under Section 252(i) of the Act, nothing would prevent the affiliate from simply adopting Navigator's Agreement as its own.[57]

CLECs, and many other companies, reorganize and create new subsidiaries as a matter of course to achieve operational synergies, tax benefits, and for numerous other legitimate reasons. SBC's proposal would impair CLECs' ability to gain such operational efficiencies to compete more effectively. SBC's proposed language would impose costs and delays on CLECs' ability to conduct legitimate business affairs, and should be rejected in favor of Navigator's proposed assignment language.

C. CLEC Company Code Changes

SBC proposes that assignments or transfers of an Agreement where only the CLEC name is changing, and which does not include a change to a CLEC OCN/ACNA, constitute a "CLEC

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55 LeDoux Direct, at 10:21-22.

56 K2A Arbitration - Arbitrator's Determination of Issues, at ¶ 24.

57 47 U.S.C. § 252(i).

name change," whereby the CLEC would incur a record order change for each CLEC CABS BAN.[58] For resale, however, SBC proposes that a record order charge would apply *per end user record*.[59] Navigator sees no reason, nor has SBC offered any legitimate reason, why if a single charge is incurred per CLEC CABS BAN in one context, the same cannot apply to a Resale BAN. SBC's proposed language baselessly imposes unnecessary costs on Navigator should be rejected.

In addition, SBC proposes unreasonable timeframes and conditions on Navigator's ability to obtain a Company Code Change in the event of a proposed assignment.[60] SBC asks for unnecessary and unjustifiable advance written notice of certain assignments, and requires that Navigator "cure any outstanding charges" associated with services purchased under the Agreement.[61] As an initial matter, there is no reason why Navigator should be forced to pay amounts that it legitimately disputes in order to effectuate an assignment. Nor is there any need for the extent of prior written notice sought by SBC, except to slow the operational efficiencies sought to be gained by Navigator in re-organizing its operations. In light of the computerized systems in place, there is no need for SBC to require two to three months' notice of an assignment, whereas Navigator's proposed one to two months' notice would more than suffice. SBC's proposed language is an attempt to impose costs and delay on Navigator and should be rejected.

ISSUE 7: Whether SBC should be allowed to limit its liability for willful or intentional misconduct, including gross negligence.

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58 General Terms & Conditions, at § 5.1.2.1.

59 General Terms & Conditions, at § 5.1.2.1.

60 General Terms & Conditions, at §§ 5.1.3.1 and 5.1.4.1.

61 *Id.*

The nature of the dispute regarding Issue 7 is simple. SBC seeks to cap its liability to the amount paid by Navigator to SBC in a single contract year, even in the context of damages arising out of SBC's willful or intentional misconduct. Navigator proposes language under the Agreement that would make clear that neither party's liability for gross negligent, willful, or intentional misconduct would not be so limited.[62]

Navigator's proposal is simply intended to remove any incentive that either party might have to engage in gross negligent, willful or intentional misconduct.[63] If shielded from liability, particularly in the event of such extreme misconduct, SBC could theoretically put Navigator out of business through its misconduct, knowing that its exposure would be limited to one year's revenue under the Agreement.[64]

As a matter of public policy, neither Party should be permitted to escape liability for willful or intentional acts, or for its gross negligence, through the language SBC proposes that would provide it *carte blanche* to engage in misconduct. Navigator's proposed limitation on liability language is more consistent with similar provisions found in commercial contracts, is better aligned with the public interest, and should be adopted by the Commission.

ISSUE 8: SBC's proposed Intellectual Property language is unclear.

SBC's proposed intellectual property language is unclear and unnecessary. In particular, the provisioning of UNEs by SBC should necessarily include any license required for the use of those UNEs, including combinations with CLEC network elements.[65] SBC's proposed language limits its own licenses in such a way as to render the provision of the UNE to a CLEC essentially

62 LeDoux Direct, at 11:10-13.

63 LeDoux Direct, at 11:13-15.

64 LeDoux Direct, at 11:15-17.

65 LeDoux Direct, at 11:21-23.

useless, and then purports to release and hold SBC harmless from any liability arising from the CLEC's attempt to use a UNE for its intended purpose.[66]

SBC's proposed language imposes needless risks and potential litigation costs on UNEs purchased by Navigator, and is inconsistent with federal law. Nowhere in the *MCI Declaratory Ruling* does the FCC suggest that CLECs should provide indemnification for third party intellectual property infringement claims. Rather, the FCC clarified that it expects that "in nearly all cases, requesting carriers will be able to access [UNEs] without the need for additional licenses" … and that "[i]n the unlikely event that this should be come an issue … we seek to clarify incumbent LECs' obligations to provide nondiscriminatory access to network elements"[67] -- including equal in scope intellectual property licenses.

Specifically, the FCC requires that incumbent local exchange carriers ("ILECs"), such as SBC, use "best efforts" to obtain co-extensive rights for competing carriers purchasing UNEs.[68] In so finding, the FCC recognized that the ILECs control the choice of third party vendors, the scope of contracts with those vendors, and "if [ILECs] were not required to obtain the right for requesting carriers to use the network elements, they would likely have an incentive to interpret the licenses with these providers as narrowly as possible to make it more difficult for competing carriers to obtain access to the elements."[69]

SBC's proposed indemnification language for third party intellectual property claims undercuts the FCC's concerns. The indemnification language creates the perverse incentive for SBC to negotiate narrow license provisions that requesting CLECs may not be privy to, knowing

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66 LeDoux, Direct, at 12:1-3.

67 *Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-Use Agreement Before Purchasing Unbundled Elements,* CCBPol. 97-4, Memorandum Opinion and Order, at ¶ 8 (rel. Apr. 27, 2000).

68 *MCI Declaratory Ruling,* at ¶ 9.

69 *MCI Declaratory Ruling,* at ¶ 10.

that it would be indemnified in the event that the third party vendor alleges infringement. After having done business with Navigator for seven years, and in light of the facilities forecasting provision under the Agreement, any use of UNEs by Navigator should not come as a surprise to SBC. As the FCC has recognized, SBC is in the best position to negotiate licenses appropriate in scope to avoid third party claims in connection with the use of UNEs by Navigator.

SBC's proposed indemnification language is redundant of the parallel indemnification provision found in the General Terms & Conditions, adds confusion to the Agreement, creates a perverse incentive for SBC to privately negotiate narrower license agreements, and should be stricken from the Agreement.

ISSUE 9: Whether the Agreement should include language that requires payments for disputed amounts to be placed in escrow and allowing disconnection for failure to pay undisputed amounts.

SBC has accepted Navigator's language with respect to Issue 9. Accordingly, this issue has been resolved.

ISSUE 10: Language regarding termination for failure to pay.

