Exhibit No.:	____
Issue:	Charter-SBC Interconnection
Witness:	Mark Barber
Type of Exhibit:	Rebuttal Testimony
Sponsoring Party:	Charter Fiberlink-Missouri, LLC
Case No.:	TO-2005-0336
Date Testimony Prepared:	May 19, 2005

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

REBUTTAL TESTIMONY OF MARK BARBER ON BEHALF OF CHARTER FIBERLINK-MISSOURI, LLC

May 19, 2005

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

AFFIDAVIT OF MARK BARBER

STATE OF MISSOURI)
) ss
COUNTY OF ST. LOUIS)

Mark Barber, appearing before me, affirms and states:

1. My name is Mark Barber. My business address is 12405 Powerscourt Drive, St. Louis, MO 63131, and I am employed by Charter Communications, Inc. and its affiliate Charter Fiberlink-Missouri, LLC as Vice President of Telephony.

2. Attach hereto and made a part hereof for all purposes is my Rebuttal Testimony on behalf of Charter Fiberlink-Missouri, LLC consisting of multiple pages, having been prepared in written form for introduction into evidence in the above-captioned docket.

3. I have knowledge of the matters set forth therein. I hereby affirm that my answers contained in the attached rebuttal testimony to the questions therein propounded, including any attachments thereto, are true and accurate to the best of my knowledge, information and belief.

Mark Barber

Dated: May 17, 2005

Sworn to and subscribed before me on this the 18th day of May, 2005.

Joan Oatis
Notary Public

JOAN OATIS
NOTARY PUBLIC - NOTARY SEAL
STATE OF MISSOURI
ST. LOUIS CITY
MY COMMISSION EXPIRES JUNE 15, 2007

My Commission Expires June 2007

EXECUTIVE SUMMARY

This document contains the rebuttal testimony of Mark Barber on behalf of Charter Fiberlink, Missouri- LLC ("Charter"). Mr. Barber testifies on the disputed issues between Charter and SBC-Missouri ("SBC") concerning the general business issues surrounding how the parties will interconnect their respective networks and exchange traffic.

Specifically, Mr. Barber testifies on the single disputed intercarrier compensation issue between SBC and Charter. Also, Mr. Barber offers testimony on a range of general business issues, including but not limited to, general definitions, insurance coverage requirements, contract assignment issues and other miscellaneous contract terms.

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I. INTRODUCTION

Q. PLEASE STATE YOUR NAME, POSITION, EMPLOYER, AND BUSINESS ADDRESS.

A. My name is Mark Barber. I am the Corporate Vice President of Telephony for Charter Communications, Inc. and its affiliate Charter Fiberlink-Missouri, LLC ("Charter"). My business address is 12405 Powerscourt Dr., St. Louis, Missouri, 63131. I am filing this testimony on behalf of Charter. I presented direct testimony in this matter on May 9, 2005.

II. STATEMENT OF SCOPE AND SUMMARY

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. In this rebuttal testimony I respond to the testimony of various SBC-Missouri witnesses, as it relates to the issues I addressed in my direct testimony.

III. INTERCARRIER COMPENSATION ISSUES

III.A. APPENDIX INTERCARRIER COMPENSATION ISSUE (1): WHICH PARTY'S LOCAL CALLING AREAS CONTROL IF THEY ARE DIFFERENT?

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

Q. WHAT IS CHARTER'S POSITION ON THIS ISSUE?

A. Briefly, Charter believes that the definition of a local calling area for purposes of intercarrier compensation should be governed by the *originating party's* tariffs, rather than in all instances by SBC's tariff. Charter believes that this is more

[1] The following paragraphs in the agreement are covered by this issue: Appendix Intercarrier Compensation, § 16.1.

consistent with the underlying applicable definitions in the law than SBC's proposal, which locks all CLECs into SBC's calling areas for intercarrier compensation purposes.

Q. WHAT IS SBC'S POSITION ON THIS ISSUE?

A. SBC's witness Scott McPhee argues (at pages 8-9 of his testimony) that Charter's proposal should be rejected because intercarrier compensation could vary from carrier to carrier as different CLECs established different calling areas.

Q. DO YOU AGREE WITH MR. MCPHEE?

A. No. Charter and SBC agree that local traffic will be exchanged on a bill-and-keep basis. We also agree that local and intraLATA toll traffic (where we are the only two carriers) may be exchanged on the same trunk groups – indeed, that is happening today. This means that in order to properly bill, each carrier needs to review its traffic records to identify which calls are subject to access charges and which are not. This is done by programming a computer to look at the records and compare the NPA-NXX of the calling and called numbers. All that would be needed to implement Charter's proposal would be for both parties to update the table of NPA-NXX combinations, when and if Charter establishes a local calling area different from SBC's. This kind of updating happens routinely when new NPA-NXXs are assigned to existing or new carriers. So, Mr. McPhee's claim that this would be difficult or unwieldy is unsupported.

Q. IS CHARTER SUGGESTING THAT THIS COMMISSION WOULD NOT HAVE FULL SUPERVISORY AUTHORITY WITH RESPECT TO THE

LOCAL CALLING AREAS CHARTER MIGHT ESTABLISH IN THE FUTURE?

A. No, not at all. Charter assumes that this Commission will continue to take a keen interest in the scope of local calling privileges end users are afforded by facilities-based carriers in Missouri. Our concern is that as time goes on Charter might want to compete with SBC by offering consumers a *larger* local calling area than SBC does currently. Such a larger area would be embodied in tariffs filed with this Commission. The problem is that under SBC's approach, if Charter establishes a larger local calling area, Charter will be subject to a tax imposed by SBC (that is, SBC's access charges) for having the temerity to offer broader local calling areas than SBC. But, since Charter will not be assessing a toll on its own end users for this traffic, it will have no economic basis for paying that "tax." The result is that requiring the payment of access charges on calls that go beyond *SBC's* local calling area boundaries, no matter what local calling areas Charter uses, acts as an economic disincentive on Charter from actually competing by offering broader local calling areas. So, however this issue might look on the surface, in fact SBC's position is anticompetitive because it economically restricts Charter's competitive choices.

