I(B) Definitions:

1. Should a definition of "end-user" be included in the ICA?

CLEC Coalition DEF Issue 1: ***Should a definition of End User be included in the Agreement?***

CLEC Coalition GT&C Issue 23: ***Should the phrase "End User" be explicitly defined in the ICA?***

MCI DEF Issue 3: ***Which Party's definition of End User should be included in the Agreement?***

Discussion:

SBC states that the phrase "End User" should be defined in the ICA because: (1) the definition is necessary to prevent the attempts of MCI and the CLEC Coalition to evade the FCC's rules, which are designed to prevent the resale of UNEs to other carriers; (2) the term is used throughout the ICA; and (3) the concept is unique to the wholesale telecommunications field and has developed a meaning different from that in ordinary English usage.[1] Moreover, the Commission should adopt SBC's proposed definition of "End User" because it clarifies that other telecommunications companies and Competitive Access Providers are not "End Users" of CLECs as that term is used in the telecom industry and, therefore, are not entitled to use UNE facilities to provide wholesale services at wholesale prices.[2] SBC's proposed definition is consistent with the express requirements of Sections 251(c)(3) and (d)(2) and the FCC's orders.[3] Specifically, the FCC has recognized in several prior orders that the class of carriers eligible to receive UNEs is limited exclusively to those telecommunications carriers who offer telecommunications

[1] Smith Direct, pp. 4-5 and 35-36; Smith Rebuttal, pp. 3 and 24-27.

[2] Smith Direct, p. 37; Smith Rebuttal, p. 3

[3] Smith Direct, p. 39; Smith Rebuttal, pp. 27-29.

services to the public, and that a provider may offer access services only where it also offers local exchange service.[4] The Commission should reject the Coalition's proposal to substitute the term "Customer" for the term "End User" just as the Texas Commission did in Docket Nos. 25188 and 26904.[5]

The Coalition responds that SBC has proposed that "end user" be defined in a manner intended to eliminate CLECs' wholesale customers from its scope. Because the term "end user" is used in hundreds of places throughout multiple attachments in the Agreement, SBC has thus proposed extensive, unwarranted, and possibly inadvertent changes to the M2A by creating a global definition without regard to whether it is appropriate in a given circumstance. Instead of addressing this ubiquitous use of the defined term, SBC has focused all of its testimony on whether a CLEC may resell UNEs to other carriers. Even in this context, there is no basis in federal or state law or regulations for any restrictions throughout the Agreement that would prohibit a CLEC from offering wholesale service to other carriers. There is nothing in the Telecommunications Act, in the FCC's rules, or in Missouri state statutes or rules that purports to limit the incumbent LECs' ICA obligations to CLEC service to retail customers only.

As an initial matter, the Coalition contends that, if Congress had intended a general restriction to limit interconnection, access to network elements, and collocation, solely to services for retail customers, it would have included that limitation directly in the statute. It did not. No such limitation can be found in FCC rules or orders either. First, the FCC has not found it necessary or appropriate to define end user, except in the limited

[4] Smith Direct, pp. 38-40; Smith Rebuttal, p. 34-35.

[5] Smith Direct, p. 40.

context of access charges.[6] Second, the FCC's most recent pronouncements in the *TRO* and *TRRO* make clear that the FCC does not envision any generalized restriction on the use of UNEs by CLECs to provide service to wholesale customers.

The Coalition explains that, in the *TRO*, the FCC developed a "qualifying services" approach to UNE availability, ruling that a CLEC could not access a UNE for the "sole purpose of providing non-qualifying services."[7] If the FCC had intended *all* wholesale services to be off limits to UNE use, then the *TRO* would have contained such a blanket prohibition rather than focusing on qualifying services. The D.C. Circuit's reversal of this portion of the *TRO* in *USTA II* likewise was *not* based on an interpretation of the Act that banned CLECs from using UNEs to provide wholesale service.[8] Hence, neither the *TRO* nor *USTA II* support SBC's position here.