SBC seeks to require Navigator to place *disputed amounts* in escrow, and seeks to disconnect services to Navigator in the event of a failure to timely pay "any charges billed to it under this Agreement."[70] SBC's language is unreasonable, unnecessary and should be rejected.

A. Escrow of Disputed Amounts

Under SBC's proposed language, Navigator would have to pay all undisputed amounts by the payment due date, give written notice of a dispute, and provide evidence that the full amount of the disputed charges has been deposited in an escrow account before such amounts will be deemed in dispute. By definition, disputed amounts are those over which Navigator has a *bona fide* dispute. Despite the contractual requirement that all disputes be in good faith, SBC

[70] General Terms & Conditions, at § 14.1.

seeks language that would permit it to tie up Navigator's limited working capital by overcharging and requiring that these amounts be placed in escrow.

SBC's proposal is troublesome in light of its history of overcharges. At essentially no point in the seven year history of Navigator's dealings with SBC has it not had a dispute over some aspect of its SBC bills.[71] Navigator has favorably resolved over $3 million in past overcharges, and currently still have over $600,000 in outstanding disputes.[72] Since it appears that SBC over-bills almost as a matter of course, experience has shown that an escrow/pay-to-dispute mechanism would create the perverse incentive for SBC to continue overcharging CLECs with whom it does business, tying up critical CLEC resources that are better served investing in new network services and facilities.

SBC argues that it has experienced large financial losses from CLECs who have either gone through bankruptcy or otherwise exited the business, many of which have filed frivolous or inflated disputes in order to avoid collection action. Navigator should not be penalized in its Agreement with SBC for SBC's past dealings with less stable CLECs. Despite the fact that Navigator disputes some aspect of most of the invoices from SBC, at the hearing, SBC witness Quate confirmed that she was not aware of any frivolous disputes that Navigator has ever raised with SBC in Missouri.[73] Nor has Ms. Quate ever heard anyone within SBC say that Navigator has filed frivolous billing disputes.[74] Despite the fact that Navigator has not frivolously disputed charges, SBC's position would require that Navigator simply forego the dispute process and pay large amounts out of its limited resources in order to prevent termination and disconnection.

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71 LeDoux Direct, at 12:19-21.

72 LeDoux Direct, at 13:2-3.

73 Tr. at 200:6-8.

74 Tr. at 200:9-11.

SBC's proposed escrow provision is essentially a pay-or-dispute process, as Navigator would essentially be forced to pay out-of-pocket the entire amount invoiced by SBC -- whether to SBC or into escrow -- leaving Navigator's cash-flow position largely at the mercy of SBC. The escrow requirement is not necessary in light of Navigator's position payment history with SBC, and is unduly burdensome. The Commission should adopt Navigator's proposal to eliminate the escrow requirement.

B. SBC Should Not Terminate for Non-Payment of Disputed Amounts

SBC should not be permitted to terminate the Agreement in the event of a failure to pay a disputed amount. Navigator proposes that the provisions be modified to apply to payment of non-disputed charges, especially in light of SBC's long history of inaccurate billings submitted to Navigator over the last seven years.[75] SBC should not be permitted to terminate the Agreement for non-payment of amounts it legitimately disputes.[76]

SBC proposes that Navigator pay non-disputed amounts, gather information regarding disputed amounts and submit a written dispute notice, and deposit disputed amounts into an escrow account before SBC would consider an amount to be in dispute. Given the scope and nature of the Agreement, the broad termination rights held by SBC for non-payment under the Agreement, and the potential impact that termination that could have on Navigator as well its the end-users and consumers in Missouri, SBC's proposed payment dispute provisions are not justified.[77]

C. SBC's Definition of Good Payment History Is Objectively Unachievable

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75 LeDoux Direct, at 14:16-20.

76 LeDoux Direct, at 14:10-14.

77 LeDoux Direct, at 14:10-12.

SBC claims that CLECs having a "good payment history" may not be required to escrow disputed amounts.[78] Although the criteria for "good payment history" are not included in the Agreement, SBC witness Quate stated at the hearing that they involve twelve months' timely payment by a CLEC.[79] Under these criteria, SBC witness Quate confirmed that it is possible that even "if a person were to miss one payment, whatever the reason, whatever the explanation in a 12-month period, they would then be subject to the escrow."[80] Even if they were described under the Agreement -- which they are not -- in light of its history of overcharges, and its unreasonable billing dispute provisions proposed under the Agreement, SBC's criteria for "good payment history" are essentially unachievable.

ISSUE 11: SBC's proposed billing guidelines are unreasonable - Navigator should not have to "pay and dispute."

SBC's proposed language would require Navigator to provide evidence that it has paid a disputed amount, before a challenge to SBC's bill would be deemed in "dispute."[81] Under this proposal, SBC could send invoices which are knowingly incorrect, and Navigator would have to pay the facially incorrect charges before being able to contest the overcharge.[82]

Over the course of the seven years in which Navigator has done business with SBC, Navigator has had some form of dispute over nearly every invoice received.[83] In fact, Navigator is over-billed by an average of about thirty percent, and most of its disputes are resolved in Navigator's favor after a second attempt.[84] Moreover, since experience dictates that these

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78 Tr. at 227:14-17.

79 Tr. at 227:19-25.

80 Tr. at 227:1-15.

81 General Terms & Conditions, §§ 13.4 and 13.4.1; LeDoux Direct, at 15:3-5.

82 LeDoux Rebuttal, at 5:9-11.

83 LeDoux Direct, at 15:5-7.

84 LeDoux Direct, at 15:9-10.

disputes take twelve to eighteen months to resolve, to tie up such substantial amounts of money through "pay and dispute" or escrow requirements would be extremely burdensome to a smaller CLEC like Navigator.[85] The Kansas Commission has recently concurred with this position and found that because bill disputes could take as much as eighteen months to resolve, it "seems unreasonable to require a CLEC to escrow the full disputed amount for potentially more than a year."[86]

Navigator will pay in a timely manner any amounts it is required to pay as a result of the billing dispute procedures. However, under SBC's proposal, when it overcharges, it would have Navigator's money until the dispute is resolved, depriving Navigator of precious financial resources which are better used investing in network and facilities.[87] SBC's proposed billing guidelines which establish a pay-and-dispute procedure are designed to unnecessarily tie-up Navigator's working capital, and are anti-competitive. The Commission should reject SBC's billing guidelines, and require that Navigator pay only undisputed amounts by the bill due date.

ISSUE 12: SBC should not be allowed to use Accessible Letters to unilaterally modify the parties' interconnection agreement.