IV. GENERAL BUSINESS AND CONTRACTUAL ISSUES (GENERAL TERMS AND CONDITIONS)

In this section I address disputed provisions concerning general business and contractual issues that arose within the General Terms and Conditions ("GTC") portion of the Agreement.

IV.A. GTC ISSUE (8): DEFINITION OF EXCHANGE AREA

➢ Which Party's definition of "Exchange Area" should be included?[2]

Q. WHAT ARE THE PARTY'S POSITIONS ON THIS ISSUE?

A. This issue is closely related to the intercarrier compensation issue just discussed. Charter believes that the definition of "exchange area" should be slightly different from what SBC proposes. As technology and service offerings continue to evolve in this industry, Charter proposes that the definition of "exchange area" refer to the areas being established "in accordance with Applicable Law." SBC's proposed definition states that exchange areas will be "defined by the Commission." McPhee Direct at 72-73.

Q. WHAT IS THE SIGNIFICANCE OF THESE DIFFERENT POSITIONS?

A. Today, none. But that may well change over the term of the agreement. For example, the FCC has ruled that certain kinds of VoIP services — even VoIP services that assign end users specific telephone numbers and specific "toll free" calling privileges — are not subject to state level regulation. It is therefore possible that some future Charter offering might have an "exchange area" (that is, as we understand it, a local calling area) associated with it, even though that area is *not* defined by this Commission. Given the rapidly changing technical and regulatory landscape, it seems far preferable to address that possibility now, with a sufficiently flexible definition in the agreement, rather than assume that the issue will not arise, leading to disputes later.

IV.B. GTC ISSUE (11): DEFINITION OF FOREIGN EXCHANGE TRAFFIC

[2] The following paragraph(s) in the agreement are covered by this issue: GTC § 1.1.50.

- Which Party's definition of "Foreign Exchange" should be included?[3]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. Charter has a simple definition of "FX" service that ties into each party's effective tariffs for that service. SBC, according to Mr. McPhee, is trying to define the service in a way that (he claims) is based on "call characteristics" rather than the retail service the customer buys. McPhee direct at 72-73. The problem, from Charter's perspective, is that there are no underlying "call characteristics" that are significant, ***other than*** the retail classification of the traffic. In practical terms any minute of traffic that SBC hands off to Charter to deliver to a Charter customer is the same as any other minute, and vice versa. Of course we recognize that under today's intercarrier compensation regime there are different regulatory classifications applicable to different traffic — which seems to be the concern underlying SBC's extended and elaborate definition of "FX" service. But the fact remains that what an "FX" service is, is a matter for this Commission and the FCC to determine in reviewing tariffs filed with them. SBC has not explained why service arrangements that are not, in fact, "FX" service should nonetheless be included in the agreement's definition of the term.

IV.C. GTC ISSUE (13): DEFINITION OF IntraLATA TOLL TRAFFIC

- Which Party's definition of "IntraLATA Toll Traffic" should be included?[4]

[3] The following paragraph(s) in the agreement are covered by this issue: GTC § 1.1.57.
[4] The following paragraph(s) in the agreement are covered by this issue: GTC § 1.1.71.

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. As noted in my direct testimony, Charter's proposed definition conforms to the language of the federal statute that creates SBC's duties, and Charter's rights, in the first place. That statute contains a specifically defined term, "Telephone Toll Service." Charter's proposed definition uses that specific term. For some reason SBC does not want to. SBC's witness, Mr. Douglas (at page 92), offers nothing remotely substantive as a reason for ***not*** using the applicable statutory term in our contract.

IV.D. GTC ISSUE (14): DEFINITION OF LOCAL TRAFFIC

➢ Which Party's definition of "Local Traffic" should be included?[5]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. Charter believes that the definition of "local traffic" in the agreement should correspond to the term used in the Communications Act, which is "telephone exchange service." SBC's witness, Mr. McPhee (at page 73) basically says that the statute is too broad. I would submit that the statute, not SBC's language, is the real measuring rod here. If SBC's language defining "Local Traffic" is narrower in some way than the statutory term, then the problem isn't that the statute is too broad; it's that SBC's language is too narrow. Given SBC's lack of substantive justification for its own position, there is nothing more to say at this point.

IV.E. GTC ISSUE (15): DEFINITION OF LOCAL NUMBER PORTABILITY

➢ Which Party's definition of "Local Number Portability" should be included?[6]

[5] The following paragraph(s) in the agreement are covered by this issue: GTC § 1.1.81.
[6] The following paragraph(s) in the agreement are covered by this issue: GTC § 1.1.84.

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. Similar to those issues discussed above, Charter proposes to define this term by specific reference to the definition used by the FCC. SBC apparently believes that the FCC's definition "is not consistent with the accepted definition in the industry." Chapman at 88. This is obviously wrong: the industry's handling of number portability is governed by and consistent with the FCC's rules.

Mr. Chapman's point, apparently, is that the FCC definition that Charter proposes that we use is broad enough to encompass both the kinds of number portability that were used before the current database system was put into place. Chapman at 89. Of course, Charter is not suggesting that SBC and Charter should abandon database number portability. So, this issue has to do with how the contract works, not with what SBC and Charter are going to ***do.*** I will leave the details to the lawyers, but from Charter's perspective, the contract should ***define*** number portability with reference to the governing FCC regulation. The substantive provisions in the contract about how the parties will ***provide*** number portability also have to comply with the applicable federal regulations (and I do not believe they are in dispute).

