STATEMENT OF FINDINGS AND CONCLUSIONS

I(A). General Terms & Conditions:

1(a). Should the ICA include non-251 provisions?

SBC's Issue Statement: ***Does the Commission have jurisdiction to arbitrate language which pertains to Section 271 and 272 of the Act and which was not voluntarily negotiated and does not address a 251(b) or (c) obligation?***

AT&T GT&C Issue 1(b): ***Should the Agreement include obligations under Section 271 of the Act or should it only cover Section 251?***

CLEC Coalition GT&C Issue 1: ***Should the M2A successor interconnection agreement continue to reflect the commitments SBC made to the Commission and CLECs in order to obtain Section 271 relief?***

MCI GT&C Issue 1: ***Should the General Terms & Conditions describe the entire contract as an agreement between the Parties with respect to obligations under Section 251 of the Act?***

Sprint GT&C Issue 1(a): ***Should this Interconnection Agreement contain language that goes beyond SBC's obligation to provide 251/252 services?***

WilTel GT&C Issue 4: ***Does the Commission have the jurisdiction to arbitrate language which pertains to Section 271 and 272 of the Act and which was not voluntarily negotiated and does not address 251(b) or (c) obligation?***

Discussion:

SBC's position is that an interconnection agreement made under Sections 251 and 252 of the Act need not reflect those obligations, if any, that Section 271 imposes on RBOCs and that Section 252, which authorizes state commissions to arbitrate interconnection agreements, does not authorize state commissions to impose any Section 271 duties while acting in that capacity.[1] Non-251(b) and (c) items are not subject to arbitration unless both parties voluntarily consent to the negotiation and arbitration of such

[1] *Coserv LLC v. Southwestern Bell Telephone Co.,* 350 F.3d 482 (5th Cir. 2003) ("*Coserv*").

items. SBC maintains that it has not, and does not, voluntarily consent to negotiate or arbitrate the terms, conditions, and rates for these facilities.

The CLECs generally seek a statement in the "whereas" clauses that acknowledges the process SBC went through to gain its § 271 authority and the market-opening commitments it made at that time. Those commitments were embodied in the M2A and should not be eliminated unless SBC is willing to give up its § 271 relief.

AT&T contends that SBC is attempting to limit its lawful obligations. AT&T suggests, for example, that SBC has proposed broad, vague language that would allow it to refuse to open NPA-NXX codes assigned to AT&T in exchanges *outside* of SBC's franchised territory but within the areas served by SBC's currently-deployed tandem switches. According to SBC, it does not have to do *anything* to facilitate traffic exchange with AT&T where that traffic originates or terminates outside of SBC's serving territory. The effect of SBC's position, however, is to prevent calls from being completed between SBC's and AT&T's customers. SBC's position directly threatens the ubiquitous phone service that Missouri presently enjoy.

Decision:

This arbitration concerns interconnection agreements ("ICAs") that will replace the now-expired M2A. The M2A, in turn, was SBC's statement of generally-available terms and conditions, offered "[t]o ensure that CLECs have easy access to a contract incorporating SWBT's various § 271 commitments[.]"[2]

[2] *In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996,* 10 Mo.P.S.C.3d 156 (issued March 15, 2001).

On November 20, 1998, SBC notified the Commission that it intended to seek authority from the F.C.C. to provide in-region, interLATA telecommunications services in Missouri under § 271 of the Act. This provision bars RBOCs such as SBC from entering the interLATA long-distance market without prior approval from the F.C.C. That approval is conditioned on its finding that certain statutory measures of competition have been met in the state in question.[3]

This Commission held proceedings in Case No. TO-99-227 to determine whether to give a positive recommendation to the F.C.C. pursuant to § 271(d)(2)(B) of the Act. That provision requires the F.C.C. to consult with the state commission "to verify the compliance of the Bell operating company with the requirements of subsection (c)." A positive recommendation could be made only if either (1) the Commission determined that SBC had entered into a binding interconnection agreement with at least one facilities-based competitor, or (2) the Commission approved a statement by SBC of the terms and conditions upon which it generally offered to provide interconnection and access to UNEs.[4] In either case, the interconnection agreement or statement of terms and conditions was required to satisfy the 14-point checklist at § 271(c)(2)(B) of the Act.

To meet the 14-point checklist and thereby secure a favorable recommendation from the Commission, SBC tendered on June 28, 2000, a model interconnection agreement for Commission approval; this agreement was the M2A.[5] The M2A included binding terms for interconnection and for access to UNEs, including UNEs not then

[3] 47 U.S.C. § 271(d)(3).

[4] 47 U.S.C. § 271(c)(1), (A) and (B), and § 252(f).

[5] The M2A is SWBT's statement of the terms and conditions upon which it generally offers access and interconnection.

combined in SBC's network, and for the resale of services.[6] The M2A was modeled upon an agreement negotiated in the course of SBC's § 271 proceeding in Texas, the T2A, which had been approved by the F.C.C.[7] After further modification, the Commission approved the M2A on March 6, 2001, finding that it met the 14-point checklist. Thereafter, the Commission made a favorable recommendation to the F.C.C.

SBC's § 271 application before the F.C.C. was ultimately successful. However, SBC can lose its § 271 authority "[i]f at any time after the approval of an application under paragraph (3), the [F.C.C.] determines that a Bell operating company has ceased to meet any of the conditions required for such approval[.]"[8] One of those conditions is the existence of a statement of generally-available terms and conditions that meets the 14-point checklist at § 271(c)(2)(B) of the Act.

For these reasons, the Arbitrator decides in favor of the CLECs and against SBC on this point.

1(b). What is the appropriate scope of SBC's obligations under the ICA?

AT&T GT&C Issue 1(a): *Should the Interconnection Agreement obligate SBC to provide interconnection, UNEs, collocation and resale services outside SBC's incumbent local exchange area?*

Charter GT&C Issue 24: *Which Party's scope of obligation language should be included in this agreement?*

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[6] *In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act,* Case No. TO-99-227 (*Report & Order,* issued March 15, 2001) (hereinafter the *"271 Report & Order*") at 17-19.

[7] *In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act,* Case No. TO-99-227 (*Order Finding Compliance with the Requirements of Section 271 of the Telecommunications Act of 1996,* issued March 6, 2001) (hereinafter the "*271 Compliance Order"*) at 2.

[8] 47 U.S.C. § 271(d)(6).

Discussion:

SBC states that it has proposed language in the ICA setting forth those sections of the Act that obligate SBC to provide UNEs, collocation, interconnection, and resale within its incumbent local exchange area. SBC states that its proposed language addresses the CLECs' assertion that SBC should be required to offer UNEs, collocation, interconnection, and resale outside of its incumbent local exchange area. SBC emphatically asserts that it is under no obligation to provide the listed services and items outside of its service area.[9]

Under § 251(c) of the Act, SBC's obligations are only applicable when it is the ILEC.[10] Section 251(h)(1) defines an incumbent local exchange carrier by characteristics "with respect to an area."[11] SBC's proposed language is necessary to ensure that SBC is not forced to adhere to CLEC-imposed requirements that exceed requirements imposed on SBC by law.

AT&T states that SBC is attempting to limit the services it provides to carriers such as AT&T by creating an artificial boundary of "SBC-MISSOURI' incumbent local exchange area." SBC argues it should have no obligation to provide the services offered under the ICA outside of the local exchange areas where it is the ILEC even though SBC may have facilities and offer service outside of that boundary to its own local customers. According to SBC, the Act does not obligate SBC to offer the services covered by its ICA with AT&T in those areas where it acts as a CLEC.

[9] McPhee Direct, pp. 65-66; Silver Direct, p. 129.

[10] McPhee Direct, p. 65; Silver Direct, p. 129.

[11] McPhee Direct, p. 66; Silver Direct, p. 130.

In areas where SBC extends its network to locations outside its ILEC territory, AT&T is simply requesting the ability to access capacity on this network. Section 251(c) does not limit interconnection to the ILEC service territory. AT&T's proposed language is intended to avoid the situation in which SBC attempts to use geographic borders to deny service to AT&T. This issue relates to AT&T's right to interconnect with SBC through another ILEC's tandem switch in a LATA where SBC does not have a tandem. For example, SBC attempts to use its language to limit its obligations to open NPA-NXX codes assigned to AT&T in exchanges outside SBC's franchised territory but within SBC-deployed tandem switches.[12] By refusing to do anything to facilitate traffic exchange with AT&T where that traffic originates or terminates outside of SBC's service territory, SBC violates the requirements of § 251.

Charter states that the underlying dispute here relates to SBC's obligations to interconnect and exchange traffic that originates or terminates with Charter, but where the Charter customer is located in another ILEC's territory.[13] Unlike AT&T, Charter and SBC agree that SBC is not obliged to establish facilities or physical interconnections 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.

Charter states that that agreed-to language, however, is intended to work around a fundamental conceptual disagreement between the parties. Charter contends that as long as Charter and SBC physically exchange traffic within SBC's territory, then the only question is whether the traffic exchanged is properly classified. Charter points out that this

[12] Guepe Direct at 4.

[13] Normally adjacent to SBC's territory.

question will be resolved for purposes of intercarrier compensation based on other definitions in the ICA. However, Charter charges that SBC believes that it is not obliged to interconnect under § 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.

Charter states that its proposed language in the General Terms and Conditions is intended to make it unnecessary for the Commission to actually rule on the parties' underlying conceptual disagreement. 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 be relevant to its classification as "Telephone Exchange Service" (local) or "Exchange Access" (toll).

Decision:

The Act, at § 251(c), imposes certain additional duties upon ILECs such as SBC. It is true, as SBC points out, that the Act at § 251(h)(1) defines "ILEC" as a LEC that has a particular relationship or function "with respect to an area." However, it does not follow that the ILEC's duties under § 251(c) are similarly limited to a geographical area. Such a limitation exists only if Congress so intended.

Section 251(c)(2)(B) requires SBC to interconnect with a requesting carrier "at any technically feasible point within the carrier's network." Nothing in this language refers explicitly to the ILEC's service area. An SBC tandem that is located outside of SBC's service area is nonetheless "within" its network and it follows that SBC is obligated to permit interconnection there. Feasibility, not geography, is the basis of the limitation that

Congress placed on this duty. SBC's obligation to provide collocation under § 251(c)(6) is also not geographically limited to its service area. Referring to the example used above of a SBC tandem located outside of its service area, § 251(c)(6) requires SBC to provide collocation there to a requesting carrier.

Resale is somewhat different because it is the sale to "subscribers who are not telecommunications carriers" of "any telecommunications service that the [ILEC itself] provides at retail[.]"[14] It is reasonable to suppose that Congress intended such reselling to occur within the same geographic area in which the ILEC is selling the service in question at retail. To the extent that SBC provides a retail service outside of its incumbent area, the Act requires SBC to allow the resale of that service outside of SBC's incumbent area. The ICA should so provide.

For these reasons, the Arbitrator determines that the Act requires, and the ICA should provide, for SBC's provision of collocation and interconnection outside of its incumbent local exchange area. However, the Act does not require, and the ICA need not provide for, resale outside of SBC's incumbent local exchange area, except to the extent that SBC itself is engaged in the retail sale of telecommunications service outside of its incumbent area.

Given that SBC's obligations to interconnect and to provide collocation are not restricted to its incumbent area, SBC's obligation to carry Charter's traffic is also not geographically restricted. As Charter states, the origination and termination points of the traffic is relevant only to its classification as "Telephone Exchange Service" (local traffic) or "Exchange Access" (toll traffic).

[14] 47 U.S.C. § 251(c)(4)(A).

2(a). What is the interplay of ICA rates with tariff rates?

AT&T GT&C Issue 2: ***If AT&T orders a product or service for which there are no rates, terms and conditions in this agreement, should AT&T pay for the product or service at the rates set forth in SBC's intrastate tariff or if no tariff applies then SBC's current generic contract rate? (b) Notwithstanding AT&T's obligation to pay for such product(s) or service(s) ordered by AT&T, should SBC be able to reject future orders and further provisioning of such product(s) or service(s)?***

AT&T GT&C Issue 3: ***Where this Agreement shows a rate, price or charge marked as "To be Determined," "TBD," or otherwise not specified, should the applicable rate be established in accordance with Section 4.1.1 or should SBC be allowed to apply generic rates for any such products and services? However the rate is established, should such rate apply retroactively back to the effective date of the Agreement?***

AT&T GT&C Issue 7: ***What are the appropriate terms surrounding AT&T ordering products or services from an SBC MISSOURI tariff? Must it amend its agreement to remove the rates, terms and conditions associated with the product it is ordering from the tariff?***

MCI GT&C Issue 10: ***Should MCI be permitted to purchase the same service from either an approved tariff or the interconnection agreement?***

MCI UNE Issue 7: ***If MCI orders a product from a SBC tariff, must it amend its agreement to remove the rates, terms and conditions associated with the product it is ordering from the tariff? What are the appropriate terms surrounding MCI ordering products or services from an SBC Missouri tariff?***

Discussion:

Both AT&T and MCI want to be able to order directly from SBC's tariffs without modifying the ICA. In effect, they want to be able to order either under the ICA or from the tariffs, whichever is most advantageous to them at the time. SBC contends that this practice is unworkable from a practical standpoint – it would cause "confusion" for SBC.[15] In SBC's view, the ICA is the controlling document and it would not be "appropriate" to allow the CLEC to by-pass the ICA in favor of a tariff.[16] If a CLEC wants to avail itself of a more advantageous tariff rate, then it should amend the ICA and insert the tariff rate into it.

[15] Quate, Direct, p. 10.

[16] Silver, Direct, p. 131.

The CLECs respond that "allowing MCI and other CLECs to purchase goods and services from the tariff was an important tool to restrain SBC's potential anti-competitive behavior."[17] The remedy that SBC proposes for the "confusion" it complains it would experience is not narrowly tailored to address the issue.[18] The remedy would be language providing that AT&T or MCI will provide adequate notice of the instrument (ICA or SBC tariff) from which it will purchase a particular product or service from SBC.[19] Instead, SBC's proposal is overly broad because it denies the CLECs the right to purchase services without unnecessary delays that result from requiring ICA amendments be completed prior to ordering the service.[20] Additionally, the flexibility sought by the CLECs is not unusual in other industries:

> in more competitive commercial markets it was not at all rare for customers to avail themselves of the most beneficial terms and conditions available when purchasing products, even from vendors with whom they have existing contracts. Such "price-shopping" contributes to equilibrium between the economic "surplus" enjoyed by both the consumer and the supplier, adding to the efficiency of a competitive market.[21]

Decision:

The Arbitrator agrees with the CLECs that the public interest is better served by permitting them to purchase services and facilities from SBC at the most advantageous rate, whether found in the ICA or in a tariff. For the same reason, where AT&T orders a service or product without a rate in the ICA, the existing tariff rate would control or, if there

[17] Price, Rebuttal, p. 38.

[18] Guepe, Rebuttal, pp. 17-18.

[19] *Id.*

[20] *Id.*

[21] *Id.,* at 38-9.

is no tariff rate, then the generic rate. SBC is not permitted to refuse to fill or provision such orders subsequently.

2(b). Are changes to tariffs referenced by the ICA automatically incorporated therein? Should the ICA require SBC to notify CLECs of such tariff changes?

Charter 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?***

CLEC Coalition GT&C Issue 14: ***Under what circumstances must SBC Missouri provide notice of its tariff filings to CLECs?***

CLEC Coalition GT&C Issue 15: ***When purchasing from the tariffs, should SBC be allowed to charge the CLEC the most current tariff rate? Should SBC be permitted to automatically incorporate all changes to tariffs when it does not notify the CLEC in advance of the proposed changes?***

Discussion:

SBC's proposed language provides that any changes to a tariff provision or rate referenced by the ICA are automatically incorporated into the ICA.

Charter responds that it and 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 ICA*,* 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.