SBC's proposed language that would allow it to unilaterally make changes to its contract obligations by notifying CLECs of its decisions to add or eliminate services, increase, decrease prices, etc., through Accessible Letters posted on the Internet should be rejected.[88] SBC typically issues Accessible Letters without prior notice to CLECs, and they are not the product of negotiation or arbitration.[89] Rather, they appear on the SBC website, and CLECs are expected to

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85 LeDoux Direct, at 15:11-13.

86 Kansas Arbitration, Order No. 13: Commission Order on Phase I, at ¶ 11.

87 LeDoux Rebuttal, at

88 LeDoux Direct, at 15:23-16:1.

89 Tr. at 201:21-23.

inform themselves of the contents of the Letters and conform their conduct accordingly.[90] Instead, Navigator proposes that changes to contract obligations should be the result of discussions between the parties and memorialized in a writing executed by both parties.

SBC regularly uses Accessible Letters to impose policies and service changes which are inconsistent with its interconnection agreements.[91] Navigator has on several occasions had discussions with SBC about the contents of Accessible Letters which appeared to contradict the M2A.[92] Indeed, Navigator's experience has been that SBC employees often reject service orders and other requests based upon information contained in its Accessible Letters.[93] Navigator simply wants to ensure itself that Accessible Letters will not be used to unilaterally amend the Agreement or the parties' obligations thereunder.[94] Thus, Navigator proposes that Accessible Letters should be used only for informational purposes, to explain, and clarify, but not change, contradict, or affect the Agreement.[95]

If SBC wants to modify contractual obligations, it can always do so by way of a written amendment under the terms of the Agreement. However, SBC's proposal which would allow it to *unilaterally* impose changes to contract obligations through Accessible Letters would inevitably lead to needless disputes,[96] and renders useless the time and expense Navigator and the other CLECs have incurred in partaking in this arbitration proceeding.

The Commission should reject SBC's proposal and accept Navigator's proposed language. This would be consistent with the agreed commitment under the General Terms &

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90 LeDoux Direct, at 16:1-5.

91 LeDoux Rebuttal, at 7:11-12.

92 LeDoux Direct, at 16:18-20.

93 LeDoux Rebuttal, at 7:6-7.

94 LeDoux Direct, at 16:8-10.

95 LeDoux Direct, at 16:21-22.

96 LeDoux Direct, at 16:15-16.

Conditions that modifications to the parties' contractual obligations be the result of discussions between the parties and memorialized in a writing executed by both parties. Navigator's proposal would ensure that Accessible Letters may be used for informational purposes only, and would not change, revise, supercede, amend, modify, or otherwise alter the provisions of the Agreement.

ISSUE 13: Whether it is reasonable that Force Majeure should also excuse the obligation to make payments.

SBC initially proposed to require timely payment of invoiced amounts event in the midst of a Force Majeure event. SBC has revised its proposal to reflect Navigator's position, such that Navigator would be excused from payment obligations for the duration of time when it is prevented from being able to make payment due to the occurrence of a Force Majeure. To the extent SBC agrees with Navigator's initial proposal, Issue 13 appears to be resolved pending agreement on mutually acceptable contract language.

ISSUE 15: Whether to include language allowing end users to take services from SBC upon end user request.

SBC proposes language that would undercut Navigator's ability to compete with SBC for customers in Missouri. Specifically, under SBC's proposed language, "SBC MISSOURI may, upon End User request, provide services directly to such End User similar to those offered to CLEC under this Agreement.[97] As drafted, the proposed language would allow SBC to offer services to Navigator's *retail* customers on the same terms and conditions governing services to Navigator, i.e., *wholesale* rates, terms, and conditions.[98]

In positions taken in other proceedings, SBC has made clear that it intends to fight for customers, even after those customers choose to leave its network for the services of other

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97 General Terms & Conditions, at § 57.4.

98 LeDoux Direct, at 18:14-15.

carriers.[99] SBC's proposed language takes this position to a logical extreme and would permit SBC to offer services to Navigator's customers on the same rates, terms, and conditions as Navigator receives. Navigator could not possibly match SBC's wholesale rates and remain in business. Indeed, SBC's proposed language would allow it to undercut all of its competitors to drive all end users in Missouri back onto SBC's services.

SBC witness Quate claims that "SBC would provide service to any end user at the rates found in its *retail* tariff as approved by the Commission."[100] Navigator simply asks that the contract language reflect this point. The Commission should adopt Navigator's proposed language that would clarify the intended meaning of section 57.4, such that SBC may only provide services to Navigator's end users through the rates, terms, and conditions found in SBC's retail tariffs.

ISSUE 16: Whether to include language prohibiting an amendment from having retroactive effect.

SBC proposes to have rates and conditions in an amendment to the Agreement apply prospectively from the date of Commission approval of the amendment. SBC's proposed language provides it no incentive for it to move quickly to implement changes adopted by the Commission where a regulatory driven change may be favorable to CLECs.[101] The Commission should reject SBC's attempt to inject possible delays into the Agreement.

To illustrate, if the Commission adopts a change to the M2A on June 1, SBC would still have to implement that change through new contractual language, yet the prohibition against retroactivity would give SBC every incentive to drag its feet to make the change as slowly as

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99 LeDoux Direct, at 18:9-11.

100 Quate Rebuttal, at 47:30-48:1.

101 LeDoux Direct, at 19:4-5.

possible.[102] Under this scenario, Navigator and every other CLEC signatory to the M2A would be deprived the benefits of the change until SBC decided to implement the new language.[103] In the meantime, consistent with its practices, when the change in law is favorable to the CLECs, SBC would sit on its hands and provide little assistance to CLECs in completing an amendment to reflect the change. Nor could a CLEC take the bull by the horns and file the amendment, as SBC would have to sign the document incorporating the amendment before it could be filed. Unless such amendments are given retroactive effect, SBC could unduly forestall the CLECs' ability to take advantage of the change.

SBC's witness Quate argues that SBC should not have to "incur the expense and burden of retroactive true-ups" if Navigator may delay in sending notice requesting an amendment to reflect the outcome of a regulatory order.[104] Again, SBC ignores the true nature of the incentives set forth under its proposal. Navigator has limited cash resources and must put its working capital to work to maintain its business. As demonstrated by Navigator's need to arbitrate the escrow and assurance of payment provisions under the Agreement, Navigator has no incentive to have SBC hold onto capital that Navigator could use to invest in network and facilities -- just to "burden" SBC with an expensive true-up.

Nor is SBC's proposed language necessary to prevent arguments in the future about when a rate change goes into effect have merit -- as SBC's witness Quate might have us believe.[105] The rates would go into effect on the thirtieth day following SBC's receipt of a CLEC request for the amendment. Navigator's position would better align the incentives for all parties to facilitate

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102 LeDoux Direct, at 19:5-8.

