

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
Request of Limited Modification of)
LATA Boundaries to Provide ELCS)
Between the Jackson Exchange)
and the Tyler Exchange)

WC Docket 04-77

COMMENTS OF FITCH AFFORDABLE TELECOM

F. CARY FITCH d/b/a FITCH AFFORDABLE TELECOM (“Affordable Telecom”)

submits these Comments on the Request by SBC Texas for a “Limited” Modification of LATA Boundaries to Provide ELCS Between the Jackson Exchange and the Tyler Exchange.

Affordable Telecom is a sole proprietorship operated by F. Cary Fitch.¹ Affordable Telecom has a series of Radio Station Authorizations (“RSAs”) issued by the FCC to use wireless spectrum on a common carrier basis in order to provide Commercial Mobile Radio Service in several parts of Texas.

Introduction

Affordable Telecom believes that local calling scopes are too small, especially in more rural areas and individuals in rural areas are often required to incur toll charges to reach medical personnel, schools, law enforcement, government, merchants and family and friends that are as proximate as – if not closer than – the same kinds of called parties in urban areas. Affordable Telecom believes that rate center consolidation and expanded calling scopes (like those resulting from mandatory EAS or ELCS) are a good thing. Usually. But, sadly, not here. The Request must be rejected, due to present Texas Public Utility Commission Policy.

¹ Mr. Fitch has nearly 50 years (since mid 1950s) of respectful involvement with the FCC, on his personal behalf and on behalf of various mass media licensees. Fitch particularly respects the candor that the FCC expects from those it oversees, which candor is notably absent in some sectors of the current matter. SBC should have disclosed that the Texas Commission has recently made certain decisions (discussed below) that render Texas ELCS to not be “traditional local service.” *Cf.*, SBC Request, p. 2,

1. Texas ELCS is not “traditional local service” in terms of the rules for interconnection and traffic exchange between ILECs and competitive carriers.

The Commission cannot grant the request to modify the LATA boundary because ELCS is not “traditional local service” in Texas. Instead, it is a special calling plan that is limited to ILECs. CMRS carriers and many CLECs are no longer allowed to receive “local” ELCS calls from ILEC customers even if the competitive carrier has NXXs that are associated with “exchanges” or “rate centers” that are included in a Texas ELCS area. The Commission has a case before it that addresses this issue.² Under the test applied by the Commission for modification of LATA boundaries,³ the FCC can no longer approve LATA modifications in Texas for the purpose of facilitating ELCS.

With “traditional” local service, a competitive carrier (either a CLEC or a CMRS carrier) is entitled to establish a single point of interconnection in a LATA and use a single switch that serves NXXs associated with many different local calling areas. With traditional local service, calls originated by ILEC customers addressed to an NXX associated with a rate center⁴ that is within in the “traditional” mandatory local calling area are still retail rated as “local” regardless of the location of the carrier’s switch, point of interconnection or even the called party’s actual physical location. In other words, the ILEC customer is not charged a toll when that customer

² See CC Docket 04-6, *Petition of ASAP Paging for Preemption of the Public Utility Commission of Texas Concerning Retail Rating of Calls to CMRS Customers*.

³ See, Memorandum Opinion and Order, *In the Matter of Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, CC Docket No. 96-159, File Nos. NSD-LM-97-2 through NSD-LM-97-25, FCC 97-244 (Rel. Jul. 1997) (“*ELCS LATA Modifications*”). This decision has been used as the foundation for all subsequent requests for LATA modifications to support expanded local calling areas. SBC cites the decision in its Request.

⁴ “A ‘rate center’ is a geographic area established by state regulators that is used to determine whether a given call is a local call or a toll call.” Opposition of the Federal Communications Commission to Emergency Motion for Stay, *USTA v. FCC*, No. 03-1414 Before D.C. Circuit Court of Appeals, filed Nov. 26, 2003, p. 3. See CO Code Guidelines, p. 5. The Commission has noted that the calling and called NXXs are the determinant for **retail rating** of calls on several occasions. See, e.g., Memorandum Opinion and Order in *Starpower Communications v. Verizon South, Inc.*, File No. EB-00-MD-19, FCC 03-278 ¶ 17 (Nov. 7, 2003) (“*Starpower Liability Order*”).

calls a competitive carrier's customer based only on the fact that the two NXXs are "local" to each other. The industry uses the rate center designations of the calling and called NXXs to determine whether a call is retail rated as "traditional local" rather than "toll." The present rule is that a competitive carrier can "participate" in traditional local calling even if the competitive carrier's customer is not physically present within the local calling area at the time of the call and even if the competitive carrier does not have a switch or point of interconnection in the local calling area. Texas ELCS ends the industry practices and violates the present rules and practices concerning interconnection and traffic exchange between ILECs and competitive carriers.

The Texas Commission has ruled that ELCS is different than "traditional local service" and has labeled it a "special arrangement".⁵ Non ILECs are not allowed to "participate"⁶ in ELCS unless they can demonstrate on a call by call basis that when an ILEC customer calls a competitive carrier's customer the called customer is physically located in the "ELCS area" at the time of the call.⁷ That is not a realistic requirement in a substantial, and even the great majority, of CMRS calls. CMRS carriers do not know the actual physical location of their customers with relation to a rate center or local calling area boundary when CMRS customers receive calls from ILEC customers. The industry uses NXX as a surrogate for customer location.

In order to "participate" in ELCS, Texas CLECs must first reach special agreement (in addition to the usual "wholesale" items included in standard § 252 interconnection agreements)

⁵ See CC Docket 04-6, *Petition of ASAP Paging for Preemption of the Public Utility Commission of Texas Concerning Retail Rating of Calls to CMRS Customers*, Exhibit 1 (TPUC Order in Docket 25673), p. 6 of ASAP Petition. "ELCS is a special arrangement that expands an ILEC's toll-free calling area to adjacent exchanges in geographic proximity or that have a community of interest."

⁶ By "participate" the TPUC means a carrier can arrange to receive calls from an ILEC's customers without the ILEC customer being charged toll charges.

⁷ See ASAP Petition Exhibit 1 (TPUC Order in TPUC Docket 25673), p. 6: "The ALJ found that, in order to be eligible for ELCS treatment, calls must have a "geographic correlation" to the ELCS area, and that the calls in question do not have a geographic correlation to the ELCS exchange. The Commission concurs with these findings, and concludes that ELCS was clearly meant to provide toll-free calling to exchanges with geographic proximity or with a community of interest."

with the ILECs involved to arrange for retail non-toll treatment of calls between the carriers.⁸

There is no such rule for CMRS carriers so there is no mechanism for them to arrange for “participation” in ELCS and they are even worse off. Hence, in Texas ELCS discriminates against CLECs and CMRS carriers. An ILEC can refuse to honor the rate center assignment of a CMRS carrier for retail purposes and can impose toll on an ILEC customer that calls a CMRS customer using a number that is associated with an ELCS rate center. For example, if the LATA modification is granted in this case, and Sprint PCS has a number associated with the Tyler rate center⁹ then after ELCS between Jackson and Tyler is established, Verizon will be able to continue imposing toll on its Jackson users that call Sprint PCS customers using the Tyler NXX, even though a call from Verizon’s Jackson customers to SBC’s Tyler customers (including SBC FX customers that have Tyler numbers but are not physically located in Tyler) will be retail rated as “local.”

With “traditional” local service, there is no requirement that a competitive carrier have a landline “physical presence” (*i.e.*, a point of interconnection or a switch) in either exchange in order to have calls between the two carriers be retail rated as local given the “single point of interconnection in a LATA rule. With traditional local service, the called party need not necessarily be physically located within the local calling area.¹⁰ According to SBC, there is a requirement to have a landline physical presence in order to “participate” in ELCS.

⁸ See TPUC Substantive Rule 26.272(d)(4)(A)(ii), 16 TAC 26.272(d)(4)(A)(ii).

⁹ Sprint does have such a number. 903-372 is a Sprint Spectrum number associated with the Tyler, Texas rate center.

¹⁰ Foreign Exchange Service is but one example of several where a called party may not be physically located within the local calling area. Another obvious example is, of course, CMRS mobile service. The CMRS customer can be anywhere, but that does not and should not determine the retail rating of calls from an ILEC customer to a CMRS customer. The determinant is the NXXs. “[T]he services provided by ILECs and CMRS carriers have an essential difference: the wireline phone is tied to a single physical location, whereas the wireless phone can travel at will.” Opposition of the Federal Communications Commission to Emergency Motion for Stay, *USTA v. FCC*, No. 03-1414 Before D.C. Circuit Court of Appeals, filed Nov. 26, 2003, p. 15.

Affordable Telecom attempted to intervene in a recent Texas ELCS case in order to secure retail local rating. *See* Exhibit 1 (Affordable Telecom’s pleadings in TPUC Docket 27802, *Petition for Expanded Local Calling Service from the City of Carrizo Springs to the Exchanges of Batesville, Eagle Pass, La Pryor and Uvalde*). SBC opposed intervention on the ground that Affordable Telecom did not have a landline physical presence in the ELCS area, and therefore had no right to be a party in the case (and presumably no right to retail rating). *See* Exhibit 2. SBC later asserted that there must ALSO be a “correlation between” the geographic location of the customer and the NPA-NXX.” *See*, Exhibit 3. In other words, according to SBC the TPUC’s rule requires the competitive carrier to have a POI or switch in the ELCS area AND both the calling and called party must be demonstrably physically located within the ELCS area at the time of the call. Foreign Exchange and mobile wireless service are therefore not “eligible” for ELCS “treatment” according to SBC. (Yet there is no indication that SBC or any other ILEC decline requests for FX service in exchanges where ELCS is available.) The TPUC staff also opposed intervention, asserting that ELCS is reserved to ILECs. *See* Exhibit 4. The Texas Commission denied Affordable Telecom’s request to intervene in the case. *See* Exhibit 5 (Administrative Law Judge Order and TPUC Order on Appeal).

2. Texas ELCS is anticompetitive and discriminatory and violates §§ 201(a), 202(a), 251(a) and 251(b)(3) of the Act.

SBC cannot in good faith claim that Texas ELCS is “traditional local service” because it simply is not and SBC knows this. TPUC specifically ordered SBC to file the instant ELCS/LATA modification petition, and SBC did so, despite the fact that TPUC has adopted a new interpretation of Texas ELCS calling that is contrary to the longstanding ELCS practice in Texas, and is discriminatory to both CLECs and CMRS carriers.

Under the Texas ELCS rule as presently defined by TPUC, ELCS is a special service, provided between ILECs only. The result discriminates against CLECs by preventing them from

offering the equivalent of FX service offered by ILECs. It discriminates against any CMRS carrier who does not directly interconnect (establish a POI) within the ELCS area AND show that at the time of the call the calling and called parties are physically located in the ILEC rate center where the NXX is assigned.

This makes the ILECs specially favored “preferred” carriers, and subjects both CLECs and CMRS carriers to significantly less favored status. It results in undue or unreasonable preferences, grants undue advantages, and subjects competitive carriers to undue or unreasonable prejudice or disadvantage in violation of §§ 201(b) and 202(a). It violates §§ 201(a) and 251(a) since it eliminates the FCC’s “single Point of Interconnection” and Type 2A interconnection rules as it pertains to ELCS. It is grossly contrary to FCC policy and rules concerning operation of CMRS carriers.

