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

CHARTER FIBERLINK-MISSOURI, LLC'S COMMENTS ON FINAL ARBITRATOR'S REPORT

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EXECUTIVE SUMMARY

Charter appreciates the Herculean effort that went into generating a decision on each of the hundreds of issues at play in this case, and does not envy the Commission's task in sorting out what will be dozens if not hundreds of objections from various parties. With that in mind, Charter has carefully considered the rulings of the administrative law judge (ALJ) and brings only three objections to the Commission's attention:

- *Threshold for establishing new physical points of interconnection ("POIs").* The ALJ's discussion of this issue correctly holds that competing local exchange carriers ("CLECs") may establish a single, LATA-wide POI to exchange all traffic with SBC, and that SBC can only require an additional POI if it is technically infeasible to keep using the POI(s) already in place. In what seems to be a scrivener's error, however, the ALJ's chart of specific contract language says that ***SBC's*** language on this point — which arbitrarily requires new POIs at a very low traffic threshold, with no consideration of technical feasibility — is "most consistent" with the ALJ's ruling. Clearly, however, it is ***Charter's*** language — which provides for new POIs at a relatively high, reasonable traffic level, supported by the competent engineering testimony — is most consistent with the ALJ's substantive ruling. The Commission should correct this error and direct the parties to use Charter's language, not SBC's.
- *Location of POI/cost responsibility for delivery of E911 traffic.* Calls to E911 are obviously of critical public importance. E911 traffic needs to be sent over separate trunk groups, properly sized to avoid blocking, and needs to go to a specialized switch in SBC's network known as a "selective router," dedicated to serving public service answering points (PSAPs). But all that notwithstanding, there is nothing magic about E911 calls from either a technical or economic viewpoint. They are, basically, calls from Charter customers (normally residence customers) to SBC customers (the PSAPs, who buy E911 connectivity out of an SBC tariff). For that reason, the point at which calls to E911 should be deemed "handed off" to SBC for purposes of financial responsibility should be the same physical POI that is the demarcation point for all other traffic. The ALJ, however — with no substantive analysis of any kind — said that the POI for E911 traffic is SBC's selective router. This shifts the cost of getting traffic from the physical POI to the selective router from SBC to Charter. The Commission should correct this error and rule that the POI for E911 traffic is the same location as the POI for any other traffic.
- *Definition of "switched access" and "local traffic."* In 1996 the FCC established a regime where traffic exchanged between two LECs was subject to reciprocal compensation if it was "local," and subject to access charges if it was not. In that same 1996 ruling the FCC defined "local" in purely geographic terms, *i.e.*, whether the call begins and ends in the same state-defined local calling area. The ALJ relied

on these clear 1996 rulings to reject Charter's proposed definitions of "switched access" and "local traffic." Unfortunately, the approach of relying on a purely geographically-based concept of "local" traffic to identify the scope of reciprocal compensation was expressly repudiated by the FCC in 2001. At that time the FCC totally re-wrote its reciprocal compensation rules, expunging the term "local" every place it had appeared. The new rules ***require*** reciprocal compensation (not access) for all traffic that (a) is not ISP-bound (not an issue between Charter and SBC) and (b) is not "exchange access." "Exchange access" is a defined statutory term that means using local facilities for originating or terminating "telephone toll service." The definition of that term requires that the affected traffic meet ***not only*** the geographic test of beginning and ending in different local areas, ***but also*** a retail rating test. There ***must be*** a "separate charge" to the customer for traffic, or it is not "telephone toll service." If it is not "telephone toll service," then terminating it is not "exchange access." And if it is not "exchange access," the traffic is included in, not excluded from, reciprocal compensation. With due respect, the ALJ simply misread the law on this issue, and his ruling must be corrected.

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Pursuant to the procedural schedule in this case,[1] Charter raises the objections noted below to the rulings of the ALJ in this matter, and respectfully requests that the Commission modify and/or reverse his rulings as noted herein.