My only observation as a businessman on this and similar issues is as follows: in practical terms the reason there ***is*** a competitive local telephone business today is because of the 1996 Act and associated FCC rules. That Act and those rules puts certain duties on ILECs like SBC and gives certain rights to CLECs like Charter. I may not always be able to understand why SBC is opposed to using, in our

contract, the same language that the law and the FCC use to define SBC's duties and my rights, but I have a high degree of confidence that SBC's opposition is not based on its desire to give me ***more*** rights and impose on SBC ***more*** duties than the law requires. To the contrary: SBC's repeated refusals to use definitions and other terms that correspond to the law and the regulations strongly suggests to me that SBC is trying, in various ways, to ***avoid*** its duties and to ***narrow*** my rights. Given this, unless SBC can lay out a clear and compelling reason for ***departing*** from the "official" language that applies to some issue, I would submit that it is safe to assume that they are looking for some way to interfere with the operation of the law and regulations designed to promote competition, and that their position should be rejected.

IV.F. GTC ISSUE (18)(A): SHOULD TRANSIT TRAFFIC BE DEFINED IN THE ICA?

➢ Which Party's definition of "Transit Traffic" should be included?[7]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. Charter believes that the agreement should contain a definition of "transit traffic." SBC does not. McPhee at 74. The problem with Mr. McPhee's position is that SBC cannot give Charter any assurance that it will not be sending Charter transit traffic – basically, traffic that starts with one LEC, goes through another (the "transiting carrier") and is terminated by a third. SBC sends such traffic to Charter today and vice versa.

[7] The following paragraph(s) in the agreement are covered by this issue: GTC § 1.1.158.

It is wrong to say, as Mr. McPhee does, that the agreement does not deal with such traffic. A variety of the attachments to the contract, including Intercarrier Compensation (§§ 3.1, 3.5, 5.8.1, 5.8.3, 9, 11.5, 14.1.3, & 16.2) and ITR (§§ 5.4.8, 12.1, & 12.2) refer directly or indirectly to traffic in which a third party carrier is involved, so that either SBC or Charter might be involved in handling transit traffic.

IV.G. GTC ISSUE (18)(B): DEFINITION OF OUT OF EXCHANGE TRAFFIC

➢ Which Party's definition of "Out of Exchange Traffic" should be included?[8]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. This is a very narrow disagreement, related to the issue just discussed. Charter seeks to include "transit traffic" within the types of traffic that might constitute "OE-LEC" traffic — which is basically traffic where one end is inside SBC's service territory and the other is outside of it. This would arise in a case where, for example, a third-party LEC, with territory next to SBC's, might send SBC a call destined for a Charter customer, or vice versa. The fact that three LECs are involved instead of two does not change the classification of the traffic as "OE-LEC" or not.

Mr. McPhee (at page 74) seems to address a different issue, which is that in some cases the OE-LEC traffic might straddle a LATA boundary. This is true, and Charter does not dispute this. But he says nothing at all about SBC's desire to exclude the term "transit traffic" from the definition.

[8] The following paragraph(s) in the agreement are covered by this issue: GTC § 1.1.103.

Essentially, this issue and the last show that Mr. McPhee is basically trying to avoid dealing with transit traffic for some reason. This is a type of traffic that exists today and will continue to exist tomorrow. He says that the agreement "doesn't deal with it," and then, with no explanation, SBC proposes to delete Charter's references to it. But the phenomenon of transit traffic will not disappear just because SBC ignores it. It exists, and the agreement should mention it where appropriate.

IV.H. GTC ISSUE (21): USE OF OUTSIDE DOCUMENTS TO MATERIALLY CHANGE TERMS OF THE AGREEMENT

➢ Should either party be able to modify or update their reference documents without seeking approval from the other party?[9]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. Charter wants language in the contract that simultaneously (a) acknowledges SBC's right to update and modify minor, ongoing, routine administrative activities, but (b) makes clear that SBC may not, under the guise of such a minor administrative change, materially increase my obligations under the contract, or materially reduce SBC's obligations. So, while we did not oppose SBC's language giving it the right to incorporate procedures manuals and the like by reference, we proposed to add language that put a limit on how far SBC could go with changes to those types of incorporated documents.

SBC's witness, Ms. Quate, totally misreads Charter's position. She says that Charter's language would somehow require SBC to negotiate with Charter over every change that might occur in connection with these reference documents. She then claims that this is impractical. Quate at 60-62.

Ms. Quate is wrong on two levels. First of all, routine, ordinary-course-of-business modifications to SBC procedural manuals and so on would not normally have any material impact on either party's obligations under the contract. Yes, we'd have to fill out some form differently. Yes, we might have to give some different information, or format the same information differently, or whatever, in order to submit an LNP request or rearrange some trunking. But these types of changes are not "material" and would not require any discussion or negotiation.

Second — and more important — suppose that in one of these SBC-controlled documents, SBC included a provision that (say) purported to impose a $100,000 charge for any new trunk orders, or suddenly declared that SBC would have 9 months or a year to increase the capacity of the interconnection between the two companies? Nothing in SBC's contract language about incorporating documents by reference would forbid SBC from taking such a step.

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

Ms. Quate's claims about Charter's proposal somehow "stagnating technology" in the telecommunications industry (Quate at 62) are simply, to coin a phrase, over the top. Charter has no interest in stagnating either SBC's technology or its own. Charter does, however, have an interest in holding SBC to the terms of its

[9] The following paragraph(s) in the agreement are covered by this issue: GTC § 2.3.1.

interconnection contract with Charter — which is all that Charter's language would do.

IV.I. GTC ISSUE (22): USE OF TARIFFS TO MATERIALLY CHANGE TERMS OF THE AGREEMENT

➢ Should additional language be included in the tariff language? 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?[10]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. This issue parallels Issue No. 21. Ms. Quate argues that SBC will regularly change its tariffs, Quate at 78, which is fine with Charter as a general matter. What Charter is trying to do is to close a loophole. To use an example from another issue, Charter and SBC have agreed to the terms of an OE-LEC appendix to deal with the exchange of traffic in situations where a Charter customer is located within the territory of an ILEC other than SBC. Suppose, however, that SBC filed a tariff that said, "as of tomorrow, SBC shall have no obligation to exchange traffic with any CLEC except for traffic where both end users are physically within SBC's service territory." Such a tariff would be a blatant end run around the terms of the negotiated OE-LEC amendment. Charter believes that it is perfectly appropriate to make clear that SBC cannot, in fact, materially alter the terms of the agreement just by filing a tariff.