103 LeDoux Direct, at 19:8-10.

104 Quate Direct, at 11:18-20; Quate Rebuttal, at 8:1-3.

105 Quate Rebuttal, at 8:5-7.

negotiations and implement changes as quickly as possible -- preferably within the thirty day grace period provided for under Navigator's proposal.

The Agreement should create the proper incentives for parties to implement changes as quickly as possible. Navigator's proposal that retroactive effect should be based upon the CLEC's request date, regardless of SBC's delay in preparing amendment documents, is fair and balanced, and should be adopted by the Commission.[106]

ISSUE 20: COIN FUNCTIONALITY - Whether SBC should provide Coin Port functionality as part of its service offering.

Coin functionality is a basic service feature that should be included and made available when Navigator purchases access to a switch port. Despite the fact that SBC's retail unit provides these services to its own payphone customers,[107] SBC has continuously delayed in any implementation of UNE-P coin for Navigator. Instead, SBC has argued that it does not have an obligation to provide this basic feature of a switch port, and has provided this service only at a high-cost through the *bona fide request* ("BFR") process, or whence forced by a state regulatory agency.[108]

SBC takes an overly narrow interpretation of its obligations to provide coin functionality. On more than one occasion, the FCC has defined local circuit switching as including all "features, functions, and capabilities of the switch."[109] Although coin functionality involves no more than an analog port on a switch -- a switch functionality that can simply be turned on or off

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106 LeDoux Direct, at 19:12-14.

107 LeDoux Direct, at 20:3-4.

108 LeDoux Direct, at 20:16-18.

109 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, at ¶ 433 (rel. Aug 21, 2003) (the "*Triennial Review Order*"); *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, at ¶ 244 (rel. Nov. 5, 1999).

-- SBC refuses to acknowledge this as a basic feature, functionality, or capability of the switch that should be made available when Navigator purchases access to the switch port.

SBC's refusal to negotiate for this functionality is especially troubling in light of the fact that other ILECs, such as Verizon and BellSouth, provide coin functionality as part of their basic offering.[110] Nevertheless, now that Navigator has already undergone the costly and time-consuming BFR process, and incorporated coin functionality through an amendment to its existing M2A, Navigator seeks to ensure that it has uninterrupted access to coin functionality for the duration of the twelve month transition period set forth under the *TRRO*[111] for CLECs to transition to other local circuit switching arrangements.[112]

Many of Navigator's payphone provider customers, that it intends to continue to service, provide payphone services in rural parts of the state and are dispersed over a wide geographic area.[113] In fact, there continues to be a segment of the general population whose only access to telecommunications is to use a payphone.[114] Even non-wireline services, such as CMRS, are hampered by poor service area coverage. Navigator seeks contractual certainty to insure that it will be able to continue to serve its independent payphone providers in Missouri, and believes that it is in the public interest that this service continues to be available.

To ensure that these payphone customers are not disconnected or underserved as of the expiration of Navigator's existing M2A, the Commission should require that SBC include this

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110 LeDoux Direct, at 19:24. While other ILECs provide coin functionality as part of their basic offering, SBC required Navigator to make upfront payments to undergo the time consuming BFR process, and execute an amendment to its existing M2A, before it would allow Navigator to order the necessary switch functionality for the provision of coin services.

111 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand (rel. Feb. 4, 2005)(the "*TRRO*").

112 LeDoux Rebuttal, at 8:19-21.

113 LeDoux Direct, at 20:5-8 and 21:1-2.

114 LeDoux Direct, at 20:21-21:1.

feature function of the switch port as a part of SBC's basic service offering under the Agreement. The Commission should adopt Navigator's position which would allow it to continue to provide its payphone provider customers with basic switching with the same software features and functionalities that SBC provides its own customers.

APPENDIX UNE

ISSUE 1: Should the Agreement state that SBC is only required to provide UNEs that it is lawfully obligated to provide under Section 251(c)(3) of the Act?

SBC has proposed the use of the term "Lawful UNE" throughout Appendix UNE, and many other parts of the Agreement. Rather than raising the issue in each appendix where the language appears, the Parties agreed to collectively raise this issue in Appendix UNE Issue 1. The parties have agreed to conform the entire agreement as appropriate based on the Commission's order relative to GTC Issue 1, and thus this issue has been resolved.

ISSUE 2: Re-classified network elements.

Navigator withdraws this issue from the arbitration proceeding.

ISSUE 3: Transition and notification process.

SBC proposes language regarding the transition and notification process for UNEs that SBC believes it is no longer be required to provide. In the event SBC believes that a network element must no longer be unbundled under section 251(c)(3) standards, it should not be permitted to automatically eliminate its obligations with respect to the particular network element under Agreement.[115] Instead, if SBC believes that a particular UNE must no longer be provided, and the Commission has approved the declassification of the network element, the parties should use the "change of law" provisions of the Agreement to promptly reflect the change.

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[115] LeDoux Direct, at 22:3-6.

The Agreement should make clear that "declassification" requires Commission approval, rather than thirty days' notice from SBC that it will disconnect a particular network element (or convert to special access) when SBC believes an FCC impairment threshold has been met. Given Navigator's limited access to data regarding fiber-based collocators and access lines on a market-by-market basis, it would be virtually impossible to properly dispute a "no impairment" claim staked by SBC. Thus, it would be patently unfair for SBC to simply assert that a threshold has been met and disconnect, or convert to special access, a particular UNE on thirty days' notice.

Navigator's proposal to require the Parties to reflect such a regulatory change through the change in law provisions of the Agreement is more fair and balanced in that it would require that the Commission approve the declassification of a particular UNE, before it is removed from the list of UNEs available for access by CLECs. Any process that would allow for automatic declassification upon notice by SBC would clearly lead to unnecessary disputes. SBC's proposed language provides too much leverage for SBC to deny access to UNEs, and should be rejected in favor of Navigator's proposal.

ISSUE 4: UNE Combinations.

This Issue has been resolved in connection with the resolution of General Terms & Conditions Issues 1 and 2, and Appendix UNE Issue 1.

ISSUE 5: EELs Eligibility Criteria.

SBC attempts to saddle the contract with sections upon sections of enhanced extended loops ("EELs") eligibility criteria that are simply not required under the FCC's *Triennial Review Order*. The FCC's eligibility criteria are objective and fully captured in 47 C.F.R. § 51.318, which Navigator simply references in its proposed language. Thus, there is no need for SBC to

include such extensive detail in the Agreement describing its interpretation of the rules, except to insert unlawful restrictions intended to delay or prevent the provisioning of EELs.