Section 251(b)(3) of the Communications Act requires every telecommunications carrier to provide dialing parity to competing providers of telephone exchange service and telephone toll service. ILECs that require users to dial “1+” and pay a toll if they wish to call a competitive carrier’s NXX that is associated with a rate center in the ELCS area would violate dialing parity. ILEC customers that wish to call one of the ILEC’s FX customers will not be forced to dial additional digits, whereas the ILEC customers that call the competitive carrier’s customer will be forced to dial additional digits.

TPUC’s policy is not only relative to future ELCS/LATA modifications. It logically applies to ELCS based LATA modifications made in the past. The representation that those were “traditional local service” is no longer correct, if this policy stands. Therefore, either TPUC must reverse its decision, or those past ELCS/LATA boundary changes must be revoked, since the “special service” is unlawful and discriminatory to CLEC and CMRS carriers.

TPUC and SBC can not be allowed to represent that ELCS is “traditional local service” to the FCC, while calling it a “special service provided by ILECs” and the benefits and calling

scopes are in fact unavailable to CLECs and CMRS NXXs on the state regulatory scene in Texas. SBC's representation that Texas ELCS is "traditional local service" is simply untrue, and SBC know it. SBC's lack of candor is shameful.¹¹

3. Texas ELCS usurps the FCC's numbering authority and violates the FCC's numbering rules.

Under the Act, the FCC has exclusive jurisdiction over the North American Numbering Plan and has promulgated rules to implement the statute.¹² The Commission's rules require an applicant seeking numbering resources to show that it is "authorized to provide service in the area for which the numbering resources are being requested" and "is or will be capable of providing service within sixty (60) days of the numbering resources activation date."¹³ For purposes of the rule, the "area" in issue is the rate center that the NXX will be associated with.¹⁴ The Commission imposed the two requirements based on a recommendation of the Texas Commission.¹⁵ The TPUC's Comments cited by the FCC clearly indicate that the TPUC was referring to the rate center.¹⁶ See, Exhibit 6.

¹¹ Cf. 47 C.F.R. § 1.17.

¹² 47 USC § 251(e)(1); 47 C.F.R. § 52.15.

¹³ 47 C.F.R. § 52.15(g)(2)(i), (ii).

¹⁴ 47 C.F.R. § 52.15(g)(3)(A) and (B) make this clear, since the accompanying documents require a month to exhaust report by for the rate center(s) in which numbers are sought.

¹⁵ Report and Order and Further NPRM, *In the Matter of Numbering Resource Optimization*, FCC 00-104, CC Docket No. 99-200, 15 FCC Rcd 7574; 2000 FCC LEXIS 1691; 20 Comm. Reg. (P & F) 1, ¶ 96, note 188 (Rel Mar., 2000).

¹⁶ "The PUCT suggests that, in order to obtain an initial code in a rate center, carriers should be required to provide the following: 1) valid interconnection agreement (or evidence that it will have one within 6 months); 2) a copy of the requesting carriers' state certification to serve the rate center for which the code is requested; and, 3) evidence that it will have facilities in the rate center within 6 months." TPUC Initial Comments in CC Docket 99-200, filed August 6, 1999, p. 7. CMRS carriers do not need state certification; the requisite "authority" that must be shown is the FCC Radio Station Authorization for the relevant area. Further, with regard to "facilities" for CMRS the "facilities" are the transmitters that provide "coverage"; given Type 2 interconnection CMRS carriers do not have a switch or POI in every rate center.

But TPUC's ELCS interpretation looks to switch location for retail rating purposes and it functionally changes the rate center assignment from the NXX rate center to the location of the switch. ILECs will not retail rate based on the NXX rate center assignment; instead they will retail rate based on where the competitive carrier's switch is, which can be some distance away. As ASAP observes in its petition in Docket 04-6:

“The TPUC Final Order, however, allows CenturyTel to ignore ASAP's rate center assignments; indeed, the TPUC Final Order functionally reassigns ASAP's Kyle, Fentress and Lockhart numbers to the Austin rate center. This violates ASAP's federal rights, since ASAP was entitled under federal law to obtain NXXs in the Kyle, Fentress and Lockhart NXXs and thereby obtain local **retail rating** for calls from all wireline customers within the mandatory local calling area associated with those numbers.”

Texas ELCS violates 47 USC § 251(e)(1) and 47 C.F.R. § 52.15 because it confiscates a competitive carrier's NXXs by changing the rate center assignment. Indeed, the Texas ELCS “rule” threatens the ability of some CMRS providers to provide service at all. Assume a CMRS carrier locates a switch next to an ILEC access tandem to facilitate Type 2 interconnection but does not have CMRS authority in the rate center where the tandem resides. Instead the switch holds numbers in other rate centers in the LATA where the CMRS carrier does have RSAs. In this circumstance, Texas' policy would mean that the CMRS carrier does not have the right to any numbers at all, since the numbers it has been assigned have been reassigned to a rate center in which it does not have authority to serve. The numbers are immediately at risk for reclamation. This is nonsense. Texas cannot arbitrarily change rate center assignments by “deeming” calls to go where they do not in fact go and by ignoring that the CMRS carrier has authority to provide service in a rate center by virtue of its radio station license and qualifies to obtain and keep numbers by placing wireless transmitters to provide coverage in a rate center. Texas ELCS is not traditional local service and is the exclusive regime of ILECs, to the detriment of competitive carriers, their customers and the ILEC customers that wish to call them

on a local basis. Texas ELCS violates 47 USC § 251(e)(1) and 47 C.F.R. § 52.15. A LATA modification simply cannot be granted under these circumstances.

4. The Commission cannot grant the Request under the prior precedent.

The Commission's *ELCS LATA Modifications* Order states the criteria for review of Requests such as the one by SBC in this case. That Order essentially applied the same tests as had been used by the *Modification of Final Judgment* Consent Decree Court for reviewing similar requests.¹⁷ The application must be for "traditional local telephone service"; it must be flat-rate and non-optional, and it cannot have anticompetitive effects, or at least present only *de minimus* discrimination or anticompetitive concerns.¹⁸

As shown above, Texas ELCS is not "traditional local telephone service" and it gives rise to significant discrimination and anticompetitive concerns. Further, Texas ELCS violates several provisions in the Act and FCC rules. In this circumstance, the Request cannot be granted. If and when Texas changes its policy and ELCS does in fact become "traditional local telephone service" as it pertains to the rules and practices for interconnection and traffic between ILECs and competitive carriers for customers that have numbering resources in the area, as expanded, then SBC can re-file its request.

CONCLUSION

Affordable Telecom does not seek to keep the citizens of Jackson and Tyler exchanges from enjoying the benefits of expanded calling scopes associated with traditional local telephone service. But part of local telephone service is the ability to make non-toll rated calls to competitive carrier numbers associated with the local calling area. Texas ELCS does not recognize that competitive carriers have the to right obtain numbering resources in a local calling area and thereby receive calls from ILEC customers on a local basis. Texas' policy discriminates

¹⁷ *ELCS LATA Modifications* at ¶¶ 3-8.

¹⁸ *Id.* at ¶ 19.

against competitive carriers, their customers and the ILEC customers that try to call them. This Request cannot be granted until Texas changes its policy.

Respectfully Submitted,

F. CARY FITCH D/B/A FITCH AFFORDABLE TELECOM

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served upon the party listed below by regular U.S. Mail on April 6, 2004 by addressing it to:

Terri L. Hoskins
Southwestern Bell Telephone, L.P.d/b/a SBCTexas
1401 I Street, NW
Suite 400
Washington, DC 20005



W. Scott McCollough

CC Docket 04-77

Affordable Telecom Comments

Exhibit 1

Affordable Telecom Pleadings in TPUC Docket 27802



Control Number: 27802



Item Number: 4

Addendum StartPage: 0

DOCKET NO. 27802

RECEIVED
MAY 28 AM 10:35
PUBLIC UTILITY COMMISSION
CLERK

PETITION FOR EXPANDED LOCAL
CALLING SERVICE FROM THE CITY
OF CARRIZO SPRINGS TO THE
EXCHANGES OF BATESVILLE,
EAGLE PASS, LAPRYOR, AND
UVALDE

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PUBLIC UTILITY COMMISSION
CLERK
OF TEXAS

**PETITION FOR INTERVENTION AND REQUEST FOR CORRECTION OF
INAVERTANT DEFICIENCY OR FOR FINDING OF DEFICIENCY**

NOW COMES CARY FITCH d/b/a FITCH AFFORDABLE (“FITCH AFFORDABLE”) and submits this Petition for Intervention and Request for Correction of Inadvertent Deficiency or for Finding of Deficiency and show as follows:

Cary Fitch d/b/a Fitch Affordable is a wireless (CMRS) service provider that has NXXs associated with several rate centers in Texas. Among those NXXs are 830-292 in Uvalde, 830-294 in Eagle Pass and 830-293 in La Pryor. Fitch Affordable supports ELCS, if properly authorized and if it is administered in a competitively neutral and nondiscriminatory fashion that comports with both state and federal rules. Fitch Affordable believes that Carrizo Springs should receive Expanded Local Calling to Batesville, Eagle Pass and La Pryor, if Carrizo Springs residents will be able to reach Fitch Affordable’s NXXs (and all other CMRS and CLEC providers with NXXs in a petitioned exchange) along with those of the incumbent. Fitch Affordable intervenes in order to ensure that this is the result in this case.

A. THE PETITION FAILS TO MENTION ALL NXXs IN THE PETITIONING EXCHANGE. THE DEFICIENCY VIOLATES PURA § 55.043, BUT CAN BE CURED BY THE ALJ.

PURA § 55.043 states that the commission may not split a petitioning or requested exchange in establishing a toll-free calling area. The Petition, however, appears to inadvertently do just that. Petitioners list the petitioning exchange as “830-876 Carrizo Springs.” There are,

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however, two other NXXs associated with the Carrizo Springs exchange. Specifically, 830-255 (Level 3) and 830-322 (Sprint Spectrum) are also part of the Carrizo Springs “exchange.”

PURA § 55.041 states that for purposes of the subchapter dealing with Expanded Toll-Free Local Calling Areas, “metropolitan exchange,” “local calling area of a metropolitan exchange” and “exchange” have the meanings assigned by the commission on September 1, 1993. On September 1, 1993, PUC Subst. R. 23.61 (12) contained the definition of “Exchange Area” and “Exchange”:

[PUC Subst. R. 23.61](12) Exchange Area-The geographic territory delineated as an exchange area by official commission boundary maps. An exchange area usually embraces a city or town and its environs. There is usually a uniform set of charges for telecommunications service within the exchange area. An exchange area may be served by more than one central office. An exchange area may also be referred to as an exchange.¹

It is clear from this definition that an exchange area is not just a single NXX and not just a single central office used in a geographic area; it is all NXXs associated with that geographic area. Accordingly, before ELCS can be approved for an exchange area, the petition must either expressly list, or must be deemed to implicitly include, all NXXs associated with the geographic area. Fitch Affordable requests that the ALJ either expressly deem the petition to include all NXXs in the Carrizo Springs exchange, or reject the petition because it is deficient in that it impermissibly splits the exchange in violation of PURA § 55.043.

