II. Resale:

1. Should the ICA have a single, consolidated Pricing Appendix?

CLEC Coalition Resale Issue 1: *Should the agreement contain a separate pricing list for the items available for resale?*

CLEC Coalition White Pages Resale Issue 2: *Should the rates applicable to this appendix appear in the price schedule?*

Discussion:

SBC contends that all pricing and product lists should be consolidated into one document for ease of use. The CLEC Coalition, however, contends that the ICA should continue to include a separate pricing list for items available for resale. Its reasons are (1) a single, combined pricing appendix is unusual in the industry; (2) it would be so large as to be unwieldy to use; (3) not all CLECs even engage in resale.

SBC urges the Commission to adopt SBC's proposed language, which incorporates the resale elements and resale discount into the ICA's consolidated Pricing Schedule, contending that this will simplify administration of such agreements for all parties and reduce disputes.[1] SBC has consolidated all pricing and product lists into one document in response to CLEC requests that all rate elements be included in a single Pricing Schedule rather than be scattered throughout the multiple attachments to the ICA.[2]

The Coalition, on the other hand, contends that the ICA should include a separate pricing list for items available for resale because the resale price list is so extensive that consolidating it with the UNE Pricing Appendix only makes it that much more unwieldy look up UNE prices. For CLECs that do not utilize resale services, the

[1] Smith Direct, pp. 60-61.

[2] Silver Direct, pp. 73-74.

inclusion of resale prices in the UNE price schedule makes interconnection agreement management that much more complicated. Because there is no overriding reason for establishing a combined price schedule, the present practice should not be replaced by a new, more unwieldy practice.

SBC responds that the resale rates should be contained in the Pricing Appendix because it will actually simplify administration of the ICA for all parties. Anyone looking for a rate for any service or UNE available under the ICA need only look to the Pricing Schedule. The location of the resale rates elsewhere would only cause confusion. Therefore, these rates should be placed in the pricing schedule along with all of the other rates applicable to the ICA.[3]

Decision:

The Arbitrator agrees with SBC, for the reasons stated above, that all rates, prices and charges applicable to the ICA should be placed in a single Pricing Appendix.

2. What should the ICA provide regarding the Primary Local Exchange Carrier Selection Charge?

CLEC Coalition Resale Issue 2: *Is it appropriate to revise the existing language in the M2A regarding the Primary Local Exchange Carrier Selection Charge?*

Discussion:

SBC maintains that this revision is appropriate because the new language addresses situations where normal service order processing charges will apply when the end user converts or adds new services at the same time that he or she changes primary local exchange carriers. The conversions and additions result in additional

[3] Silver Direct, pp. 75-76.

service order activity and the charges are necessary to recover the costs of the additional activity.

The Coalition has proposed the following replacement language for Section 3.1.4:

> 3.1.4 Simple and Complex Service Orders: If SBC MISSOURI can process an order on an electronic flow-through basis, the order is simple. All other orders are complex.

The Coalition contends that its proposal addresses concerns raised by SBC about CLECs being able to process orders on a flow-through basis when SBC cannot. Changing the proposed definition to make clear that orders that can be processed on a flow-through basis are simple is a beneficial clarification.

SBC argues that the Commission should adopt its proposed language regarding because (1) all prices should be consolidated into a single Pricing Schedule rather than scattered throughout multiple appendices in the agreement;[4] (2) its language recognizes that an electronic order should be considered "simple" if it can be processed electronically and without the "manual intervention" of an employee;"[5] and (3) clarifies what constitutes a "new" service and how service order charges will be applied to these services.[6] The CLEC Coalition now appears to agree with the distinction SBC makes with its language.

Decision:

SBC's language is preferable for the reasons SBC states.

[4] Smith Direct, p. 61; Silver Direct, pp. 73-74.

[5] Smith Direct, pp. 62-64.

[6] Smith Direct, p. 65.

3. Should this appendix contain provisions for Performance Metrics?

CLEC Coalition Resale Issue 5: *Should this appendix contain provisions for Performance Metrics?*

Discussion:

SBC points out that Performance Metrics are addressed in Attachment 17 and that there is no reason to include them here. The CLEC Coalition responds that, while Performance Metrics are indeed addressed in Attachment 17, it is beneficial for a Resale CLEC who may adopt this agreement to have references and information in the Resale sections of the ICA. The OP section is intended to incorporate the manual provisioning language for this agreement. A CLEC that purchases only resale services may be better served by including references to the Performance Metrics in the attachments it is most likely to use during its operations.