As with non-tariff documents incorporated by reference, I have a very hard time generating any sympathy for SBC's claim that it ***should*** be able to materially increase my obligations to SBC, or to materially reduce its obligations to me, by taking the unilateral act of filing a tariff.

IV.J. GTC ISSUE (23): IDENTIFICATION OF TERMS THAT SBC CLAIMS HAVE NOT BEEN "VOLUNTARILY NEGOTIATED"

➢ Should SBC's additional language concerning terms that are not voluntarily negotiated be included in the agreement?[11]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. It appears that this issue has been settled by both parties agreeing that Section 2.10.1 of the General Terms & Conditions would read: "2.10.1 The Parties acknowledge that this Agreement incorporates certain rates, terms and conditions that were not voluntarily negotiated by the Parties, but instead resulted from determinations made in arbitrations under Section 252 of the Act or from other requirements of regulatory agencies or state law (individually and collectively, a "Non-Voluntary Arrangement"). If any Non-Voluntary Arrangement is modified as a result of any order or finding by the FCC, the appropriate Commission or a court of competent jurisdiction either Party may proceed under the intervening Law Section."

If I am wrong about that, and SBC is still insisting on its original language, then I would note that Charter's view is that if SBC wants to identify "non-voluntary" provisions it is free to do so, but it should not be able to declare that "there are a lot of non-voluntary provisions in the contract" without saying what they are. SBC has never identified to Charter which provisions are supposedly "non-voluntary."

According to SBC's testimony, it wants to identify non-voluntary provisions so that other parties in other states cannot adopt them. Quate at 78-79. That might

[10] The following paragraph(s) in the agreement are covered by this issue: GTC § 2.5.1.
[11] The following paragraph(s) in the agreement are covered by this issue: GTC § 2.12.1.

make some sense if, in fact, SBC had ever identified any provisions as non-voluntary, but it never has. So, Charter is left with a concern that the SBC is actually trying to use the declaration that certain provisions it has never objected to in discussions with Charter are in some way different than others.

Charter's provision simply obliges SBC to actually identify the provisions it claims are non-voluntary.

IV.K. GTC ISSUE (24): SCOPE OF OBLIGATIONS

➢ Which party's scope of obligation language should be included in this agreement?[12]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. As discussed earlier, Charter has negotiated an OE-LEC appendix with SBC. Charter's proposed language here in the "General Terms and Conditions" is intended simply to reference that agreed-to document. SBC, however, seems totally confused on this point. According to Mr. Silver, "the CLECs" — by which he apparently means Charter, among others — "are proposing language … that would require SBC Missouri to provide the CLEC with UNEs beyond SBC Missouri's local service area." Silver at 128. First of all, Charter's language would do nothing of the sort; it would simply reference the existing OE-LEC appendix. Second, Charter has its own network to connect to its customers, and except in very rare cases (involving the use of on-premises network wiring in apartment buildings classified as sub-loops) Charter will not be using any SBC UNEs.

Q. WHAT SHOULD THE COMMISSION DO WITH THIS ISSUE?

[12] The following paragraph(s) in the agreement are covered by this issue: GTC § 2.10.1.

A. The Commission should adopt Charter's language, which does nothing more than indicate that issues regarding OE-LEC matters are addressed in the agreed-to appendix.

IV.L. GTC ISSUE (26): INSURANCE COVERAGE

➢ What are the appropriate provisions relating to insurance coverage to be maintained by the Parties under this agreement?[13]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. Charter and SBC agree that it is appropriate to require insurance coverage in the agreement. Where the parties disagree is over the details of those requirements. SBC wants to dictate to Charter the characteristics of the insurance companies from which Charter may buy insurance. Ms. Quate notes the supposed benefits of requiring Charter to buy from companies that fall into the rating categories that SBC proposes. Quate at 59. What Ms. Quate never does, however, is explain why Charter would ever want to buy insurance from an entity that cannot actually deliver payments if called for under the policy.

This is one of many issues between Charter and SBC where SBC has not given adequate thought to the fact that Charter has its own network and is not relying on SBC to offer its own services. Charter has its own connections to its end users and its own switching plant. Charter has a very strong incentive to obtain and retain adequate insurance on that plant. Charter has agreed to maintain insurance in accordance with the contract that also protects SBC, although SBC has never explained — certainly not in Ms. Quate's testimony — any situation in which ***Charter's*** activities could or would do any damage to ***SBC's*** plant or personnel.

[13] The following paragraph(s) in the agreement are covered by this issue: GTC § 4.7.5.

Charter's point is simply that its own self-interest will drive it to obtain insurance from a reliable and efficient insurance provider. Whether in all cases that insurance provider will meet the specific criteria SBC wants to impose is not clear. Charter's point is that there is no good reason for SBC to constrain Charter in its choice of insurance company, particularly where, again, SBC has provided no explanation of how an entity like Charter would place SBC's plant or personnel at risk ***at all.***

IV.M. GTC ISSUE (27)(A): ASSIGNMENT

➢ What are the appropriate terms and conditions regarding restrictions on the assignment of the agreement?[14]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. There seem to be three disagreements here. First, SBC claims the right to assign its obligations under the contract to other entities without Charter's consent. Charter's position is that neither party should be permitted to assign the contract without consent. Quate Direct at 15-16. Second, SBC wants to be able to charge Charter a service charge of some sort if, in fact Charter assigns the contract. Quate Direct at 13-14. Charter does not believe that this is appropriate. Third, the parties agree that withholding consent to assignment might be appropriate if there are ***undisputed*** charges outstanding. Quate Direct at 16. Unfortunately, SBC's proposed language would allow SBC to hold up an assignment of the contract simply because there are pending billing disputes. That is unfair.