SBC's proposed language requires Navigator to certify to number of conditions that go beyond the FCC's eligibility criteria as a part of the ordering process. For example, SBC would require Navigator to "provide the corresponding Local Telephone Number(s) as part of the required certification" -- whereas, the FCC has found that requesting carriers may satisfy the numbering criteria by certifying that it will not begin to provide service until a local number is assigned.[116] Moreover, in Section 2.12.2.2.7, SBC provides an extensive example of the meaning of its already lengthy and overly burdensome EELs eligibility criteria and certification process, which is unnecessary and serves only to inject confusion into the Agreement.

SBC mistakes the nature of the FCC's "self-certification" process. In its *Triennial Review Order*, the FCC clarified that "a letter sent to the [ILEC] by a requesting carrier is a practical method" for EELs eligibility criteria certification, and that a "critical component of nondiscriminatory access is preventing the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process."[117] However, by imposing extensive criteria on EELs eligibility not required under the FCC's rules, and by seeking to dictate the form and substance of Navigator's "self-certification" letter in request of an EEL, that is precisely what SBC seeks to accomplish.

Navigator should be permitted to self-certify its compliance with the eligibility criteria by sending a confirming letter without having to follow SBC's form, and without having to provide up-front all of the documentation requested by SBC.[118] The FCC did not anticipate that the

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116 *Triennial Review Order*, at ¶ 602.

117 *Triennial Review Order*, at ¶ 623.

118 LeDoux Direct, at 22:19-21.

specific types of information requested by SBC would be necessary to certify compliance with the EEL's eligibility criteria found. Instead, the FCC clarified that it expects that "requesting carriers will maintain the appropriate documentation to support their certifications," and provided a non-exhaustive list of documentation that could be used to support a self-certification.[119] SBC's proposed criteria are overly restrictive, and run afoul of the FCC's EEL eligibility rules.

Navigator's proposed language better reflects the parties' obligations under the FCC's rules. The Commission should adopt Navigator's proposed language and reject SBC's overly restrictive language that would serve as an "undue gating mechanism," and impose costs and delay into the EELs ordering process.

ISSUE 6: Appropriate Service Order charges for commingling requests that have yet to be developed or flow through.

SBC proposes language that would allow it to charge a *manual* Service Order charge, until such time that it develops an automated order process for commingling requests. There is no reason why SBC should be permitted to continue to require CLECs to incur the delay and expense of manual order process for commingling requests. SBC has been ordered to comply with commingling requests since August 21, 2003.[120] Yet, SBC still claims that it has not developed an automated order process to manage such requests.

To better align the incentives, Navigator proposes that only *electronic* Service Order charges are applicable.[121] If SBC were permitted to continue to require the more expensive manual Service Order charges until such time that it develops an appropriate automated process,

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119 *Triennial Review Order*, at ¶ 629.

120 *Triennial Review Order*, at ¶ 579. "We therefore modify our rules *to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services*, and to require [ILECs] to perform the necessary functions to effectuate such commingling upon request." (emphasis added).

121 LeDoux Direct, at 23:1.

it would have no incentive to update its systems to facilitate the order process. There is no reason for SBC to handle the orders manually, except that the manual processes are slower and more expenses thus imposing cost and delay onto requesting CLECs.

Navigator's proposal would provide greater incentive for SBC to put the appropriate process in place to accept orders that Navigator is rightfully permitted to place. SBC's attempt to avoid its obligation to commingle UNEs on behalf of requesting CLECs should be rejected in favor of Navigator's approach that would create the proper incentives for SBC to develop automated processes.[122] SBC's transparent attempt to impose unnecessary costs and expense into the ordering process should be rejected.

ISSUE 8: BFR final quote costs.

SBC's proposed language would require that Navigator submit full payment for a BFR final quote before it can order the UNE that is subject of the BFR. It is not reasonable or appropriate that a CLEC pay for unspecified costs associated with a BFR up-front prior to submitting the order for the service. Navigator's proposal to specify the costs associated with a BFR in the Agreement would minimize uncertainty under the Agreement, and stem any opportunity for SBC to use the BFR process to unfairly restrict access to UNEs.

Under SBC's proposal, since the BFR prices would not be specified under the Agreement, it could demand unreasonable costs for BFRs simply to impose a barrier to Navigator's access to a UNE. Even if SBC were required to provide proof of costs incurred, nothing would prevent SBC from taking on needless costs simply to drive up the BFR price and pass through added expenses to Navigator. Such actions would likely be taken by SBC to drive up the price of ordering UNEs and to increase Navigator's costs of doing business.

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[122] App. UNE, at § 2.29.1.

Instead, Navigator proposes that the parties should negotiate the costs associated with final BFR quotes as part of the Agreement. Navigator's proposal provides better contractual certainty and should be adopted in favor of SBC's open-ended approach.

ISSUE 9: Inside Wire

Navigator proposed language that would require SBC to provide non-discriminatory access to inside wire in instances where SBC owns and maintains control over inside wire within a building or property up to the network interface device ("NID"). Based on SBC's representation that it owns no inside wire in any properties in Missouri, Navigator agrees to accede to SBC's proposed language on this issue.

ISSUE 10: Loops language.

SBC seeks to avoid its obligation to provide certain section 251(c)(3) network elements as of the effective date of the Agreement. SBC excludes references to certain loops that have been addressed by the FCC's *TRRO*, but which SBC remains obligated to provide during a transition period. Any of those section 251(c)(3) service obligations that may expire during the term of the Agreement should still be addressed in the Agreement, even if by including references to the services' sunset dates under the TRRO.[123] Any other changes may be handled through the change of law provisions in the Agreement.[124]

Navigator proposes to include terms and conditions for UNE loops to maintain certainty under the Agreement that such existing service offerings that are in place to serve Navigator's end users will not be affected. Navigator's proposal is fair, reasonable, and should be adopted by the Commission.

ISSUE 11(b): Performance measurements.

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123 LeDoux Direct, at § 23:15-18.

124 LeDoux Direct, at § 23:18-19.

Navigator proposes language that would require SBC to provide access to the low-frequency/voice-grade portion of a broadband capable loop until such time that a traditional copper loop becomes available pursuant to a Navigator service request -- only in such instances where SBC would otherwise not be able to meet a performance interval associated with an unbundled loop request under the Agreement. To be clear, under Navigator's proposal, SBC would only be required to make the broadband capable loop available until such time as the copper loop is ready for use, at which point Navigator would transition the services over to the traditional loop.

SBC is apparently concerned that Navigator may be making a request for DSL or fiber-to-the-home loops. This is not the case. Navigator simply wants to insure that it is able to turn up service to its customers in the committed timeframes. In the event SBC misses a performance measurement, a credit may be issued as a remedy under the Agreement. This, however, does not properly compensate for the true measure of harm to Navigator in the event of missed customer deadlines. When Navigator fails to turn-up services in the timeframe it commits to, the customer becomes instantly dissatisfied and may likely return to SBC for service.