B. THE PETITION FAILS TO MENTION ALL NXXs IN THE PETITIONED EXCHANGES. THE DEFICIENCY VIOLATES PURA § 55.043, BUT CAN BE CURED BY THE ALJ.

Similarly, the Petition seeks ELCS to only some of the NXXs in the petitioned exchanges. Some of the NXXs that are omitted are SWBT NXXs, while others are assigned to

¹ As issued on May 19, 1993. Effective date: June 9, 1993. See <http://texinfo.library.unt.edu/texasregister/text/1993/0528adop.txt>.

other carriers. The petition expressly mentions “830-376 Batesville,” “830-278 Uvalde,” “830-773 Eagle Pass” and “830-365 La Pryor.”

Batesville has only the 830-376 NXX. Uvalde, however also has 830-261 (Level 3); 830-275 (US Cellular); 830-279 (SWBT); 830-292 (Fitch); 830-337 (Metrocall); 830-364 (Awesome); 830-486 (SWBT); and 830-591 (SWBT). Eagle Pass also has 830-294 (Fitch); 830-335 (MetroCall); 830-352 (Sprint Spectrum); 830-421 (Sprint Spectrum); 830-501 (Awesome); 830-503 (Awesome); 830-513 (US Cellular); 830-752 (SWB); 830-757 (SWBT); 830-758 (SWBT); 830-773 (SWBT); 830-776 (SBC Mobile); 830-872 (KMC); and, 830-968 (STPCS Joint Venture). La Pryor also has 830-293 (Fitch); and, 830-812 (Awesome).

The petition lists only one SWBT NXX in each petitioned exchange, but there are several other SWBT NXXs in Eagle Pass and Uvalde. Are the petitioners seeking access to only part of Eagle Pass and Uvalde, *i.e.*, the specific NXXs they mention, or do they in fact seek access to all SWBT NXXs in all towns? Fitch Affordable believes the latter is the case. Fitch Affordable also believes that the petitioners seek access to all NXXs associated with the petitioned exchanges regardless of the carrier that holds the NXX. Any other result would violate PURA § 55.043 by splitting the exchange. Any other result would be unreasonably discriminatory and anticompetitive in violation of PURA §§ 55.003, 55.005 and 55.006. Any other result would violate the FCC’s dialing parity rules as set out in 47 C.F.R. § 51.207.²

The petition itself notes that residents of the petitioning exchange routinely need to contact their doctors and schools and other persons in the petitioned exchange. These personnel may well be served by carriers other than SWBT. Doctors and school personnel, for example

² Sec. 51.207 Local dialing parity.

A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider.

routinely carry pagers or cell phones. Fitch Affordable believes that the petitioners intended to seek local calling to all NXXs, including cell phones, pagers and alternative wireline carriers who have numbers associated with the petitioned exchange.

Fitch Affordable requests that the ALJ either expressly deem the petition to include all NXXs in the petitioning and petitioned exchanges, or reject the petition because it is deficient in that it impermissibly splits the petitioning and petitioned exchanges in violation of PURA § 55.043. Any other result would be unreasonably discriminatory and anticompetitive and would violate the federal dialing parity rules.

WHEREFORE, PREMISES CONSIDERED, FITCH AFFORDABLE respectfully requests that it be granted intervention in this matter. Fitch Affordable also requests that the ALJ either deem the petition to include all NXXs associated with each of the petitioning and petitioned exchanges, regardless of the identity of carrier, or reject the petition as deficient.

Respectfully Submitted,

FITCH AFFORDABLE

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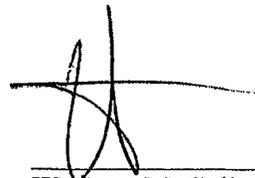
W. Scott McCollough

Certificate of Service

The undersigned certifies that a copy of the foregoing instrument was served upon the representatives of record below to the above-styled cause, on this 28th day of May, 2003 and in compliance with P.U.C. Proc. R. § 22.328.

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W. Scott McCollough



Control Number: 27802



Item Number: 9

Addendum StartPage: 18

DOCKET NO. 27802

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PUBLIC UTILITY COMMISSION
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PETITION FOR EXPANDED LOCAL
CALLING SERVICE FROM THE CITY
OF CARRIZO SPRINGS TO THE
EXCHANGES OF BATESVILLE,
EAGLE PASS, LAPRYOR, AND
UVALDE

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PUBLIC UTILITY COMMISSION
OF TEXAS

FITCH AFFORDABLE RESPONSE TO ORDER NO. 2

NOW COMES CARY FITCH d/b/a FITCH AFFORDABLE (“FITCH AFFORDABLE”) and submits this Response to Order No. 2:

Order No. 2 summarizes Fitch Affordable’s position by stating that “Fitch Affordable believes that Carrizo Springs should receive ELCS to Batesville, Eagle Pass, LaPryor and Uvalde **if Carrizo Springs residents will be able to reach Fitch Affordable’s NXXs along with those of the incumbent.**” The Order then allowed the parties, including Staff, to respond to Fitch Affordable’s Petition for Intervention, and Request for Correction of Inadvertent Deficiency or for Finding of Deficiency.

Fitch Affordable is concerned that the parties may misunderstand Fitch Affordable’s position. Fitch Affordable does want Carrizo Springs residents to be able to reach Fitch Affordable’s NXXs that are associated with the petitioned exchanges. But Fitch Affordable’s position is not limited to Fitch Affordable’s NXXs. Fitch Affordable believes that Carrizo Springs residents should be able to reach the NXXs of any carrier holding an NXX associated with any of the petitioned exchanges, whether ILEC, CMRS or CLEC. This was the position stated in the pleading. For example, Fitch Affordable noted that the petition mentions only some, but not all, of SBC Texas’ NXXs in the petitioned exchanges and suggested that all of them must be included because of PURA § 55.043.

2

Fitch Affordable reiterates that all NXXs associated with a petitioned exchange must be included (*i.e.*, toll charges will no longer apply to calls to any NXX associated with a petitioned exchange) for both legal and policy reasons. When a customer of a carrier (say, a CLEC or CMRS carrier) gives out a particular number to persons who may call that number, it is quite common to indicate that "this is a 'Uvalde' number" which tells the calling party that if the calling party has a number that is local to Uvalde, then the calling party will not incur toll to reach the called party. So if a Carrizo Springs resident needs to reach his or her doctor who lives in Uvalde, and tries to reach that doctor by pager or cell phone, any normal person would expect that the call will not be toll if the petition is granted. If the purpose of ELCS is to facilitate local calls of this sort, then the purpose is not served if one limits ELCS eligibility to only NXXs held by the incumbent telco.

Number portability makes this even more important. Beginning November of 2003, customers will be able to port their number from an ILEC to a CLEC or cell phone provider; from a cell phone provider to an ILEC or CLEC; from a CLEC to an ILEC; and from one cell phone provider to another. While the NXX block will still be "held" by the porting carrier, the line number will be effectively be associated in the porting database with the ported carrier.¹ As a result, a customer with an SBC 830-278 number in Uvalde who shifts from SBC to a CLEC or CMRS carrier will "retain" the 830-278 SBC number, even though the customer will use another carrier. Similarly, a customer with a US Cellular 830-275 number in Uvalde that shifts to SBC will "retain" the 830-275 US Cellular number even though the customer will be an SBC customer.

If calling from Carrizo Springs is limited only to ILEC NXXs associated with the petitioned exchanges, then a Carrizo Springs calling party may not be able to reach a doctor or government office, school or any other customer that initially used SBC but then chose to use a

¹ Fitch Affordable has simplified somewhat the technical issues related to porting. We recognize that in actuality the ported number is translated to an LRN associated with the ported carrier's serving switch. End users, however, will perceive that they will still be using the same number to receive calls. And calling parties will still dial the same ported number,

CLEC or CMRS provider.² How will this Commission explain to a Carrizo Springs resident that toll charges incurred to call a user in one of the petitioned exchanges are proper because the called party used to subscribe to SBC but chose to use a different carrier? How will the Commission explain the result that only some 830-278 numbers are ELCS? Carrizo Springs expressly requested ELCS to the entire 830-278 NXX block, not part of it. How will the Commission explain to a Carrizo Springs resident that calls to one customer with an 830-275 number is "local" (because the customer now uses SBC) but calls to another customer with an 830-275 number (who continues to use US Cellular) are not local?

Restricting ELCS to only ILEC-held NXXs will wreck havoc and cause confusion, anger and frustration when calling parties incur toll charges they did not expect or do not know what to expect with any given number. Any normal human being will properly believe that ELCS results in local calling to any number that is associated with the petitioned exchanges, regardless of the identity of the carrier that "holds" the NXX block. And that is a reasonable expectation.

Limiting local calling to only ILEC NXXs certainly does not encourage or support competition. That is why excluding alternative carriers would be unreasonably discriminatory and anticompetitive in violation of PURA §§ 55.003, 55.005 and 55.006 and would violate the FCC's dialing parity rules as set out in 47 C.F.R. § 51.207.

WHEREFORE, PREMISES CONSIDERED, FITCH AFFORDABLE respectfully requests that it be granted intervention in this matter. Fitch Affordable also requests that the ALJ

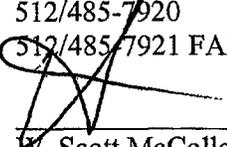
² The call may complete or it may not depending on the interconnection architecture of the porting and ported carriers. The more important question here, however, is whether calls from Carrizo Springs to former SBC customers in Uvalde who have chosen a CLEC or CMRS carrier will be retail rated as local/ELCS, or whether they will revert to toll when porting occurs. If the calls are treated as local/ELCS, then the Commission will quite soon be fairly called upon to explain why one Uvalde customer of the CMRS/CLEC carrier (the customer who has a ported number) can receive local/ELCS calls from Carrizo Springs, but another customer of the same carrier who did not use porting cannot. Alternatively, if a customer who used SBC "loses" local/ELCS calling as a result of choosing an alternative carrier, the Commission will fairly be called upon to explain why this is reasonable. And, the Commission should consider itself whether such a result has the effect of reducing competition once it becomes known that if you use any carrier except SBC you cannot receive calls from ELCS areas.

either deem the petition to include all NXXs associated with each of the petitioning and petitioned exchanges, regardless of the identity of carrier, or reject the petition as deficient because it splits the exchanges.

Respectfully Submitted,

FITCH AFFORDABLE
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By:



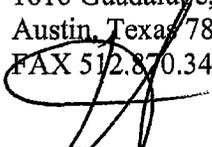
W. Scott McCollough

Certificate of Service

The undersigned certifies that a copy of the foregoing instrument was served upon the representatives of record below to the above-styled cause, on this 13th day of June, 2003 and in compliance with P.U.C. Proc. R. § 22.328.