SBC opposes the CLEC Coalition proposal because the CLEC community and SBC have for years found it most efficient for all such measurements to be included in a single document, Attachment 17, which addresses all performance measurement questions. The CLEC Coalition, which has agreed to the comprehensive Performance Measurement Plan, has offered no evidence to support including Performance Metrics throughout the ICA. Moreover, the CLEC Coalition's proposal is inconsistent with the agreement of the parties on Performance Measures.[7]

Decision:

The Arbitrator concludes that Performance Measures should be grouped in Attachment 17 and not sprinkled throughout the ICA.

[7] Smith Direct, pp. 65-66.

4. Who should be responsible for 900/976 calls for which the CLEC's customers refuse to pay?

CLEC Coalition Resale Issue 6: *Should SBC be required to provide adjustments to CLECs for 976 charges that CLEC customers refuse to pay?*

Discussion:

SBC states that it offers CLECs the opportunity to block their customers from accepting 900 and 976 calls. If the CLEC chooses not to utilize this feature, then SBC asserts that it should be the CLEC's responsibility to collect monies from their customers for those calls as SBC will charge the CLEC and expect payment.

The Coalition argues that there will be instances in which a CLEC's customer will challenge or refuse to pay certain charges. In these cases, the Coalition contends that SBC should be willing to follow "established settlement procedures."[8] However, the Coalition offered no testimony to support or explain its reference to "established settlement procedures."

The Commission should reject the language proposed by the CLEC Coalition because it improperly attempts to shift responsibility for CLEC end users' unpaid "976" calls from the CLECs to SBC Missouri. SBC Missouri offers CLECs the ability to block their end users from placing "900" and "976" calls. If the CLEC chooses not to utilize this feature, it should be the CLEC, and not SBC Missouri, that should be responsible to collect monies from their customers for those calls. It is the CLECs' responsibility to address its end users' refusal to pay such charges directly with the "900/976" provider, just as all other carriers, including SBC Missouri, must do for their own end users.[9] The

[8] From the Coalition's Position Statement, Resale DPL Issue 6.

[9] Smith Direct, p. 66.

CLEC Coalition has offered no evidence to support or explain why its proposed language should be incorporated into the agreement.

Decision:

The Arbitrator agrees that the Coalition is responsible for 900/976 calls that its subscribers refuse to pay for where the Coalition has declined to avail itself of SBC's offer to block such traffic.

5. Should the ICA provide for a single point of contact between SBC and the CLEC?

CLEC Coalition Resale Issue 8: *Should SBC be required to provide a single point of contact to respond to CLEC call usage, data error, and record transmission inquiries?*

Discussion:

SBC contends that the Commission should reject the CLEC Coalition's proposed language, which would require SBC to establish a single contact for responding to CLEC call usage, data error, and record transmission inquiries, because SBC has established different work groups to handle these different matters for CLECs. As reflected in its proposed language, SBC has established Information Services ("IS") call centers to address issues regarding usage record transmissions, which are more technical in nature. Other inquiries should be directed to the CLEC account manager, who has the expertise to locate the appropriate internal organization to address non-technical inquiries.[10] The CLEC Coalition has offered no evidence to support the adoption of its proposed language. Further, SBC's proposed language defines how long SBC will retain the usage data, which is sent to the CLECs on a daily basis, and

[10] Smith Direct, pp. 67-68.

the interval within which a CLEC can raise any concern it has with the data.[11] The Coalition has not voiced any objection to this data retention procedure.

The Coalition responds that many CLECs find that they establish a good rapport with IS Call Center representatives who know and understand the problems the CLEC routinely encounters. For this reason, the establishment of a single point of contact at the IS Call Center will lead to improved customer service and efficiencies.

Decision:

The Arbitrator notes that the CLEC account manager in SBC's proposal will function as the CLEC's primary – if not sole – point of contact, permitting the benefits sought by the Coalition. Additionally, SBC's proposal appears better able to quickly provide for resolution of technical issues. Consequently, the Arbitrator determines that SBC's language is preferable.