INTRODUCTION

Charter is a facilities-based telephone service provider in the State of Missouri. Utilizing the existing network facilities of its cable company affiliate, Charter is unlike most other CLECs in Missouri. First, Charter's use of the local distribution network of its cable company affiliate means that Charter does not need to lease or purchase unbundled network elements (switching, loops, transport, etc.) from SBC. For this reason Charter is in the position of a true co-carrier, with its own peer network, and does not require of SBC anything more than efficient and fair traffic exchange under reasonable terms and conditions. Second, unlike other CLECs that perceive business customers to be the "low hanging fruit" that should be the focus of their competitive efforts, Charter's customer base is almost entirely residential. Although Charter's

[1] ORDER MODIFYING PROCEDURAL SCHEDULE, Case No. TO-2005-0336 (June 16, 2005).

operations in Missouri are still relatively new, it already has developed a subscriber base of approximately forty-five thousand (45,000) customers. Charter is working to expand its subscriber base by competing with SBC on the basis of price, features and service.

1. Standard for Establishing Additional POIs.

The underlying issue here is the establishment of physical points of interconnection, or POIs, where Charter and SBC will physically link up their networks in order to exchange traffic.[2] The ALJ's textual discussion of this issue correctly holds that competing local exchange carriers ("CLECs") may establish a single, LATA-wide POI to exchange all traffic with SBC.[3] The ALJ also noted, properly enough, that under 47 U.S.C. § 251(c)(2), interconnection must be "technically feasible."[4] It necessarily follows that if SBC can show that it is technically infeasible to keep using the POI(s) already in place, SBC may reasonably require an additional POI to overcome the (here, assumed) technical infeasibility of the single POI.

The problem arose in translating these correct legal conclusions into contractual language. Having reached these conclusions, the issue was to identify which of the parties' proposed language more closely matched the ALJ's reasoning. SBC's language proposed a totally arbitrary standard for establishing new POIs: any time traffic to a particular tandem or switch reaches the level of 24 DS1s, a new physical POI must be

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[2] The parties' competing contract language on this point is set out in the Charter-SBC NIM DPL, Issue No. 1(c) at pp. 2-3.

[3] *See* Final Arbitrator's Report at § V (Interconnection) at pp. 6 & 8, Case No. TO-2005-0336 (rel. June 21, 2005) (hereinafter *Final Arbitrator's Report*). *See also* In the Matter of Developing a Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking,* FCC 01-132 (released April 21, 2001) at ¶ 112 (footnote omitted) (an ILEC "must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA.")

[4] *See Final Arbitrator's Report* at § V (Interconnection) at p. 3.

established.[5] SBC flat-out admitted that this proposal was not supported by ***any*** technical or engineering analysis.[6] By contrast, although Charter's proposed traffic threshold for establishing new POIs (an OC-12 level of traffic between the networks at a given location) was a compromise, unlike SBC's it was at least based on a consideration of the engineering and economic factors affecting the establishment of new POIs.

Indeed, because Charter has the right to have a single POI per LATA, Charter may partially waive that right by agreeing to set up more POIs if traffic reaches a level that Charter finds reasonable — as Charter has done. On the other hand, because it is ***Charter's*** right to insist on a single, LATA-wide POI, it is ***not*** legally permissible to ***force*** Charter to establish additional POIs when Charter is ***not*** willing to do so.[7]

Given this, the only logical conclusion based on the ALJ's substantive rulings is that ***Charter's*** proposed contract language — the least restrictive of the two — is more consistent with those rulings than SBC's language is. Unfortunately, however, the ALJ's

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[5] *See* Charter-SBC NIM DPL, Issue No. 1(c) at p. 3.

[6] SBC's witness Mr. Hamiter forthrightly agreed that "I have no engineering analysis behind" SBC's 24-DS1 proposal. Transcript ("Tr.") at 421. Instead, SBC's figure was, apparently, a compromise between SBC and MCI in Texas. *See* Tr. 668 (Mr. Gryzmala questioning Mr. Cornelius). The evidence plainly established, however, that a number of technical factors must be considered in deciding when a new POI might reasonably be established. Tr. 689 (Cornelius).