Navigator merely seeks contractual assurances that it will be able to meet its committed service deadlines. SBC is typically able to turn up unbundled loops within the appropriate provisioning intervals. However, to the extent SBC is not able to meet such intervals, and other services are available that can be deployed to provide service to Navigator's end users, such services should be offered temporarily until the original unbundled loop service order can be provisioned.

ISSUE 12: "Spare" to be defined.

SBC proposes language making reference to "spare" loops, but does not clarify meaning of "spare" loop under the Agreement.[125] Navigator has proposed a simple definition of the term "spare" to be used in this section in order to avoid potential disputes as to the meaning and applicability of SBC's interpretation.[126]

To illustrate, if Navigator is able to win an SBC retail customer and requests re-use of the existing loop, then SBC should consider that loop as a "spare" available to provision the service.[127] Using the same loop in this scenario would create obvious efficiencies and would minimize the problems that could be created by migrating the customer from SBC to Navigator.[128] On the other hand, provisioning a new loop to provide the same service, as SBC proposes, carries with it the obvious risks of a service disruption during transition. Simply using the same loop would eliminate one crucial element of transition which could result in the disruption of service to the customer, if not handled correctly.[129]

Thus, Navigator seeks to clarify the meaning of "spare" by defining the term as "an existing digital loop carrier unbundled loop that is not defective and is either (i) not currently being used to provide service to any customer, or (2) is being used to serve a customer but that customer has decided to migrate to CLEC and CLEC has requested re-use of the loop and will port customer's telephone number to CLEC." SBC contests the introduction of this definition, and would prefer that Navigator not re-use the loop to serve SBC's then-existing customer.

SBC would like to keep the meaning of the term "spare" vague and ambiguous, which would allow it greater flexibility to deny service requests for unavailability. In the event

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125 App. UNE, at § 4.3.1.2.

126 LeDoux Direct, at 24:8-10.

127 LeDoux Direct, at 24:10-12.

128 LeDoux Rebuttal, at 9:19-21.

129 LeDoux Rebuttal, at 10:1-3.

Navigator "wins" the SBC customer, there is no reason to believe that the loop serving that customer would be damaged, within SBC's capacity planning forecasts, or that any other orders may be placed on it. The existing loop serving the customer is clearly available and spare, and efficiency principles dictates that it should continue to be used by Navigator to serve the customer. Navigator's proposed definition provides better clarity and efficiency under the Agreement and should be adopted.

ISSUE 14: Re-insert UNE switching language.

SBC proposes to delete all language relating to unbundled switching under the Agreement. SBC's proposed deletions are premature in light of its on-going obligation to provide existing switching arrangements throughout the transition period set forth under the FCC's *TRRO*. To the extent SBC has a continuing obligation to provide certain services to Navigator as of the effective date of the Agreement, Navigator proposes that the Agreement should contain rates, terms, and conditions for such services.

The provision of these services during the transition period is vitally important to Navigator.[130] The provisions of the existing M2A allow for the provisioning of these services, and it stands to reason that those provisions should be maintained throughout the transition period without the need to renegotiate those provisions.[131] Navigator seeks assurance that all services that are currently being provided, and that will continue to be provided as of the effective date of the Agreement, should be included in the Agreement to avoid any confusion over SBC's on-going obligation to provide access to these services until the conclusion of the transition period.[132]

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130 LeDoux Direct, at 24:20-21.

131 LeDoux Direct, at 24:21-23.

132 LeDoux Direct, at 24:23-25:1.

Any concerns SBC may have can be resolved simply by including reference to the sunset date for the transition period. Navigator's proposal is necessary to assure that the terms and conditions for existing service that are being purchased and paid for under the Agreement on an on-going basis will not be negatively affected during the FCC's transition period set forth under the *TRRO*. Moreover, even if Navigator is not permitted to place new orders for certain services under the Agreement as a result of the *TRRO*, the terms and conditions under the Agreement address more than just new order procedures. There is nothing that suggests that it is inappropriate for the parties to discuss and capture the terms and conditions for on-going services in an Agreement, even if new orders may no longer be placed for such services. SBC's proposed deletions are unnecessary, unreasonable, and should be rejected.

APPENDIX PRICING - UNE

ISSUE 1: Lawful UNE language objection.

This issue is the same issue that appears in Issues 1 and 2 of the General Terms and Conditions, and App. UNE Issue 1.

ATTACHMENT 5 - CUSTOMER USAGE DATA

ISSUE 1: The Agreement should reference current procedure.

SBC's characterization of the issue is misleading, referring to use of an "outdated" process for local account maintenance. Simply because SBC does not wish to provide a service in a certain manner does not render the process outdated.[133] Instead, SBC should clearly specify the rules under which data will be maintained.[134] Absent the contractual protections sought by Navigator, SBC will refer to its Daily Usage File User's Guide -- which is subject to unilateral

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133 LeDoux Rebuttal, at 10:20-22.

134 LeDoux Direct, at 25:16.

change without prior notice to Navigator -- permitting SBC to change practices at its whim; and if Navigator, or any other CLEC, becomes dissatisfied, there would be no remedy.[135]

Navigator requires greater certainty in its local account maintenance process, and should have input and advance notice of rules changes in order to make appropriate accommodations in its procedures. The Agreement should specify the rules applicable to customer usage data, and not allow for a process which SBC can change at its discretion.[136] If SBC seeks to make changes in those rules, it should do so through contract amendment procedures established under the General Terms & Conditions.[137]

In addition, SBC proposes to eliminate Section 7.1 from the Agreement. Elimination of the language would remove a needed reference to Performance Measurements ("PMs").[138] CLECs rely on interconnection agreements in order to provide services to its end users. CLECs are simply not in a position to terminate interconnection agreements in order to provide services to their end users. As such, PMs are, in many cases, a CLEC's sole remedy under the Agreement; and the remedy most critical in ensuring that services provided to end users are of the quality the customer expects to receive. The Agreement must contain reference to PMs, and those PMs must contain remedies which will provide full and adequate relief.[139] Any attempt by SBC to skirt its PM responsibilities must be rejected by the Commission.

ATTACHMENT 7: ORDERING AND PROVISIONING

ISSUE 1: All Services provided as of the effective date should be included in the Agreement.

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135 LeDoux Direct, at 25:17-20.