Charter notes that 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.[22] 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. Charter warns that 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 loophole language that would allow that party to materially alter any of the obligations under the ICA. 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 contends that its language is intended to avoid such problems as between Charter and SBC, while at the same time reserving to SBC the necessary flexibility to make changes to its own tariff.[23]

The CLEC Coalition responds that it does not have an objection to incorporating up-to-date tariff rates provided SBC also is willing to provide notice of its tariff filings.[24] The CLEC Coalition states that in Issue 14 it has proposed that SBC continue its practice during the term of the M2A to notify CLECs, in advance, through the Accessible Letter process, when SBC is proposing a change to its tariffs. In related Issue 15, the Coalition states that it opposes SBC's language that automatically and unilaterally modifies the terms of the ICA

[22] *See* Tr. 211-12 (Quate, indicating SBC's view that in cases where tariff and contract conflict, contract controls).

[23] 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.

[24] Ivanuska GT&C Rebuttal at 18.

agreement when a tariff changes. The Coalition's objection is based upon SBC's change to existing M2A language in which it seeks to limit its commitment to provide advance notice of tariff changes to CLECs to only such notice as is required by the Commission's rules.[25] SBC's unwillingness to continue its current practice of giving CLECs prior notice of tariff filings is at odds with its proposal that such changes be automatically incorporated into the ICA.

If CLECs are to have a real opportunity to voice objections to tariff changes prior to the time they take effect, CLECs must have time to review the proposed changes and determine their potential impact. The Coalition argues that SBC's resistance to notifying CLECs of pending tariff revisions creates a concern that SBC may unilaterally make significant changes to the terms of the Agreement without affording CLECs the opportunity to comment.[26]

SBC claims generally that a tariff notification process is burdensome.[27] However, the Coalition points out, SBC has not shown that the current Accessible Letter notification process is expensive to administer. SBC knows when a tariff will affect a CLEC; SBC has a notification system already in place in its Accessible Letter system. Creating a single Accessible Letter and disseminating it to all CLECs, whether affected or not, is certainly preferable to every single CLEC, down to the smallest with no personnel to spare, continually monitoring the PSC website to try to spot tariff changes that might affect them. The Coalition states that every Commission that has considered this issue to date has

[25] SBC does not have a section that expressly states it will provide notice *on tariffs* according to Commission rules. Instead, the parties have an agreed general regulatory provision in Section 35.1 that says they will abide by such rules (no matter what the subject).

[26] Ivanuska GT&C Direct at 32.

[27] Quate Direct at 57.

agreed that SBC must continue its practice of notifying CLECs in advance of upcoming tariff changes if it expects those changes to be automatically incorporated into the ICA.[28]

SBC responds that its proposed language is superior for two reasons.[29] First, automatic incorporation of tariff changes is the entire reason that the ICA references certain tariffs.[30] Second, whatever jurisdiction that the tariff is being provided under has requirements for notification.[31] A requirement for prior notice in the ICA is thus unnecessary.

Decision:

The Arbitrator agrees with SBC that any tariff provision or tariff rate incorporated into the ICA should automatically be updated as the referenced tariff is changed. As SBC points out, that is the reason that the ICA references certain tariffs. The Arbitrator further determines that the *quid pro quo* for such automatic incorporation is prior notice to the CLECs via the Accessible Letters process. The Arbitrator agrees with Charter, however, that SBC cannot use tariff modifications to alter the terms of the parties' ICA. The ICA always trumps contrary tariff provisions. Where a CLEC orders under a tariff rather than under the ICA, however, the CLEC is then stuck with the tariff.

[28] Texas Docket 28821, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, *Order on Clarification and Reconsideration* at 4 (May 11, 2005); O2A Successor Arbitrator's Decision, General Terms & Conditions DPI Issue 33; K2A Successor Arbitrator's Phase I Decision at 28, affirmed by Kansas Commission Order on Phase I at 2.

[29] Quate Direct, p. 7; Quate Rebuttal, p. 5.

[30] Silver Rebuttal, p. 53.

[31] Silver Rebuttal, p. 54.

2(c). Should the ICA include language relating to refunds, true-up or retroactive credits or debits?

Navigator GT&C Issue 16: ***Which Party's provisions regarding amendments, modifications should be incorporated into the Party's agreement***

Discussion:

Both parties agree that the ICA must address modifications and amendments. The parties disagree, however, on SBC's proposal to omit language requiring refunds, true-up or retroactive credits or debits. The language at issue is as follows:

> The rates, terms and conditions contained in the amendment shall become effective upon approval of such amendment by the Commission**; and such amendment will not require refunds, true-up or retroactive crediting or debiting prior to the approval of the Amendment.**

SBC's position is that its proposed language is standard to most business contracts. It is designed to make clear that the rates and conditions set forth in the amendment apply prospectively only for periods after the Commission approves the ICA.

Navigator's position is that removing the requirement for refunds, true-up or retroactive credits or debits could promote unnecessary delay in the preparation and implementation of amendments to the agreement. Navigator's witness LeDoux testified:

> The prohibition against retroactivity would in fact give SBC every incentive to drag its feet, to make the change as slowly as possible. This would deprive Navigator, and every other CLEC signatory to the M2A, of the benefit of the change until SBC decides to implement the new language. Navigator believes that the Agreement should incent [sic] SBC, and all other parties, to implement changes as quickly as possible. Retroactive effect in these circumstances would provide that incentive.[32]

[32] LeDoux, Direct, p. 19.

SBC's response is that retroactive effect would be burdensome for SBC, particularly where Navigator may delay in requesting a change. SBC's witness, Quate, testified that "The language is necessary to prevent arguments in the future about when a rate change goes into effect. . . . where the Commission does not specify otherwise, it is only reasonable that amendments will have prospective application only."[33]

Decision:

The Arbitrator agrees with SBC for the reasons stated above.

2(d). Do references in the ICA to SBC tariffs constrain SBC from changing those tariffs?

Charter GT&C Issue 22: *When a CLEC voluntarily agrees to language relating to a SBC Missouri tariff, does it thereby gain the right to (a) prevent SBC Missouri from modifying its tariffs or (b) require SBC Missouri to negotiate its tariffs with the CLEC?*

Discussion:

The parties have agreed to language in Section 2.5.1 that to the extent a tariff provision or rates are incorporated into the agreement that "any changes to said tariff provision or rate are also automatically incorporated" into the agreement. Charter seeks additional language specifying that a party may not "materially reduce" its obligations by "modifying or amending any tariff." SBC disagrees with Charter's language because it could inhibit SBC's ability to seek revisions to its tariffs. SBC also states that Charter's proposed language would allow it to lock in a tariff rate, term, or condition via its contract language even though tariff rates, terms, and conditions frequently change. SBC argues that it should not be required to maintain its tariffs for the life of the ICA or to negotiate with CLECs regarding changes to its tariff offerings.

[33] Quate, Rebuttal, p. 8.

Charter, in turn, states that it is not trying to interfere with SBC's ability to modify its tariffs or to require SBC to negotiate any particular tariff changes with Charter. What Charter is trying to do, it states, is to close a possible loophole. Specifically, Charter wants to make clear that SBC may not use a tariff filing to do an end run around its obligations in this ICA. Charter's position is that it must be the ICA, 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. It would be inappropriate for SBC to try to modify or supersede those agreements by filing a tariff purporting to cover the same subject matter. SBC's language might permit such a result.

Charter further states that it is not trying to "lock in" any particular tariff term or provision and that its proposed language does not give it any right to do so. Instead, Charter's proposed language makes it clear that if SBC attempts to revise its tariff in a manner that modifies the terms and conditions of this ICA, then SBC should provide notice to Charter. The proper means for making material changes to the terms of the ICA is through the ICA's amendment process. SBC should be required to adhere to that process, and should not be allowed to utilize tariff revisions in order to materially alter either party's obligations under the agreement.

SBC responds that the modification of a SBC tariff would only impact the terms in the ICA where the parties have agreed to refer to the tariff. There would be no impact on any other provisions of the ICA. SBC further asserts that it cannot know what changes Charter would consider "material." For this reason, Charter's language would effectively require SBC to negotiate the terms of its tariffs.

Decision:

The Arbitrator has already determined that changes to tariffs referenced by the ICA will be automatically incorporated therein. Obviously, this would not be the case in those instances where the ICA expressly specifies otherwise. The Arbitrator has also already determined that the necessary corollary of automatic incorporation is prior notification through the existing Accessible Letters process.

The Arbitrator determines that the incorporation of a tariff into the ICA by reference does not supersede or negate SBC's power under state law to modify or change its tariff. Likewise, the incorporation of a tariff into the ICA by reference does not impose any obligation on SBC to negotiate changes to that tariff with the signatory CLECs. The Arbitrator suggests that the parties not reference tariffs with respect to terms that they do not want changed or modified during the life of the ICA.

3(a). Should the restrictions on assignments in the ICA be reciprocal?

AT&T GT&C Issue 4: ***Should the assignment provision be reciprocal?***

Charter GT&C Issue 27(a): ***What are the appropriate terms and conditions regarding restrictions on the assignment of the agreement?***

Sprint Structure Access Issue 1(c): ***Is Sprint required to obtain SBC Missouri's permission to assign or transfer its assets to affiliated entities?***

WilTel GT&C Issue 8:
What are the appropriate terms and conditions regarding restrictions on the assignment of the agreement?

Discussion:

SBC contends that the assignment provision should not be reciprocal because it is subject to a significantly greater degree of regulatory scrutiny than are the CLECs. In SBC's view, the regulatory oversight of any assignments or mergers by SBC is sufficient

protection for the CLECs. SBC's witness, Quate, testified that at least one other commission has endorsed this view.[34]

AT&T and Charter disagree. Because the CLECs are dependent on the facilities, services and products that they obtain from SBC, the ICA should allow the CLECs to protect their interests.[35] They should have the same right to approve assignments by SBC that the ICA accords to SBC with respect to assignments by CLECs. AT&T is also concerned that SBC's language would prevent it from partnering with a third party in serving its subscribers.[36]

Sprint states that it seeks the ability to assign or transfer its assets, including provisions of this Structure Access appendix, to affiliated entities with only written notice to SBC and without obtaining SBC's written permission. Sprint recognizes SBC's ability to freely transfer real property assets without Sprint's consent. Sprint continues to ask for a reasonable and more limited right to transfer or assign the agreement to affiliated companies without having to go through a consent process. This is a common provision in corporate agreements that allows flexibility in corporate structuring among related companies and avoids having to obtain consents from all contracting parties every time a contract is moved to an affiliate, or a merger or consolidation takes place. For all proposed nonaffiliated assignments, the Sprint language still requires SBC's approval of the assignment, which could not be unreasonably withheld

[34] Quate, Direct, pp. 17-18. The commission in question is the Illinois Commerce Commission.

[35] Barber, Direct, p. 29; Guepe, Direct, pp. 14-16.

[36] Guepe Direct, p. 15.

Decision:

The Act imposes obligations upon SBC with respect to any requesting carrier.[37] The Arbitrator determines that a right of approval under the ICA of CLEC assignments is incompatible with SBC's obligation under the cited section of the Act. Should SBC refuse its consent to an assignment, it necessarily would be refusing to perform its duties under the Act. For this reason, SBC's proposed language is rejected.

3(b). Who should bear any costs arising from assignments, mergers, name changes, and the like?

CLEC Coalition GT&C Issue 5(b): ***Should SBC Missouri be responsible for the cost associated with changing their records in SBC Missouri's systems when CLECs enter into an assignment, transfer, merger or any other corporate change?***

Charter GT&C 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?***

MCI GT&C Issue 3: ***Should the general terms and conditions contain a cost recovery clause in the event of a change in either party's OCN or ACNA?***

Navigator GT&C Issue 6: ***Should SBC Missouri be responsible for the cost associated with changing their records in SBC Missouri's systems when CLECs enter into an assignment, transfer, merger or any other corporate change?***

WilTel GT&C Issue 7: ***Is it appropriate to charge for record order charges, or other fees for where the CLEC name is changing if there is no OCN/ACNA change?***

WilTel GT&C Issue 8: ***(a) Can SBC require advanced written notice and consent of an assignment associated with a CLEC Company Code Change? (b) Is it appropriate for SBC to link its consent to an assignment to the CLEC's cure of any outstanding, undisputed charges owed under the Agreement and any outstanding, undisputed charges associated with the "assets" subject to the CLEC Company Code Change and can SBC require the CLEC to tender additional assurances of payment? (SBC) Is it reasonable to require WilTel to seek SBC's consent before WilTel can change its OCN or ACNA?***

[37] 47 U.S.C. § 251(c).

Discussion:

SBC's position is that any merger, acquisition, assignment, or change of company name, including OCN/ACNA (Operating Company Number/Access Carrier Name Abbreviation), is the CLEC's business decision and therefore the CLEC's responsibility.[38] ACNAs and OCNs are assigned by industry agencies such as Telcordia and NECA (National Exchange Carriers Association).[39] They appear on each end user account or circuit and are used throughout the industry to ensure accurate provisioning and billing.[40] SBC Missouri uses ACNAs and OCNs in numerous SBC databases and they are also used in other industry databases such as the Local Exchange Routing Guidelines (LERG).[41] To implement an OCN/ACNA change for a CLEC, SBC must update the accounts of each of the CLEC's end users in SBC's databases to reflect the correct company name, OCN/ACNA, or other CLEC company identifier.[42]

Charter contends that SBC should not be allowed to recover "costs" from Charter in association with any actions under the assignment provision.[43] Charter contends that any costs SBC might incur are incidental to its general obligations under the agreement.

The CLEC Coalition and MCI propose that each CLEC be permitted to make one change within a 12-month period without being charged by SBC for SBC's updating of its own records.[44] The practice allowing one OCN change during a 12-month period without a

[38] Quate Direct, pp. 11-15.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Barber Direct, pp. 28-31.

[44] Ivanuska Direct, pp. 48-49.

charge is a standard industry practice and, for the last several years, SBC voluntarily included such a provision in its 13-state interconnection agreement.[45] This proposal is evidently a compromise position; as a general rule, the CLEC Coalition believes that the costs to update OCN/ACNA numbers that occur as a result of a merger, consolidation, assignment or transfer of assets should be borne by SBC as a cost of doing business.

Navigator's objection concern's different methods used by SBC to compute the charges in different circumstances.[46] Navigator's witness, LeDoux, testified that SBC imposes a single charge for changing the Billing Accounts Number (BAN) for UNE lines billed in CABS, but imposes a per-line charge for resale lines.[47] LeDoux testified, "We believe that this is discriminatory, and there is no business reason to justify this practice. As a substantial number of our lines are resale, this practice could have a substantial impact on Navigator. We simply believe that SBC should impose the same block charges for both UNE and resale lines."[48]

WilTel's position is similar to that of Charter: SBC should not be permitted to charge to its customers an "extortionate fee" to cover what should be a cost of doing business.[49] At most, SBC is entitled to recover actual costs incurred in providing services to WilTel. WilTel may be willing to agree that if there is more than one name change, or more than one OCN/ACNA change, per calendar year, then SBC could charge a

[45] *Id.*

[46] LeDoux Rebuttal, p. 4.

[47] *Id.*

[48] *Id.*

[49] Schwebke Rebuttal, p. 2.

"reasonable" records change charge for changes after the first one. Such a charge, however, must be reasonable.

WilTel also asserts that SBC's proposed language would require WilTel to obtain SBC's consent to a Company Code Change, not an assignment. SBC's concerns about consent to assignment of the ICA are addressed in Section 4.8.1.1. WilTel contends that there is no basis whatsoever for WilTel to have to obtain consent from SBC if WilTel wants to change its OCN or ACNA, not even reasons of nonpayment. SBC's concerns about assurance of payment are addressed elsewhere in this ICA. Allowing SBC control over whether WilTel, or any other competitor, can or cannot make changes to its OCN or ACNA is discriminatory and violates Section 251 of the Act and FCC rules prohibiting anti-competitive behavior.

Decision:

The Arbitrator agrees with SBC that it is entitled to recover a reasonable charge for database corrections caused by CLEC assignments, mergers, name changes, and the like. The Arbitrator agrees with WilTel that it need not obtain permission from SBC prior to changing its OCN or ACNA; however, it will have to pay SBC for data base corrections necessitated by such a change. The Arbitrator has already determined that CLECs need not obtain SBC's consent to assignments.

4(a). How long an interval should the ICA allow to CLECs to pay bills rendered by SBC?