[7] Due to Charter's status as a facilities-based co-carrier with SBC, Charter has no conceivable incentive to fail to establish additional POIs if it is not technically feasible to continue with a single POI. Charter's customers need to make calls to, and to receive calls from, SBC's customers. If that purpose cannot be achieved with a single POI, Charter will want to establish additional POIs as needed. For this reason, Charter does not object to including language in the contract that preserves SBC's right to insist on additional POIs if SBC can show that it is technically infeasible to interconnect without establishing them. That said, the parties' current OC-48 meet point interconnection can accommodate a great deal of traffic already (48 DS3s' worth), well above the OC-12 level at which Charter has agreed to establish a new POI. (Cornelius Direct at 13-16). So, it is ***not*** technically infeasible to wait until traffic hits that OC-12 level before establishing a new POI. Under FCC's rules, the fact that the current interconnection works at an OC-48 level is substantial evidence that this form of interconnection agreement is technically feasible and appropriate. *See* 47 C.F.R. § 51.305(c), (d).

detailed chart of which language would prevail stated that it is ***SBC's*** language that is more consistent with the ALJ's substantive rulings.

As far as Charter can discern, this seems like a classic "scrivener's error." It simply makes no sense to say that Charter is entitled to a single, LATA-wide POI unless SBC can show that it is technically infeasible to interconnect without additional POIs, and then to say that SBC's language, which unequivocally ***requires*** the establishment of new POIs at a comparatively low traffic threshold, is more "consistent" with the substantive ruling. This is all the more clear given that, as noted above, SBC's witness flatly admitted that "I have no engineering analysis behind" SBC's proposed traffic threshold for establishing new POIs. Tr. 421 (Hamiter).

For these reasons, Charter respectfully requests that the Commission correct this error — whatever its genesis — and direct SBC and Charter to use ***Charter's*** language with respect to when new POIs must be established.[8]

2. <u>The POI for E911 Traffic Should Be The Normal POI for All Traffic.</u>

As noted in the "Introduction" above, SBC and Charter are connected today in the St. Louis LATA by means of an optical fiber meet point operating at the OC-48 level. And, as noted under Section 1 above, the ALJ correctly ruled that Charter is entitled to a single POI in each LATA, barring some hypothetical technical feasibility concerns that have yet to arise. Unfortunately, despite these clear and correct rulings, the ALJ

[8] As noted above, Charter believes this is a scrivener's error rather than a substantive conclusion that SBC's language is actually more consistent with the ALJ's ruling. In legalistic terms, requiring use of SBC's language in light of the governing law that the ALJ correctly cited is illogical, internally inconsistent, and, therefore, arbitrary and capricious. Since terms and conditions imposed in arbitration have to be consistent with governing federal law, *see* 47 U.S.C. § 252(e), it would violate federal law to leave this aspect of the ALJ's ruling unchanged.

established a requirement regarding a separate POI for E911 traffic that is unsupported by the record and that makes neither technical, economic, or legal sense.

SBC had proposed that use of the existing, highly efficient optical interconnection facility be arbitrarily restricted, by stating that it could ***only*** be used for certain limited types of traffic.[9] The ALJ, however, concluded that SBC may not impose such restrictions, and rejected SBC's proposed language.[10] This made perfect sense for many reasons, including that SBC's network architecture witness testified repeatedly that there was no technical reason to exclude this traffic from the fiber meet point arrangement.[11] As a result, Charter is permitted to send its customers' outbound E911 traffic to SBC over

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[9] *See* Charter-SBC NIM DPL, Issue No. 4(a) at p. 6.

[10] *See Final Arbitrator's Report*, Attachment V, Part 1, Detailed Language Decision Matrix on Interconnection at pp. 13-14 (Charter NIM Issue No. 4).