136 LeDoux Rebuttal, at 11:5-7.

137 LeDoux Rebuttal, at 11:7-9.

138 LeDoux Direct, at 25:22-23.

139 LeDoux Direct, at 26:1-2.

Attachment 7 should not impose any restrictions on the use of, or commingling or combination or, UNEs that are not addressed under Attachment 6. SBC proposes language stating that it will fill orders for "specified" combinations of UNEs. SBC argues that it should not have to anticipate all the combinations of UNEs that CLECs may request, and that if a CLEC orders any combination of UNEs, or seeks to commingle UNEs with wholesale services, that are not specified under the Agreement, the CLEC would have to submit a BFR.

The FCC eliminated commingling restrictions on August 21, 2003.[140] Yet SBC claims that commingling is an entirely new area for it, and that it would have to develop and test ordering process for such arrangements.[141] There is nothing unique or complex about the ordering process for two services that will be used together, as SBC would lead us to believe. SBC's proposed language requiring that commingled services or UNE combinations not specified under the Agreement must be purchased via the BFR process is intended to unnecessarily and unreasonably impose costs and delay on critical services that the FCC has clearly found that Navigator is entitled to.

If SBC is permitted to continue its anti-competitive practice of requiring CLECs to submit BFR requests for services that they are clearly entitled to order under the FCC's rules, there would be no incentive for SBC to become more efficient in its provisioning practices. Navigator's proposed language creates better incentives, better reflects the FCC's rules, and should be adopted.

ISSUE 2: Should the terms and conditions for UNE switching, ordering, provisioning and maintenance be in this Agreement?

This issue relates to App UNE Issue 14. SBC should not be permitted to delete language relating to certain services that Navigator currently purchases from SBC. SBC has a continuing

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140 *Triennial Review Order*, ¶ 579.

141 APP Ordering and Provisioning, DPL Issue 1.

obligation to allow Navigator unbundled access to these services until the conclusion of the transition periods set forth under the FCC's *TRRO*. If SBC is concerned that the language relating to unbundling switching, and other related services under the Agreement may be interpreted to require it to provide on-going services beyond the transition period, that concern is best addressed with a simple reference to the sunset dates for the transition periods.

SBC's proposed deletions, on the other hand, inject uncertainty into the Agreement by failing to address Navigator's continued use of critical UNEs until the conclusion of the respective transition period. SBC's proposed deletions should be rejected, in favor of the contractual certainty sought by Navigator.

ISSUE 3: Should SBC MO only be required to provide "Lawful" Unbundled Elements?

This issue is the same issue that appears in Issues 1 and 2 of the General Terms and Conditions, and App. UNE Issue 1.

ATTACHMENT 8: MAINTENANCE

ISSUE 1: Should SBC be required to provide MLT Testing of UNEs?

SBC's proposed language fails to acknowledge that Navigator may continue to use existing UNE-P arrangements until March 11, 2006, and that UNE-L arrangements are still available for Navigator's use beyond that date. Accordingly, MLT capabilities are still required by Navigator, and contractual arrangements for such capabilities should be addressed in the Agreement.[142]

SBC seems to believe that since there is an end in sight to certain unbundling obligations pursuant to the *TRRO*, it need not address terms and conditions for the continued use by Navigator of such UNEs under the Agreement through the end of the transition period. The terms and conditions under an interconnection agreement relate to far more than the ordering of

[142] LeDoux Direct, at 26:20-24.

new service arrangements. For example, interconnection agreements address the terms and conditions for maintenance and repair relating to existing service arrangements. Simply because SBC is not required to provide new arrangements, it is not excused from discussing and memorializing fair and balanced terms and conditions surrounding SBC's obligations with respect to existing arrangements.

Navigator seeks contractual certainty that such existing arrangements will continue to be offered on fair, reasonable and non-discriminatory rates, terms, and conditions until such time that it must transition off of such services per the terms of the FCC's *TRRO*. The Commission should find that the need for such contractual certainty is vital to Navigator's continued use of certain UNEs to provide services to its end users until the end of the transition period, and reject SBC's proposed deletions.

ATTACHMENT 9: BILLING

ISSUE 1: Lawful UNEs.

This issue relates to General Terms & Conditions Issues 1 and 2, and App UNE Issue 1.

ATTACHMENT 12: COMPENSATION

ISSUE 1: Reciprocal compensation / routing of Switched Access Traffic and the proper treatment for PSTN-IP traffic.

SBC's proposed language is overly complex and should be rejected in favor of a more simplified approach. Navigator proposes that reciprocal compensation, as opposed to access compensation, should be based upon the delivery of traffic to the PSTN in combination with the local calling scopes of the telephone numbers involved.[143] Further, if a call originates on a local number and terminates on a number in a differing exchange (interexchange traffic), it should be properly subject to switched access. SBC's proposed language should be rejected in favor of

[143] LeDoux Direct, at 27:11-13.

more simplified language that would still allow for the proper compensation for local exchange, interexchange, and information services traffic. In this regard, Navigator adopts the proposals set forth by the other CLECs in this arbitration regarding intercarrier compensation.

ISSUE 2: Change of Law Language.

SBC proposes specific change of law language for reciprocal compensation arrangements for Information Services traffic, including IP-Enabled Service Traffic. The unopposed change of law provisions under the General Terms & Conditions are adequate and inclusion of additional change in law language in this Attachment is unnecessary.[144] SBC's proposed language adds nothing to the change of law process set forth under the General Terms & Conditions, and serves only to add confusion to the Agreement. The Commission should find that SBC's proposed change of law provision specific to intercarrier compensation is redundant of the change of law provision under the General Terms & Conditions, needlessly adds confusion to the Agreement, and require the deletion of the language in its entirety.

ATTACHMENT: OSS

ISSUE 1: Lawful UNEs

This issue relates to General Terms & Conditions Issues 1 and 2, and App UNE Issue 1.

ISSUE 2: Change Management Process / Whether a CLEC can unilaterally extend the hours of operation of SBC Missouri's LSC and LOC.

SBC states that all users of SBC's OSS may participate in the Change Management Process ("CMP") in order to insure that OSS changes are properly introduced and implemented with the collaborative method embedded in the CMP guidelines. SBC has informed Navigator, however, that its request for SBC to expand its hours of operation in the LSC and LOC from Friday to Saturday would need to be addressed in the CMP since it does not intend to adjust its

144 LeDoux Direct, at 27:16:19.

contractual hours of operation just for Navigator.[145] Since SBC explicitly includes the hours of operation in the Agreement, there is no reason why the Parties should not be required to negotiate the specifics of under the Agreement -- particularly when it is apparent from SBC's initial response that it would not provide the requested hours of operation unless ordered by the Commission to do so on a CLEC-wide basis.