Similarly, the Coalition asserts, when the FCC addressed the issue in the *TRRO*, it placed a very limited restriction on service to two particular types of wholesale providers. Specifically, the FCC prohibited the use of UNEs "exclusively for the provision of telecommunications services in the mobile wireless and long distance markets."[9] Regardless of whether the FCC's use of the word "exclusively" narrows this limitation even further, it is clear that the FCC did not find as a matter of law that UNEs are not available for CLEC service to *any* wholesale customer.

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6 47 C.F.R. § 69.2. Contrary to SBC's implication that the FCC has defined "end user" for all purposes in this section (*see* Smith Direct at 37 and Smith Rebuttal at 26), this definition is expressly confined by its terms to use in interpreting the FCC's Access Charge rules and is therefore inapplicable in the broader context addressed in this proceeding.

7 *TRO* rule amendment to 47 C.F.R. § 51.309.

8 *USTA II*, 359 F.3d at 591-592.

9 TRRO ¶ 5; 47 C.F.R. § 51.309(b).

The Coalition notes that SBC has cited to several older FCC rulings, purporting to support SBC's position.[10] As recognized by the Arbitrator in the recent Kansas proceeding, such a position is "unreliable" because SBC's conclusions are unsupported by the text of the cited rulings.[11] SBC also cites a Texas decision to support its position that the term "customer" cannot be substituted for "end user."[12] Such support is unnecessary because the CLEC Coalition is not attempting to make such a substitution.[13] Beyond that, the Texas ruling expressly stated that it was intended to be consistent with a prior holding that a CLEC could use UNEs to carry traffic for other telecommunications providers regardless of who serves the retail, local end-user customer.[14]

Nevertheless, the Coalition states, regardless of whether this Commission rules that SBC has any right to restrict the use of UNEs in CLEC provision of service to wholesale customers, there is no justification for the blanket use of SBC's defined term throughout the agreement because the interconnection agreement has a broader scope than just the availability of UNEs. For example, interconnection is another fundamental obligation under the Telecommunications Act and there is no interconnection limitation for retail-only service to be found in the Act or the FCC's rules.[15] Yet SBC's language might be construed to permit SBC to deny interconnection to CLECs to the extent CLECs utilize

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[10] Smith Direct at 39.

[11] The Kansas Arbitrator also noted that SBC had injected its defined term inappropriately throughout the interconnection agreement, and adopted the Coalition's position that the term remain undefined. K2A successor Arbitrator's Phase I Decision at 8-9. The Arbitrator's rulings were upheld by the Kansas Commission in a recent order. Kansas Commission Order on Phase I at 4.

[12] Smith Direct at 40.

[13] Cadieux GT&C Rebuttal at 9.

[14] *Petition of El Paso Networks, LLC, for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company,* Docket No. 25188, Order Approving Revised Arbitration Award and Interconnection Agreement, at 3 (Aug. 31, 2004); Cadieux GT&C Rebuttal at 9-10.

[15] *See* 47 C.F.R. § 51.305.

interconnection (the two-way exchange of traffic and the facilities that permit same) with SBC in the process of providing wholesale service.[16] Similarly, collocation is undeniably an SBC obligation under the Act and the interconnection agreement; indeed, SBC has not even attempted to argue that collocation is available to CLECs only to the extent of their provision of service to retail customers.[17] Thus, regardless of the Commission's decision on UNE availability, the term "end user" should not be a defined term throughout the non-UNE attachments to the Agreement. To hold otherwise risks placing a discriminatory limitation on CLECs' ability to market services to wholesale customers.[18] A definition should not have such a wide-reaching effect throughout the Agreement when SBC has not offered a single argument to justify such use outside the context of UNE Attachment 6.

In conclusion, the Coalition notes that the parties have operated for years under the M2A without any incident resulting from "end user" being an undefined term.[19] There is no reason at this point to approve a ubiquitous definition that can have the effect of imposing limitations unsupported by the law.

MCI responds that SBC's definition of end user customer should be rejected because it is unreasonable, discriminatory and contrary to the FCC's definition of "telecommunications service," and thus violates Section 251(c)(4) of the

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[16] Cadieux GT&C Rebuttal at 10-11.

[17] *Id.* at 11.