Q. WHY ARE SBC'S VIEWS WRONG?

[14] The following paragraph(s) in the agreement are covered by this issue: GTC § 4.9.1.1.

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

Charter also thinks it is manifestly unfair and unreasonable to allow SBC to assign the contract to some third party without Charter's consent, while requiring SBC's consent before Charter can assign its contract. Ms. Quate says that there is no reason for Charter's consent to be required for an assignment by SBC, because any SBC activity that would lead to an assignment would require regulatory approval. Quate Direct at 17-18. The lawyers will address "assignment" in more detail, but from a business perspective, this is unfair and unreasonable. SBC is entering into a contract with Charter under which SBC takes on certain obligations. Charter will not unreasonably refuse to permit the contract to be assigned by SBC — the contract says that agreement will not be unreasonably withheld. What this means is that if for some reason it is ***reasonable*** for Charter

to refuse to permit assignment of the contract by SBC, it may do so. Under Charter's language, SBC would be required to negotiate with Charter in order to resolve whatever problems make it unreasonable for such an assignment to be made. This would be a business-to-business discussion that would likely be able to be handled quickly and efficiently. SBC's alternative, however, would require Charter to spend time and money participating in some regulatory proceeding trying to get its specific issues addressed as part of an overall regulatory review of whatever SBC transaction is making the assignment necessary. It is not at all clear that all of my concerns would be germane to a public proceeding regarding approval of some SBC transaction. But even if I could raise all my concerns in such a case, as a businessman I do not think it is fair to require me to spend time and money on regulatory proceedings to address reasonable business issues on a business-to-business basis. Nothing that SBC says suggests why I should be subject to that cost and risk.

Finally, SBC is being unreasonable with regard to payment of outstanding balances as a condition of assignment. Of course it is reasonable to require that any ***undisputed*** bills must be paid, and Charter's language accomplishes that. Charter's language, in fact, makes it explicit that it is ***only*** undisputed charges that must be paid prior to assignment. SBC's language does not contain this limitation and therefore could be read to allow SBC to refuse to consent to an assignment simply because there is an ongoing billing dispute at the time. Ms. Quate's discussion of this point seems unrelated to the actual language in the agreement discussed with Charter.

Finally, on a related point, Charter proposes to delete language permitting SBC to require additional "assurances of payment" as a condition of assignment. As I discuss in Issue No. 30, SBC's proposed "assurance of payment" language is unreasonable and oppressive. It should be deleted here for those reasons.

IV.N. GTC ISSUE (27)(B): NAME CHANGES

➢ 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?[15]

IV.O. GTC ISSUE (27)(C): NAME CHANGES

➢ What are the appropriate terms and conditions related to the types of changes identified above?[16]

Q. WHAT ARE THE PARTIES' POSITIONS ON THESE ISSUES?

A. Similar to Issue No. 27(A) above, SBC wants to be able to assess a service order charge on Charter for the routine task of updating its records if Charter changes its name or obtains a different industry identification number. Quate Direct at 13-14. Charter believes that this is simply a routine administrative matter for SBC to handle. I do not dispute that it costs SBC something to keep its records and systems updated if and when CLECs change their names or operating numbers. What SBC seems not to realize is that any time two businesses enter into a contract, each party will have a variety of administrative activities it must undertake to fulfill its obligations under the contract. It is not appropriate to permit either party to assess charges on the other for these normal administrative tasks.

[15] The following paragraph(s) in the agreement are covered by this issue: GTC § 4.9.1.1.
[16] *Id*.

IV.P. GTC ISSUE (28): OSS OBLIGATIONS

➢ Should Charter be required to utilize the standard and nondiscriminatory OSS' provide by SBC Missouri, reviewed by the Commission and utilized by the Missouri CLEC Community?[17]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. As far as I can tell, SBC totally misunderstands Charter's point. SBC seems to think that Charter is entitled to some sort of special or unique OSS arrangements from SBC. Christensen Direct at 50-51. This is not what Charter's language says or means. Charter's language is addressing a broader and more important point: in the relationship between SBC and Charter laid out in the contract, each party agrees to pay whatever specified contract rates properly apply, but neither party can be called upon to pay the other for activities that do not have a specific, associated charge. Charter has had problems with SBC seeking to impose charges for activities that are simply not chargeable under our current agreement. For example, at times SBC has failed to program its network to properly route calls from its customers to Charter customers who have left SBC and ported their numbers to Charter. When Charter has complained about SBC's failure to properly comply with its number portability obligations, SBC has responded by sending Charter a bill for investigating the supposed "trouble" and failing to find any trouble on the affected loop. As far as Charter can tell this is some charge that some CLEC that might buy a UNE loop might incur in some circumstances; it has nothing to do with Charter's operations.

What it illustrates, however, is that SBC will look for ways to export to Charter the costs that SBC is properly called upon to bear in performing its obligations

under the contract. The point of Charter's language is to make completely clear that neither party has the right to impose charges on the other for any and all activities undertaken to make the contract work. Instead, many activities are undertaken mutually and with no charge.

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

What SBC seems not to recognize is that in the case of Charter, which has its own independent network and independent customers, there are ***mutual*** benefits from the contract. While SBC might benefit by imposing costs on Charter and thereby making it harder for Charter to operate, the public — SBC's customers and Charter's customers — benefit by the two carriers' interconnection. I can understand, to some degree, why SBC might be inclined to view some CLECs as, essentially, customers of SBC rather than co-carriers. If a CLEC simply resells

[17] The following paragraph(s) in the agreement are covered by this issue: GTC § 4.1.3.

SBC's services, or provides services by means of buying large chunks of SBC's network at regulated rates, SBC could come to view the things that it does to support such activities as properly chargeable to the CLECs in question. But Charter does not depend on SBC to serve its customers. Charter serves its own customers using facilities Charter obtains completely independently from SBC. While SBC might tend to lump all CLECs into a single group, in fact a facilities-based competitor like Charter is different, and I believe is entitled to different consideration that reflects its investment in and commitment to the market and to serving its own customers.