CLEC Coalition GT&C Issue 7: ***(a) Should CLECs be allowed to have the standard (universally accepted) interval of 30 days to review and pay invoices and bills? (b) Should the due date run from the date printed on the invoice, regardless of when the invoice/bill is sent to the CLEC?***

SBC Statement of the Issue: ***(a) Should CLECs be allowed to extend the standard (universally accepted) interval to pay invoice and bills from 30 days to 45 days? (b) Should the due date run from the time a bill/invoice is sent or the time that it is received?***

Discussion:

SBC's proposed language specifies that CLECs have 30 days from the bill or invoice date to pay their bill or invoice. The Coalition's proposal extends this timeframe to 45 days from issue or 30 days from receipt.[50] SBC's proposed language specifies that the 30 days runs from the date the bill or invoice is sent, rather than from the date that it is received.[51]

SBC argues that, if the Commission were to determine that a CLEC or CLECs could have a longer billing review period, resulting in a payment due date of more than 30 days, it would require an enormous amount of time and money to write programs to change the handling of the bills for each affected CLEC.[52] The same would be true if the Commission were to determine that the date that payment was due to SBC would be based on the date the bill or invoice was received by the CLEC.[53] SBC has made available to the CLECs a variety of options that enable them to increase the time frame to analyze bills prior to payment.[54] Additionally, CLECs may pay their bills via the Automated Clearinghouse method of electronic bill payment, eliminating the need to allow multiple days for transmission of payments and further ensuring timely crediting of payments.[55] Moreover,

[50] Quate Direct, pp. 20-22; Quate Rebuttal, pp. 37-38.

[51] Quate Direct, pp. 20-22; Quate Rebuttal, pp. 37-38.

[52] Quate Direct, p. 21.

[53] Quate Rebuttal, pp. 13-14.

[54] Quate Rebuttal, p. 14.

[55] Quate Rebuttal, p. 14.

CLECs have the option of selecting the date on which SBC bills them, ensuring specific knowledge by the CLEC of when it will receive its bill.[56]

SBC proposes that payments be in SBC's hands no more than 30 days from the issue date of SBC's invoice. As a compromise, the Coalition offered in its testimony to have the due date be either 45 days from the date of the invoice or 30 days from receipt.[57] The testimony offered by the CLEC Coalition shows that CLECs need 30 days to review and pay SBC's invoices.[58] The written testimony offered by SBC stated that SBC's invoices are available to CLECs within 24 hours of the bill release,[59] and the bills are then due within 30 days of the invoice date. Both parties thus agree that the proper amount of time needed to review and pay SBC's bills is approximately 30 days.[60] However, the evidence indicates that the invoice date printed on the bill, to which the payment due date is tied, bears no resemblance to either the date on which SBC sends its invoices out or the date on which CLECs receive their bills. That discrepancy results in a bill review period of much less than 30 days.

The Coalition states that a review of Xspedius' invoices received from SBC shows that paper invoices were received, on average, 15 days late, while electronic invoices were usually 11 days late.[61] From December 2002 to November 2004, Birch

[56] Quate Rebuttal, p. 14.

[57] Ivanuska GT&C Direct, at 39-40.

[58] *Id.* at 38; Ivanuska GT&C Rebuttal, at 23; Wallace Direct, at 7-11; Wallace Rebuttal, at 5-7.

[59] Quate Direct, at 21.

[60] Indeed, SBC's statement of the issue in the GT&C Final Joint DPL at 35-36 refers to the "standard universally accepted interval to pay invoices and bills [as] 30 days."

[61] Falvey GT&C Direct, at 7.

received electronic invoices from 7 to 9 days following the invoice date.[62] On paper invoices,[63] the date of receipt ranged from 7 to 13 days following the invoice date, with an average of 10 days.[64] SBC's theoretical 30-days-to-pay is, in practice, less than 20-days-to-pay for a significant portion of invoices.

While SBC witness Quate testified that bills are available electronically within 24 hours of the bill release date,[65] the testimony of Coalition witnesses Wallace and Ivanuska showed that this actually means only the ability to look at the figures online in a "picture" format.[66] SBC's invoices can run for hundreds of pages and the ability to view them online is insufficient to permit audit of those charges.[67] Instead, CLECs need the information in a downloadable, searchable, electronic format to be able to adequately check the charges. Indeed, SBC has admitted that its "goal" is to send invoices out within 6 working days of the invoice date.[68] Because 6 working days inevitably translates to at least 8 calendar days, because of intervening weekends, SBC's own internal procedures confirm the CLEC experience that SBC invoices are routinely received more than 8 days past the invoice date, even if SBC meets its "goal."

The Coalition asserts that this shortened period of review is a serious problem because SBC's bills are both very long and burdened with errors. Coalition witness

[62] Wallace Direct at 7; Wallace Rebuttal at Attachment MJW-1.

[63] Some invoices are only available on paper.

[64] Wallace Direct at 7-8.

[65] Quate Direct at 21.

[66] Wallace Rebuttal at 5; Ivanuska GT&C Rebuttal at 22.

[67] Wallace Direct at 8.

[68] Ivanuska GT&C Direct at 38.

Wallace noted that Birch recently settled over 3,000 separate disputes with SBC.[69] During 2004, Birch issued over 2,000 disputes in Missouri alone, worth approximately $600,000. Also in 2004, Birch issued over 8,200 disputes with SBC in the states of Kansas, Missouri, Texas and Oklahoma, worth over $2.3 million. In Birch's experience, approximately 80% of these disputes were ultimately decided in Birch's favor.[70] This testimony shows that CLECs do not routinely challenge every bill and that CLECs simply cannot afford just to pay the bill without a careful review. Wallace testified that SBC's bills are uniquely late and error-prone compared to other RBOCs.[71]

The Coalition contends that, in addition to demonstrating that SBC's invoices are so error-prone that a thorough review is necessary, the testimony of their witnesses also showed that a 30-day review period is needed because the bill review process itself is lengthy and cumbersome. Birch does not receive only a single bill from SBC in a month; instead, Birch gets approximately 1,030 invoices every month, each invoice averaging 400 to 900 pages in length.[72] The bill auditors not only review the bills prior to payment, but also have to create documentation to send to SBC on billing disputes, and then track the resolution of those disputes to make sure the CLEC receives proper credit on subsequent bills for disputes resolved in its favor.[73]

The CLEC Coalition characterizes the bill review process as very labor-intensive. For Birch, it consists of comparing the most recent bill with the prior month's bill and then

[69] Wallace Direct, at 10.

[70] *Id.*

[71] Wallace Direct, at 11.

[72] Wallace Direct, at 8.

[73] *Id*.

checking whether there is an accurate and reasonable basis for the differences. If Birch finds a charge that appears unreasonable, it may seek additional documentation from SBC or dispute the charge. The latter requires logging it into Birch's dispute database and submitting it to SBC in its required format. SBC routinely rejects Birch's disputes, sometimes in as little as 10 minutes, and Birch then has to file the dispute again, often with additional documentation.[74]

The Coalition states that SBC's back-billing also can cause difficulty because there is no limit on how far back SBC can go to recharge the CLEC. If SBC sends a back-bill for two years, it means CLECs have to comb back through old invoices to confirm that they have not already been charged for the same item.[75] A recent Birch bill described the item charged as "internal correction debit" in the amount of $256,000.[76] In such situations, the bill review process is necessarily delayed because the CLEC must seek additional information from SBC.

The Coalition contends that having a reasonable due date is critical because SBC ties its escrow and deposit requirements to the payment due date. The invoice dates and due dates printed on SBC's bills have no relation to the date on which SBC actually sends the bills to the CLEC. CLECs have no control over when SBC actually delivers its invoices, either electronically or through the mail; CLECs can only control the payment process once the invoice is received. In view of SBC's claims that tying the due date to the receipt of the invoice makes the due date too nebulous,[77] the due date could be tied to the

[74] *Id.* at 9.

[75] *Id.*.

[76] *Id.*

[77] Quate Direct, at 20. This position is contrary to the status quo. The Commission's new Enhanced

invoice date – provided the due date were sufficiently distant from the invoice date to account for SBC's delay in sending the bills to the CLEC.

The Coalition state that every state commission that has considered this issue has ruled against SBC, and approved the CLEC Coalition's language. In the T2A successor proceeding, the Texas PUC approved a due date that is 45 days from the invoice dates;[78] in the K2A successor proceeding, the Kansas Arbitrator ruled in the same manner and was affirmed by the Kansas Commission;[79] in the O2A successor proceeding, the Arbitrator approved a due date that is 30 days from receipt of the invoice.[80]

Decision:

The evidence shows that SBC's bills are actually rendered a significant interval after the so-called issue date, leaving the CLECs an inadequate period of time within which to audit the bills and remit payment. For this reason, the Arbitrator agrees with the CLEC Coalition that the payment due date should be 30 days from the day on which SBC's invoice or bill is *actually* received, as in the current M2A.

4(b). Should the ICA provide that SBC must make a cash refund to Charter of amounts involved in a billing dispute resolved in Charter's favor, or should the

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Record Exchange Rule provides that a carrier has 31 days to pay "upon *receiving* a correct invoice requesting payment . . . ." (4 CSR 240-29.090(2) (emphasis supplied), hence tying such bills to receipt of invoice. In addition, the current M2A provides that a CLEC shall pay its bills within 30 days of *receipt* of invoice. (*See* current § 8.1.)

[78] Texas Docket 28821, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Order on Reconsideration* at 1 (May 11, 2005).

[79] Kansas Docket No. 05-BTKT-365-ARB, *Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b)(1) of the Telecommunications Act of 1996, Arbitrator's Determination of Issues – Phase I* (Feb. 15, 2005) ("*K2A Successor Arbitrator's Phase I Decision"*) at 15; *Kansas Commission Order on Phase I* at 8.

[80] O2A Successor Arbitrator's Decision, General Terms & Conditions DPL Issue 16.

ICA allow SBC to credit that amount against other outstanding charges that Charter owes SBC?

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

Discussion:

SBC's preference is to issue credits either to either the specific account that had the dispute or to another account that has an outstanding balance.[81] In those situations, the CLEC can advise SBC which account to credit. If a CLEC has other unpaid or past due charges, it would be appropriate to use the credit toward the unpaid charges "right of set off" process. SBC believes is it not good business practice to refund cash to a CLEC on one account when they're delinquent on other accounts they have with SBC.

Charter believes that if a billing dispute has been resolved in its favor and it has been determined that SBC owes Charter money, then SBC should be required to actually pay Charter 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. 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.

SBC's proposed language (1) requires escrowed funds to be distributed following resolution of a dispute and specifies what happens to accrued interest; and (2) specifies that when a CLEC receives a monetary credit for a dispute that is resolved in its favor, SBC is allowed to credit the specific account in which the dispute arose or to credit another

[81] Quate Direct, pp. 20-23.

account, at the CLEC's direction, that has an outstanding balance.[82] All of the other CLECs that are parties to this proceeding have agreed that once a billing dispute is resolved, the billing party will credit the invoice of the paying party.[83] Charter should not be an exception.

Decision:

The Arbitrator agrees with SBC. Amounts owed by SBC to a Charter due to the resolution of a billing dispute in Charter's favor should be credited against any outstanding amounts owed by Charter to SBC. If there are no such outstanding amounts, then SBC should pay a cash refund to Charter.

4(c). What time limits, if any, should the ICA impose on back-billing and back credits?

CLEC Coalition CGT&C Issue 8: *Should the agreement contain procedures for backbilling?*

Discussion:

SBC states that it is reasonable to expect an occasional back-billing or credit claim to arise. SBC contends that the billing party should be able to take advantage of any increases in rates determined in such a proceeding for the same period of time that the billed party is entitled to receive the advantage of any reduction in rates ordered in such a proceeding. SBC states that its proposed language allows the billed party to bring a dispute for billing issues where the bill has been paid in full, and subsequently a disputed amount is found, for a 12-month period. A 12-month limitation on back-billing and credit claims provides a reasonable period of time for any error that occurred to be discovered by one party and brought to the attention of the other party.

[82] Quate Direct, p. 23; Quate Rebuttal, p. 18.

[83] Quate Rebuttal, p. 18.

The CLEC Coalition states that there are two components to the dispute on § 10..3: (1) whether the limitation on back-billing should be 6 months or 12 months, and (2) whether there should be any limitation on seeking and receiving credit for overcharges. The Coalition supports six months as the maximum time for back-billing because that is the greatest time period that a provider can reasonably have any hope of passing through and collecting such charges from its customers.[84] A 12-month back-billing period, as proposed by SBC, would complicate the already-difficult reconciliation and audit process created by what the Coalition characterizes as "SBC's lengthy and error-prone bills."[85] SBC does not provide any detail on its bills when it back-bills. Instead, CLECs must request a special, manually-generated backup and then attempt to reconcile the back-billing from that. Further, if there is no reasonable limitation on back-billing, SBC can dump a significantly large "make-up" bill on a CLEC in a given month and then expect payment within 30 days. The Coalition argues that it is inequitable to impose a significant burden on the billed party due to the billing party's mistake.

The Coalition further states that imposing any limitation on billing credits, however, is bad public policy. As demonstrated in testimony and at hearing, SBC's bills are so lengthy and so complicated that it is very difficult to process and approve them; verifying every line item is virtually impossible. Consequently, an error could be discovered in one month that had been overlooked for several months prior. It is SBC's error that is being corrected, not the CLEC's error. Even more egregious would be the situation where SBC itself determines it has been overcharging a CLEC through some mechanism where it was difficult or impossible for the CLEC to detect the error. In such a case, to permit SBC to

[84] Ivanuska GT&C Direct, at 42.

[85] CLEC Coalition Brief, at 162.

avoid refunding those overcharges would be to countenance the overcharge and encourage sloppy billing practices. SBC is protected from unlimited credits by the 24-month general limitation on disputes agreed to in the ICA.

SBC responds that the Commission should adopt SBC's proposed language, that allows for a twelve month limitation on back-billing and credit claims, and should reject the Coalition's proposed language that provides for a six month limitation on back-billing and contains no limitation on credit claims.[86] It is commercially reasonable to expect some back-billing or credit claims to arise.[87] A 12-month limitation on back-billing and credit claims provides a reasonable period of time: (1) for any error that occurred to be discovered by one party and brought to the attention of the other; and (2) to retain records associated with such bills.[88] The Coalition's position that back-credits should be allowed without restraint is bad public policy and is unreasonable because SBC cannot be expected to indefinitely retain its records.[89]

Finally, SBC urges the Commission to reject the Coalition's contention that back-billing charges and back-credits should be set out separately on the bill.[90] SBC's billing systems have limited space for entering a description.[91] However, SBC will provide a spreadsheet, upon request of the CLEC, that itemizes all adjustments.[92]

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[86] Quate Direct, p. 24; Quate Rebuttal, pp. 15-16.

[87] Quate Direct, pp. 24 and 37.

[88] Quate Direct, pp. 24-25.

[89] Quate Rebuttal, pp. 16 and 25.

[90] *Id.*

[91] Quate Rebuttal, p. 16.

[92] Quate Rebuttal, p. 17.

Decision:

The Arbitrator agrees with SBC that twelve months is a reasonable period for both back-billing and back credits. The Arbitrator further agrees with SBC that its bills and invoices need not separately state back-billed charges and back credits.

4(d). What should the ICA provide with respect to the withholding or deposit into escrow of disputed amounts? Should the ICA provide that the escrow of the amount of a disputed bill be a precondition to access to the billing dispute resolution process?