[18] Cadieux GT&C Direct at 12-13. Such a retail-only restriction would also be unreasonably discriminatory and patently anticompetitive because it would effectively restrict the CLECs to providing service to only a subset of the market – i.e., to retail customers only – when SBC operates under no such restriction. SBC offers service to both retail and wholesale customers and it would be severely detrimental to competition and to consumers of communications services to restrict CLECs solely to the retail segment of the market.

[19] Cadieux GT&C Rebuttal at 8.

Telecommunications Act of 1996.[20] MCI recognizes that there are prohibitions against so-called "cross-class selling," such as purchasing residential service at wholesale rates and reselling that service to a business class customer. However, the issue in DEF 3 centers on the definition of "telecommunications service." According to the FCC, this term was not intended to create a wholesale/retail distinction, which is squarely contrary to SBC's rationale that an end user is a retail customer. The FCC stated that "Common carrier services may be offered on a retail or wholesale basis because common carrier status turns not on *who* the carrier serves, but on *how* the carrier serves its customers."[21] SBC's proposed definition should be rejected.

Definition:

The Arbitrator agrees with the CLECs that there is no need to define "end-user" in the ICA.

2. The definition of "exchange area":

Charter GT&C Issue 8: *Which Party's definition of "exchange area" is correct?*

Discussion:

SBC states that the Commission should adopt its proposed language, which defines exchange area to be as "defined by the Commission," because it is more specific than Charter's definition and appropriately recognizes the Commission's role.

Charter responds that this is essentially entirely a legal issue. Charter contends that the ICA should make clear that each party may define its own local service area boundaries for purposes of providing service to their own end users. Charter's language accomplishes that purpose. In addition, Charter's language is sufficiently flexible to allow

[20] 47 U.S.C. § 251(c)(4).

[21] Price Direct at 162.

for any subsequent changes in the law, technology, or both, such that either party can continue to have the flexibility to offer new and innovative services without being tied to the other party's conventions or conceptions of what constitutes a local or toll call.

SBC opposes this approach, and suggests that Charter's proposal somehow undermines this Commission's authority to establish exchange area boundaries.[22] Charter asserts that SBC's objections are without merit because Charter's proposal in no way undermines the Commission's authority over local exchange area boundaries. This is supported by the fact that Charter's language refers to Exchange Areas established "in accordance with Applicable Law."[23] Charter asserts that the Commission's rules and regulations governing the establishment of exchange area boundaries fall within the scope of "Applicable Law." Therefore, this language anticipates the establishment of local calling areas in accordance with this Commission's requirements. For that reason, Charter states that the Commission should resolve this issue by ruling that the parties may define their own local calling area boundaries for purposes of defining Switched Access Traffic and order the parties to adopt Charter's proposed language on this issue.

SBC replies that Charter's proposed language, which defines exchange area as an area "established by a Party in accordance with Applicable Law" is vague and misleading. While a carrier may designate its own calling area for purposes of retail services, the purpose of this interconnection agreement is to address provisions for a wholesale arrangement between the parties. For the purposes of the agreement, and intercarrier compensation, it is the Commission that designates the exchange areas.[24]

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[22] *See* McPhee Direct, at 72.

[23] *See* Charter-SBC GTC DPL Issue 8 at p. 5.

[24] McPhee Direct, p. 72.

Decision:

The Arbitrator agrees with SBC that, while Charter may define its exchange areas as it wishes for retail purposes, it may not impose its definitions upon the ILEC for purposes of intercarrier compensation.

3. The definition of "foreign exchange":

Charter GT& C Issue 11: ***Which Party's definition [of "foreign exchange"] is correct?***

Discussion:

SBC states that the Commission should adopt its proposed definition because it more accurately and completely defines the term "foreign exchange" ("FX").

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

SBC's witness McPhee suggests that the definition is tied to certain "call characteristics" instead of the retail service that the end user purchases.[25] This approach assumes that such underlying "call characteristics" are, in fact, of consequence. Charter's definition rejects that approach and simply states the standard industry-accepted definition of such traffic. Moreover, as Charter witness Barber explained, in practical terms, there is little difference between a minute of traffic that SBC hands off to Charter to deliver to a

[25] McPhee Direct at 73.