6. What local account maintenance process should the ICA contain?

Navigator Resale Issue 1: *Should SBC be required to follow an outdated Local Account Maintenance process detailed in the Agreement?*

Discussion:

SBC states that this language references dated documentation that is no longer in use. SBC's witness, Smith, testified that "[i]t appears that Navigator is seeking to retain outdated language from its 2000 interconnection agreement with SBC Texas."[12] Performance Metrics are addressed in Attachment 17, Performance Measurements. Line loss notifications are addressed in Attachment 27, Access to Operation Support Systems (OSS).

[11] Smith Direct, pp. 67-68.

[12] Smith Direct, pp. 69.

Navigator explains that SBC's characterization of the issue is misleading in its reference to use of an "outdated" process for local account maintenance. A process that SBC does not wish to use is not therefore outdated.[13] Navigator insists that SBC should clearly specify the rules under which data will be maintained.[14] Absent the language sought by Navigator, SBC will simply follow its internal practices, which are subject to unilateral change without prior notice to Navigator, and Navigator will have no remedy if SBC institutes changes with which Navigator disagrees.[15] Therefore, the ICA should specify the rules applicable to customer usage data and not allow for a process subject to unilateral change, without prior notice, by SBC.[16] Changes in those rules should be made through the contract amendment procedures established under the ICA's General Terms & Conditions.[17]

Navigator notes that SBC also proposes to eliminate Section 7.1, a necessary reference to Performance Measurements ("PMs").[18] CLECs rely on interconnection agreements in order to provide services to their end users and they rely on PMs as their sole practical remedy for ensuring that the services provided to their end users are of appropriate quality. For this reason, the ICA must contain reference to PMs that contain remedies which provide full and adequate relief.[19]

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[13] LeDoux Rebuttal, at 10.

[14] LeDoux Direct, at 25.

[15] *Id*.

[16] LeDoux Rebuttal, at 11.

[17] *Id.*

[18] LeDoux Direct, at 25.

[19] LeDoux Direct, at 26.

SBC responds that the Commission should reject Navigator's language because (1) Navigator's language incorporates documentation that is no longer in use by SBC or any other CLEC; and (2) Navigator's language seeks to insert Performance Metrics into the Resale Appendix. As noted under CLEC Coalition Resale Issue 5, Performance Metrics are already appropriately and comprehensively addressed in Attachment 17, Performance Measurements.[20]

Decision:

The Arbitrator finds Navigator's language to be preferable. SBC has not shown where in Attachment 17 the Performance Measures in question are to be found. The Arbitrator emphatically agrees with Navigator that the rules applicable to the data in question should be specified in the ICA and not be subject to unilateral change without prior notice.

7. Should the ICA permit MCI to resell, to other carriers, services purchased from SBC under the Resale Appendix?

MCI Resale Issue 1: *May MCI resell, to another Telecommunications Carrier, services purchased from Appendix Resale?*

Discussion:

SBC states that the ICA should not permit MCI to resell services purchased under this Appendix to other Telecommunications carriers. MCI responds that SBC's language violates the obligations imposed upon LECs under the Act by prohibiting, or imposing unreasonable and discriminatory conditions or limitations, on the resale of telecommunications services under Section 251(b)(1). SBC's language also violates the rules set forth by the FCC regarding resale in the First Report & Order.

[20] Smith Direct, pp. 68-69.

SBC argues that Section 251(c)(4)(A) of the Act imposes on ILECs a duty to offer for resale, at wholesale rates, "any telecommunications service that [the ILEC] provides at retail to subscribers who are not telecommunications carriers" [i.e., to end users]. However, Section 251(c)(4)(B) allows a state commission to prohibit a reseller that purchases a service "that is available at retail only to a category of subscribers from offering such service to a different category of subscribers." End users and telecommunications carriers are different categories of subscribers; therefore, the Commission may impose the restriction that SBC proposes.

SBC seeks this restriction, it claims, to avoid certain potential problems inherent in MCI's proposal. These problems include cross-class selling, provision of service by un-certificated carriers, evasion of the provision prohibiting MCI from purchasing retail service at wholesale rates for its internal use, and violation of other provisions of the ICA.