Mario A. Martinez
City Manager
308 West Peña Street
Box 329
Carrizo Springs, TX 78834
FAX 830.876.3127

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W. Scott McCollough



Control Number: 27802



Item Number: 10

Addendum StartPage: 0

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HOUSTON, TEXAS
SAN ANTONIO, TEXAS
BEAUMONT, TEXAS

June 13, 2003

Mark Gentle
Administrative Law Judge
Public Utility Commission of Texas
1701 N. Congress Ave.
Austin, TX 78711-3326

RECEIVED
2003 JUN 13 PM 4:11
PUBLIC UTILITY COMMISSION
FILING CLERK

RE: Docket No. 27802; Petition for Expanded Local Calling Service from the City of Carrizo Springs to the Exchanges of Batesville, Eagle Pass, La Pryor and Uvalde

Dear Judge Gentle:

Fitch Affordable filed its Response to Order No. 2 earlier today. We were subsequently served with the Responses of SBC and Staff. Both those parties have challenged Fitch Affordable's standing to participate. Fitch Affordable is preparing a reply to those claims which will be submitted no later than Tuesday, June 17. We ask that you not address the pleadings until you receive our reply.

We must immediately indicate three things. Staff asserts that Fitch Affordable has no standing because it can achieve its goals by interconnecting with SBC. While we are grateful for the suggestion, the ability to take one path does not preclude standing if the party affected prefers another. Strangely, SBC – among other things – asserts that Fitch Affordable is already interconnected in the San Antonio LATA at the tandem that tends the affected end offices. SBC, however, asserts that Fitch Affordable must place facilities in each of the affected local calling areas in order to receive traffic.

First, SBC is simply lying. Fitch Affordable *is not* interconnected with SBC in the San Antonio LATA. Fitch Affordable *has been trying* to get interconnected with SBC in the San Antonio LATA since the end of last year, but SBC has refused to do so. Staff's suggestion that Fitch Affordable can adequately protect its interest by reaching agreement with SBC is therefore also untrue. Apparently SBC has no intention of reaching any reasonable agreement with Fitch.

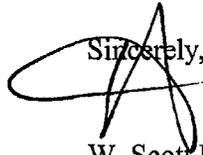
Second, regardless of certain statements or conclusions in an as-yet-unwritten Final Order that is subject to rehearing, both SBC and Staff are asking you to make a ruling that will violate Fitch Affordable's rights under federal law. Under federal law, Fitch Affordable is entitled to interconnect at a LATA tandem and has no obligation to establish wireline facilities in every rate center where Fitch Affordable has an NXX. Under federal law, SBC must provide dialing parity to its customers, and allow them to call Fitch Affordable on a local, 7-digit basis. This applies in ELCS areas. These principles will be further explained in the reply. In short, Fitch Affordable

has rights under federal law and a justiciable interest in this case under federal law. A finding of no standing will violate Fitch Affordable's federal rights. Fitch Affordable has every intention of protecting those rights. In any event, there are certain factual differences between Fitch Affordable and ASAP Paging that justify a different result even if the Commission does adopt a final order and deny rehearing in Docket 25673.

Third, SBC asserts that Fitch Affordable will not have customers that will be physically located in the petitioned exchanges. This too is a lie. Fitch Affordable will have end user customers who live and/or work in each of the rate centers where Fitch Affordable has an NXX. They will be physically present there. Indeed, those customers will likely include the doctors and nurses and other employees of the hospitals and clinics mentioned in the petition. Of course this will be so only *if* SBC interconnects and *if* Fitch Affordable can receive the traffic to which it is entitled.

SBC and Staff's position essentially boils down to a claim that Fitch Affordable has no standing because they intend to see to it that Fitch Affordable will never be in business regardless of the facts and regardless of the law. We trust that the ALJ will not subscribe to that irrational and unreasonable approach. Fitch Affordable has standing.

Sincerely,

A handwritten signature in black ink, appearing to be 'W. Scott McCollough', written over the word 'Sincerely,'.

W. Scott McCollough



Control Number: 27802



Item Number: 11

Addendum StartPage: 0

DOCKET NO. 27802

RECEIVED
2003 JUN 17 PM 2:51
PUBLIC UTILITY COMMISSION
FILING CLERK

PETITION FOR EXPANDED LOCAL
CALLING SERVICE FROM THE CITY
OF CARRIZO SPRINGS TO THE
EXCHANGES OF BATESVILLE,
EAGLE PASS, LAPRYOR, AND
UVALDE

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PUBLIC UTILITY COMMISSION

OF TEXAS

FITCH AFFORDABLE REPLY TO SBC AND STAFF RESPONSE TO ORDER NO. 2

NOW COMES CARY FITCH d/b/a FITCH AFFORDABLE (“FITCH AFFORDABLE”) and submits this Reply to SBC and Staff’s Response to Order No. 2:

Both SBC and Staff assert that Fitch Affordable does not have a justiciable interest in this case. Apparently there is some new, unarticulated test for whether a person “has or represents persons with a justiciable interest which may be adversely affected by the outcome of the proceeding.”¹ SBC and Staff state different incorrect rationales for opposing Fitch Affordable’s intervention, and both are addressed below. This Reply is supported by the Affidavit of Cary Fitch, the principal of Fitch Affordable.

According to Staff, even if a person has an interest in the case and the decision in the case could adversely affect that interest, intervention can still be denied since that person can – as an alternative to seeking a Commission Order – negotiate and execute a contract with the ILEC. As will be seen below, Fitch Affordable has been trying to interconnect with SBC so as to exchange traffic with SBC in the San Antonio LATA. To date those efforts have been fruitless. SBC has refused to interconnect. In addition to this factual problem, Staff’s logic is faulty. Two potential litigants always have the theoretical ability to consensually and voluntarily resolve any disagreement through a contract. This theoretical ability, however, does not mean that neither party has “standing” to initiate or intervene in a case that will resolve all or part of the issue that is

¹ PUC Proc. R. 22.103(b).

the source of the disagreement. It is unreasonable to deny standing to someone in a case that will affect their interests based on some theoretical ability to execute a contract resolving the matter in dispute. If Staff's proposed test for standing is accepted, then no private entity will ever have standing to intervene in any case.

SBC claims that Fitch Affordable has no justiciable interest because Fitch Affordable allegedly has no wireline or wireless presence, and no customers, in the affected areas. SBC also assigns the pejorative label "Virtual NXX" to the service that Fitch Affordable "is rendering." Fitch will dispose of those claims below, but this matter can be easily resolved on another ground.

Fitch Affordable is a subscriber to Sprint PCS service, and has an Eagle Pass number. This service supports Fitch Affordable's efforts to initiate service in that part of the state. Fitch Affordable would like very much for the fine folks in Carrizo Springs to be able to reach that number on a local basis. This alone provides a justiciable interest, unless Staff and SBC now contend that the consumers comprising the "public" on whose behalf the Commission decides the "public interest" have no right to participate in cases that affect them. While SBC and Staff would probably prefer to sort these cases out without being bothered by consumers who desire to intervene, that is not the law.

Fitch Affordable will further demonstrate the error in logic of both Staff and SBC below by providing a brief overview of **federal** law and how Fitch Affordable's rights under federal law provide standing to protect those rights in this case.

1. CMRS Interconnection.

CMRS interconnection rights predate the 1996 amendments to the federal Communications Act. The FCC has consistently indicated that – in addition to §§ 251 and 252 of the Act and Part 51 of the FCC's rules – § 332(c) of the Act and 47 CFR § 20.11 of the FCC rules provide an independent grant of interconnection rights to CMRS carriers.

In the 1996 *Local Competition Order*, the FCC codified new interconnection rules in Part 51 as part of its implementation of § 251 and 252.² The FCC concluded, however, that in light of Congress' retention of § 332(c)(1)(B), the federal agency retained separate authority over LEC-CMRS interconnection pursuant to that section.³ Because the FCC viewed §§ 251, 252, and 332 of the Act as furthering a common goal with respect to interconnection, the Commission declined at that point to further act on or define the scope of its § 332 interconnection authority, but instead amended 47 C.F.R. § 20.11 to provide for reciprocal compensation between LECs and CMRS providers.⁴ The FCC reaffirmed this principle in the *TSR* decision, and the DC Circuit agreed that § 332 provided an independent grant of authority for interconnection, and independent federal rights.⁵

SBC and Staff are attempting to require Fitch Affordable to interconnect under § 251(c)(2) (and apparently § 251(b)(5) and/or § 251(g)) in order to exchange traffic. This alone is an attempt to deny Fitch Affordable its choice to obtain interconnection under § 332. The Commission cannot be party to this denial of rights.

CMRS interconnection is in some respects different than ILEC-CLEC interconnection. While CLECs have the right to select a single point of interconnect in a LATA, they still derive trunking to local tandems, access tandems and, where necessary, end offices. CMRS can, however, have the right to choose to interconnect, and have trunking only to the "LATA

² Memorandum Opinion and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Mobile Radio Service Providers*, FCC 96-325, CC Docket Nos. 96-98, 95-185, FCC (1996) ("*Local Competition Order*").

³ *Local Competition Order* at ¶¶ 1023.

⁴ 47 C.F.R. §§ 20.11(c). See also *Local Competition Order* at 16195.

⁵ Memorandum Opinion and Order, *TSR Wireless, LLC, et al., v. US West Cellular, Inc., et al.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, FCC 00-194 (Rel. June 2001), *US, Inc., et al., v. Fitch Affordable, Inc., et al.*, File Nos. E-98-19, E-98-20, E-98-21, E-98-22, E-98-23, E-98-24, E-98-25, E-98-26, E-98-27, E-98-28, E-98-29, E-98-30, E-98-31, E-98-32, E-98-33, E-98-34, E-98-35, E-98-36, E-98-37, E-98-38, E-98-39, E-98-40, E-98-41, E-98-42, E-98-43, E-98-44, E-98-45, E-98-46, E-98-47, E-98-48, E-98-49, E-98-50, E-98-51, E-98-52, E-98-53, E-98-54, E-98-55, E-98-56, E-98-57, E-98-58, E-98-59, E-98-60, E-98-61, E-98-62, E-98-63, E-98-64, E-98-65, E-98-66, E-98-67, E-98-68, E-98-69, E-98-70, E-98-71, E-98-72, E-98-73, E-98-74, E-98-75, E-98-76, E-98-77, E-98-78, E-98-79, E-98-80, E-98-81, E-98-82, E-98-83, E-98-84, E-98-85, E-98-86, E-98-87, E-98-88, E-98-89, E-98-90, E-98-91, E-98-92, E-98-93, E-98-94, E-98-95, E-98-96, E-98-97, E-98-98, E-98-99, E-99-1, E-99-2, E-99-3, E-99-4, E-99-5, E-99-6, E-99-7, E-99-8, E-99-9, E-99-10, E-99-11, E-99-12, E-99-13, E-99-14, E-99-15, E-99-16, E-99-17, E-99-18, E-99-19, E-99-20, E-99-21, E-99-22, E-99-23, E-99-24, E-99-25, E-99-26, E-99-27, E-99-28, E-99-29, E-99-30, E-99-31, 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tandem.” While the CMRS carrier may choose to establish direct trunking to specific end offices, the ILEC may not force it to do so. CMRS carriers do not typically interconnect at a local tandem unless it also serves as the “LATA access tandem.”