Charter customer that comes from a third-party long distance carrier, or a minute of traffic that comes directly from SBC's network.[26] In both instances, Charter generally incurs the same costs of getting those calls to the called party. Charter's proposed language, however, relies upon the fairly ubiquitous, and now standard, definition of such traffic.[27] For these reasons, Charter asserts, the Commission should resolve this issue by ruling that the parties must adopt Charter's proposed language on this issue.

SBC replies that there are various types of FX services, such as FX-like services, where the provisioning of the service differs from other types of FX service. Additionally, SBC contends, Charter's proposed definition relies upon a retail arrangement (" . . . customer who has purchased. . . ."). Regardless of whether or nor a retail end user "purchases" FX or gets the service for free, the definition should track the actual call characteristics instead of one possible retail arrangement.[28]

Decision:

The Arbitrator concurs with SBC for the reasons stated above.

4. The definition of intraLATA toll traffic:

Charter GT&C Issue 13: *Which Party's definition [of "intraLATA toll"] is correct?*

[26] Barber Rebuttal, at 6.

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

[28] McPhee Direct, pp. 72-73.

Discussion:

SBC states that the Commission should adopt its proposed definition because it is consistent with the Act and better conforms to the terminology customarily used in the industry.

Charter responds that its proposed definitions of telephone toll traffic conforms to the language of the federal statute that governs the obligations of both SBC and Charter with respect to the exchange of this traffic. The statute contains a specifically defined term, Telephone Toll Service,[29] which Charter has incorporated into its proposed definition. Therefore, use of Charter's definition will ensure conformity with governing federal law and reduce the possibility that the term could be construed in a manner that is inconsistent with federal law.

SBC replies that, while Charter claims that its proposed language employs the definition contained in the Telecommunications Act,[30] its definition is not consistent with the Act's definition of telephone toll service because it does not clearly indicate that the call does not originate and terminate within the same local calling area.[31] The Act defines telephone toll service as:

> The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.[32]

[29] 47 U.S.C. § 153(48).

[30] Barber Direct, p. 12.

[31] Charter has proposed to define interLATA toll simply as telephone toll service between two locations within a single LATA.

[32] 47 U.S.C. § 153(48).

SBC asserts that its proposed language provides the necessary specificity, as it defines intraLATA toll traffic as traffic originating and terminating within the same LATA and terminating in a local calling area that is different than the originating calling area. Because SBC's proposed definition is more consistent with the definition contained in the Act, it should be accepted.[33]

Decision:

The Arbitrator concurs with SBC for the reasons stated above.

5. The definition of "local calls" or "local traffic":

Charter GT&C Issue 14: Which ***Party's definition of "local calls" or "local traffic" is correct?***

Discussion:

SBC states that the Commission should adopt its proposed definition because it more accurately defines what constitutes a local call for purposes of intercarrier compensation.

Charter responds that it believes that the definition of "local traffic" in the agreement should correspond to the term used in the Communications Act, which is "telephone exchange service."[34] Doing so ensures that the obligations under this ICA will conform with governing law and will reduce the possibility that the term will be misconstrued. Charter notes that SBC objects to the use of the statutory term and suggests that the statute is "too broad."[35] Charter contends that this response is peculiar in that SBC is obviously bound by the definitions of the Communications Act, as those terms

[33] Douglas Direct, p. 28; Douglas Rebuttal, p. 10.

[34] 47 U.S.C. § 153(47).

[35] McPhee Direct at 73 ("Charter's language is overly broad").

are used and applied through the substantive provisions of the Act. Charter asks how SBC can credibly argue that a statutory definition which clearly applies to SBC is too broad to use in an agreement that reflects SBC's obligations under the same statute? The only explanation for that position, Charter contends, is that SBC is somehow trying to reduce or eliminate some portion of its obligations and Charter's rights under the Act. Charter asserts that the Commission should not allow SBC to avoid or undermine affirmative duties under the Act through the use of definitions which do not mirror federal law.

SBC replies that the Commission should reject Charter's proposed definition because it is overly-broad and its adoption would lead to future disputes over whether a call is or is not "local for purposes of intercarrier compensation."[36]

Decision:

The Arbitrator concurs with SBC for the reasons stated above.

[36] McPhee Direct, p. 73.