[11] As Mr. Hamiter testified, "you know, technically speaking, pure and simple, there's no problem, because the [fiber optic] facility is a facility." Tr. at 428. *See also id.* at 439 ("as I mentioned before, a facility is a facility"); Tr. 466-67 (Hamiter) (no technical issues in running 911 traffic over the fiber meet point facility on separate trunks and then to the 911 switch; 911 switch is part of SBC's network). *See also* Cornelius Direct at 25-26; Cornelius Rebuttal at 8-10. An exchange between Mr. Hamiter and the ALJ (transcript pages 464-65) makes this clear:

> Q. … So theoretically speaking, if the pipe, the connection is big enough, this OC-48, can you run all this traffic through that one pipe?
>
> A. It is technically -- as I mentioned in my cross a moment ago, there's no distinction. A facility is a facility.
>
> Q. Right. So you could put it all onto one pipe?
>
> A. Yes, sir.
>
> …
>
> Q. … Because you're going to have to program your switches and what have you to handle the different types of traffic to distinguish between them and route them appropriately –
>
> A. Yes, sir.
>
> Q. -- at your end of the pipe, right?
>
> A. Yes, sir. We need the separate trunk groups for those.
>
> Q. I understand that. And that's what makes that possible, right?
>
> A. Yes, sir.
>
> Q. Okay. But it can still all go over the same facility, assuming it's big enough?
>
> A. Yes, sir.

the same fiber optic facility that carries all other Charter-originated traffic bound for SBC customers (as it does today).

For reasons that are completely obscure, however, the ALJ ruled that the POI for E911 traffic will ***not*** be the fiber meet point that defines the POI for all other traffic. Instead, for E911 traffic, he ruled that the POI will be deemed to be the specific switch within SBC's network that handles E911 traffic (called the "selective router").

This ruling will not mean very much in terms of the physical routing of E911 traffic. Charter and SBC will work together to establish a separate trunk group (that is, a communications path between Charter's switch and SBC's switch) from Charter's network, over the OC-48 meet point facility, to the E911 switch. This separate trunk group will be dedicated to carrying E911 traffic, and will be established with enough capacity to ensure that all calls go through. (This, of course, is what Charter and SBC do with any other traffic between Charter's network and any other SBC switch that receives a large enough volume of calls from Charter customers to justify a separate trunk group.)

But in economic terms, requiring a separate POI for E911 calls at the SBC E911 switch means that Charter has to pay SBC for the service of carrying the traffic from the physical hand-off point (the OC-48 fiber optic facility) to the E911 switch. There is no logical reason — certainly no reason on this record — to impose these costs on Charter.

To the contrary, calls to PSAPs established by dialing "911" are, in network terms, no different from any other call from a Charter customer to an SBC customer. Just as SBC is responsible for the costs of handling traffic on its side of the POI for "normal" calls, SBC should be responsible for the costs of handling E911 traffic on its side of the

POI.[12] In this regard, Charter submitted an exhibit (Exhibit 204, SBC's 911 tariff for Missouri) that shows plainly that PSAPs are SBC's customers, and SBC's witness, Mr. Hamiter, agreed. *See* Tr. at 428-29. He also agreed that the E911 switch (the selective router) is part of SBC's network. Tr. at 467-68. So, a call from a Charter customer to a PSAP, by means of SBC's dedicated E911 switch, is not fundamentally any different from a call from a Charter customer to any other SBC customer, by means of any other SBC switch. While 911 calls are dialed in a special manner, in network terms they are just telephone calls to a particular government agency. *See* Cornelius Rebuttal at 9.[13]

There is, therefore, no rational basis to decide that for this specific class of calls, the normal POI isn't the POI, and, instead, the particular SBC switch serving the customer being called (the PSAP) is the POI instead. Yet that is what the ALJ did.[14]

The ALJ may have been misled by SBC. On cross-examination, SBC's witness on this topic gamely asserted that the ALJ had no power to decide that the POI for E911 traffic would be the normal POI at the fiber meet point, because somehow in the uncontested language of the E911 Appendix, Charter had already ***agreed*** that the selective router would be the POI. Tr. 853-54. Now, obviously Ms. Chapman had a lot

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[12] Because Charter and SBC have agreed to a bill-and-keep arrangement for local traffic they exchange, there would be no charge for calls that Charter's customers make to PSAPs served by SBC. That said, the total volume of such calls is almost certainly *de minimis* when compared to the overall level of traffic exchanged between the carriers.