Navigator's proposal is simply a request that SBC extend the hours of operation for its LSC and LOC to match their retail office hours.[146] Presently, SBC does not allow Saturday due dates for orders not requiring field work. An order placed during the week flows through to completion on the day it is submitted, but orders from CLECs placed on the weekend do not flow through until the following business day, which would be the next Monday or the day following a holiday.[147] SBC's position is discriminatory and unnecessarily extends the due date of Navigator's service orders.

Navigator initially intended to negotiate a request for SBC to operate its wholesale order processing on Saturday. Other regional Bell operating companies ("RBOCs") around the country allow for the mechanized flow of orders during the weekend, but SBC does not.[148] However, Navigator would settle for the ability to have its mechanized orders flow through SBC's systems and complete on Saturday where possible, without SBC automatically extending due dates for such orders to Monday. It is unreasonable for SBC to implement manual process requirements to restrict the use of automatic processes. SBC should not be able to arbitrarily truncate automatic processes that do not require staffing and manual intervention. If SBC is not willing to mirror the staffing and services offered by other RBOCs and SBC Retail, the least it

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145 OSS Attachment 27, DPL Issue 2.

146 LeDoux Direct, at 28:5-6.

147 LeDoux Rebuttal, at 12:23-13:3.

148 LeDoux Rebuttal, at 12:20-21.

can do is allow automatic processes to function. SBCs processes are in place for no reason other than to delay CLECs' access to the critical services that are ordered from SBC.

The current disparity between retail and wholesale office hours is a competitive advantage for SBC.[149] CLECs such as Navigator are competitively disadvantaged in turning up new customers, since it would not have the same access to OSS support vis-à-vis SBC needed to support a new customer. There is no reason why the LSC and LOC should not remain open to accept orders on Saturday, just as SBC's retail offices remain open to accept orders on Saturday for its own orders.[150] SBC's practices are discriminatory, designed to inject delay in the CLEC ordering process, and should be rejected in favor of Navigator's proposal.

EMBEDDED BASE RIDER

ISSUE 1: Should this rider be included?

All services provided as of the effective date of the Agreement should be included in the Agreement. Any of those services scheduled to terminate during the life of the Agreement can be addressed by including sunset dates.[151]

CONCLUSION

For the reasons stated herein, Navigator maintains that the Arbitrator should adopt the proposals set forth by Navigator in this arbitration.

Respectfully submitted,

/s/ Mark P. Johnson
Mark P. Johnson Mo. Bar #30740
SONNENSCHEIN NATH & ROSENTHAL LLP

149 LeDoux Direct, at 28:6-7.

150 LeDoux Rebuttal, at 12:2-4.

151 LeDoux Rebuttal, at 29:2-3.

4520 Main Street, Suite 1100
Kansas City, MO 64111
Tel: 816/460-2400
Fax: 816/531-7545
mjohnson@sonnenschein.com

ATTORNEYS FOR NAVIGATOR
TELECOMMUNICATIONS, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was served electronically and mailed, postage prepaid, this 7th day of June, 2005, to:

Dana K. Joyce
General Counsel
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
d.joyce@psc.mo.gov
gencounsel@psc.mo.gov

John B. Coffman
Office of the Public Counsel
P. O. Box 2200
Jefferson City, MO 65102-2200
opcservice@ded.mo.gov

Paul G. Lane/Leo J. Bub
Robert J. Gryzmala/Mimi B. MacDonald
Southwestern Bell Telephone, L.P.
One SBC Center, Room 3518
St. Louis, MO 63101
paul.lane@sbc.com
lb7809@momaol.sbc.com

Mark Comley
601 Monroe Street, Suite 301
P. O. Box 537
Jefferson City, MO 65102-0537
comleym@ncrpc.com

Kenneth A. Schifman/Mark A. Grover
Sprint
6450 Sprint Parkway, Bldg. 14
Mail Stop KSOPHN0212-2A303
Overland Park, KS 66251
kenneth.schifman@mail.sprint.com
mark.a.grover@mail.sprint.com

Stephen F. Morris/Kathy Jespersen
Spy Sinantha
MCI WorldCom Communications, Inc.
MCImetro Access Transmission Services, LLC
701 Brazos, Suite 600

Austin, TX 78701
stephen.morris@mci.com
kathy.jespersen@mci.com
spy.sinantha@mci.com

William Steinmeier
Mary Ann (Garr) Young
William D. Steinmeier, P.C.
P. O. Box 104595
Jefferson City, MO 65110
myoung0654@aol.com
wds@wdspc.com

Kevin K. Zarling/Mary Anne Allen
L. Fredrick Cederqvist/Jerry Hicks
Sheila Paananen
AT&T Communications of the Southwest, Inc.
TCG Kansas City/TCG St. Louis
919 Congress, Suite 900
Austin, TX 78701
kzarling@att.com
masa@att.com
fcederqvist@att.com
jghicks@att.com
sheilapaananen@att.com

Bill Magness
Casey & Gentz, LLP
98 San Jacinto Blvd., Suite 1400
Austin, TX 78701
bmagness@phonelaw.com

James M. Fischer
Larry W. Dority
Fischer & Dority, P.C.
101 Madison, Suite 400
Jefferson City, MO 65101
lwdority@sprintmail.com

Carl J. Lumley
Leland B. Curtis
Curtis, Heinz, Garrett & O'Keefe, P.C.
130 S. Bemiston, Suite 200
Clayton, MO 63105
clumley@lawfirmemail.com
lcurtis@lawfirmemail.com

Edward J. Cadieux/Carol Keith
Abby L. Sydlow
NuVox Communications of Missouri, Inc.
16090 Swingley Ridge Road, Suite 500
Chesterfield, MO 63017
ecadieux@nuvox.com
ckeith@nuvox.com
asydlow@nuvox.com

Michael R.Moore/James C. Falvey
Xspedius Communications, LLC
5555 Winghaven Boulevard, Suite 300
O'Fallon, MO 63366
michael.moore@xspedius.com
jim.falvey@xspedius.com

John Ivanuska/Christopher Bunce
Barbara Fillinger
Birch Telecom of Missouri, Inc.
2020 Baltimore Avenue
Kansas City, MO 64108
jivanuska@birch.com
cbunce@birch.com
bfillinger@birch.com

Marva Brown Johnson/Randy Meacham
KMC Data, LLC/KMC Telecom, III, LLC
1755 N. Browh Road
Lawrenceville, GA 30043
marva.johnson@kmctelecom.com
meach@kmctelecom.

Jerry Bankes/James E. Paluskievicz
Metro Teleconnect Companies, Inc.
2150 Herr Street
Harrisburg, PA 17103
jbankes@metrotelco.com
JPaluskievicz@MetroTeleco.com

Kathy L. Hough
WilTel Local Network, LLC
One Technology Center TC-15L
Tulsa, OK 74103
kathy.hough@wiltel.com

/s/ Mark P. Johnson