SBC Statement of the Issue: ***With the instability of the current telecommunications industry, is it reasonable to require CLECs to escrow disputed amounts so that CLECs do not use the dispute process as a mechanism to delay and/or avoid payment?***

SBC Statement of the Issue: ***(a) Is the creation of an escrow mechanism appropriate? (b) If an escrow mechanism is to be created, what terms and conditions should govern?***

Charter GT&C Issue 32: ***Is it appropriate to require parties to escrow disputed amounts?***

Charter GT&C Issue 34: ***Which [bill dispute] language should be included in the ICA?***

CLEC Coalition GT&C Issue 7(c): ***Should a party have a right to withhold payment of disputed amounts?***

CLEC Coalition GT&C Issue 11(c): ***Should a party have the right to withhold payment of disputed amounts?***

MCI Invoicing Issue 1: ***Should the billed party be entitled to hold payment on disputed amounts?***

MCI Invoicing Issue 2: ***If payments are to be withheld should they be put in an interest bearing escrow account pending resolution of a dispute?***

MCI Invoicing Issue 3: ***When a party disputes a bill, how quickly should that party be required to provide the party all information related to that dispute?***

MCI Invoicing Issue 4: ***What should trigger the contractual stake date limits?***

Navigator GT&C Issue 11(b): ***Should the GT&Cs contain specific guidelines for the method of conducting business transactions pertaining to the rendering of bills, the remittance of payments and disputes arising thereunder? Is it appropriate to require Party's to escrow disputed amounts?***

Sprint GT&C Issue 11: ***Should the GT&Cs contain specific guidelines for the method of conducting business transactions pertaining to the rendering of bills, the remittance of payments and disputes arising thereunder?***

Sprint GT&C Issue 12: ***Should CLEC be required to deposit disputed funds into an interest bearing escrow account?***

Sprint GT&C Issue 13(b): ***Should SBC be obligated to review all CLEC billing disputes if the disputed amount is not placed in escrow?***

WilTel GT&C Issue 9: ***Should undisputed amounts be paid promptly with disputed amounts resolved in accordance with the dispute resolution procedures or should disputed amounts be required to be paid by each Party into an escrow account?***

WilTel GT&C Issue 11: ***(a) Should WilTel's right to dispute charges under the ICA be conditioned upon depositing such amounts into an escrow account? (b) Under what circumstances is the use of an escrow account appropriate and reasonably necessary to protect the parties' interests?***

Discussion:

SBC states that the Commission should adopt its language which proposes the adoption of a uniform bill dispute process for use by all CLECs — a process that will ensure that SBC receives all of the information it needs to investigate a billing dispute in a timely manner.[93] SBC further states that requiring the deposit into escrow of disputed amounts is not only reasonable, it is necessary.[94] Since 2000, approximately 180 CLEC customers have ceased operations in SBC's 13-state incumbent region.[95] SBC has lost approx.

[93] Quate Direct, p. 31.

[94] Quate Direct, pp. 26-31.

[95] *Id.*

$255M over the past four years from CLECs who failed to pay bills.[96] SBC asserts that many CLEC customers represent unacceptably high credit risks and that there have been "many" instances of CLECs raising disputes just to avoid having to pay for services rendered, resulting in higher uncollectible receivables for SBC.[97]

In contrast, the CLECs hold varying positions on escrow requirements, proposing instead that they should be able to dispute their bills and withhold payment regardless of the dispute's merits.

Charter does not believe that escrow requirements are appropriate given the nature of the interconnection relationship between Charter and SBC.[98] Charter states that it is not reselling SBC's services, or using UNEs, or even collocating at SBC's central offices. Rather, the parties are simply exchanging traffic. While it is reasonable to assume that there will be disputes between the parties about billing matters, there is no reason to assume that they will be of such a nature as to require the expense and burden of escrow accounts.

The CLEC Coalition states that a party that has a good faith dispute regarding the accuracy of a charge by the other party should have the right to withhold payment of any amount that is in dispute. SBC proposes that the CLEC pay the charge to SBC or into escrow even if the charge is clearly in error. This concept is contrary to normal business practices in the telecommunications and other industries.[99] The Coalition asserts that SBC's bills frequently contain errors that are ultimately confirmed as SBC's mistakes at the

[96] Quate Direct, p. 3.

[97] Quate Direct, p. 26.

[98] Barber Direct, pp. 35-36.

[99] Ivanuska GT&C Direct, at 41.

end of the dispute resolution process. Birch had 2,000 disputes with SBC in 2004, totaling approximately $600,000, and routinely has 80% of such disputes resolved in its favor. At the hearing on the merits, a witness for Sprint noted that approximately 70% of Sprint's billing disputes with SBC are resolved in Sprint's favor.[100]

Navigator states that 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."[101] Under this proposal, SBC could send invoices that it knows are incorrect and Navigator would have to pay the facially incorrect charges before being able to contest the overcharge.[102]

Navigator further states that, 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.[103] In fact, Navigator asserts, it is routinely over-billed by an average of about thirty percent by SBC and most of its disputes are resolved in Navigator's favor after a second attempt.[104] Experience dictates that these disputes take twelve to eighteen months to resolve and to tie up substantial amounts of money through "pay and dispute" or escrow requirements would be unduly burdensome to a smaller CLEC like Navigator.[105] 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

[100] Tr. at 383.

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

[102] LeDoux Rebuttal, at 5.

[103] LeDoux Direct, at 15.

[104] *Id.*

[105] *Id.*

than a year."[106] Navigator states that it will pay, in a timely manner, any amounts it is required to pay as a result of the billing dispute procedures. SBC's proposed billing guidelines are designed to unnecessarily tie-up Navigator's working capital and are thus anti-competitive.

MCI states that the billed party should be entitled to withhold payments on disputed amounts. MCI's proposal is consistent with current business practice — that is, withhold and dispute — between MCI and SBC.[107] This provision applies to SBC as well as MCI, given that MCI renders bills to SBC. Likewise, MCI contends that there is no need for an escrow arrangement as proposed by SBC. The current business practice between MCI and SBC is to withhold and dispute the charges without the necessity of adding another layer to the process.[108] MCI also believes that ninety days is a reasonable time to provide all information related to a particular dispute. As a practical matter, MCI states that it will provide the information when it is available and not wait ninety days to turn over the data.[109] Finally, MCI urges the Commission to adopt its proposed language regarding the Stake Date. MCI contends that SBC's proposed date -- the date the dispute is filed -- makes no sense. The Bill Date, as proposed by MCI, is a date certain, known to both parties. SBC's proposal has no reference to when the disputed charges were rendered, while MCI's proposal does.

Sprint contends that the escrow requirements proposed by SBC should be stricken from the ICA. The language that SBC has proposed to Sprint draws no distinction

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[106] *Kansas Arbitration, Order No. 13: Commission Order on Phase I,* at ¶ 11.

[107] Hurter Direct, 15-16.

[108] Hurter Direct, 19.

[109] *Id.*

between the least reliable and most financially vulnerable CLECs and a highly reliable CLEC with a well-established record of payment. Though Ms. Quate's pre-filed Direct Testimony speaks of exceptions from the escrow requirement for CLECs with good payment records over 12 months and a record of disputes "largely" resolved in the CLECs' favor,[110] those exceptions simply do not appear in the language SBC has proposed to Sprint in this baseball arbitration. At hearing, Ms. Quate testified that it is appropriate to draw a distinction between reliable and unreliable CLECs regarding escrow and she also agreed that the language proposed to Sprint by SBC in the DPL and in the accompanying appendix does not draw any distinction.[111] Sprint's testimony that it has a good payment record and that it has been vindicated in 70 percent of disputes has not been rebutted.[112] Accordingly, the escrow provisions proposed by SBC should be stricken from the ICA as urged by Sprint.

WilTel states that SBC's proposed language provides that WilTel must either pay all amounts owed or place disputed amounts into an escrow account. WilTel disputes that it should always have to place disputed amounts into escrow and SBC agrees with this position as it has clearly represented to this Commission in its testimony.[113] If SBC itself is stating that escrow deposits are not always warranted, then its proposed language in this Section 5.5.2 is simply incorrect. WilTel also notes that SBC's proposed language would make such an escrow deposit a pre-condition to WilTel's bringing a legitimate billing dispute. SBC's language would also require WilTel to irrevocably waive any right to dispute

[110] Quate Direct, 26.

[111] Tr. 227-229.

[112] Tr. 383.

[113] Ex. 9, at pp. 26–18, and p. 29.

such amounts if they are not deposited in escrow. WilTel contends that these requirements are unreasonable and are designed to deter WilTel and other CLECs from disputing charges under their ICAs. SBC claims that the escrow deposit requirement is necessary to ensure that any amounts owed them will be paid. SBC's argument, however, is premised on a presumption that WilTel represents a high risk of non-payment. WilTel asserts that SBC's requirement that a dispute will not even be valid unless such amounts are paid into escrow is discriminatory behavior and contrary to section 251 of the Act.[114]

WilTel complains that SBC's proposed language is unreasonable because it gives SBC the option to suspend any new or existing orders for services under the ICA on the day SBC provides its written demand for payment, although the ICA allows 10 business days from the demand to comply. WilTel's proposed language, on the other hand, is more reasonable because it provides that SBC's option to suspend orders would commence after the 10 day period has expired.

SBC replies that the Commission should adopt its proposed language, which provides for uniform billing dispute procedures and requires the disputing party to escrow the disputed amount, for two reasons. First, an escrow provision is necessary to protect SBC from financial loss. Second, some CLECs raise disputes without merit as a way to avoid having to pay for services rendered.[115] This tactic results in higher uncollectibles for SBC.[116] Both the Public Utility Commission of Ohio and the Michigan Public Service Commission have required escrow provisions and this Commission should too.[117] SBC

[114] *See* 47 U.S.C. § 251(c)(2)(D), and 47 U.S.C. § 251(c)(3).

[115] Quate Direct, p. 26.

[116] Quate Direct, p. 26.

[117] Quate Direct, pp. 28-29.

urges the Commission to reject proposed CLEC language that provides CLECs with a means to delay the resolution of a billing dispute and avoid payment, a situation that may result in more disputes being brought before the Commission.[118]

Decision:

The record shows that SBC's bills contain an unusually large number of errors, leaving the CLECs no option but to dispute many bills. For this reason, the Arbitrator concludes that it would be highly inequitable and contrary to the public interest to require the CLECs to deposit the amount of the disputed bills into escrow. as a prerequisite to the billing dispute resolution process. Otherwise, a significant amount of CLEC capital might be tied up in escrow. Therefore, the Arbitrator directs the parties to use the CLECs' proposed language on this point.

4(e). Should the ICA require that billing disputes be submitted on a form specified by SBC?

<u>Sprint GT&C Issue 13(a)</u>: *Should SBC be allowed to require CLEC to use a specific form for submitting billing disputes?*

Discussion:

SBC states that the Commission should adopt its proposed language which requires a CLEC to submit a specific form when raising a billing dispute.[119] Requiring CLECs to submit a specific form is reasonable in that the form was collaboratively refined based on CLEC comments made within the CLEC User Forum and it allows SBC Missouri to process CLECs' claims in a more expeditious fashion.[120]

[118] Quate Direct, p. 33; Quate Rebuttal, pp. 18-19.

[119] Quate Direct, pp. 31-31.

[120] Christensen Rebuttal, pp. 16-17.

Sprint responds that the undisputed testimony of its witness, Linda Shipman, reflects that Sprint and SBC have a reasonable working relationship for billing disputes right now and that SBC's proposal should therefore be rejected. Sprint and SBC have agreed in the past to the use of a Microsoft Excel spreadsheet that contains essentially the same information as SBC's form. This process is established and is working for both companies. It is already a manual process for Sprint, but being compelled to utilize a SBC form to convey a dispute would be an expensive and unnecessary burden to Sprint. The testimony at hearing revealed that while SBC wants its form adopted because it must field billing disputes from dozens of CLECs in Missouri, Sprint does not think the form is appropriate because Sprint CLEC must interact with thousand of LECs around the country and could, conceivably, be required to submit bill disputes on thousands of different forms.[121]

Decision:

The Arbitrator concludes that Sprint's language is preferable for the reasons stated above.

5. What should the ICA provide with respect to the resolution of non-billing disputes?

<u>CLEC Coalition GT&C Issue 11</u>: ***(a) What language should govern the resolution of informal non-billing disputes? (b) Should a party have the right to seek emergency relief from the MPSCMO-PSC in case of customer-affecting disputes?***

<u>Charter GT&C Issue 36</u>: ***Should SBC's language for Dispute Resolution that has been established for all CLECs be included in the Agreement?***

<u>SBC's Statement of the Issue</u>: ***Should SBC's language for Dispute Resolution that has been established for all CLECs be included in the Agreement?***

Discussion:

[121] Tr. 380-382.

SBC states that the Commission should adopt its dispute resolution provisions which provide: (1) that the parties must pursue informal dispute resolution for 60 days before either party may invoke the Commission's complaint process and (2) that all settlement negotiations, as well as settlement offers, will be exempt from discovery.[122]

The CLEC Coalition responds that the parties generally agree that there should be alternatives to litigation in handling their disputes, so they have established an informal dispute resolution process. The Coalition complains that SBC, however, prefers language that is very vague and that essentially states the parties will meet and negotiate the dispute. The Coalition states that SBC's language has no parameters over the location, form, frequency or duration of such deliberations, but leaves it all to the discretion of the representatives; indeed, SBC does not even have any parameters around how long one party can take to name a representative. Hence, one of the primary sub-issues on dispute resolution concerns the Coalition's proposal that five business days is more than sufficient for such a designation. The dispute resolution process will operate more smoothly if the parties make commitments in the contract concerning this issue.[123] Both the Texas Commission and the Oklahoma Arbitrator, in the T2A and O2A successor proceedings respectively, agreed that five days is a reasonable amount of time to designate a representative to resolve the disputes, and ordered accordingly.[124]

The Coalition further states that the parties also have been unable to agree on language regarding whether discussions and correspondence "for the purposes of

[122] Quate Direct, p. 40; Quate Rebuttal, p. 24.

[123] Ivanuska GT&C Direct, 43.

[124] T2A Successor Arbitration Award, Awards Matrix, General Terms & Conditions Jt. DPl at 29; O2A Successor Arbitrator's Decision, General Terms & Conditions DPL Issue 20.

settlement" are exempt from discovery and production. The Coalition and SBC agree that "offers of settlement" are exempt from discovery. However, the Coalition asserts that SBC's language exempting "discussions" and "correspondence" is overly broad and would permit the exemption of discussion details and documents that would be otherwise discoverable. The Coalition contends that only settlement offers themselves, whether oral or written, and documents -- but not "discussions" -- that are part of a settlement offer should qualify for an exemption from disclosure.[125] The Coalition points out that both the Kansas and Oklahoma Arbitrators agreed that the CLEC Coalition's language is preferable and ruled against SBC on this sub-issue.[126]

The Coalition also states that another major issue on dispute resolution is that SBC's generalized procedures do not recognize any exception in the case of customer-affecting disputes. Consequently, the primary issue to be decided by the Commission on this topic is whether the agreement should contain the following CLEC Coalition explicit language preserving the right of a party to seek emergency relief from the PSC in the event of a customer-affecting dispute:

> 13.2.2 Notwithstanding the other dispute resolution procedures set forth in this Agreement, a Party may seek emergency relief from the Commission for the resolution of any problem that interrupts or threatens to interrupt the service of either Party's customers.

The Coalition explains that this provision concerning customer-affecting disputes is intended to embody, in contract, the commitments SBC made during the 271 process

[125] Ivanuska GT&C Direct, at 44.

[126] O2A Successor Arbitrator's Decision, General Terms & Conditions DPL Issue 20; K2A Successor Arbitrator's Phase I Decision at 24. The Kansas Commission recently affirmed the Kansas Arbitrator. *Kansas Commission Order on Phase I* at 2.

regarding CLECs' ability to obtain expedited relief for customer-affecting disputes.[127] These "service affecting" issues include instances where SBC is unable to meet a due date or where a network outage occurs, for example: (1) missed due dates, (2) due dates in jeopardy, (3) service outages, (4) severe service impairment, and (5) 911 listings missing or incorrect.[128] In these situations, the CLEC's customer may be so severely impaired that a complaint to the Commission is the only way to expedite a resolution.

The Coalition does not believe the Commission should have to intervene every time there is a customer-affecting dispute, nor do its members want to go to the trouble and expense of filing a complaint for each such dispute.[129] Instead, the parties' ICA should set out a procedure that will quickly resolve all major disputes, including customer-affecting disputes. Nevertheless, the Coalition wants explicit references to its rights to bring customer-affecting disputes to the Commission as a last resort.

Charter responds that its 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. However, it does exchange traffic with SBC. Charter contends that 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, the disputes

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127 Ivanuska GT&C Direct, 45.