There are three general CMRS interconnection types:

105. LECs are currently obligated to provide three basic types of interconnection to CMRS providers. Type 1 service involves interconnection to a telephone company end office similar to that provided by a local exchange carrier to a private branch exchange (PBX). Type 1 interconnection involves an end office connection that combines features of line-side and trunk-side connections and uses trunk-side signaling protocols. Type 1 interconnections enable the CMRS provider to access any working telephone number, including all NXX codes within the LATA of the LEC providing the interconnection. The Type 1 connection also permits access to Directory Assistance, N11 codes, and service access codes. Type 2A connections give the CMRS carrier the ability to connect to the Public Switched Network in the same manner as any wireline carrier. The connections, which may be either solely to access tandems or to a combination of tandems and other central offices, are true trunk-side connections using trunk-side signaling protocols. Type 2A connections do not permit access to LEC operator services or N11 codes. Type 2B connections are trunk-side connections to an end office that operate in the same manner as high-usage trunks. Under Type 2B interconnection, the CMRS provider’s primary traffic route is the Type 2B connection, with any overflow traffic routed through a Type 2A connection. Type 2B interconnection permits access to valid NXX codes, but cannot access operator services or N11 codes.⁶

The CMRS carrier is the party that decides the form of interconnection; the ILEC cannot dictate the architecture.⁷ Similarly, since the CMRS carrier’s choice of architecture is granted by federal law, the PUC cannot deny this choice.

⁶ See, e.g., *In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, ¶ 105 FCC 94-145, CC Docket No. 94-54, RM-8012, 9 FCC Rcd 5408, 1994 FCC LEXIS 3181 (Rel. Jul. 1, 1994). (“*CMRS Equal Access Obligations*”). Note that this decision predates the 1996 amendments and ILEC-CLEC interconnection. It is important to remember that like other direct end office trunks, Type 2B gives access only to NXXs served by the end office. The importance of this limitation to Type 2B is discussed below.

⁷ Memorandum Opinion and Order, *In the Matter of William G. Bowles Jr. P.E. d/b/a Mid Missouri Mobilfone, Complainant, v. United Telephone Company of Missouri*, File No. E-96-04, DA 97-1441 ¶ 5 (Rel. July, 1997); *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, ¶ 12, FCC 86-85 LEXSBE 59 Rad. Reg. 2d (P&F) 1275 (Rel. Mar. 5, 1986)(“*FCC Policy Statement*”).

Fitch Affordable has indicated to SBC that it has chosen Type 2A interconnection, meaning that it will interconnect at the San Antonio LATA access tandem in San Antonio. Under Type 2A, Fitch Affordable will be able to receive calls from any end office that subtends that tandem, including those in the petitioning and petitioned exchanges.

When a call is from an SBC end users to a Fitch Affordable number that is associated with a rate center in the same mandatory local calling area as the calling party's NXX, then SBC must retail rate the call as local, and it cannot impose toll. This is the result required by the FCC's local dialing parity rule, 47 C.F.R. § 51.207.⁸

Staff and SBC seem to be saying that ELCS is something different than "traditional" local service. They are wrong. ELCS is "traditional local" for federal purposes – including local dialing parity. Once ELCS is approved the entire area as expanded constitutes the mandatory local calling scope, and the ILEC's service to its end users within that area is **basic local service**. The federal commission considers ELCS and EAS to be nothing more than action by the state to expand the basic service local calling area so long as the expansion is mandatory and not optional.⁹ SBC routinely represents to the FCC that Texas ELCS is "traditional local" service. SBC cannot be allowed to make this representation in order to obtain LATA boundary changes, but then treat ELCS as something other than basic local service in terms of interconnection and call rating and routing in other cases. Because of the federal right to obtain local NXXs and because of the federal

⁸ Sec. 51.207 Local dialing parity.

A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider.

⁹ See, e.g., *In the Matter of Southwestern Bell Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS)*, DA-1129, WC Docket No. 02-373, Memorandum Opinion and Order (Apr. 2003). That case involved SBC in Texas, and this ALJ handled the case at the Commission in Docket 26080. SBC filed the FCC order in that Docket on April 14, as Item Number 6. Before the FCC, SBC represented that ELCS is "traditional local service." The FCC agreed. DA-1129 ¶ 2. Both SBC's petition at the FCC and the FCC's order are attached to Cary Fitch's affidavit.

local dialing parity rule, SBC must retail rate calls within the ELCS area to a Fitch Affordable NXX associated with a rate center in that area as local.

Staff and SBC are essentially saying that SBC can impose toll on its users for what is a “traditional local” call to a non-ILEC carrier’s customer. They are simply incorrect. Any action by this Commission which allows SBC to ignore these federal requirements, including denying Fitch Affordable intervention in this case based on SBC’s theory, will violate federal law, and will immediately result in federal involvement in this case. It will also guarantee that there are no further LATA modifications in Texas to support ELCS, since Texas will have necessarily ruled that ELCS is not “traditional local” service.

What is most interesting is that SBC apparently believes that Fitch Affordable must establish Type 2B trunks to its Carrizo Springs end office if Fitch Affordable desires to exchange traffic between Carrizo Springs and any of Fitch Affordable’s NXXs on a local basis. While SBC does not directly so state, that is the only possible result. Type 2B connections only allow access to NXXs that are served by the end office to which the Type 2B connection is made. Type 2B connections to SBC’s Uvalde, Eagle Pass or La Pryor end offices will not allow calls from Carrizo Springs to be routed to Fitch. Fitch Affordable does not have a Carrizo Springs NXX; Fitch Affordable does not at present have any traffic, much less “high volume”¹⁰ traffic from Carrizo Springs.¹¹ SBC’s position simply makes no sense. Why must Fitch Affordable have Type 2B to Carrizo Springs when Fitch Affordable does not have a Carrizo Springs rate centered NXX?

¹⁰ SBC’s Texas Cellular Mobile Interconnection Tariff, for example, defines Type 2B as “available” (*i.e.*, not mandatory) for high volume routes. www.sbc.com/Large-Files/RIMS/Texas/Cellular/tx-cl-04.pdf. Section 4, Sheet 1. Note again that the tariff also restricts calling to NXXs held by the particular end office.

¹¹ Indeed, Fitch Affordable does not have any traffic from Uvalde, Eagle Pass or La Pryor either. SBC has refused to interconnect, so there is no traffic.

2. CMRS NXX resources.

CMRS carriers have a federal right to obtain numbering resources from NANPA.¹² The CMRS carrier needs only to have authority to provide or resell CMRS service in the area represented by the geographic rate center with which the NXX is associated.¹³ Neither the state commission nor the ILEC can challenge or ignore the wireless carrier's rate center assignment based on a preference that the CMRS carrier interconnect in some particular way or out of some unwarranted distaste for the federally allowed network architecture that has been selected. Neither the state commission nor the ILEC can refuse to honor federal local dialing parity rules.

4. A "physical presence" is not required, but Fitch Affordable will have a local physical presence and so will its customers.

SBC asserts that Fitch Affordable is not entitled to receive local rated calls because Fitch Affordable will not have a local presence in the area, and its customers will not be in the area. SBC is wrong. As shown in the affidavit of Cary Fitch, Fitch Affordable will have both wireless network facilities and end use customers in the area. But there is no requirement that Fitch Affordable have such a presence in any event.

Fitch Affordable will have or use transmitters that provide coverage to Uvalde, Eagle Pass and La Pryor. These transmitters, the paging units they talk to and the human beings that carry

¹² *In the Matter of Numbering Resource Optimization; Connecticut Department of Public Utility Control Petition for Rulemaking to Amend the Commission's Rule Prohibiting Technology-Specific or Service-Specific Area Code Overlays; Massachusetts Department of Telecommunications and Energy Petition for Waiver to Implement a Technology-Specific Overlay in the 508, 617, 781, and 978 Area Codes; California Public Utilities Commission and the People of the State of California Petition for Waiver to Implement a Technology-Specific or Service-Specific Area Code*, FCC 99-122, CC Docket No. 99-200; RM No. 9258; NSD File No. L-99-17; NSD File No. L-99-36, 14 FCC Rcd. 10322, 1999 FCC LEXIS 2451 ¶ 111 (Rel. Jun. 2, 1999) ("*NRO NPRM*").

¹³ Report and Order and Further Notice of Proposed Rule Making, *In the Matter of Numbering Resource Optimization*, CC Docket No. 99-200, FCC 00-104, note 178, 15 FCC Rcd 7574; 2000 FCC LEXIS 1691; 20 Comm. Reg. (P & F) 1 LEXSEE 15 FCC Rcd 7574 (Rel. Mar. 2000). Fitch Affordable lawfully obtained the NXXs in issue, and the rate center assignments for these NXXs must be honored.

them, will be in those areas. Fitch Affordable does not know where SBC got the notion that there would be no facilities and no customers in Uvalde, Eagle Pass and La Pryor. But the ALJ should not be misled by this lie. There will be transmitters and real live customers in the area. That is presence.

But even if there were no customers in the area, Fitch Affordable would still have the right to obtain and use NXXs, and the right to local dialing parity, in those areas. SBC seems to be somewhat inconsistent in its representations to Commission and the FCC. **Before the FCC** SBC correctly acknowledges that “there are no state or federal requirements to associate an NPA-NXX for a new subscriber based on [the subscriber’s] residence, billing or other location.” SBC correctly points out that NXX rate center assignment is made by CMRS carriers only to “facilitate wireline to wireless call rating.”¹⁴ SBC is correct on these points, and it’s representation to this Commission that wireless carriers must have physical presence and end use customers physically located in a rate center in order to obtain and use local NXXs is not only wrong, it is exactly the opposite of what SBC is saying at the FCC. Such duplicity should not be allowed.

CMRS carriers obtain NXXs and associate them with wireline rate centers for a single purpose: to obtain retail local rating for calls to those numbers from wireline customers in that rate center. The NXX has no other meaning to the CMRS provider. There is no law or regulation that requires a CMRS provider to give a number within an NXX block only to CMRS customers who are physically located in the rate center to which the NXX is assigned. If there were such a regulation, CMRS providers would be required to contractually bind their customers to turn off their mobile stations at the rate center boundary, or the CMRS provider would have to possess the ability to “auto-sense” when a customer stepped over the boundary and then immediately inform

¹⁴ Comments of SBC Communications, Inc. in Opposition to the Petition for Declaratory Ruling of the Cellular Telecommunications & Internet Association, p. 3, FCC Docket 95-116, filed February 26, 2003 (attached to Cary Fitch affidavit).

every ILEC in the rate center to start charging toll at retail for calls to that number. The rule espoused by Staff and SBC is silly and wrong. We are talking about mobile service.¹⁵ Mobile customers move around, and are not constrained by arbitrary ILEC devised rate center boundaries:

2.3 Wireless NXX Assignments

NXX codes that are assigned to wireless carriers are associated to a specific wireline rate center and are communicated via the LERG. These are assigned to wireline rate centers in order to accomplish land to mobile rating. However, once NPA-NXXs are assigned to a wireless carrier, wireless carriers may select any one of their NPA-NXXs when allocating numbers to a subscriber. The WSP may select a particular NPA-NXX value based on customer desires of calling areas for land to mobile calls, mobile to land calls, or a combination of both. Alternatively, a wireless carrier may choose to select an NPA-NXX value that is physically closest to the subscriber billing address. There are no state or federal requirements to associate an NPA-NXX for a new subscriber based on their residence, billing, or other location.¹⁶

5. While Fitch Affordable has been trying to interconnect with SBC, SBC has to date refused to interconnect in the San Antonio LATA.