SBC asserts that its proposed language is (1) is fully consistent with the Act; (2) promotes competition; and (3) allows SBC to retain limited, but necessary, oversight of its services that are being resold by other carriers. Section 251(c)(4) of the Act does not require an ILEC to resell its services to CLECs so that they can wholesale those services to other CLECs. Under the Act, "telecommunications carriers" provide "telecommunications services,"[21] which is the "offering of telecommunications for a fee directly to the public."[22] If MCI were permitted to sell SBC's services to other carriers, it would not be offering such services "directly to the public" and would not be acting as a telecommunications carrier. The Act's definitions make clear that resale services can

[21] 47 U.S.C. § 153(44).

[22] 47 U.S.C. § 153(46).

only be provided by an ILEC to a CLEC for use by end users, not other carriers. SBC's position is consistent with the purposes of the resale provisions of the Act to encourage competition for retail end users. Allowing MCI to wholesale SBC services to other carriers would subvert the negotiation process set out under Sections 251 and 252 of the Act.

As MCI's witness acknowledged at the hearing, MCI would be the only one with a contract with the other carriers and would be placing orders on their behalf. From SBC's perspective, those orders would look just like MCI orders and SBC would have no way to identify the carriers to whom its services are being wholesaled.[23] SBC would have none of the normal contractual protection vis-à-vis that third-party carrier and no remedies against it.[24] Before providing service, SBC would not know whether the "carriers" selling its services to end users have even been authorized by the Commission to provide service, or whether they have Commission-approved ICAs and tariffs in place.[25]

Further, SBC asserts that other provisions of the ICA, not disputed by MCI, also prohibit it from reselling services to other carriers. Those provisions are as follows:

> 4.3 MCIm shall only resell services to the same category of subscriber to whom SBC MISSOURI offers such services (for example, residential service shall not be resold to business subscribers).
>
> 4.5 MCIm shall not use resold local Telecommunications Services to provide access or interconnection services to itself, Interexchange carriers (IXCs), wireless carriers, competitive access providers (CAPs), or other telecommunications providers;

[23] Tr. 364-366 (Price).

[24] Tr. 364-365 (Price).

[25] Tr. 366-367 (Price).

> provided, however, that MCIm may permit its subscribers to use resold local exchange telephone service to access IXCs, wireless carriers, CAPs, or other retail telecommunications providers.

SBC advises the Commission that two other state commissions have adopted SBC's position. The Ohio PUC upheld a restriction prohibiting MCI from using SBC services to serve other carriers.[26] The Ohio arbitration panel found that the Act's aim was "to allow CLECs to enter the telecommunications market as alternative retail providers not alternative wholesale providers. Otherwise, the . . . resale obligations of ILECs would not be necessary due to the existence of multiple wholesale providers."[27] The Texas commission acted similarly. [28]

MCI, in turn, characterizes SBC's language as an unlawful attempt to prevent it from reselling "telecommunications services" to an entire class of customers. The FCC has determined that Section 251(b)(1) of the Act requires all carriers to resell "all telecommunications service offered by the carrier."[29] SBC's language attempts to prevent MCI from complying with Section 251(b)(1) by prohibiting it from reselling all of the telecommunications services it provides.

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[26] *See Arbitration Award, Petition of MCImetro Access Transmission Services, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio,* Docket No. 01-1319-TP-ARB, at 77 (Nov. 7, 2002) ("*Ohio MCI Arbitration*").

[27] *Id.,* at 75.

[28] "The Commission determines that a CLEC may only resale services purchased under the resale appendix to end users. The scenario of a CLEC reselling an ILEC's resale services to another CLEC circumvents the process of negotiating a contract to resell ILEC telecommunications services that the ILEC provides at retail to subscribers that are not telecommunications carriers. Therefore, CLECs may not resell to other telecommunications carriers, services purchased under the appendix resale." Texas Commission Track 1 Arbitration Award dated February 24, 2005 in Docket No. 28821, *Arbitration of Non-Cost Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, at Resale Issue 8 (emphasis added).

[29] *See First Report & Order,* ¶ 976.