IV.Q. GTC ISSUE (29): SUCCESSOR AGREEMENTS

➢ Should successor language be added to Section 5.6, even though it is stated in Section 5.7?[18]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

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

Basically, SBC's proposed language says that, once renegotiation has begun, the agreement will remain in effect until the earlier of (a) 10 months from the start of renegotiation or (b) the effective date of the new agreement. This means that if for some reason the conclusion of the renegotiation/arbitration is delayed beyond the 10 month period (which could occur for various reasons), the agreement

[18] The following paragraph(s) in the agreement are covered by this issue: GTC § 5.6.

would technically stop being in effect during any such interim period. One can imagine, for example, some unforeseen delay in finalizing contract language after an arbitration ruling that might create a "gap" in contract effectiveness.

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

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

IV.R. GTC ISSUE (30): ASSURANCE OF PAYMENT

➢ Should CLEC be required to give SBC an Assurance of Payment?[19]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. Charter understands that if it (or any other CLEC) fails to pay its bills, that SBC can reasonably require a deposit to ensure that it gets paid. Charter's specific proposal is a deposit sufficient to cover two months' bills. So, at the outset, it is important to understand that Charter does not oppose a deposit requirement in reasonable circumstances. So, Ms. Quate's observations about CLECs that have gone out of business since the height of the telecom boom in 2000 (Quate Direct at 47) are beside the point as far as Charter is concerned.

[19] The following paragraph(s) in the agreement are covered by this issue: GTC § 5.6.

Charter's issue with SBC is not really about deposits. The problem is that SBC's proposed contract gives SBC the right to require elaborate and oppressive "assurances of payment" without any showing that Charter has not paid its bills. SBC's proposed language says that Charter shall provide such assurances "upon request." (SBC proposed GT&C § 7.1) Ms. Quate tries to argue that this right is meaningfully restricted, but it is not: SBC, for example, can demand assurances of payment based on its interpretation of articles it reads in the newspaper. (*See* SBC proposed GT&C § 7.2.2.) When Ms. Quate discusses this section (*see* page 50 of her direct testimony) she claims that this is actually an "objective" standard, but neglects to mention the full scope of the material SBC claims to be able to rely upon.

I believe that this is another situation in which SBC has drafted generic contract terms that might make some sense when applied to CLECs that do not operate their own networks, but that do not make sense when applied to Charter. If a CLEC is (for example) a pure reseller, then all the underlying service is really being provided by SBC. Such a CLEC collects money from its customers and then remits payment to SBC for the service that SBC has provided. If such an entity looks like it is in financial trouble, SBC is at risk of providing service and not getting paid. Charter, however, is in a totally different situation. Charter has its own network and will basically be exchanging traffic with SBC. While SBC provides "services" to Charter in some cases under this arrangement (for example, if Charter delivers an intraLATA toll call to SBC for completion), in every case SBC's own end user customer benefits directly, by (for example) receiving a call

that he or she wants to receive. SBC's relationship with Charter, therefore, is not a situation, in which SBC is at risk of providing significant services for which it does not get paid. Giving SBC a broad-ranging right to demand extra "assurances of payment" from Charter based on newspaper articles, etc. is neither necessary nor fair.

Again, Charter fully recognizes SBC's right to get paid, and Charter's language provides for cash deposits if for some unforeseen reason Charter does not pay its bills on time. It is only the oppressive and discretionary "assurance of payment" language that Charter objects to.

IV.S. GTC ISSUE (32): ESCROW

➢ Is it appropriate to require Party's to escrow disputed amounts?[20]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. Charter does not believe that escrow requirements are appropriate given the nature of the interconnection relationship between Charter and SBC, discussed above. SBC asserts the right to require escrow of disputed amounts, unless certain criteria are met. Quate Direct at 26-29. Ms. Quate basically complains that CLECs in general are bad credit risks and so escrows are reasonable. Again, though, Charter will not be reselling SBC's services or using the piece-parts of SBC's network to serve customers; Charter will simply be exchanging traffic with SBC, mainly on a bill-and-keep basis. While billing disputes can and will arise between SBC and Charter, the nature of this interconnection relationship inherently mitigates the risks that SBC seems concerned about in Ms. Quate's testimony. SBC is simply trying to use a one-size-fits-all approach when the

nature of Charter's business dealings with SBC is really very different from a reseller or a UNE-based CLEC.

I note that Ms. Quate claims that SBC will not require an escrow in the case of a "material billing error." Quate Direct at 28. This sounds fine. The problem is that as far as Charter can tell there is nothing in SBC's actual contract language that addresses this issue. Moreover, reading Ms. Quate's testimony, what she really seems to be saying is that no escrow is required if ***SBC admits up front*** that a bill might be materially wrong. Of course, in the case of a bona fide billing dispute, Charter will be asserting, because it believes, that SBC's bill is materially wrong, but SBC might well have a different view. That said, Ms. Quate's discussion of this point highlights precisely the problem that Charter has with the escrow requirement, particularly given the fact that our relationship with SBC is basically limited to exchanging traffic. SBC should not be able to require us to undertake the time and expense of setting up escrow accounts, and tying up our cash in them, when SBC makes billing errors. Again, whatever may be true with other CLECs, with Charter this will not be a case of SBC trying to protect its right to collect for "services" that it has provided in the normal sense. SBC and Charter exchange traffic for the mutual benefit of both of their customers, and most of that traffic is exchanged on a bill-and-keep basis. Requiring the escrow of disputed funds for the kinds of fees that might be in dispute between Charter and SBC does not make sense.

IV.T. GTC ISSUE (33): CREDITS OR REFUNDS

[20] The following paragraph(s) in the agreement are covered by this issue: GTC § 8.6.