Staff's blithe suggestion that Fitch Affordable can "merely" enter a traffic exchange agreement illustrates Staff's naiveté and ignorance of what is happening in the real world. Fitch Affordable has been attempting to interconnect with SBC in various parts of Texas for two years. The most recent discussions have centered on the San Antonio LATA. Even though Fitch Affordable requested interconnection under § 332 of the Act and § 20.11 of the FCC's rules, SBC has refused ASRs for interconnection trunks. SBC has refused to give a date when the trunks

¹⁵ For this reason, the FCC has held that CMRS carriers' entitlements do not depend on their "relationship to wireline network components." *In Re Cost-Based Terminating Compensation for CMRS Providers*, CC Docket Nos. 95-185 and 96-98, and WT Docket No. 97-207, DA 01-1201 (May 9, 2001); *In the Matter of Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 ¶¶ 104 (Rel. Apr. 27, 2001) ("*Intercarrier Compensation NPRM*").

¹⁶ North American Numbering Council LNPA Working Group Report on Wireless Wireline Integration, p. 33 May 8, 1998 (NANC Report to FCC) available at <http://www.fcc.gov/wcb/tapd/Nanc/rptnancr.doc> (emphasis added). The NANC is a Federal Advisory Committee under 5 U.S.C. App. 2. SBC now trying to impose a local presence requirement that does not exist and which it has admitted does not exist.

would be provided. Every day brings a new excuse. One recent excuse proffered by SBC was that Fitch Affordable was not entitled to interconnection. The “logic” went like this: an entity is not a CMRS provider unless it is interconnected to the PSTN. Fitch Affordable is not interconnected. Therefore Fitch Affordable is not CMRS and is not entitled to interconnection. The circularity of the requirement that Fitch Affordable be interconnected before it can be interconnected somehow escaped SBC. It also ignores the FCC’s definition of “Interconnected,” which includes a pending request for interconnection.¹⁷ Fitch Affordable was quite surprised to learn from SBC’s Response to Order No. 2 that it was already interconnected in the San Antonio LATA. Sadly, this is not so.

Staff should make more of an effort to see what it is like in the real world. Although SBC shows only genial smiles when it is at the PUC, when there is no Commission representative in the room, quite a different persona emerges. Reaching agreement with SBC is no simple task and is certainly not a joyful assignation. Any “consensual” agreement obtained without regulatory fiat usually involves losing the financial equivalent of an arm or a leg, even when all SBC is doing is the bare minimum required by law. Staff’s off-hand suggestion that “all” Fitch Affordable needs to do is execute an agreement demonstrates a total disconnect with reality that would be hilarious except for its tragic consequences. Thank you, but Fitch Affordable will continue to press for its rights in this case while it also continues its quest for interconnection with SBC.

¹⁷ See, 47 CFR § 20.3, definition of “Interconnected Service.” A service: (a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or

(b) For which a request for such interconnection is pending pursuant to section 332(c)(1)(B) of the Communications Act, 47 U.S.C. 332(c)(1)(B).

Observe also that this rule mentions § 332, and not §§ 251 or 252. As noted § 332 provides independent interconnection authority and rules.

6. Fitch Affordable is not providing “Virtual NXX” service and even if it were, Virtual NXX is permitted and SBC must still retail rate the calls in issue as local.

SBC on several occasions asserts that Fitch Affordable “is” providing “Virtual NXX” service, and implies that this unsupported “fact” somehow will somehow justify imposing toll when SBC users in Carrizo Springs call one of Fitch Affordable’s NXXs in Uvalde, Eagle Pass or La Pryor after the petition is granted. SBC is wrong. Fitch Affordable is not and will not be providing “Virtual NXX.” Even if Fitch Affordable were to provide “Virtual NXX” SBC still cannot impose toll.

A. Fitch Affordable is not and will not be providing “Virtual NXX.” SBC labels Fitch Affordable’s service as “Virtual NXX.” The context of the appellation implies that there is something untoward about “Virtual NXX.” There is not. “Virtual NXX” are “central office codes that correspond with a particular geographic area that are assigned to a customer located in a different geographic area.”¹⁸ Fitch Affordable is not sure why SBC believes that Fitch Affordable will not have customers in the area, but SBC is wrong. As indicated in the Affidavit of Cary Fitch, Fitch Affordable will have customers in Uvalde, Eagle Pass and La Pryor. Therefore, Fitch Affordable will not be providing Virtual NXX.

B. Even if Fitch Affordable were to provide Virtual NXX, there is nothing wrong with such a service, and SBC must still rate the calls in issue as local. This Commission addressed Virtual NXX in Docket 24015, the so-called “FX Docket:”

As to the physical network, SWBT explained that when a carrier begins service of new telephone numbers, it publishes the new prefix to other carriers in the Local Exchange Routing Guide (LERG) in a process known as “opening a code in the LERG.” SWBT testified that when the carrier opens a code, it will publish the code

¹⁸ *In the Matter of Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 ¶ 115, note 189 (Rel. Apr. 27, 2001) (“*Intercarrier Compensation NPRM*”).

with 1) a “rate center” designation and 2) a switch designation. SWBT indicated that the rate center designation identifies the code’s geographic location so that another carrier may classify the traffic as local or toll (long distance); the switch designation determines where to physically route calls that are dialed with that prefix.¹⁹

SWBT contended that NPA/NXX assignment is important only from a retail (carrier to end user) but not from a wholesale (carrier to carrier) perspective.²⁰

From the perspective of FX customers, ILEC-provided FX service and CLEC-provided FX-type service serve the same intended purpose. The end user in the foreign exchange is able to avoid toll calls to the FX customer and instead to place local calls to the FX customer physically located in a different exchange. ... To be sure, these FX arrangements provide FX customers with exchange service within a Commission-prescribed mandatory local calling area even though the FX customer physically resides outside of said mandatory local calling area. ... What is FX or FX-type service? FX service, including FX-type service offered by CLECs, is a retail service offering purchased by customers which allows such customers to obtain exchange service from a mandatory local calling area (a.k.a an exchange service area or local calling area) other than the mandatory local calling area where the customer is physically located. FX service enables particular end-user customers to avoid what might otherwise be toll calls between the FX customer’s physical location and customers in the foreign exchange. However, FX service does not enable the end-user customers in the foreign exchange to avoid toll calls to other exchanges, including other customers located within the exchange where the FX customer is physically located.²¹

FX service is a value-added service offered to customers who are interested in creating a “local” presence in a foreign exchange. The Arbitrators consider a value-added service to be a service that a customer pays a premium for in order to derive additional economic or other benefits. From the perspective of the end user located in the foreign exchange, the FX customer appears to be “local” and all calls made to that customer are treated as local. While FX service has traditionally been offered by SWBT for many decades, the evidence in the record indicates that the competitive market for the service is in its infancy.²²

As is clear from the discussion in the FX Docket Award, Virtual NXX (or FX-like) service is used to secure retail rating of a call as local. That case properly assumed and means that even

¹⁹ Consolidated Complaints and Requests For Post-Interconnection Dispute Resolution Regarding Inter-Carrier Compensation for “FX-Type” Traffic Against Southwestern Bell Telephone Company, Docket No. 24015, Revised Award (Aug. 2002), p. 21 (“FX Docket”).

²⁰ FX Docket Revised Award, p. 27.

²¹ FX Docket Revised Award, pp. 30-32 (italics in original).

²² FX Docket Revised Award, p. 49 (italics in original).

when a service is “FX-like” or “Virtual NXX” the ILEC must retail rate the call as local if the call is between two NXXs that are associated with rate centers in the same mandatory local calling area. ELCS expands the mandatory local calling area and retail rating of calls to NXXs associated with that area.

But there is another reason why “virtual NXX” – if Fitch Affordable’s service is such – is not a crime punishable by a toll. **We are talking about mobile service. The service is...mobile. SBC is complaining that people can move around, but that is the purpose and essence of the service.** As noted above, there is no requirement that a customer be physically located in any given spot before a call to that person’s mobile device may be retail rated as local. As noted above, the *only* reason a CMRS carrier gets a local number is to obtain local retail rating. SBC’s position here simply cannot be squared with its comments to the FCC cited above and the essence of mobile service.

Allowing SBC to impose toll on its Carrizo Springs users when they call one of Fitch Affordable’s Uvalde, Eagle Pass or La Pryor numbers will violate Fitch Affordable’s right to numbering resources and local dialing parity, and its interconnection rights under § 332 of the federal Act and § 20.11 of the FCC’s rules. This is so even if one wrongly deems Fitch Affordable’s service to be “Virtual NXX.”

7. Imposing toll on calls to CMRS puts alternative carriers at an incredible competitive disadvantage.

Staff has indicated that Uvalde is 46.87 miles from Carrizo Springs, Eagle Pass is 41.14 miles, and La Pryor is 28.60 miles.²³ That means that a Carrizo Springs resident that calls any

²³ Staff Recommendation on Sufficiency, Geographic Proximity, Community of Interest and Possible Exemptions, filed May 28, 2003.

Uvalde or Eagle Pass number (including those NXXs held by non-ILEC carriers)²⁴ currently pays SBC 31¢ for each minute. If the Carrizo Springs resident calls La Pryor, then the resident is charged 21¢ for the first minute and 18¢ for each additional minute.²⁵ Assuming that ELCS is approved and SBC receives the maximum fee, then that resident will pay SBC \$3.50 per month for “unlimited” calling from Carrizo Springs to Uvalde, Eagle Pass and La Pryor. If the resident makes more than 11 minutes of calls from Carrizo Springs to Uvalde or Eagle Pass in any given month, then that customer has saved money. Unless, that is, the customer has the temerity to call one of the NXXs held by a carrier other than SBC. In that instance, the Carrizo Springs user will pay the ELCS fee and still pay toll. There can be no doubt that a carrier whose customers can only be called via toll will suffer a significant competitive disadvantage. It is therefore no surprise that SBC wants to create this result. But it cannot. SBC cannot be allowed to act in such a discriminatory and anticompetitive manner. Federal rules prohibit it.

CONCLUSION

Fitch Affordable is seeking only to intervene at this point in order to protect its rights. The ALJ need not rule on the substance of this position at this time; he can merely note the assertion of federal rights that appear to provide a justiciable interest and then grant intervention. Fitch Affordable has every intention of protecting its rights, however. If Fitch Affordable is not granted intervention, then this entire case may well be delayed while the FCC or a state or federal court addresses the resulting denial of due process and federal substantive rights.

²⁴ These non-ILEC carriers have Uvalde NXXs: 830-261 (Level 3); 830-275 (US Cellular); 830-292 (Fitch); 830-337 (Metrocall); 830-364 (Awesome). In Eagle Pass: 830-294 (Fitch); 830-335 (MetroCall); 830-352 (Sprint Spectrum); 830-421 (Sprint Spectrum); 830-501 (Awesome); 830-503 (Awesome); 830-513 (US Cellular); 830-776 (SBC Mobile); 830-872 (KMC); and, 830-968 (STPCS Joint Venture). La Pryor has 830-293 (Fitch); and, 830-812 (Awesome). At this time, any call to these NXXs by a SBC Carrizo Springs customer incurs toll, just as with an SBC NXX in Uvalde, Eagle Pass or La Pryor.

²⁵ See, http://www.sbc.com/Large-Files/RIMS/Texas/Long_Distance_MTS/tx-ld-02.pdf (SWBT Texas intraLATA toll tariff), Section 2, Sheet 7.