128 *Id.*

129 *Id.*

between Charter and SBC will be more complicated and dependent on contract interpretation.

Charter asserts that this situation has certain consequences. First, the information that must be supplied to explain a billing dispute cannot be determined in advance on a standardized form. It is necessary that the contract generally require that the information reasonably necessary to deal with the issue be provided, as Charter's language proposes. Second, determining whether a billing error has occurred will never be a unilateral decision by SBC. For this reason, 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 – 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.

Charter complains that SBC seems totally oblivious to the real issue here, which is that the nature of the 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.

SBC replies that informal dispute resolution saves time, resources, and money, not only for SBC and the CLEC, but also for the Commission.[130] The Commission should reject Charter's proposed language, which is unreasonable, in that once SBC Missouri has

[130] Quate Direct, p. 40.

completed its investigation and communicates the results to Charter, Charter could withhold its agreement that the dispute is resolved.[131] If Charter is not satisfied with the resolution of the billing dispute, the parties have already agreed that it can pursue formal dispute resolution.[132] Moreover, Charter's proposal would allow 90 days to pass even before dispute resolution begins, a process which itself could take months.[133]

The Commission should also reject the CC's proposed language because it allows for the discovery of settlement negotiations.[134] If settlement negotiations are not protected, as they are under general rules of evidence, parties will likely withhold information during the settlement negotiations for fear that it will later be disclosed. This will reduce the ability of the parties to resolve matters through negotiations, thus leading to unnecessary Commission involvement.[135] The Commission should also reject the Coalition's proposed language, which requires a separate dispute resolution process for "customer-affecting disputes," since the process is "unnecessary, unworkable, and would likely result in disputes before the Commission."[136] The ICA already contains both informal and formal dispute resolution processes.

Decision:

The Arbitrator agrees with SBC that the ICAs should contain uniform, standardized procedures for resolving non-billing disputes. The Arbitrator further notes, however, that a party's right to bring a complaint before the Commission is statutory and

[131] Quate Rebuttal, p. 25.

[132] *Id*.

[133] Tr. 634 (Barber).

[134] Quate Direct, p. 40.

[135] Quate Direct, p. 40; Quate Rebuttal, p. 24.

[136] Quate Direct, p. 40; Quate Rebuttal, pp. 24-25.

cannot be abridged by these ICAs. As for the discovery of settlement negotiations and offers, the Arbitrator believes that the civil rules already provide all necessary protection for such information. Therefore, the ICAs need only state that settlement negotiations and offers are immune from discovery to the extent already provided by state law and practice.

6. Should the ICA provide for credits where service is interrupted?

CLEC Coalition GT&C Issue 19: ***Should the agreement include provisions regarding credits for interruption of service?***

SBC's Statement of the Issue: ***Should the CLECs' language be included in the Agreement?***

Discussion:

The Coalition states that, if SBC were a willing wholesaler, it would not be opposed to credits for service interruptions. In any other commercial context, a customer would not expect to pay for something it did not receive.[137] Indeed, if one of the Coalition's customers experiences an outage, they are credited for the time they were without service; this is a standard commercial practice. In fact, SBC's Missouri access tariffs offer a credit allowance for service interruptions associated with its Special Access Service, Switched Access Service, SS7 Interconnection Service, and Frame Relay Service, among others.[138] SBC has presented no testimony or evidence whatsoever explaining why it is opposed to service credits in this context. Consequently, the Commission should rule in the Coalition's favor on this issue.

Decision:

The Arbitrator finds for the CLEC Coalition for the reasons stated above.[139]

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[137] *Id.* at 48.

[138] *Id.*

[139] So far as the Arbitrator can determine, SBC did not address the credit for service interruptions issue

7. What should the ICA provide with respect to non-payment and procedures for disconnection?

AT&T GT&C Issue 5: ***Under what circumstances may SBC Missouri discontinue providing services for nonpayment including discontinuing collocation?***

AT&T GT&C Issue 6: ***Must SBC obtain an order from the Commission prior to terminating the ICA or suspending or discontinuing any services provided under the ICA? Must AT&T comply with the dispute resolutions procedures in the ICA to prevent such disconnection?.?***

CLEC Coalition GT&C Issue 12: ***Under what circumstances may SBC disconnect services for nonpayment?***

MCI GT&C Issue 7: ***What terms and conditions should apply in the event the billed party does not either pay or dispute its monthly charges?***

Navigator GT&C Issue 10: ***Which party's language regarding grounds for termination for non-payment should be included in this agreement?***

Navigator O&P Issue 2: ***Given the TRRO decision, should terms and conditions for UNE switching ordering, provisioning and maintenance be in this ICA?***

Discussion:

SBC proposes certain reasonable non-payment and disconnection language for the ICA. The CLECs raise two primary issues with SBC's proposed language. First, the CLECs seek to lengthen the disconnection timeline. Second, MCI, at least, wants to limit any disconnections to the specific unpaid accounts.

SBC proposes to send a collection letter to a CLEC any time that there are past due amounts owing.[140] This initial collection letter provides that the non-paying party must remit all unpaid charges within ten business days. If the CLEC wants to dispute any of the unpaid charges, it must notify SBC in writing of any disputes in detail, pay all undisputed

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and thus is presumably not opposed to it. This issue originally included language pertaining to the resolution of non-billing disputes that SBC opposed and addressed in its Brief. The Coalition has withdrawn that language.

[140] This and the following two paragraphs: Quate Direct, pp. 42-44. *See also* Hurter Direct, p. 11.

amounts owing, and deposit all disputed amounts into an interest-bearing escrow account, all within ten business days. If, after ten business days, the CLEC has not met its obligations under the first letter, SBC would send a second letter demanding that the outstanding unpaid balance be paid within five business days. At the time of the second letter, SBC could suspend order acceptance. If the CLEC fails to pay within five business days, SBC may disconnect the CLEC's services, but only if the unpaid charges exceed 5% of the aggregate amount billed by SBC to the CLEC in Missouri in the prior month.

SBC's proposal gives the CLEC approximately 60 days from the invoice date to pay for undisputed charges, which are due 30 days from the invoice date, before a disconnection takes place. The CLEC's proposal would give the CLEC approximately 125 days from the invoice date to pay SBC before a termination would be possible. These figures do not include the additional exposure SBC faces when it provides service to the CLEC's end users until the end users are able to obtain alternative service. Factoring in this transition of end users, SBC would actually be exposed to 90 days of service under its proposed terms and 155 days of service under the CLECs' proposal.

SBC argues that the CLEC proposal would destroy a CLEC's incentive to timely compensate SBC and would encourage CLECs to game the system disregard of due dates on invoices which the CLECs acknowledge they are required to pay. The CLECs' proposed timeline is unworkable, especially given the high credit risk many CLECs pose to SBC and the relatively small amount of deposits SBC seeks. SBC notes that, under its proposal, it can only terminate services for the non-payment of undisputed charges.[141]

[141] Quate Rebuttal, p. 28.

The CLEC Coalition complains that SBC lumps all CLECs together, even though the CLEC Coalition's proposal is very different from that proposed by other CLEC parties.[142] The Coalition generally seeks to maintain the M2A's current language. Its proposal is substantively similar to SBC's and would not result in a longer waiting period before SBC could disconnect service. The primary difference is that SBC would have to wait 15 days before sending the initial disconnection notice, but no second notice would be required.

Under MCI's proposal, upon the CLEC's failure to pay all amounts due by the bill due date, SBC may demand in writing payment of all overdue amounts within five days.[143] Upon a further failure to respond, SBC may make a second written demand for payment within five days. If the CLEC does not satisfy the second written demand to pay within five business days of receipt, SBC may, as to that account only, (1) require provision of a deposit or increase an existing deposit; and/or (2) refuse to accept new, or complete pending, orders for the services billed in that account.

SBC points out that MCI's proposal (1) does not permit disconnection for any reason and (2) permits the CLEC to game the system by transferring services to different accounts, thwarting SBC's collection efforts.[144]

Navigator evidently seeks longer timelines.[145] Navigator also proposes that the provisions be modified to apply only to the payment of non-disputed charges due to SBC's history of inaccurate billings submitted to Navigator over the last seven years.

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[142] Ivanuska GT&C Direct, p. 31.

[143] Hurter Direct, pp. 11-12.

[144] Quate Rebuttal, pp. 28-29.

[145] LeDoux Direct, p. 14.

AT&T wants to require SBC to obtain Commission approval before it disconnects certain services – resale, UNEs, collocation, and interconnection services and facilities -- for non-payment.[146] SBC is willing to let AT&T invoke the dispute resolution process in the face of impending disconnection, but only if AT&T has first paid all undisputed amounts and deposited all disputed amounts into escrow.[147]

Decision:

SBC's proposed language is reasonable and should be adopted. The necessary and ultimate sanction for nonpayment of undisputed amounts is disconnection. For the reasons raised by SBC, disconnection should be of all services, not just those under a single account number. The timeline contained in SBC's language is commercially reasonable and provides ample warning to the CLEC before disconnection occurs. SBC need not seek specific permission from the Commission before terminating service to a non-paying CLEC.

8. Should the ICA permit SBC to require a deposit as an assurance of payment?

Charter GT&C Issue 30: ***Should CLEC be required to give SBC an assurance of payment?***

CLEC Coalition GTC Issue 3: ***Should CLEC be required to give SBC an assurance of payment?***

Xspedius-only GTC Issue 3: ***Should Xspedius be required to provide a deposit in excess of one month's average net billing?***

MCI GT&C Issue 6: ***With the instability of the current telecommunications industry, is it reasonable for SBC Missouri to require a deposit from Parties with a proven history of late payments?***

[146] Guepe Direct, pp. 16-18.

[147] Quate Rebuttal, pp. 30-31.

Navigator GT&C Issue 4(a): ***Should CLEC be required to give SBC an assurance of payment?***

Navigator GT&C Issue 4(b): ***If SBC is allowed to require adequate assurance of payment, what form and amount is appropriate?***

Sprint GT&C Issue 10(1): ***With the instability of the current telecommunications industry, is it reasonable for SBC Missouri to require a deposit from Parties with a proven history of late payments?***

Sprint GT&C Issue 10(2): ***What are the appropriate terms and conditions for such a deposit?***

WilTel GT&C Issue 10(1): ***Should SBC be allowed to require adequate assurance of payment?***

WilTel GT&C Issue 10(2): ***If SBC is allowed to require adequate assurance of payment, what form and amount is appropriate?***

Discussion:

SBC's proposed language would permit it to require a deposit, as an assurance of payment, from CLECs that (1) have not established a good payment record; or (2) have a history of late payments. SBC's witness Quate testified that collecting deposits from trade customers is a standard commercial business practice.[148] She further testified that deposits are a necessity in the current telecom industry. According to Quate, about 180 CLEC customers have ceased operations in SBC's-13 state incumbent region since 2000, showing that many CLEC customers are unacceptably high credit risks.[149] However, Quate testified, deposits are particularly important where the customer is a CLEC because SBC cannot deny service to a CLEC customer for lack of good credit.[150] In the normal business world, companies have the option to decline to sell products and services to high risk

[148] Quate Direct, pp. 47-8.

[149] *Id.*

[150] *Id.*

customers on open credit terms and may instead demand cash in advance. Since high risk CLEC customers must receive open credit terms, requiring the CLEC to make a reasonable deposit is one of the few safeguards SBC has against the risk of payment default.[151]

Charter's position is that "a simple and straightforward system under which a cash deposit is required if for some reason Charter misses its payment obligations is sufficient."[152] The CLEC Coalition is willing to include a reasonable deposit provision in the ICA.[153] So is MCI, so long as the deposit provisions are narrowly tailored to provide the parties with the proper incentives to make timely payments, do not impose undue burdens on the party paying the deposit, and are not so onerous as to become a barrier to competition.[154] Navigator takes the same position, but objects that SBC's particular proposal is not reasonable.[155]

The parties' dispute concerns (1) the amount of the deposit and (2) the triggers that will permit SBC to invoke its power to demand a deposit.

SBC's proposal requires a deposit equal to three months anticipated charges while the CLECs' propose either (1) no deposit (Sprint); (2) a one-month deposit (MCI and Navigator); or (3) a two-month deposit (Charter and CLEC Coalition). SBC witness Quate testified that a 3-month deposit is appropriate given the 90-day length of the disconnection process.[156] Because of the length of the termination process, a one month deposit, or flat

[151] *Id.*

[152] Barber Direct, p. 34.

[153] Ivanuska GTC Direct, pp. 34-5.

[154] Hurter Direct, p. 5.

[155] LeDoux Direct, p. 7.

[156] Quate Direct, p. 48.

sum of $17,000 as the CLEC Coalition proposes, is not sufficient protection against the risk of non-payment.

SBC proposes that deposit requirements be triggered if: (a) the CLEC has not established satisfactory credit; (b) there has been an "impairment" of the financial health or creditworthiness of the CLEC;[157] (c) the CLEC fails to timely pay a bill rendered to it, excluding any disputed amounts in compliance with Dispute Resolution Procedures set forth in the ICA; or (d) "the CLEC admits its inability to pay debts as they become due, has commenced a voluntary case (or has had an involuntary case commenced against it) under the U.S. Bankruptcy Code or any other law relating to insolvency, reorganization, winding up, composition or adjustment of debts or the like, has made an assignment for the benefit of creditors, or is subject to a receivership or similar proceeding."[158]

Decision:

The Arbitrator agrees with SBC that it is reasonable for SBC to require a deposit, as an assurance of payment, from CLECs that have not established a good payment record or that have a history of late payments. The Arbitrator also agrees with SBC that "[t]he only adequate assurance . . . is a cash deposit or letter of credit."[159] While the Arbitrator is reluctant to agree with SBC that the appropriate measure of a deposit is three months' anticipated charges, the CLECs have not shown that the amount at risk under the proposed termination procedures is less than that figure. Therefore, the Arbitrator must agree with SBC on the size of the deposit. Finally, with respect to the deposit triggers, the Arbitrator is of the opinion that SBC may require a deposit only from CLECs that have not

[157] "[A]s measured by a Moody's or Standard & Poors credit rating." Quate Rebuttal, p. 33.

[158] Quate Direct, p. 49.

[159] Quate Rebuttal, p. 35.

yet established a good payment record or that have failed to pay undisputed bills as they fall due. With respect to the deposit triggers, the Arbitrator decides for the CLECs and against SBC.

9. What should the ICA provide with respect to the negotiation of a successor agreement?

Charter GT&C Issue 29: ***Should successor language be added to Section 5.6, even though it is stated in Section 5.7?***

CLEC Coalition GT&C Issue 4(a): ***What terms and conditions should apply to the contract after expiration, but before a successor ICA has become effective?***

MCI GT&C Issue 5: ***What terms and conditions should apply to the contract after expiration, but before a successor ICA has become effective? If the parties are negotiating a successor agreement, should either party be entitled to terminate this agreement before the successor agreement becomes effective?***

Discussion:

SBC's proposed language provides that the ICA will continue on a month-to-month basis if no notice of termination of agreement is served by either party.[160] SBC maintains that this language is necessary in order to avoid uncertainty and possible disruption upon expiration of the ICA. Once served notice of termination and during the negotiation of a successor agreement, the current ICA will continue in full force until replaced by a successor ICA, either through negotiation or arbitration.

Charter states that the real issue is what happens, substantively, at the end of this agreement's initial term.[161] Charter wants the agreement to make clear that it will remain in effect until replaced by a successor agreement. Otherwise, Charter is at risk of a situation in which this agreement has expired and no successor has been established. On

[160] Quate Direct, pp. 53-55.

[161] Barber Direct, pp. 32-33.

the other hand, if Charter's proposed language is adopted, it will be clear that this agreement will remain in effect even if for some reason there is a delay in negotiating or arbitrating a replacement.

For the CLEC Coalition, the most important difference in the parties' positions is language to cover the situation where outside forces, such as pending regulatory action, causes a delay in the arbitration of a new interconnection agreement.[162] In that case, the existing agreement would be extended until the arbitration is complete. This provision would therefore cover situations such as whose which have just occurred in the X2A proceedings, where the FCC's impending *TRRO* order caused negotiation and arbitration problems that required various difficult resolutions to prevent termination of the contract during the period that the UNE provisions were being arbitrated. Should such an eventuality occur again, the agreement will simply continue until the successor agreement is in place.