Furthermore, MCI states, the FCC has made it clear that the only reasonable prohibition that can be placed on the resale of services is a restriction against "cross-class" selling. This restriction limits MCI from purchasing wholesale residential services and reselling them to business customers and also purchasing wholesale lifeline service and selling it to customers not eligible to receive lifeline assistance. "These two restrictions are the sum total of the permissible resale prohibition."[30]

MCI further states that, according to the FCC's interpretation of the definition of "telecommunications service" in Section 3(a)(51) of the Act, the term "telecommunications service" was not intended to create a wholesale/retail distinction, or to limit "the public" to "end users" of a service.[31] The only restriction that the FCC has placed on "telecommunications service," as that term is defined in the Act, is that the services must be provided on a common carrier basis.[32] The FCC noted that "[n]either the Commission or the courts …has construed 'the public' as limited to end-users of a service."[33]

Decision:

The restriction sought by SBC is permissible, but not required. The Arbitrator is persuaded that it is anti-competitive and the Arbitrator concludes that MCI's language is therefore preferable.

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[30] Price Direct, p. 165.

[31] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* 11 F.C.C.R. 21905 (1996) ("*Non-Accounting Safeguards Order*"), in which the FCC noted that while the definition of "telecommunications service" draws a distinction between common and private carriage, it does not draw a distinction between retail and wholesale services.

[32] *See Virgin Islands Telephone Corporation v. Federal Communications Commission,* 198 F.3d 921, 930 (D.C. Cir. 1999).

[33] *Non-Accounting Safeguards Order,* ¶ 265.

8. Should the ICA include the language proposed by MCI at Sections 3.2 and 4.12?

MCI Resale Issue 2: *Should SBC be required to offer Resale services at Parity?*

SBC's Statement of the Issue: *Should MCI have a contractual adoption (i.e., MFN) right similar to Section 252(i)?*

Discussion:

SBC states that MCI's language is an attempt to garner the benefits of a "pick-and-choose" that has been held illegal by the FCC. MCI states that it wants the right to purchase the same services SBC is offering its other wholesale customers at the same wholesale rates. SBC should be required to offer resale services to all CLECs at the same terms and conditions.

SBC states that it will make telecommunications services available for resale at the appropriate state-approved wholesale discount. Those discount rates are reflected in the Appendix Pricing. To the extent, however, that SBC and a CLEC agree to the provision of a particular wholesale service at a lower rate, that negotiated rate must be viewed as a piece of the entire agreement between those parties, obtained in exchange for some *quid pro quo*. Therefore, while MCI may always MFN into the entire ICA at issue, it has no right to "cherry pick" only the desirable rate without taking the other terms and conditions of the entire agreement that made that rate possible. That is the basis of the FCC's decision to outlaw "pick-and-choose."

On July 13, 2004, the FCC released its Second Report and Order ("MFN Order"), in which it eliminated the "pick-and-choose" rule by which it had previously implemented the requirements of Section 252(i). The FCC now adopted an "all-or-

nothing" approach to the requirements of Section 252(i) that applies to all ICAs.[34] In particular, 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.[35]

MCI's additions in Section 4.12 similarly go beyond required law. Section 251(c)(4)(A) of the Act imposes on ILECs a duty to offer for resale, at wholesale rates, "any telecommunications service that [the ILEC] provides at retail to subscribers who are not telecommunications carriers" [i.e., to end users]. As is clear, SBC's resale obligation is triggered when it sells services to its end users at retail. While an SBC affiliate could clearly be a retail end user (and thus SBC's language would cover that transaction anyway), that is not always the case and the statute clearly did not mean to impose a resale obligation on ILECs for *any* transaction between them and their affiliates.[36] MCI's language, however, would do just that.

MCI responds that all MCI wants is for SBC to treat MCI the same as it treats other carriers by offering resold services at the same discount as it give other CLECs.[37] The wholesale discount for resold services should be the same regardless of which CLEC is reselling the services.

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[34] *Second Report and Order, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338 (rel. July 13, 2004).

[35] *Id.* at ¶ 10.

[36] Smith Direct, p. 74.

[37] Lichtenberg Direct, p. 18.

Decision:

The Arbitrator agrees with SBC that MCI's proposed language is improper under the Act. Therefore, SBC's proposed language is preferable.