WHEREFORE, PREMISES CONSIDERED, FITCH AFFORDABLE respectfully requests that it be granted intervention in this matter. Fitch Affordable also requests that the ALJ either deem the petition to include all NXXs associated with each of the petitioning and petitioned exchanges, regardless of the identity of carrier, or reject the petition as deficient because it splits the exchanges.

Respectfully Submitted,

FITCH AFFORDABLE
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Austin, Texas 78746
~~512/485-7920~~
~~512/485-7921 FAX~~

By: _____

W. Scott McCollough

Certificate of Service

The undersigned certifies that a copy of the foregoing instrument was served upon the representatives of record below to the above-styled cause, on this 17th day of June, 2003 and in compliance with P.U.C. Proc. R. § 22.328.

Mario A. Martinez
City Manager
308 West Peña Street
Box 329
Carrizo Springs, TX 78834
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Austin, Texas 78701
FAX 412/870.3420

W. Scott McCollough

STATE OF TEXAS

§

COUNTY OF TRAVIS

§

§

AFFIDAVIT OF
F. CARY FITCH

BEFORE ME, the undersigned authority, on this the 17th day of June, 2003, personally appeared Cary F. Fitch, who, being by me duly sworn, on his oath deposed and said:

1. "My name is Cary F. Fitch. I am over the age of 21 years, of sound mind and competent to testify as to the matters stated herein. All of the facts asserted in this Affidavit are true and correct to the best of my knowledge and belief. I am personally aware of each such fact.

2. Fitch Affordable is a d/b/a used by me. It is a sole proprietorship. Fitch Affordable is a licensed Commercial Mobile Radio Service ("CMRS") carrier. Pursuant to my FCC CMRS authorizations, I sought and obtained NXXs from the North American Numbering Administrator ("NANPA") in the Uvalde (830-292), Eagle Pass (830-294) and La Pryor (830-293) rate centers.

3. I have checked in the Local Exchange Routing Guide ("LERG"). The following NXXs exist in the various petitioned exchanges in addition to those specified in the petition for ELCS:

Batesville has only the 830-376 NXX held by SBC. Uvalde contains 830-261 (Level 3); 830-275 (US Cellular); 830-279 (SWBT); 830-292 (Fitch); 830-337 (Metrocall); 830-364 (Awesome); 830-486 (SWBT); and 830-591 (SWBT). 830-294 (Fitch); 830-335 (MetroCall); 830-352 (Sprint Spectrum); 830-421 (Sprint Spectrum); 830-501 (Awesome); 830-503 (Awesome); 830-513 (US Cellular); 830-752 (SWB); 830-757 (SWBT); 830-758 (SWBT); 830-773 (SWBT); 830-776 (SBC Mobile); 830-872 (KMC); and 830-968 (STPCS Joint Venture) are rate centered on Eagle Pass. The La Pryor rate center contains 830-293 (Fitch) and 830-812 (Awesome).

4. Fitch Affordable has been diligently attempting to interconnect with SBC in the San Antonio LATA. Although Fitch Affordable is presently interconnected in the Corpus Christi LATA, SBC has to date refused to interconnect in any other LATA, even though Fitch Affordable has expressly sought interconnection under § 332(c)(1)(B) of the federal Act and 47 CFR § 20.11. Fitch Affordable has to date chosen to not seek interconnection under §§ 251 and 252 of the federal Act, and my understanding is that we are not required to do so.

5. Our efforts to interconnect in the San Antonio LATA began many months ago. December 2002, we submitted an ASR to SBC for interconnection trunks from SBC's San Antonio access tandem, but SBC has refused to process that request and will not give a date on which it will interconnect. One basis given by SBC was that Fitch Affordable was not entitled to interconnection because it was not interconnected. Given that we are not interconnected in the San Antonio LATA, despite our efforts to do so, Fitch Affordable and SBC are not exchanging

traffic in that LATA, including traffic from the petitioning exchange or any of the petitioned exchanges. We will continue to seek interconnection with SBC in the San Antonio LATA.

6. Fitch Affordable has chosen Type 2A interconnection. Type 2A interconnection occurs at the LATA access tandem; in this case, the relevant tandem is SBC's access tandem in San Antonio (SNANTXCA03T, located at 105 Auditorium Circle). Fitch Affordable does not desire Type 1 interconnection because Type 1 involves use of an NXX "held" by the ILEC end office switch and precludes the CMRS carrier from interconnecting via SS7. Fitch Affordable does not desire Type 2B interconnection, at least at this time. In the first place, Type 2B interconnection requires that the CMRS carrier already have Type 2A. Type 2B involves use of "high volume" direct end office trunks, and allows access only to the end office to which the trunks are connected. SBC's Texas Cellular Mobile Interconnection Tariff defines Type 2B as "available" (*i.e.*, not mandatory) for high volume routes. See, <http://www.sbc.com/Large-Files/RIMS/Texas/Cellular/tx-cl-04.pdf>, Section 4, Sheet 1. Note again that the tariff also restricts calling to NXXs held by the particular end office. Type 2B trunks to Uvalde, Eagle Pass or La Pryor will not result in the receipt of calls from Carrizo Springs, since that is a different end office and SBC will not allow its Uvalde, Eagle Pass or La Pryor end offices to provide a tandem function. There is no volume of traffic from any end office in the petitioning or petitioned exchanges, so we do not know whether any of them will be "high volume" routes that could theoretically justify Type 2B direct trunks. Requiring Type 2B at this point would be inefficient and wasteful, and SBC does not have the right to unilaterally require it.

7. Fitch Affordable will have or use facilities in the relevant areas. We will have or arrange to use transmitters there. We will use landline or wireless connections to get from our switch to those transmitters. There will be wireless coverage for each of the relevant rate centers. Fitch Affordable will also have customers in the relevant areas. Our business plan is to offer and provide wireless messaging services to customers who reside or work, and are physically located in Uvalde, Eagle Pass and La Pryor. Indeed, those customers will likely include the doctors and nurses and other employees of the hospitals and clinics mentioned in the petition. Of course this will be so only *if* SBC interconnects and *if* Fitch Affordable can receive the traffic to which it is entitled. Fitch Affordable will also provide service to Law Enforcement, Public Safety, Service Vendors, Delivery Services, Attorneys, Clubs, Governmental Agencies, Construction Firms, Stock Traders, Religious Organizations, Dispatching Services, Utilities and many others. Indeed, some of our customers may well be employed by SBC. A description of our services can be found at <http://www.usawide.net/superpage.html>. We are already providing these services in the 361 area code, and our goal is to provide them in the 210 and 830 area codes as soon as possible. Of course, our service is mobile, so our customers may some time actually traverse a rate center boundary. In my experience, most customers do not know where that boundary actually is, and it is arbitrary and irrelevant to what we do, other than for the purpose of securing local rating of calls to a particular NXX that is "local" to the calling party.

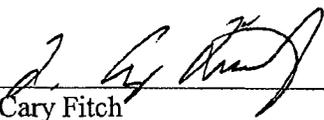
8. I am aware that SBC has acknowledged that "there are no state or federal requirements to associate an NPA-NXX for a new subscriber based on the subscriber's residence, billing or other location." Attached to this affidavit is a copy of an SBC pleading to the FCC that so states. We are therefore somewhat perplexed by SBC's position in this case, which essentially claims that Fitch Affordable must associate an NPA-NXX to subscribers based on their physical location.

9. I am also aware that SBC has told the FCC that ELCS is "traditional local service." I have attached SBC's pleading to the FCC in a recent case that so states, and the FCC order that so rules. We are therefore surprised and confused by SBC's apparent position that ELCS is something other than traditional local service in terms of retail rating of calls to other carriers' NXXs that are associated with rate centers that are mandatory local to the calling party.

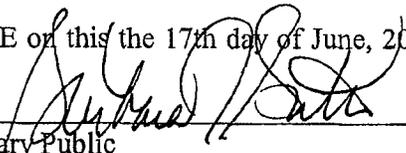
10. Fitch Affordable's services compete with wireline and other wireless services. It will be extraordinarily difficult for me to compete with SBC and its wireless affiliate Cingular (which has an NXX in Uvalde and perhaps other areas) if Carrizo Springs residents can call SBC (or its affiliate) on a "local" basis, but will incur toll to call one of my Uvalde, Eagle Pass or La Pryor numbers. According to SBC's Texas IntraLATA toll tariff, a Carrizo Springs resident that calls any Uvalde or Eagle Pass number (including those NXXs held by non-ILEC carriers) currently pays SBC 31¢ for each minute. If the Carrizo Springs resident calls La Pryor, then the resident is charged 21¢ for the first minute and 18¢ for each additional minute. See, http://www.sbc.com/Large-Files/RIMS/Texas/Long_Distance_MTS/tx-ld-02.pdf (SWBT Texas intraLATA toll tariff), Section 2, Sheet 7. Assuming that ELCS is approved and SBC receives the maximum fee, then that resident will pay SBC \$3.50 per month for "unlimited" calling from Carrizo Springs to Uvalde, Eagle Pass and La Pryor. If the resident makes more than 11 minutes of calls from Carrizo Springs to Uvalde or Eagle Pass in any given month, then that customer has saved money. Unless, that is, the customer has the temerity to call one of the NXXs held by a carrier other than SBC. In that instance, the Carrizo Springs user will pay the ELCS fee and still pay toll. In my experience, people will be very much less inclined to call a number if it incurs toll. This makes my service less valuable to my potential customers, since they will be less likely to be called by customers in the mandatory local calling area.

11. Fitch Affordable has obtained cell phone service from Sprint PCS. The phone number is 830.352.4519, which is an Eagle Pass number. We obtained this service in order to support our marketing efforts in the area involved in this case. We desire for this number (along with our numbers and those of all other CLECs and CMRS providers in the petitioned exchanges) to be accessible to Carrizo Springs residents on a local basis. Fitch Affordable is therefore affected by this case as a consumer, in addition to the impact to Fitch Affordable as a provider and competitor.

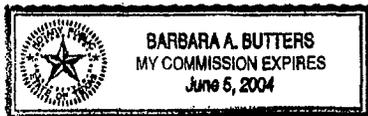
Further, Affiant sayeth not.


F. Cary Fitch

SWORN TO AND SUBSCRIBED BEFORE ME on this the 17th day of June, 2003, to certify which witness my hand and seal of office.


Notary Public
State of Texas

SEAL:



A. The Rate Center Issue.

1. Wireless Carriers are from Venus; wireline carriers are from Mars

The CTIA's Petition arises out of the "Rate Center Issue," articulated by the NANC's WWITF in the May 8, 1998 NANC report.¹ In that report, both sides of the issue set out their respective views. From the wireline carriers' perspective, the issue is seen as one of disparity of treatment; *i.e.*, with respect to telephone number portability, wireless carriers will have a competitive advantage over wireline carriers.²

This advantage is a product of the differences between the two services. As the name implies, wireline service is fixed and static; wireline carriers are literally tethered to their customers by wire. For the wireline carrier, rating and routing for both local and toll calls are based on the use of rate centers. Rate centers may embrace a single wire center, a portion of a wire center, or multiple wire center areas.³ Typically, a wireline local calling area may encompass multiple rate centers. A wireline call within a rate center or between rate centers could be billed as a flat rate call or a measured rate call or a toll call. Differences in local billing will depend on state regulations and the carrier's state tariffs. Generally, for wireline carriers, central office codes (NXXs) are assigned to individual central office switches and used in the geographic wire center serving area within a rate center. A wireline carrier's customer will be

¹ North American Numbering Council, "Local Number Portability Administration Working Group Report on Wireless Wireline Integration," (May 8, 1998). (*NANC Working Group Report*). A copy of this report was attached as Attachment A to the Petition.