MCI argues that SBC's proposed language would permit SBC to terminate this agreement after expiration of the initial term even if the parties are pursuing a successor agreement.[163] MCI proposes that the agreement should remain in an "evergreen" status after expiration of the initial term, provided that the parties are negotiating a successor agreement.

Decision:

The Arbitrator agrees that the ICA should continue in force until replaced by a successor ICA. SBC's language is adequate to achieve that goal.

[162] Cadieux Direct, pp. 13-14.

[163] Collins Direct, p. 11.

10. What requirements concerning the maintenance of insurance coverage should the ICA include?

Charter GT&C Issue 26: ***What are the appropriate provisions relating to insurance coverage to be maintained by the Parties under this agreement?***

Navigator GT&C Issue 3: ***Are the insurance limits requested by SBC reasonable?***

WilTel GT&C Issue 6: ***Are the insurance limits and requirements requested by SBC reasonable?***

Discussion:

SBC states that the parties need insurance to protect their investments in their infrastructure and network facilities, as well as to protect their employees from losses resulting from injuries and third-party liability.[164] SBC states that it has based its insurance requirements on the fact that if a CLEC interconnects with SBC or collocates with SBC, then SBC has far more risk of damage to its equipment and central office structure. The insurance requirements requested by SBC are the minimum amount required to protect SBC and its property.

SBC explains that it seeks different levels of insurance depending upon each individual CLEC's use of SBC network.[165] SBC's exposure is greater with those CLECs that collocate. There is necessarily an increased potential for liability when a CLEC's employees and contractors have direct access to SBC's facilities. The public switched network is worth billions of dollars.[166] The amounts proposed by SBC are the absolute minimum that is commercially reasonable amounts under the circumstances.

[164] Quate Direct, pp. 57-59.

[165] *Id.*

[166] *Id.*

Navigator responds that SBC's proposed language would force Navigator, and every other CLEC that signs the ICA, to acquire insurance coverage that "far exceeds any reasonable liability."[167] Navigator contracts with SBC for UNE-P and resale; it has very few, if any, employees in Missouri. According to Navigator's witness, LeDoux, liability coverage of the limits proposed by SBC adds unnecessarily to the CLEC cost of doing business in Missouri.

SBC's proposed language also specifies that the CLECs will purchase insurance from an insurance company with a rating of B+ or better and from an insurance company with a Financial Size Category rating of VII or better, as rated in the A.M. Best Key Rating Guide for Property And Casualty Insurance Companies.[168]

Charter opposes this requirement. Charter argues that the parties should be prepared to provide proof of adequate insurance coverage.[169] However, Charter contends that there is no need to specify insurance requirements in the detail which SBC proposes, including the commercial "ratings" of each party's insurance carrier. Charter has every incentive to maintain adequate insurance, and its freedom to choose among different insurance providers should not be constrained unreasonably by SBC. SBC's detailed requirements are not needed as a predicate to establishing appropriate insurance coverage requirements.

SBC explains that the A.M. Best Company is a widely recognized rating agency dedicated to the insurance industry.[170] Best's ratings indicate the financial strength of

[167] LeDoux Direct, pp. 6-7.

[168] Quate Direct, p. 59.

[169] Barber Direct, pp. 27-28.

[170] Quate Direct, p. 59.

insurance companies. Best's rating provides the information needed to make sound, informed decisions that the insurance provider has the financial strength to handle potential claims that may arise. For example, a B+ means that the insurance company has a good ability to meet their ongoing obligations to policyholders. Also, a Financial Size Category rating VII indicates that the insurance company has sufficient financial capacity to provide the necessary policy limits to insure its risk. This information is necessary to ensure adequate insurance coverage not only for SBC, but also the CLEC and ultimately the public switched network.

Decision:

The Arbitrator agrees with the CLECs on these issues. The level and kinds of coverage need not be sufficient for every possible mishap, however unlikely. SBC insists that its proposal is the minimum that is commercially reasonable in the circumstances, but offers no insight into how that conclusion was reached. The Arbitrator agrees with Charter that there is no need for SBC to impose specifications as to the rating of the insurance company selected by the CLEC.

11. What provisions should the ICA include concerning referenced documents?

CLEC Coalition GT&C Issue 16: ***Which party's language regarding Notice of Network Changes should be included in the Agreement?***

CLEC Coalition GTC Issue 25 (Birch/Ionex GT&C Section 1.7(A)): ***Should SBC MISSOURI be allowed to make changes in its UNE offerings that disrupt provisioning to CLEC without advance notice or written approval of CLEC?***

Charter GT&C Issue 21: ***Should either party be able to modify or update their reference documents with out seeking approval from the other party?***

Discussion:

SBC states that the Commission should adopt its proposed language regarding notice of network disclosures, which specifies that that SBC will provide network disclosure consistent with the applicable network disclosure rules adopted by the FCC and codified at 47 C.F.R. §51.325.[171] SBC's processes have never been challenged in any SBC-led or other industry forum, such as the Change Management of CLEC User Forum, and no CLEC has ever filed an objection to an SBC Network Disclosure.[172] SBC further states that the Commission should adopt its proposed language regarding referenced documents, which clarifies that whenever any of the documents listed in Section 48.1. [technical publications, industry documents, etc.} are referred to in any provision in the ICA, then that document to which the ICA refers is the most current version of that document.[173] As things change and processes improve, documents are updated to incorporate the most current practices.[174] SBC's proposed language is necessary to ensure that the ICA reflects the most current versions of these documents.

SBC contends that the Commission should reject the CLEC's proposed language, which would effectively require SBC to negotiate any changes to its practices or even industry publications with numerous CLECs.[175] For example, the Coalition proposes language requiring that any substantive change to an industry publication, technical standard, or other document incorporated into the Agreement "shall not be effective against CLEC without its express written consent." SBC has to maintain its network for the benefit

[171] Hatch Direct, p. 24.

[172] Hatch Direct, p. 25.

[173] Quate Direct, p. 61.

[174] Quate Direct, pp. 61-62.

[175] Quate Direct, p. 62.

of all users and does not have the time or resources to forward every proposed change to every CLEC and wait for a reply.[176] SBC's experience with negotiating a successor to the parties' M2A agreement demonstrates that CLECs are not a universally-responsive group.[177] To require SBC to negotiate changes to its technical documents before implementing them would effectively freeze its practices in time.[178] This is not a desired outcome for SBC, for CLECs or, most importantly, for end users.[179]

SBC contends that the Commission should reject Birch/Ionex's proposed language, which prohibits SBC from making any change to any of its policies, procedures, methods, or processes without the CLEC's written permission, because: (1) the CLEC would have the "sole discretion" to withhold its permission; and (2) this language would hamstring SBC, while providing Birch/Ionex with a blank check that would allow them to run virtually all aspects of SBC's business to everyone's detriment.[180]

SBC also asserts that the Commission should reject Charter's proposed language that prevents any change to an industry document that would: "materially reduce" the obligations of SBC without an amendment to the ICA because Charter's provision would force SBC to enter negotiations with Charter to negotiate a document over which SBC has no control.[181] Further, even if the document is a SBC-13STATE practice, no party has time or resources to negotiate every proposed change with every CLEC and wait for a

[176] *Id.*

[177] Quate Direct, p. 62; Quate Rebuttal, p. 39.

[178] Quate Direct, p. 62.

[179] *Id.*

[180] Quate Direct, p. 61.

[181] Quate Direct, p. 62; Quate Rebuttal, p. 46.

reply, which as is evident from this proceeding may never come. This would freeze SBC's and all users' of the network practices in time.

The Coalition responds that it does not expect SBC to provide access to UNEs other than pursuant to applicable law. However, the Coalition's proposed additional language is designed to prevent SBC from unilaterally withdrawing UNEs by simply announcing a network change. Over the past three years under the existing ICA, the Coalition points out that SBC has made "policy" or "process" modifications unilaterally, and without notice to the CLECs, that materially and detrimentally affected the CLECs' ability to obtain certain UNEs and services. In large part, the problems arise as a result of unilateral changes that the CLECs are not made aware of until after SBC has already implemented them and informed the CLEC that a particular process or UNE is no longer available. Because the CLECs have created and relied on processes, methods, and availability of UNEs and services from SBC, SBC's refusal to provide advance notice is significantly detrimental to the CLECs and, ultimately, their customers. The Coalition seek language in sections 1.3 and 1.7 that will establish much-needed standards to ensure: (a) a specific prohibition of SBC modifying a practice, process, procedure, or method of providing any service, network elements or offering under the ICA; (b) without advance notice to the CLECs; and (c) requiring mutual agreement before the change is made. Each aspect of these proposed modifications is essential to a continued business-to-business relationship. Through creation of standards, SBC and the CLECs should be able to work more closely on a business-to-business basis to promote communication of changes before they are effectuated. Such procedures should reduce the number of disputes brought to the commission.

The Coalition states that, in the K2A successor proceeding, the Arbitrator agreed that SBC must get a CLEC's express written consent before it makes any change to its practices or publications, if the change would result in a significant difference in SBC's provision of service to the CLEC. Similarly, in the T2A successor arbitration, the PUC is requiring that SBC provide 45 days advance written notice for any policy, process, procedure or method affecting CLECs. The Arbitrator in the O2A successor proceeding adopted the Texas PUC's notice language. The Coalition urges the Commission to approve their language. In the alternative, Birch states that it is willing to accept the Texas-ordered language in this proceeding for its Missouri ICA.

Decision:

The Arbitrator finds for the CLECs for the reasons stated above. SBC cannot be permitted to "pull the rug out from under" a CLEC under the guise of network management or improvement.

12. Should this ICA also bind a CLEC's non-party affiliates?

WilTel GT&C Issue 5: ***Is it reasonable that SBC should attempt to bind non-parties to this ICA to its terms and conditions, such as payment and indemnification obligations?***

SBC's Statement of the Issue: ***Should CLEC and its affiliates be required to enter into ICAs with SBC that contain like terms and conditions that WilTel has with SBC in this ICA?***

Discussion:

SBC states that the Commission should adopt its proposed language, which provides that any and all agreements between SBC and WilTel, as well as WilTel's affiliates, will contain the same terms and conditions for a particular state. SBC asserts that this language is necessary as it: (1) keeps CLECs and their affiliates from picking and

choosing the most favorable terms and conditions from various ICAs; (2) prevents the parties from re-arbitrating issues and getting different outcomes; and (3) prevents ambiguities and disputes from arising when a CLEC and its affiliates attempt to operate under two separate agreements.

WilTel responds that, as a matter of basic contract law, SBC's proposed language on this issue is untenable. Under SBC's proposed section 2.13.1, all of WilTel's affiliates would be bound by the terms and conditions of *this* agreement even though WilTel is the only party to this agreement with SBC. No entity but WilTel can order UNEs or other services under this agreement, but SBC clearly seeks to hold WilTel's affiliates responsible for any obligations under this agreement in the event WilTel breaches the agreement. WilTel objects to binding any entities other than WilTel to this agreement. However, WilTel's proposed language would allow reference to WilTel Local Network, L.L.C.'s wholly-owned subsidiaries.

WilTel contends that SBC's assertion that its language is necessary to prevent discrimination between CLECs is simply ridiculous. Carriers may have an interest in taking advantage of previously negotiated agreements of their affiliates if they can do so, but that should be solely at their option and not for SBC to decide in advance. If affiliated carriers each wish to negotiate their own interconnection agreements with SBC, there is nothing under applicable law that prevents that. To the contrary, it would be discriminatory to permit SBC to mandate the terms and conditions to which a particular CLEC should be bound, and it would additionally circumvent SBC's obligation to negotiate in good faith the particular terms and conditions of interconnection agreements with any requesting

telecommunications carrier.[182] If a CLEC wishes to negotiate its own agreement, or adopt a separate agreement as permitted under § 252(i) of the Act, SBC cannot prevent that.

Decision:

How, one wonders, can WilTel's ICA bind its non-party affiliates? The Arbitrator concludes that WilTel's language is preferable on this point.

13. Indemnification and Limitation of Liability:

Charter GT&C Issue 40: ***Is it appropriate to replace a commercially reasonable capped indemnification exposure with non-capped damages?***

Navigator GT&C Issue 7: ***Should the contract contain limits on liability for willful or intentional misconduct? Which Party's limitation of liability language should be incorporated into this Agreement?***

WilTel GT&C Issue 12: ***Is it reasonable for SBC to seek to limit its liability if it violates the law?***

SBC's Statement of the Issue: ***Which Party's limitation of liability language should be incorporated into this Agreement?***

Decision:

SBC states that the Commission should adopt its proposed language which: (1) specifies that indemnification should apply to the extent not prohibited by applicable law and not otherwise controlled by tariff; (2) requires the CLEC to reimburse SBC if SBC's facilities are damaged by the negligence or willful act of the CLEC, it agents, subcontractors, or end users; and (3) requires SBC to assign its right of recovery against the person causing such damage to the CLEC.[183] SBC's proposed language regarding indemnification limitations for services ordered through an SBC tariff is necessary because

[182] *See* 47 U.S.C. § 251(c)(1).

[183] Quate Direct, pp. 64-66.

the prices for services that are contained in tariffs are contingent upon limitation of liability language that is also contained in the tariff.[184]

Charter responds that this is a situation where SBC's language relates mainly to resellers and UNE-users, not to Charter. SBC's witness, Quate, testified that SBC's language protects SBC against damages to its facilities that arise from "Charter, its agents, subcontractors, and end users."[185] 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 [other] than SBC-13STATE*" (emphasis added).[186] 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."[187]

Charter states that it is logical and sensible for Charter to be responsible for things that happen as a result of third parties operating at Charter's direction, but that is not what SBC's language achieves. Instead, SBC seems to make Charter responsible for problems arising from *any* third party, whether the third party is related to or under the

[184] Quate Direct, p. 65.

[185] Quate Direct, p. 64.

[186] *See* Charter-SBC GTC DPL Issue 40 at 62-63 (SBC's proposed section 14.2).

[187] *See id*. (Charter's proposed section 14.2).

direction of Charter or not. This seems likely to be a drafting error on SBC's part, given what SBC says it means.

Charter further states that SBC's objection to Charter's language in section 14.3, is based on a misreading of Charter's language.[188] 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 third parties – does not affect the liability, including limitations on liability, of the two parties directly to each other.

Navigator responds that the nature of the dispute is that SBC is seeking 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 ICA that would make clear that neither party's liability for grossly negligent, willful, or intentional misconduct would not be so limited.[189] Navigator states that its proposal is simply intended to remove any incentive that either party might have to engage in gross negligent, willful or intentional misconduct.[190] 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 ICA.[191]

Navigator contends that, 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

[188] Quate Direct, p. 65.

[189] LeDoux Direct, at 11.

[190] *Id.*

[191] *Id.*

language such as 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.

WilTel responds that the issue before the Commission is whether it is reasonable for SBC to contractually limit its liability to WilTel in situations where SBC has violated a statutory obligation. WilTel agrees that the parties' liability for *contractual* violations should be limited. However, the potential harm to WilTel in the event SBC violates obligations imposed by state or federal statute could be extensive and WilTel should not be forced to relieve SBC of liability for such violations.

For example, SBC has a statutory obligation to provide interconnection to WilTel at nondiscriminatory rates.[192] If SBC were to provide interconnection to a competitor of WilTel in the same location and under the same circumstances, but at substantially lower rates than those charged to WilTel, the resulting harm to WilTel could be substantially more than the amount SBC charged or would have charged for the affected services. Additionally, there are circumstances where SBC's liability for violation of a statute, including in the preceding example, is prescribed by statute, and WilTel should not be forced to give up any such statutory right to seek damages.[193]

WilTel contends that SBC's argument that its costs of goods and services would be much higher if it were to take this type of liability into consideration is without merit.

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[192] 47 U.S.C. § 251(c)(2); *see also* 47 U.S.C. § 202(a) (duty to not subject to undue or unreasonable prejudice or disadvantage).