[13] SBC's position was that Charter should pay for the physical facilities that carry this traffic from the physical POI to the selective router because, somehow, this traffic benefits only Charter subscribers, not SBC subscribers. (Hamiter Direct at 66-74, Hamiter Rebuttal Testimony at 35-26). But, as noted in the text, this is simply wrong: the PSAPs who subscribe to SBC's E911 service are plainly SBC customers. Their job entails receiving calls from the public, and they, therefore, benefit by receiving these calls, just like a pizza parlor served by SBC benefits from getting calls for pizza orders, or any other government agency serving the public that takes telephone service from SBC benefits from getting the calls it is supposed to get.

[14] *See Final Arbitrator's Report* at § V (Interconnection) at p. 14.

of different contracts with many different CLECs to try to keep straight in her mind, but in the case of Charter's contract with SBC, her statement is simply not true. Section 4.1.1 of the Charter-SBC Appendix E911 makes specific reference to establishment of connections ***from*** each POI ***to*** the selective router. This language only makes sense on the understanding that the POI and the selective router are in two different places. For Ms. Chapman's erroneous recollection to be correct, the language would have said simply that Charter would establish a POI for E911 traffic "***at***" the selective router.[15]

For all these reasons, Charter requests that the Commission reverse the ALJ on this point and rule that the POI for traffic between Charter's customers and PSAPs served by SBC — that is, E911 traffic — is the same as the POI for all the rest of the traffic the parties will exchange: the fiber meet point facility linking their two networks.

3. The Definitions of "Switched Access" and "Local Traffic" Should Comply with Governing Federal Law.

This issue has to do with when access charges apply to traffic sent from Charter to SBC, or vice versa, and when reciprocal compensation applies.[16] Charter's position is that the parties' agreement governing when access charges apply should track, and be consistent with, the FCC's current, specific rule on this specific issue. SBC's position — accepted in full by the ALJ — is that the contract should be governed by an old FCC rule,

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[15] Charter can speculate that the ALJ may have thought that there was some technical or operational reason, relating to the integrity of the E911 system, that required moving the POI for E911 traffic from the normal fiber meet point between the parties' networks to the E911 switch within SBC's network. All Charter can say in response is that there is not a shred of evidence in the record that would support such a conclusion.

[16] In terms of the parties' agreement, this dispute affects General Terms & Conditions Issue No. 14 (definition of "local traffic"), Intercarrier Compensation Issue No. 1 (definition of "switched access"), and ITR Issue No. 8 (definition of "switched access"). The parties have agreed that they will exchange traffic that would normally be subject to reciprocal compensation on a bill-and-keep basis. So, traffic they exchange will either be exchanged for free (in terms of monetary payments), or will be subject to access charges.

originally established in 1996, but specifically and unequivocally repudiated by the FCC in 2001.

The dispute boils down to this: under the old rule, traffic exchanged between two LECs was either "local" (subject to reciprocal compensation), or "access" (subject to access charges) based on a single test: whether the call begins and ends in the same local calling area.[17] But under the new rule, the concept of "local" traffic has been eradicated. What matters is whether the traffic counts as "exchange access" or not. Whether traffic is "exchange access" depends on two things: a geographic test, just like before, but also a ***pricing*** test: the underlying call ***has to be*** subject to a "separate charge" to the end user. If there is no "separate charge" for the underlying traffic, then the LEC terminating the traffic ***is not*** providing "exchange access," and if the terminating LEC is not providing "exchange access," the traffic ***is not*** excluded from reciprocal compensation.

This conclusion is so totally clear from the language of the FCC's order and new rule, and the terms of the Communications Act, that it is not surprising that the ALJ made no effort to parse out what the rule actually says and explain why he was justified in ignoring it — there is, simply, no way to square his ruling with the law. Instead, at SBC's behest, he pretended that the new rule was not there, and relied on 1996-era FCC rulings, made in conjunction with the now-superseded 1996-era rule, to establish a contract to apply from 2005 through 2008.[18] This is plain and simple legal error.