➢ Should CLEC expect to receive monetary credits for resolved disputes (in their favor) if CLEC has outstanding and or other past due balances due to SBC?[21]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. As noted in my direct testimony, Charter believes that if a billing dispute has been resolved in its favor — that is, if it has been determined that SBC owes Charter money — that SBC should be required to actually pay what it owes. SBC's discussion of this issue (Quate Direct at 20-23) actually does not really address Charter's proposal.

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

In other words, the point of Charter's language is to ensure that SBC does not have a contractual right to offset its losses in one billing dispute with Charter against other pending, unresolved disputes.

Nothing in Ms. Quate's discussion of this point even addresses this concern. This leads me to believe that SBC does not understand the purpose or effect of

[21] The following paragraph(s) in the agreement are covered by this issue: GTC §§ 7.1, 7.2.

Charter's proposed language. In any case, Charter's language is reasonable and should be approved.

IV.U. GTC ISSUE (34): BILLING DISPUTES

➢ Which party's language regarding billing disputes should be included in the ICA?[22]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. This issue as well illustrates the difference between Charter's position as an interconnected facilities-based competitor and the position of CLECs who basically buy services or facilities from SBC to serve end users. SBC's generic bill dispute language parallels what SBC might reasonably impose on a customer of SBC's services. If a customer disputes a bill, SBC has to investigate to decide whether the customer is right and let the customer know. This will normally depend on what services the customer is buying, whether SBC has actually provided them, etc. But in Charter's case, again, Charter does not buy "services" from SBC in the normal sense. Charter exchanges traffic with SBC, mainly on a bill-and-keep basis. There will undoubtedly be situations in which Charter and SBC might send each other erroneous bills that need to be sorted out. But it cannot be assumed that SBC's standard forms or standard end-user-like procedures will make any sense when sorting out who is responsible for the cost of a particular run of fiber, or whether particular traffic is properly classified as local or access.

Given this, Charter made a proposal that is flexible enough to deal with the kinds of disputes that might actually arise in its relationship with SBC: a requirement

[22] The following paragraph(s) in the agreement are covered by this issue: GTC § 9.3.1.

that the party objecting to a bill provide a commercially reasonable explanation of the problem, including, ***if reasonable in the circumstances,*** the specific information SBC has identified in its one-size-fits-all contract.

Ms. Quate claims (at page 33 of her Direct Testimony) that somehow Charter's language will excuse Charter from providing enough information to resolve a billing problem. This is obviously wrong. Charter has every incentive to fully explain why an erroneous bill from SBC is, in fact, wrong. But the precise information that is needed will vary from case to case given the nature of Charter's relationship with SBC. This is why Charter's more flexible "commercially reasonable" language is appropriate.

IV.V. GTC ISSUE (36): DISPUTE RESOLUTION

➢ Should SBC's language for Dispute Resolution that has been established for all CLECs be included in the Agreement?[23]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. SBC totally misses the point of Charter's language here. Charter is not an SBC customer, buying services for resale or UNEs to serve end users. Charter has its own network and serves its own customers; it does, however, exchange traffic with SBC. This means that the kinds of disputes that are likely to arise between Charter and SBC will not be garden variety problems like billing for 375 UNE loops when the CLEC-customer really only bought 357 UNE loops, or billing for resale service for 1091 end users when the CLEC-customer really only resold service to 1019 end users. Barring gross billing errors by SBC (such as, for example, sending Charter a bill for UNE loops at all), the disputes between

[23] The following paragraph(s) in the agreement are covered by this issue: GTC § 10.3.1.

Charter and SBC will be more complicated and dependent on contract interpretation. They will require real business-to-business attention.

This has a couple of consequences. First, the information that must be supplied to explain a billing dispute cannot be determined in advance on some form. It is necessary that the contract generally require that the information reasonably necessary to deal with the issue be provided. This is what Charter's language proposes. Second, determining whether a billing error has occurred will never be a unilateral decision by SBC. So, it does not make sense for the contract to provide that SBC gets to declare when and whether a billing dispute is "resolved." To the contrary, given the nature of Charter's relationship with SBC (again – exchange of traffic, largely on a bill-and-keep basis), no dispute can properly be viewed as "resolved" for or against either party unless both parties agree. (Of course, if the parties can't agree, they can bring the matter to the Commission for resolution.)

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

IV.W. GTC ISSUE (38)(A): AUDITS

- Which Party's audit requirements should be included in the Agreement?[24]

IV.X. GTC ISSUE (38)(B): AUDITS

- Which Party's aggregate value should be included in the agreement?[25]

IV.Y. GTC ISSUE (38)(C): AUDITS

- Should either Party's employees be able to perform the audit?[26]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. As noted in my direct, we object to SBC's proposal that its own employees should be permitted to "audit" Charter; and we object to the proposal that the audited party bear some of the costs of the audit if an error of 5% or more is found; we think a more appropriate number, given the nature of Charter's relationship with SBC, is 10%.

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

When a CLEC is using SBC's own facilities to offer services to end users and/or simply reselling SBC's services, I can see that SBC might want to use its own employees to conduct an audit of the CLEC in the case of a dispute. SBC's employees would know exactly what the CLEC was doing and selling, and so might be the best people for the job (although, frankly, I think SBC's claim that qualified outside auditors are not available is overblown). But Charter does not use UNEs and does not resell SBC's services. It has its own operations and its

[24] The following paragraph(s) in the agreement are covered by this issue: GTC § 11.1.
[25] *Id*.

own records. It uses switching and network equipment that is different from the equipment SBC uses. There is no reason to think that SBC's employees would have any particular expertise in conducting any sort of "audit" of Charter, were one to be necessary. Indeed, because Charter is an independent, facilities-based competitor, SBC has much to gain competitively by "training" its employees in how Charter actually conducts its business. Thus, in Charter's case, an "audit" performed by SBC employees would be particularly inappropriate and intrusive.

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

As to the "bogie" 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.