9. What should the ICA provide concerning the assumption of Customer Specific Pricing Arrangements?

MCI Resale Issue 3: ***Which Party's proposal for reselling Customer Specific Arrangements (CSA) should apply?***

Discussion:

SBC argues that its proposal is superior because it is more specific and provides more detail regarding the resale of Customer Specific Arrangements ("CSAs"). MCI states that its proposed language sets forth in a straightforward manner SBC's obligations to permit MCI to assume CSAs and thus should be included in the contract.

SBC states that its proposed language concerning the resale of CSPs supplies the necessary detail concerning the resale of such arrangements. SBC's proposed language reflects: (1) this Commission's prior determination that wholesale discounts are not applicable to the resale of CSAs in Missouri; (2) that MCI must assume the balance of terms of the existing CSAs; (3) that MCI cannot charge its end users termination liabilities; and (4) that MCI must handle the assumption of CSAs without SBC's involvement.

SBC's language points out that MCI may only resell telecommunications services from CSPs. SBC's witness, Smith, testified:[38]

> MCIm is not entitled to resell entire ICBs when they contain both telecommunications and non-telecommunications services. Many

[38] Smith Direct, p. 75 (citations omitted).

> ICBs do, in fact, contain a mixture of telecommunications and other services. Without SBC Missouri's language, the CLECs' proposal suggests that as long as an ICB contains a single telecommunications service, the CLECs may resell the entire ICB. Some telecommunications services cannot be resold for all purposes. For example, it is well- settled that telecommunications services cannot be resold to provide access or interconnection services to other telecommunications providers. It is also well-settled that CLECs cannot resell services for their own use.

MCI's language purports to give it the right to resell any non-telecommunications service portion of a CSA when the CSA contains a mixture of telecommunications and other services. However, MCI has provided no authority for this position.

MCI, in turn, states that it has proposed language that sets forth in a straightforward manner SBC's obligations to resell services to MCI in assuming a customer specific pricing arrangement. MCI objects to the "unnecessary or ambiguous language" that SBC has attempted to add.[39]

Decision:

The Arbitrator finds MCI's language to be simple and straightforward and thus preferable.

10. What should the ICA provide with respect to the process for updating E-911 end user information?

MCI Resale Issue 4: *What process should apply for updating End User 911 information?*

[39] Lichtenberg Direct, pp. 18-19.

Discussion:

SBC states that the process for updating the End User E911 information is via the Local Service Request ("LSR") process with the update sent to the LSC.[40] However the End User update information submitted by the reseller must be accurate, complete and provided in a timely manner. MCI states that its language clearly sets out how MCI will update E-911 information and provide it to SBC. MCI characterizes SBC's language as vague both in format and as to timing of requesting such information.

SBC's proposed language requires CLECs reselling SBC's services to provide SBC with "accurate and complete information" regarding the CLECs' end user customers for purposes of E-911 administration.[41] MCI's proposed language should be rejected because it speaks merely of "update(s)" without regard to accuracy, completeness or timeliness.

MCI explains that its responsibility to update the 911 database occurs when it submits the LSR to SBC. At that time, SBC will have the information necessary to update the 911 database. MCI's witness, Lichtenberg, testified that SBC's proposal is deficient.[42] First, SBC's proposal is vague as to the timing of updating the 911 information. SBC states that it wants such information from MCI "when requested."[43] MCI will provide the information when it submits its LSR. Second, MCI will provide the information in the LSR format, which is known and used by both SBC and MCI. SBC,

[40] "LSC" is nowhere defined.

[41] *See* Section 8.5 from the Resale Appendix to SBC Missouri's proposed ICA.

[42] Lichtenberg Direct, p. 19.

[43] *Id.*

on the other hand, wants MCI to submit 911 information in a "format" prescribed by SBC; however, SBC has yet to define the "format."[44]

Decision:

The Arbitrator concludes that MCI's language is preferable for the reasons cited by MCI's witness Lichtenberg.

11. Should certain appendices to the ICA contain special indemnity and limitation of liability language applicable to the services contained in those appendices and which supersedes the indemnity and limitation of liability language in the General Terms and Conditions?