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[17] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") at ¶ 1035; *see id.* at Appendix B (1996-era rules), 1996-era version of 47 C.F.R. § 51.701 (defining "local" traffic subject to reciprocal compensation, as opposed to access charges).

[18] *See Final Arbitrator's Report* at § VI (Intercarrier Compensation) at pp. 15-21.

Just so the record will be clear, Charter presents below the step-by-step parsing of the governing FCC rule and associated provisions of the Communications Act. The point of this step-by-step analysis is to show that there is nothing unclear, ambiguous, or open to interpretation about the governing law. The problem here is not that the law is not clear; the problem is that the law clearly requires something that SBC does not want.

1. The FCC's Reciprocal Compensation Rule. As of today, and for the last four years, the FCC's rule defining the scope of "telecommunications" subject to reciprocal compensation reads as follows:

> (b) *Telecommunications traffic.* For purposes of this subpart, telecommunications traffic means: (1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (*see* FCC 01–131, paragraphs 34, 36, 39, 42–43);

47 C.F.R. § 51.701(b)(1). This rule plainly says that all "telecommunications" is subject to reciprocal compensation, except for (1) traffic exchanged with a wireless carrier (which is subject to a special rule and is not involved here);[19] (2) traffic that is "information access, or exchange services for such access" (which is basically ISP-bound traffic, not a matter in dispute between Charter and SBC); and (3) traffic that is "exchange access." Since this dispute does not involve either wireless traffic or ISP-bound traffic, the only thing that matters, as between SBC and Charter, is whether traffic counts as "exchange access." If it is, then the traffic is excluded from reciprocal compensation and subject to access charges; if it is not, then the traffic is included within reciprocal compensation and (as between Charter and SBC) subject to bill-and-keep.

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[19] Wireless traffic is dealt with in Rule 51.701(b)(2).

2. The meaning of "exchange access." FCC Rule 51.701(b)(2)'s reference to "exchange access" points to a specific, defined term in the Communications Act. "Exchange access" is defined in 47 U.S.C. § 153(16) (emphasis added) as follows:

> (16) EXCHANGE ACCESS.--The term "exchange access" means the offering of access to telephone exchange services or facilities ***for the purpose of the origination or termination of telephone toll services.***

So, the only way that traffic sent between Charter and SBC will be "exchange access" is if the exchange is "for the purpose of the originating or termination of telephone toll services." Since we are dealing with terminating traffic, the question becomes simply whether the call being terminated is, or is not, a "telephone toll service" call."

3. The meaning of "telephone toll service." The reference in the statutory definition of "exchange access" points to another specific, defined term: "telephone toll service." "Telephone toll service" is defined in 47 U.S.C. § 153(48) (emphasis added) as follows:

> (48) TELEPHONE TOLL SERVICE.--The term "telephone toll service" means telephone service between stations in different exchange areas ***for which there is made a separate charge not included in contracts with subscribers for exchange service.***

The highlighted language shows, as noted above, that the definition of "telephone toll service" includes ***both*** the traditional geographic test ("telephone service between stations in different exchange areas") ***and*** a pricing test ("for which there is made a separate charge…"). The existence of a separate charge is literally part of the definition of "telephone toll service." If there is no separate charge, then the traffic simply is not, and under the law cannot be, "telephone toll service." And if the traffic is not "telephone toll service," then the function of terminating it is not, and under the law cannot be, "exchange access." And if the traffic is not "exchange access," then the traffic simply is

not, and under the FCC's rule cannot be, excluded from the "telecommunications" traffic which is subject to reciprocal compensation, rather than access charges.