[193] *See, e.g.*, 47 U.S.C. § 206, where any common carrier that acts or omits to act in violation of law or Chapter 5 of Title 47 shall be liable to the person(s) injured thereby for the full amount of damages sustained in consequence of such violation, including attorney fees.

First, pricing under this ICA is established generally by the FCC and particularly by this Commission. More importantly, SBC's pricing of its goods and services should already take into account the potential for company liability in the event SBC breaches any legal obligations imposed by Congress and the FCC, or any other legal obligations for that matter. It is difficult to believe SBC's assertion that its "costs" will increase if an ICA states that it may be liable for statutory violations.

SBC replies that the proposed language of Charter and WilTel should be rejected because they would replace commercially reasonable capped indemnification exposure, contained in SBC's tariffs and ICAs, with non-capped damages when such unlimited damages were not factored into SBC's cost studies underlying the service and products provided for in the ICA.[194] Additionally, SBC asserts that the Commission should reject Charter's proposed additional indemnification language because it undercuts the agreed upon language of the parties. Charter and SBC have agreed to language that in the case of any loss alleged or claimed by an end user of either party, the party whose end user claimed the loss shall defend and indemnify the other party against any claim unless the claim or loss was caused by the gross negligence or willful conduct of the indemnified party. Charter's proposed language guts that agreement by providing that the indemnified party's liability will not be limited in "any" way to the indemnifying party. Finally, the Commission should reject Charter's proposed language which limits reimbursement of damages to damages caused by gross negligence or willful misconduct.[195] Under Charter's language, SBC would be liable to Charter for loss caused by ordinary negligence or misconduct, while Charter would only be liable for gross negligence or willful misconduct.

[194] Quate Direct, p. 65.

[195] *Id.*

Charter concedes that its proposal in this regard was one-sided, not reciprocal, and unfair.[196] Such a one-sided approach is not appropriate.

Finally, with regard to the Navigator/SBC Missouri ICA, the Commission should adopt SBC's proposed language which specifies that the parties' liability to each other resulting from any and all causes and for willful or intentional conduct will not exceed the total of any amounts charged to CLEC by SBC. Navigator's proposal to exempt willful or intentional misconduct from this cap is improper.

Decision:

The Arbitrator concludes, first, that it is improper for this ICA to attempt to limit or alter damages available under a statute. Second, the Arbitrator concludes that it is contrary to public policy to cap liability for intentional, willful or grossly negligent conduct. Third, the Arbitrator concludes that liability and indemnity provisions should be reciprocal and symmetrical.

14. What should the ICA provide with respect to audits?

Charter GT&C Issue 38: ***(a) Which Party's audit requirements should be included in the Agreement? (b) Which Party's aggregate value should be included in the Agreement? (c) Should either Party's employees be able to perform the audit?***

MCI GT&C Issue 8: ***Which Party's audit requirements should be included in the Agreement?***

Discussion:

SBC states that the Commission should adopt its proposed audit language which: (1) allows either party to audit the other's bills and the records upon which such bills are based; (2) allows for two audits per year, including an initial audit and a subsequent audit, if the first audit should reveal an error with an aggregate value of at least 5% of the

[196] Tr. 641-642 (Barber).

amount payable by the auditing party for the audit time frame, to ensure compliance with the ICA; and (3) provides that the auditing party may use its own employee to conduct the audit because its employees are uniquely qualified to perform the audit since they have knowledge of telecommunications specific terminology, or, if the audited party is not comfortable with an auditing party's employee performing the audit, it may request an independent auditor if it agrees to pay one-fourth of the independent auditor's fee.[197]

Charter responds that it objects to SBC's proposal that SBC's 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%. Charter asserts that, where a CLEC uses SBC's own facilities to offer services to end users or simply resells 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. 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.[198] 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

[197] Quate Direct, pp. 73-76; Quate Rebuttal, pp. 46-47..

[198] Barber Rebuttal at 32-33.

its business.[199] Thus, in Charter's case, an "audit" performed by SBC employees would be particularly inappropriate.

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.[200]

Charter emphasizes that the vast majority of the business done between the companies — the exchange of local traffic — will occur on a bill-and-keep basis.[201] 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 the other -- might exist in terms of amounts billed, even though the activity

[199] *Id*.

[200] Barber Rebuttal at 33.

[201] *Id.*

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.

Charter states, "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."[202] Charter insists that 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. The purpose of the 1996 Act is to encourage the growth and development of independent, facilities-based, intermodal competitors to the ILECs. That is just what Charter is.

MCI responds that, with respect to billing audits, SBC once again proposes overly-broad and unreasonable contract language. Accordingly, MCI contends that the Commission should adopt its proposed language, which protects the parties from disclosure of competitively sensitive business information and has been successfully used by the parties in other interconnection agreements. SBC has provided no explanation of its proposed changes.[203]

SBC replies that the Commission should reject Charter's proposed language that would establish an aggregate value at 10% as it is unreasonably high and may result in continued noncompliance with provisions that are contained in the ICA.[204] While Charter

[202] Charter's Brief, at 66.

[203] Hurter Direct, at 14-15.

[204] Quate Direct, p. 76.

asserted that SBC Missouri's 5% threshold may involve "*de minimis*" amounts, it admits that it is unlikely that SBC Missouri would initiate an audit, at its expense, for a *de minimis* amount.[205] The Commission should also reject MCI's language that would establish an aggregate value at 1.5% as it is unreasonably low and would result in expensive and unnecessary work by both parties.[206] Moreover, MCI's proposed language inappropriately fails to require MCI to bear any of the costs of the audit, even if MCI owes reimbursement above a threshold amount.[207]

Decision:

As between Charter and SBC, the Arbitrator concludes, for the reasons stated above, that Charter's language is preferable. As between MCI and SBC, the Arbitrator concludes that SBC's language is preferable.

15. Provision of Service to End-Users:

Navigator GT&C ISSUE 15: *Whether to include language allowing end users to take services from SBC upon end user request?*

SBC's Statement of the Issue: *Should the agreement specify that SBC Missouri is allowed to provide services directly to End Users at the request of said End Users?*

Discussion:

SBC states that the Commission should adopt its proposed language regarding the provision of service to End Users; specifically, SBC's proposed language states that SBC may, upon request, provide services directly to End Users similar to those offered to the CLEC under this ICA.[208]

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[205] Tr. 639 (Barber).

[206] Quate Direct, p. 75.

[207] Tr. 897 (Collins).

[208] Quate Direct, p. 76.

Navigator responds that 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.[209] 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, that is, *wholesale* rates, terms, and conditions.[210]

Navigator contends that, 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 carriers.[211] 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."[212] Navigator simply asks that the contract language reflect this point. For this reason, Navigator urges the Commission to adopt Navigator's proposed language that would clarify the intended

[209] General Terms & Conditions, at § 57.4.

[210] LeDoux Direct, at 18.

[211] LeDoux Direct, at 18.

[212] Quate Rebuttal, at 47:30-48:1.

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.

SBC replies that the Commission should reject Navigator's proposed language that specifies that SBC would provide such service at the rates found in its retail tariff because while most of SBC's retail services are tariffed, not all services are subject to tariff requirements. Thus, Navigator's proposed language is legally inaccurate.

Decision:

The Arbitrator generally agrees with Navigator. Services offered by SBC to "win back" Navigator's subscribers are subject to retail tariff rates, terms and conditions so far as applicable.

16. Novation:

CLEC Coalition GT&C Issue 21: *Should this successor ICA be left silent as to whether it constitutes a contractual novation of the predecessor contract?*

Discussion:

SBC states that the Commission should adopt its proposed language which simply states that the ICA, consisting of appendices, attachments, exhibits, schedules, and addenda, is the entire ICA and supersedes all prior negotiation.[213] Moreover, SBC contends that it is appropriate to provide that this ICA does not operate as a novation of the prior ICA; the obligations to pay for services rendered under prior agreements and to guard proprietary information, for example, continue after the new ICA is in effect. The Kansas Corporation Commission agreed with SBC's position, and this Commission should as well.

The Coalition responds that SBC has proposed a contractual novation clause in Section 69.1, which is virtually identical to the agreed clause in Section 39.1 SBC witness

[213] Quate Direct, p. 77.

Ms. Quate merely stated it is reasonable to expect the new agreement to supercede the prior agreement, but did not explain the redundancy.[214] The Coalition contends that It is simply unnecessary to have SBC's superfluous language and it should be omitted from the successor agreement.

Decision:

The Arbitrator agrees that SBC's proposed language is redundant and thus unnecessary.

17. Should the ICA include language intended to protect CLECs from improper charges by SBC?

Charter GT&C 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?*

Discussion:

SBC maintains that Charter should utilize the standard OSS ordering tools provided by SBC Missouri and used by the CLEC community when issuing service requests to SBC.[215] To allow Charter to require the design and implementation of its own OSS would advantage Charter at the expense of other CLECs and impose unrecoverable costs upon SBC. Charter should use the OSS provided to make ordering as easy as possible for the CLEC and should not attempt to shift its administrative costs to SBC.[216]

Charter explains that it and SBC seem to be talking past each other here. Charter is not suggesting that it have some special or unique OSS from SBC.[217] Charter's

[214] *Id.*

[215] Christensen Direct, pp. 50-51.

[216] Christensen Direct, p. 9.

[217] Barber Direct, pp. 31-32.

proposed language in this section is designed to ensure that SBC cannot send Charter bills for SBC administrative activity, which will likely occur in connection with ordering or arranging for interconnection, except to the extent that charges are laid out specifically in the agreement. For example, if it is necessary for the parties to have a meeting to discuss how to establish a new fiber meet point, or to agree on which SBC end offices have sufficient traffic volume to warrant some particular trunking arrangement, SBC should not send Charter a bill for the time its employees take to prepare for and attend such a meeting.

SBC responds that Charter's proposed language is overly broad and could prevent the parties from ever assessing any charges for any of the work they perform on behalf of each other if those charges were not specifically identified within the ICA.[218] When SBC processes a service order for a CLEC, SBC incurs costs to perform that activity. SBC is entitled to recover those costs. Under Charter's language, however, it appears that the costs for internal administrative and related functions that SBC must perform to fulfill its service order processing obligation to Charter could be costs that SBC would not be entitled to recover.

Charter responds that Charter has had problems with SBC seeking to impose charges for activities that are simply not chargeable under their current agreement.[219] 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

[218] Christensen Rebuttal, pp. 19-20.

[219] Barber Rebuttal, pp. 21.

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.

Decision:

The Arbitrator concludes that Charter's concerns, while real, are better addressed on a case-by-case basis through the billing dispute process. Charges that "are simply not chargeable under [the parties'] current agreement" could be easily resolved in that fashion without introducing possibly ambiguous language into the ICA.

18. Use of the other party's name in advertising:

Charter GT&C Issue 41: *Should the Parties by allowed to use the Party's name in advertisements?*

Discussion:

SBC states that the Commission should reject Charter's proposed language which would allow each party to use the other party's name in advertisements.[220] A § 251/252 ICA should contain provisions that are required by law or which the parties freely negotiate. SBC is not required by law to allow a CLEC to use its name in advertisements and it did not freely negotiate such a provision.[221] Therefore, SBC contends, such a provision should not be included in this ICA.

As Charter witness Barber testified, Charter wants to be able to use SBC's name in truthful comparative advertising.[222] SBC Witness Quate's testimony on this issue, does not seem to address Charter's specific proposal and is somewhat confusing overall.[223] It is hard to understand how SBC can say that head-to-head competition between facilities-

[220] Quate Direct, p. 79; Quate Rebuttal, p. 49.

[221] *Id.*

[222] Barber Rebuttal, at 36-37, Barber Direct, at 41-42.

[223] Quate Direct, at 79.

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.

Decision:

The Arbitrator concurs with Charter for the reasons stated above.

19. Is it appropriate that only an end-user have the ability to initiate a challenge to a change in its LEC?

Charter GT&C Issue 42: ***Is it appropriate that only an End User have the ability to initiate a challenge to a change in its LEC?***

Discussion:

SBC states that the Commission should adopt its proposed language, which specifies that only an end-user can initiate a challenge to a change in its LEC, because only an end-user can authorize a LEC to have her local service changed and, therefore, the end-user should be the only one who can initiate a challenge if a subsequent question or dispute arises concerning an alleged "slam."[224]

Charter replies that, as its 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.[225] 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.*

[224] Quate Direct, p. 80; Quate Rebuttal, pp. 49-50.

[225] Barber Rebuttal at 37, Barber Direct at 42-43.

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. Charter states further that 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.

SBC replies that the Commission should reject Charter's proposed language because it would allow Charter to assert a challenge to an end-user's change in local service provider and to immediately access such customer's Customer Proprietary Network Information ("CPNI"), which is exclusively in the possession of SBC, without the authorization of the end-user.[226] Charter's language, therefore, may violate both the FCC's and this Commission's CPNI and slamming rules.[227] The FCC's and this Commission's rules on slamming provide a very specific set of rules for when and how an allegation of slamming must be handled. SBC contends that Charter is attempting to circumvent those rules and to lay additional responsibilities on SBC. Its proposal should be rejected.

Decision:

The Arbitrator finds for Charter for the reasons stated above.

20. Intervening change of law:

MCI GT&C Issue 9*: Which Party's Intervening Law Clause should be included in the Agreement?*

WilTel GT&C Issue 13: *Should changes in law that affect material terms and conditions under the ICA, including changes in unbundling obligations, be implemented under the ICA by agreement of the parties through a reasonable process involving notice, negotiation and amendment?*

[226] Quate Rebuttal, p. 49.

[227] Quate Rebuttal, pp. 49-50; Quate Rebuttal, p. 13.

SBC's Statement of the Issue: ***Which Party's Change of Law language is more appropriate and should be used in this ICA?***

Discussion:

SBC states that the Commission should adopt its proposed language which clearly defines what qualifies as a change of law event and sets forth a procedure and time frame for negotiating contract language to comply with the change of law.[228]

MCI responds that the parties have proposed dramatically different intervening law provisions, that is, change-of-law provisions. The main differences between the language proposed by MCI and the language proposed by SBC are that: (1) MCI's proposal requires the parties to enter into negotiations and an appropriate contract amendment to effectuate an intervening law event, while SBC's proposal would permit SBC to *immediately and unilaterally* effectuate its understanding of an intervening law event, without the need to negotiate or agree to a contract amendment prior to effecting a change, and (2) MCI's proposal confines itself to the subject of intervening law while SBC's proposal includes extraneous language relating to, among other things, a reservation of rights. To avoid abrupt and potentially unnecessary disruption of the parties' ongoing business relationship, the Commission should approve MCI's language and reject the language proposed by SBC.[229] Further, the extraneous reservation of rights language SBC proposes to include in the contract's intervening law provision also should be rejected. Accordingly, the Commission should approve MCI's language and reject SBC's language.

WilTel responds that FCC rulings and court opinions are not always the clearest of documents insofar as establishing clear rights and obligations of the parties. It is only

[228] Quate Direct, p. 81.

[229] Collins Direct, at 4-6.

reasonable, therefore, that the parties to a mutually negotiated contract attempting to implement such rights and obligations should negotiate and agree to any changes to those rights and obligations as they attempt to implement them under such contract. To do differently would violate the very letter of § 251 of the Act requiring good faith negotiations.[230] A reasonable process for handling changes in law is beneficial to both parties, and negotiation is an essential element in defining the extent of the parties' rights and obligations and then translating those into contract language. The FCC has also made very clear that SBC has the duty to negotiate with WilTel in implementing its rules. Most recently in the *TRRO*, the FCC stated:

> We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.[231]

This duty extends to any modifications to existing interconnection agreements as well. The FCC held in its *TRO* that "the section 251(c)(1) duty to negotiate in good faith applies to [*TRO*] contract modification discussions, as they do under the section 252 process."[232] Clearly, SBC should not be permitted to unilaterally make modifications to its

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[230] 47 U.S.C. § 251(c)(1) ("The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs 91) through (5) of subsection (b) and this subsection"); 47 U.S.C. § 252(b)(5) (refusal to participate or continue to negotiate shall be considered a failure to negotiate in good faith).