CLEC Coalition E-911 Issue 9: ***Should SBC Missouri's liability to CLEC exceed commercially reasonable damages available under this agreement by also including remedies beyond those allowed by applicable law by allowing more than one full recovery on a claim?***

MCI Resale Issue 5: ***Should the Commission adopt SBC's liability and indemnity language contained in Appendix Resale?***

SBC's Statement of the Issue: ***Should the Commission adopt SBC's Resale liability and indemnity language?***

Discussion:

SBC needs the limitations of liabilities and indemnities protection in order to offer 911 at the applicable rates. SBC is not being compensated for the risk of offering the service, so SBC shouldn't be required to assume the risk. MCI contends that SBC's proposed language is unnecessary because the topic is covered extensively in the General Terms and Conditions section of the ICA. The CLEC Coalition's proposed language also refers to the General Terms and Conditions section of the ICA.

[44] *Id.*

SBC's position is that the language in the General Terms and Conditions is inadequate to address the liabilities specific to E-911 for resale services. Without its language, SBC claims that unquantifiable financial risks and unreasonably large contingent liabilities would be placed upon SBC and its network. SBC's proposed rates for E-911 service do not compensate it for the risk of offering the service and SBC should not be required to assume this risk. [45]

MCI argues that, if a particular topic is addressed in a comprehensive manner in the General Terms and Conditions, there is no reason to address it again in an individual appendix. The limitation of liability (Section 15), indemnity (Section 16), intervening law (Section 23) and breach of contract (Section 7.3) provisions contained in the GT&C are comprehensive and apply equally to each of the individual appendices. Nonetheless, SBC has proposed additional language in a number of appendices covering these topics again. However, if SBC's proposed language is included in the ICA, each of these provisions would supersede the corresponding provision of general application in the GT&C pursuant to GT&C Section 2.6.1, Conflict in Provisions.

The Illinois Commerce Commission faced this issue in the recent MCI/SBC ICA arbitration in Illinois.[46] The ICC ruled in MCI's favor in each instance. For example, in deciding an issue identical to the present MCI xDSL Issue 2, the ICC stated, "We reject SBC's liability and indemnity language proposed for inclusion in the xDSL Appendix. SBC's proposed language is unnecessary since the parties have agreed to comprehensive liability and indemnity provisions of general applicability in the GT&C."

[45] Quate Direct, pp. 68-69.

[46] ICC Order in Docket 04-0469 at p. 343.

SBC responds that service-specific language is best contained within the relevant appendix. SBC's proposed language limits SBC's liability in the event of damages arising from E-911 service, except where SBC has been grossly negligent, reckless, or committed intentional misconduct. The limitation of liability extends to damages suffered *both* by CLECs *and* by customers of the CLECs. SBC should not be liable for personal injury, death, or destruction of property for system or equipment failures that result from the normal course of doing business. Such damage could be the result of actions outside of SBC's control. For example, an independent contractor could inadvertently cut one or more E-911 facilities. In the event of a major disaster, capacity in the facilities or at the emergency answering points might be inadequate to handle the volume of calls. In these circumstances, peoples' lives or property may be at stake. Such situations are unfortunate, but the CLECs cannot hold SBC responsible for any and all damage resulting from such events.

Decision:

The Arbitrator agrees with the CLECs that all indemnity and limitation of liability language should be located in the General Terms and Conditions.

12. What rate should apply to the resale of White Pages Directory Listings?

CLEC Coalition White Pages Resale Issue 1: *Should the following listings: unpublished, unlisted, foreign, enhanced or other listings in addition to the primary listing on a per listing basis, be charged the applicable SBC tariffed rate?*

Discussion:

SBC states that white pages listings are resold on a tariff rate basis and are not subject to the avoided cost discount. The CLEC Coalition objects to the use of

SBC's tariff to establish the charges for the ICA and contends that the charges for the listings should be listed in the ICA because the relationship between the parties will thereby be better-defined and easier to administer.

SBC's witness, Silver, testified that "the CLEC Coalition is looking to have the resale discount applied to directory listings, and opposes SBC Missouri's proposed language which would apply the tariffed rate to those listings in question."[47] Under Section 251(c)(4) of the Act, the obligation to resell at wholesale discounted rates applies only to "telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." A listing in the white pages is not a "telecommunications service."[48]

Decision:

The Arbitrator agrees with SBC that these listings are subject to the tariff rate.

[47] Silver, Direct, p. 75.

[48] The term "telecommunications" is defined in the Act to mean "the transmission between or among points specified by the user, of information of the user's choosing, without changing the former content of the information as sent and received." 47 U.S.C. § 153(43).