What this means is that, as a matter of law, Charter is right in its position regarding what counts as "switched access" traffic, on the one hand, and "local traffic," on the other, in sorting out when Charter and SBC have to pay each other access charges. Correspondingly, SBC and the ALJ are wrong about this.[20] Specifically, the retail local calling area of the carrier originating a call will determine whether a toll charges applies, and ***that*** will determine whether the traffic falls under the definition of "exchange access" (as defined in 47 U.S.C. § 153(48)) or, instead, under the rubric of "transport and termination," to which reciprocal compensation applies under 47 U.S.C. § 251(b)(5).

As noted above, neither SBC nor the ALJ have made any effort to explain why the plain language of the FCC's rule, and the plain language of the statutory language that rule references, does not control. So, at SBC's behest, the ALJ established a definition of "local traffic" and a corresponding definition of "switched access" traffic that relies only and entirely on the old, 1996-era geographic notion of "local" traffic — traffic that stays inside a state-determined local calling area. But this is ***precisely*** the analysis that the FCC rejected in 2001, calling it a "mistake" and a source of "ambiguities."[21]

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[20] Aside from being right as a matter of law, Charter's proposal also makes complete economic sense. When an originating carrier charges its customer a toll to make a call bound for the other carrier, that carrier will have a source of funds (the toll charge) with which to pay the higher access charge to the terminating carrier. When there is no separate toll charge, no access charge would apply. Barber Direct at 5-10; Barber Rebuttal at 2-4. *See* Tr. 643-44 (Barber).

[21] It is significant that the FCC cites, as part of its authority for the new rule, paragraph 34 of "FCC 01-131," which is the *ISP Remand Order*. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic, *Order on Remand and Report and Order,* 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"). Paragraph 34 (emphasis added) contains the following observation about "local" traffic:
(note continued)…

There are two "red herring" objections to doing what the law says has to be done and following the FCC's rule here. First is the claim that adopting Charter's proposal — that is, following the law — will somehow implicate payments due by Charter or SBC to third party carriers with whom Charter might interconnect via an SBC transiting arrangement. Clearly, however, the contract at issue here binds only Charter and SBC; it has no effect on the rights of third party carriers to compensation, whatever those rights might be. Any issues regarding appropriate compensation between Charter (or SBC) and third party carriers can, and should, be sorted out in some other proceeding.

Second is the claim that there will be insurmountable billing problems caused by following what the law requires. As Charter's witness Mr. Barber explained, however, today billing (in this case, sorting out which traffic is subject to bill-and-keep and which is not) is based on comparing the originating NXX code for each call with a list of which terminating NXX codes are properly deemed toll calls from that originating code. This same process will occur under Charter's language; it's just that the lists of NXX codes will be different. *See* Barber Rebuttal Testimony at 3-4. This is not an insurmountable

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…(note continued)

> This analysis differs from our analysis in the *Local Competition Order*, in which we attempted to describe the universe of traffic that falls within subsection (b)(5) as all "local" traffic. ***We also refrain from generically describing traffic as "local" traffic because the term "local," not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g).***

In paragraph 45 of this same order, the FCC states that it was "mistaken" to have relied on the notion of "local" calls; in paragraph 46 the FCC notes that the use of the term "local" created "ambiguities," and that it was, in this order, "correct[ing]" its earlier "mistake." It is flatly inconceivable, in light of this clear repudiation of the traditional notion of "local" calling, that the FCC intended there to be no change in the rule for determining whether traffic is subject to reciprocal compensation or not. Yet that is exactly what SBC got the ALJ to believe — notwithstanding the new rule, all that supposedly matters today is the old rule's geographic test of "locality."

administrative problem. It is simply a matter of keeping some lists in billing computers straight. [22]

For these reasons, the Commission should reverse the ALJ and direct the parties to use Charter's definitions of "switched access" and "local traffic" in their contract.

CONCLUSION

For the foregoing reasons, the Commission should modify and/or reverse the ALJ's ruling with respect to the issues noted above.

Respectfully submitted,
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[22] Moreover, nothing in Charter's proposal would affect the Commission's authority with respect to the establishment of local calling zones. Charter's proposal, however, would keep the inter-carrier economics of establishing a broader local calling zone, with Commission approval, in line with the retail economics of treating calls to a particular exchange as local rather than toll.