Again, the vast majority of the business done between the companies — the exchange of local traffic — will occur on a bill-and-keep basis. This means that the total amount of money billed by Charter to SBC or vice versa actually reflects a fairly small proportion of the overall business relationship between the parties, which occurs on a mainly "barter" basis. Other than incidental administrative

[26] *Id*.

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, 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. In these circumstances it is quite possible that an error of 10% or even more (one way or another) might exist in terms of amounts billed, even though the activity affected by the error reflects only 5% or 1% or even less of the total activity between the parties under the contract. Because so much of the parties' relationship is conducted on a non-cash basis, the standard of what counts as a de minimis error not warranting shifting the cost of the audit must be adjusted as well.

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

IV.Z. GTC ISSUE (40): INDEMNIFICATION

➢ Is it appropriate to replace a commercially reasonable capped indemnification exposure with non-capped damages?[27]

Q. WHAT ARE THE PARTIES' POSITIONS ON THIS ISSUE?

A. Ms. Quate correctly notes in her direct testimony (at page 64) that the scope of the parties' disagreements is not fully captured in the brief statement of the issue.

First, she notes that Charter's proposed language does not allow for the effect of tariff provisions in limiting liability and the obligation to indemnify. Quate Direct at 65. This is a situation where again, I think SBC's language relates mainly to resellers and UNE-users, not to Charter. That said, upon consideration Charter does not believe this language will affect Charter, and so withdraws its object to that phrase in Section 14.2.

Second, Ms. Quate claims (at page 64) that SBC's language protects SBC against damages to its facilities that arise from "Charter, its agents, subcontractors, and end users." Charter agrees that this is a reasonable concept, but notes that SBC's actual proposed language does not properly effectuate that concept. Under SBC's proposed Section 14.2 language, Charter is on the hook for damages to SBC's facilities "due to malfunction of any facilities, functions, products, services or equipment provided by ***any person or entity than SBC-13STATE***" (emphasis added). 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***

[27] The following paragraph(s) in the agreement are covered by this issue: GTC S§ 14.2 -14.6

CLEC's control other than SBC-13STATE." It makes sense for Charter to be responsible for things that happen as a result of third parties operating at Charter's direction. But SBC's language seems to make Charter responsible for problems arising from ***any*** third party, whether they are related to or under the direction of Charter or not. This seems to me to simply be a drafting error on SBC's part, given what SBC says they mean.

Ms. Quate's objection to Charter's language in Section 14.3 (Quate Direct at 65) is based on a misreading of Charter's language. The lawyers will discuss it in briefs, but, basically, Ms. Quate seems to think that Charter is trying to create a loophole in the limitation of liability clause, when, in fact, Charter is trying to simply ensure that the indemnification provision – which relates to one party protecting the other from claims brought by 3rd parties – does not affect the liability (including limitations on liability) of the two parties directly to each other.

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

IV.AA .GTC ISSUE (41): ADVERTISEMENTS

- Should the Parties be allowed to use the Party's name in advertisements?[28]

Q. WHAT ARE THE PARITES' POSITIONS ON THIS ISSUE?

A. As noted in my direct testimony, Charter wants to be able to use SBC's name in truthful comparative advertising. Ms. Quate's discussion of this issue (at page 79 of her direct) is so cryptic that I still have no idea why SBC thinks this would be

inappropriate. Head-to-head competition between facilities-based competitors can and — if the parties so choose as a business matter — should include head-to-head advertising.

IV.BB. GTC ISSUE (42): CHALLENGES TO CARRIER SELECTION CHANGES

➢ Is it appropriate that only and End User have the ability to initiate a challenge to a change in its LEC?[29]

Q. WHAT IS CHARTER'S POSITION ON THIS ISSUE?

A. As I explained in my direct testimony, 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. For example, suppose that Charter marketed to and won the business of a large number of SBC customers in a large apartment building. Suppose further that SBC, due to some error, went back to the apartment building and re-connected the end users' specific loops to SBC plant, *en masse*. While end users could certainly be expected to object, there is no reason for the contract to contain language that would forbid Charter from directly raising this matter with SBC.

Ms. Quate's discussion of this issue is obscure to the point of being meaningless. Quate Direct at 80.

VII. CONCLUSIONS

Q. WHAT GENERAL OBSERVATIONS DO YOU HAVE ABOUT SBC'S POSITIONS ON THE MATTERS YOU HAVE ADDRESSED?

A. It seems to me that SBC has developed a cookie-cutter contract designed to deal with the kinds of CLECs it has dealt with in the past – resellers and UNE-users.

[28] The following paragraph(s) in the agreement are covered by this issue: GTC § 18.3.

The contract is full of terms that don't really make sense – or the justification for which is much, much weaker – if the interconnecting CLEC does not resell SBC's services and does not use UNEs. Charter does not resell SBC's services, and, as noted above, except in very rare circumstances (some apartment building configurations) will not use SBC UNEs. Charter serves its own customers using its own facilities. It interconnects with SBC for the exchange of traffic, mainly on a bill-and-keep basis.

Common sense says that a CLEC like Charter will need contract provisions that are different from those applicable to resellers and UNE-users, because Charter's business – and its business relationship with SBC – is different. Certainly nothing in the 1996 Act that I am aware of requires Charter to have to do business under a contract that is designed for a different type of CLEC.

Unfortunately, SBC seems unable or unwilling to recognize that Charter ***is*** different and ***does*** need different contract provisions. That blindness on SBC's part, frankly, seems to underlie most of the disagreements we have about the matters I have discussed above. I urge the Commission not to force Charter to operate under contract terms designed for (or to protect SBC from) resellers and UNE-users. Charter believes that the future of telecommunications in Missouri is in facilities-based, intermodal competition like Charter offers. The Commission should support and encourage this kind of competition by requiring SBC to establish a contract with Charter that reflects that competition and the kind of interconnection relationship it entails.

[29] The following paragraph(s) in the agreement are covered by this issue: GTC § 24.1.2.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.