[231] *In the Matter of Unbundled Access to Network Elements,* WC Docket No. 04-313 (*Order on Remand,* released February 4, 2005) ("*TRRO")*, ¶ 233. *See also* 47 C.F.R. § 51.301(a) ("An incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251(b) and (c) off the Act.")

[232] *In the Matter of the Section 251 Unbundling Obligations of Local Exchange Carriers,* CC Docket No. 01-338 (*Report & Order on Remand and Further Notice of Proposed Rulemaking,* released August 21, 2003) ("*TRO")*, ¶ 704.

obligations under the Agreement and must negotiate any such modifications with WilTel, just as WilTel must do so with SBC.

WilTel's proposed intervening law language would also allow rulings in generic proceedings of this Commission to be implemented by an amendment initiated without the need for a written notice from WilTel requesting such an amendment. This is reasonable since a generic rulings are typically intended to apply to all CLECs, or at least to a general class of CLECs. WilTel does not wish to remove the requirement for an amendment, simply to reduce the steps involved in arriving at the amendment. SBC currently does this today when such an amendment is to its advantage (such as rate increases), so SBC should not have an issue doing this when it is the other way around.

Finally, WilTel's proposed Section 21.2 is intended to shorten the process in situations where WilTel seeks to amend the Agreement to address an identical issue which this Commission has already ruled upon in another proceeding. Again, as with the previous language, this is not meant to circumvent the requirement to negotiate or the change of law procedures. It is simply meant to shorten the negotiation period because presumably there should be less need for negotiation given that the Commission has just made an identical ruling on the issue. WilTel's proposed intervening law provision should be adopted in full as it is more reasonable for both parties and more closely implements the FCC's rules and the Act in addressing the parties' duty to negotiate.

SBC replies that the Commission should reject MCI's proposed language, which is vague and does not clearly define the rights of the parties to invoke the change of law clause. Specifically, MCI's proposed language does not provide for immediate invalidation, modification, or stay of provisions consistent with the action of any regulatory or legislative

body or court of competent jurisdiction. Rather, MCI's proposed language requires the parties to negotiate language in good faith and, if the parties cannot agree on language within 60 days, requires the parties to resolve their dispute pursuant to the dispute resolution provisions of the ICA. Even then, no change of law would occur until a written amendment was executed.[233] It would take several months or, according to MCI, even years to accomplish a change of law under MCI's proposal,[234] and excessively long period to conform to applicable law. MCI's proposed language also requires the parties to continue to comply with all superseded obligations set forth in the ICA during the pendency of negotiations or dispute resolution. SBC asserts that the purpose of MCI's language is clear — MCI seeks to avoid implementing legislative, regulatory, and court orders for as long as possible. SBC contends that MCI's proposal should be rejected.

SBC also argues that the Commission should reject WilTel's proposed language because: (1) it improperly requires the parties to perform in accordance with the terms and conditions of the ICA during the pendency of negotiations and arbitration for all items, including declassified network elements, even though the Commission, FCC, or court of competent jurisdiction may immediately permit or require a change regarding the provision of UNEs; (2) it improperly requires the ICA to be corrected to reflect the outcome of generic proceedings by the Commission without notice from the CLEC requesting such an amendment; (3) it shortens the time frame for negotiation from 135 days to the 30th day following written notice in violation of the Act; and (4) it allows the parties to continually arbitrate all provisions in the ICA that are addressed in any subsequent arbitration with any CLEC, thereby effectively potentially requiring non-stop negotiation and arbitration of this

[233] Tr. 899 (Collins).

[234] Tr. 899 (Collins).

ICA. In other words, WilTel is attempting to give it the power to pick and choose provisions in subsequent arbitrations even though the FCC has expressly prohibited such activity. Specifically, in the *Second Report and Order*, the FCC stated:

> Because we find that the current pick-and-choose rule is not compelled by section 252(i) and an all-or-nothing approach better achieves statutory goals, we eliminate the pick-and-choose rule and replace it with an all-or-nothing rule. Under the all-or-nothing rule we adopt here, a requesting carrier may only adopt an effective interconnection agreement in its entirety, taking all rates, terms and conditions of the adopted agreement . . . as of the effective date of the new rule, the pick-and-choose rule will no longer apply to any interconnection agreement.[235]

Decision:

The Arbitrator concurs with SBC. Public policy is best served by the prompt implementation of changes of governing law.

20. Should the ICA refer to Section 251(c)(3) UNEs?

Navigator GT&C Issue 2: ***Should the ICA contain language that specifies SBC's obligation to provide only section 251(c)(3) UNEs even if the term "section 251(c)(3) UNE" is not always referenced in front of Unbundled Network Elements?***

Discussion:

SBC states that the Commission should adopt its proposed language, which clarifies that whenever there are references to UNEs that are to be provided by SBC, the parties agree that the ICA only requires the provision of § 251(c)(3) UNEs regardless of whether the term "section 251(c)(3)" is used as a part of the reference to UNEs.[236] This language is necessary so that § 251(c)(3) UNEs are distinguished from declassified network elements, which are those that, under FCC and court decisions, are not required to

[235] *Second Report and Order*, *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, ¶ 10, released July 13, 2004.

[236] Silver Direct, p. 10; Silver Rebuttal, p. 4.

be unbundled under the law governing ICAs under § 252 of the Act.[237] SBC is mindful of its obligations under § 271 of the Act, but such obligations do not require the provision of declassified UNEs in this ICA.

Navigator responds that 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.[238] 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[239] 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" rates rather than TELRIC-based rates under the ICA.

Navigator states that 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 § 271 of the Act[240] or at "just and reasonable

[237] Silver Direct, p. 10; Silver Rebuttal, p. 4.

[238] LeDoux Direct, at 4.

[239] In its 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.

[240] Indeed in the *TRO*, 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." *TRO* at ¶ 652.

rates" under the ICA.[241] Despite the simplicity of this regime, SBC seeks to inject uncertainty into the ICA 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 therefore be eliminated throughout the ICA.

Navigator asserts that, at minimum, the proposed language will lead to substantial disputes.[242] 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 ICA 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.

Navigator contends that SBC's proposal is inappropriate given the substantial litigation over which UNEs SBC must provide and at what prices.[243] The state regulatory commissions, the FCC, and federal courts have all considered the obligation to provide UNEs in numerous decisions.[244] Navigator asserts that, 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.[245] Under its proposed language, however, SBC would be able to establish its own list of UNEs -- *based on its own*

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

[242] LeDoux Direct, at 4.

[243] LeDoux Direct, at 3.

[244] *Id.*

[245] LeDoux Direct, at 3.

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 ICA.[246] 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.[247] Navigator has expended a great deal of time and resources into negotiating and arbitrating its ICAs with SBC. Having done so, at minimum, the ICA should provide Navigator some degree of certainty as to its contractual obligations with SBC.[248] Under SBC's proposed language, the ICA would do no more than restate SBC's current interpretation of its obligation to provide UNEs.[249]

Navigator contends that 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.[250] 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.[251] SBC's proposed language should therefore be rejected.

Decision:

The Arbitrator concurs with Navigator for the reasons stated above.

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[246] *Id.*

[247] LeDoux Direct, at 4.

[248] LeDoux Direct, at 5.

[249] *Id.*

[250] *Id.*

[251] LeDoux Direct, at 6.

21. Termination for a material breach:

Navigator GT&C Issue 5: ***Under what timeframe may a party terminate the contract for a material breach? What constitutes a "material" breach of the agreement?***

Discussion:

SBC states that the Commission should adopt its proposed language which provides that the parties may terminate the ICA and provisioning of services if the other party materially breaches the ICA and fails to cure is non-performance within 45 days of written notice.[252]

Navigator responds that SBC proposes language under which either party may terminate the ICA for failure to perform a "material obligation," or breach of a "material term," of the ICA.[253] It is unclear from SBC's proposed language, however, what constitutes a "material" obligation or term of the ICA, as that term is not defined. Navigator asserts that the Commission should reject SBC's proposed language and accept Navigator's proposal to clarify the meaning the "material" under the Agreement.

Navigator's concern is that, because the ICA 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 ICA and related services provided under it. In such an event, Navigator's sole remedy would be to seek relief from a court, the FCC, or this Commission.[254] Navigator states that it requires greater contractual certainty.

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[252] Quate Direct, p. 81; Quate Rebuttal, p. 42.

[253] General Terms & Conditions, at § 4.8.

[254] LeDoux Direct, at 9.

The fact that Navigator is provided a cure period in the event SBC alleges a "material" breach does not alleviate Navigator's concern.[255] 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.[256]

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…"[257] 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 ICA, and Navigator would have no contractual recourse.

Thus, under the ICA, SBC may disconnect all services under the ICA, regardless of the relationship, or lack thereof, between the would-be disconnected service and any breach that SBC may allege.[258] SBC's incentives to engage in such behavior are two-fold -- 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 ICA to better define a "material" obligation or term. An

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[255] *Id.*

[256] *Id.*

[257] General Terms & Conditions, at § 4.8.

[258] LeDoux Direct, at 10.

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 ICA 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 ICA 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 ICA, regardless of SBC's performance. SBC is sufficiently protected under the ICA in the event of any breach by Navigator through broad assurance of payment and termination rights.[259] Thus, in order to balance the relative inequities under the ICA, 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.

SBC replies that the Commission should reject Navigator's proposal to leave the ICA silent on this issue because it would allow Navigator to breach the ICA and suffer no consequences for its breach. A party must have a remedy if the other party has materially breached the ICA, including the right to terminate.

Decision:

The Arbitrator concurs with SBC for the reasons stated above.

22. Intellectual property:

Navigator GT&C Issue 8: *Should SBC's Intellectual Property Language be included in this Agreement?*

[259] *Id*.

Discussion:

SBC states that the Commission should adopt its proposed language regarding Intellectual Property because it provides that the parties are not providing a license to use either party's patents, copyrights, or other software- type rights, aside from the limited license that SBC must provide in connection with certain UNEs, when those licenses are used in connection with the same terms, conditions, and restrictions of this agreement.[260] If a CLEC intends to use the limited license in any other way, SBC is under no legal obligation to provide such license.

Navigator responds that SBC's proposed intellectual property language is unclear and unnecessary. In particular, Navigator asserts, the provisioning of UNEs by SBC should necessarily include any license required for the use of those UNEs, including combinations with CLEC network elements.[261] SBC's proposed language limits its own licenses in such a way as to render the provision of the UNE to a CLEC essentially 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.[262]

Navigator states that 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

[260] Quate Direct, p. 82.

[261] LeDoux Direct, at 11.

[262] LeDoux, Direct, at 12.

that this should be come an issue . . . we seek to clarify incumbent LECs' obligations to provide nondiscriminatory access to network elements"[263] -- including equal in scope intellectual property licenses.

Specifically, Navigator contends, the FCC requires that ILECs, such as SBC, use "best efforts" to obtain co-extensive rights for competing carriers purchasing UNEs.[264] 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."[265]

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

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[263] *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) ("*MCI Declaratory Ruling"*).

[264] *MCI Declaratory Ruling*, at ¶ 9.

[265] *MCI Declaratory Ruling*, at ¶ 10.

Navigator argues that SBC's proposed indemnification language is redundant of the parallel indemnification provision found in the General Terms and Conditions, adds confusion to the ICA, creates an incentive for SBC to privately negotiate narrower license agreements, and should be stricken from the ICA.

SBC replies that its proposed language is substantially similar to that contained in the M2A today and is consistent with the FCC's decisions in this area. Navigator provides no substantive rationale explaining why this provision, which is acceptable to other CLECs should not apply.

Decision:

The Arbitrator concurs with SBC for the reasons stated above.

23. Accessible Letters:

Navigator GT&C Issue 12: *Should the Interconnection Agreement incorporate the nondiscriminatory and commonly used Accessible Letter process as a form of communication between SBC Missouri and Navigator?*

Discussion:

SBC states that the Commission should adopt its proposed language which allows SBC to communicate with CLECs via the Accessible Letter process, whereby the CLEC receives the letter via e-mail and is able to access such letters on the CLEC Online Website.[266] SBC communicates official information to CLECs via its Accessible Letter notification process, including information about new retail telecommunications services offered for resale, retail promotions, OSS changes and updates, as well as industry

[266] Quate Direct, pp. 82-83; Quate Rebuttal, pp. 50-51.

information. The process has worked well in the past and should be used during the term of this ICA.[267]

Navigator responds that 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, and the like through Accessible Letters posted on the Internet should be rejected.[268] SBC typically issues Accessible Letters without prior notice to CLECs and they are not the product of negotiation or arbitration.[269] Rather, they appear on the SBC website and CLECs are expected to inform themselves of the contents of the Letters and conform their conduct accordingly.[270] 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.

Navigator charges that SBC regularly uses Accessible Letters to impose policies and service changes which are inconsistent with its ICAs.[271] Navigator has on several occasions had discussions with SBC about the contents of Accessible Letters which appeared to contradict the M2A.[272] Indeed, Navigator's experience has been that SBC employees often reject service orders and other requests based upon information contained in its Accessible Letters.[273] Navigator simply wants to ensure itself that Accessible Letters will not be used to unilaterally amend the ICA or the parties' obligations

[267] Quate Direct, pp. 82-83.

[268] LeDoux Direct, at 15-16.

[269] Tr. at 201:21-23.

[270] LeDoux Direct, at 16.

[271] LeDoux Rebuttal, at 7.

[272] LeDoux Direct, at 16.

[273] LeDoux Rebuttal, at 7.

under the ICA.[274] Thus, Navigator proposes that Accessible Letters should be used only for informational purposes, to explain, and clarify, but not change, contradict, or affect the ICA.[275] If SBC wants to modify contractual obligations, it can always do so by way of a written amendment under the terms of the ICA.

SBC replies that Navigator is simply incorrect that the Accessible Letter process is used to unilaterally change, revise, supersede, amend, modify or otherwise alter the provisions of the ICA.[276]

Decision:

The Arbitrator concurs with Navigator. SBC states that Navigator is "simply incorrect" that the Accessible Letter process is used to unilaterally change, revise, supersede, amend, modify, or otherwise alter the provisions of the ICA. If that is true, SBC should not have a concern with Navigator's language.

24. Coin Port Functionality:

Navigator GT&C Issue 20: *Should SBC include Coin Port Functionality as part of its service offering?*

Discussion:

The Commission should reject Navigator's proposal to include Coin Port Functionality as part of SBC's service offering because Navigator failed to negotiate or propose any language to address this issue and, therefore, this issue is not properly before the Commission for arbitration.[277] Moreover, SBC is no longer required to offer unbundled local circuit switching beyond the FCC's transition plan and, therefore, there is also no

[274] LeDoux Direct, at 16.

[275] *Id.*

[276] Quate Direct, p. 82; Quate Rebuttal, p. 50.

[277] Silver Direct, pp. 63-64; Silver Rebuttal, p. 29.

requirement to offer such functionality to coin phone providers, since there is no longer an unbundled port to which to add that functionality.[278] To add language that suggests that new ULS/UNE-P can be ordered, would be contrary to the *TRRO*, 47 C.F.R. §51.319(d), and the FCC's transition plans and is outside the scope of this § 251/252 arbitration, with the exception of resold payphone service. For all of these reasons, the Commission should reject Navigator's proposal as beyond SBC's legal obligations and as not properly raised.

Navigator responds that 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,[279] 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 when forced by a state regulatory agency.[280]

Navigator asserts that 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."[281] Although coin functionality involves no more than an analog port on a switch -- a switch functionality that can simply be turned on or off -- SBC refuses to acknowledge this as a basic feature,

[278] Silver Direct, pp. 63-64.

[279] LeDoux Direct, at 20.

[280] *Id.*

[281] *TRO* at ¶ 433; *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).

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.[282] 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* for CLECs to transition to other local circuit switching arrangements.[283]

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.[284] In fact, there continues to be a segment of the general population whose only access to telecommunications is through a payphone.[285] 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 feature function of the switch port as a part of SBC's basic service offering

[282] LeDoux Direct, at 19.

[283] LeDoux Rebuttal, at 8.

[284] LeDoux Direct, at 20 and 21.

[285] *Id.*

under the ICA. Navigator urges the Commission to 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.

Decision:

The Arbitrator concurs with SBC for the reasons stated.