² *NANC Working Group Report* Appendix D – Rate Center Issue § 1.3 Wireline Position Paper p. 39 ("All parties recognize that a difference exists in the scope of number portability when porting from a wireless to a wireline service provider as compared to porting from a wireline to a wireless service provider. Porting from a wireline to a wireless service provider is virtually unlimited — the end user can be physically located anywhere, while porting from a wireless to a wireline service provider is narrowly limited to the situation where the wireless end user is physically located with the rate center associated with the NPA-NXX of the end user's telephone number.")

³ "A rate center is a geographical area [that] utilizes a common geographical point of reference, called a rating point and defined by vertical and horizontal (V/H) coordinates, for distance measurements associated with call rating." *NANC Working Group Report*, Appendix D, p. 32.

assigned a telephone number based on his or her physical location within the wire center serving area.⁴ This assignment allows for calls to be billed based on the rate-center method.

Wireless service, however, is mobile, not fixed. And, while not entirely deregulated, wireless carriers are not as regulated as incumbent LECs. For example, wireless carriers do not file state or federal tariffs setting out their prices. How a wireless carrier decides to structure its rates is solely a business decision. While it is true that NXX codes assigned to wireless carriers are associated with a specific wireline rate center, these assignments are made to facilitate wireline to wireless call rating.⁵ As noted in the *NANC Working Group Report*, wireless carriers have great latitude in assigning telephone numbers and are free to assign telephone numbers from these NXXs throughout the carrier's calling area:

[O]nce NPA-NXXs are assigned to a wireless carrier, wireless carriers may select any one of their NPA-NXXs when allocating numbers to a subscriber. The WSP [wireless service provider] may select a particular NPA-NXX value based on customer desires of calling areas for land to mobile calls, land calls, or a combination of both. Alternatively, a wireless carrier may choose to select an NPA-NXX that is physically closest to the subscriber billing address. There are no state or federal requirements to associate an NPA-NXX for a new subscriber based on [the subscriber's] residence, billing, or other location.⁶

In brief, except for interacting with wireline carriers, rate centers are totally irrelevant to wireless carriers.

When the NANC adopted and recommended its "LNP Architecture and Administrative Plan," it proposed, and this Commission adopted, a rate center limitation on wireline-to-wireline porting.⁷ This limitation was not recommended for anti-competitive reasons, rather the

⁴ "ILEC customers will be assigned a telephone number from the NXX(s) assigned to the switch that serves the wire center and rate center area in which the customer is physically located. CLEC customers will be assigned a telephone number from the NXX(s) assigned to the CLEC for the rate center area in which the customer is physically located." *NANC Working Group Report* Appendix D p. 33.

⁵ *Id.*

⁶ *Id.* at p. 34. ("The customers [sic] physical, residential, business or billing location is not a necessary requirement in determining which numbers are assigned. . . . There is no requirement that a subscriber limit their [sic] service usage to certain rate centers, nor is their physical location necessarily a determining factor in which number they are assigned.")

⁷ "[L]ocation portability is technically limited to rate center/rate district boundaries of the incumbent LEC due to rating/routing concerns." NANC, "Local Numbering Portability Administration Selection Working Group," Appendix D – Architecture & Administrative Plan

limitation is a practical one: incumbent LECs, who are highly regulated and who do not share the flexibility of their competitors, have legitimate rating/routing concerns tied to the rate center structure. To ignore this regulatory reality would not have been in the best interests of either the industry or consumers. Indeed, the Commission acknowledged this regulatory reality early on by refusing to require location portability and in assigning to the state commissions the task of evaluating whether location portability was technically feasible and desirable:

To avoid the consumer confusion and other disadvantages inherent in requiring location portability, however, we believe state regulatory bodies should determine, consistent with this Order, whether to require carriers to provide location portability. *We believe the states should address this issue because we recognize that "rate centers" and local calling areas have been created by individual state commissions, and may vary from state to state. To the extent rate centers and/or local calling areas vary from state to state, the degree of location portability possible without causing consumer confusion may also vary. We therefore expect state regulatory bodies to consider the particular circumstances in their respective locales in determining whether to require carriers to implement location portability.*⁸

Although entirely reasonable, the rate center limitation to porting means that, in order for a wireless customer to switch to a wireline competitor and have his or her number ported to the new carrier, "the wireless end user must be located within the rate center associated with the NPA-NXX of the end user's telephone number."⁹ For example, using the Figure 4D in Attachment A to these comments, wireless subscriber 972/234-3333, whose billing location is in rate center F (RC F) would not be able to change to a wireline service provider while remaining at his or her same location because the subscriber is located in RC F while the subscriber's telephone number is assigned to rate center A (RC A).¹⁰

It is because of this disparity that the WWITF posed three questions to the Commission for resolution:

for Local Number Portability, § 7.3, p. 6 (April 25, 1997). (*Working Group Report*) See 47 C.F.R. § 52.26.

⁸ *Telephone Number Portability*, 11 FCC Rcd 8352, 8449 (1996) (emphasis supplied).

⁹ *NANC Working Group Report*, Appendix D, p. 39.

¹⁰ Attachment A to these Comments include Figures 4A – 4D used in the *NANC Working Group Report*, Appendix D, to set out demonstrative scenarios. See *NANC Working Group Report*, Appendix D, § 5.0 Example Porting Scenarios, pp. 34-35.

- Does the difference in the scope of porting capabilities between wireless and wireline service providers create a competitive disadvantage which [sic] would be inconsistent with the FCC's objectives for numbering?
- If so, is this competitive disadvantage overridden by the FCC's order to implement wireless-wireline portability to encourage CMRS-wireline competition?
- Would the inability in certain situations for a wireless end user, staying at the same location, to keep their [sic] telephone number when changing to a wireline service provider be acceptable from a statutory or regulatory perspective?¹¹

SBC contends that the difference in the scope of porting capabilities between wireless and wireline service providers does create a competitive disadvantage for wireline carriers that is inconsistent with the Commission's objectives for numbering. Nevertheless, the Commission can assist the industry in arriving at a solution that, while not perfect, more faithfully adheres to the principles underlying number portability. That solution, however, would not include running roughshod over the rate center model for rating and routing. For its part, CTIA would have the Commission ignore the regulatory reality of rate centers and formalize the competitive advantage the wireless carriers presently enjoy with respect to number porting.

2. The Commission should assist the WWITF in addressing the rate center issue without giving wireless carriers a competitive advantage.

In 1998, when the *NANC Working Group Report* was sent to the Commission, some members of the WWITF did not see mobile wireless service as in direct competition with wireline telephony.¹² If this was ever true in 1998, it certainly is not true today. Wireline carriers are reporting the loss of access lines to wireless carriers at an increasing rate.¹³ Indeed, as reported in the *UNE Fact Report 2002*:

¹¹ Letter from Woody Kerkeslager and Terry Appenzeller to Alan C. Hasselwander, Chairman, NANC, dated January 7, 1998. See *NANC Working Group Report*, Appendix D, p. 31.

¹² "Because no service competition exists and is not expected in the foreseeable future, the recommended course of action is to defer the introduction of portability between wireless and wireline service providers until a clear and real competitive need exists." *NANC Working Group Report*, Appendix D, pp. 42-43.

¹³ "While firm data is difficult to come by, analysts estimate that 3 to 5 percent of wireless customers use their wireless phones as their only phone. Though these estimates indicate that relatively few wireless customers have "cut the cord" in the sense of canceling their subscription to wireline telephone service, there is growing evidence that consumers are substituting wireless service for traditional wireline communications. One analyst claimed that 20 percent of residential customers had replaced "some" wireline phone usage with wireless, and that 11

Independent experts now almost uniformly conclude that wireless is a significant competitive substitute for second-line service today. For example, IDC found that, as of year-end 2001, "10 million wireline access lines will have been displaced by wireless, primarily by consumers choosing wireless service over installing an additional access line at home. IDC estimates that, by 2005, wireless phones will replace 30 to 35 percent of second and additional wireline access lines. Many other independent analysts have reached similar conclusions.¹⁴

This change in the competitive landscape makes it even more important that the rate center issue be resolved in a manner creating more, not less, competitive parity.

Whatever other agenda CTIA may have, it seeks nothing less than an FCC seal of approval on a competitive advantage favoring CRMS providers. CTIA wants the Commission to approve a wireline/wireless number porting integration plan that would allow the porting of numbers from wireline carriers to wireless carriers anywhere within the wireless carriers' serving area but restrict, either *de jure* or *de facto*, the porting of numbers from wireless carriers to wireline carriers to those occasion where the subscriber lives in the rate center designated for the wireless switch.

There are alternatives to this disparity scenario, some of which are discussed in the *NANC Working Group Report*.¹⁵ These alternatives include:

- Location portability, which has been referred to the state commissions for the same reasons that created the disparity in the first instance, the rate center model for rating and routing calls.

percent had replaced a "significant percentage." According to a USA Today/CNN/Gallop poll, almost one in five mobile telephony users regard their wireless phone as their primary phone. . . . Several local carriers have attributed declining access line growth rates in part to substitution by wireless. The number of residential access lines served by BellSouth, SBC, and Verizon dropped by almost 3 percent during 2001, more than 2.5 million lines. A top executive at Verizon attributed the decline in the number of access lines served by his company, the first in the company's history, in part to the shift to wireless phones. One study estimated that, by the end of 2001, wireless had displaced 10 million access lines, primarily by consumers choosing wireless over installing additional access lines." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market conditions With Respect to Commercial Mobile Services*, 17 FCC Rcd 12985, 13017 (2002).

¹⁴ *UNE Fact Report 2002*, Prepared for and submitted by BellSouth, SBC, Qwest, and Verizon in *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; etc.*, CC Dockets Nos. 01-338, 96-98, and 98-147 (April 2002). See Attachment B.

¹⁵ *NANC Working Group Report*, Appendix D, pp. 41-44 and 46-47.

- Rate center consolidation/modification, which suffers from many of the same issues as location portability and therefore requires individual state commission action.
- Numbering assignment, which would require wireless carriers to be assigned an NXX for each rate center in which they offered service and the assignment of telephone numbers based on the physical location of the wireless customer.

Regardless of whether any of these alternatives are acceptable to the Commission, it is clear that, as requested in 1998, the NANC needs direction from the Commission with respect to the rate center issue. CTIA, however, has not made the case that the question ought to be resolved by codifying a gross competitive advantage to wireless carriers.

B. CTIA's Proposed Service-Level Agreement Is Inconsistent With the Incumbent LEC's Obligations Under Sections 251 and 252.

CTIA asserts, but does not factually or legally support, a contention that interconnection agreements are not necessary to telephone number porting.¹⁶ CTIA contends that "a standard service-level porting agreement" is all that is needed.¹⁷ One problem with this contention is that there is no such thing as a "standard service-level porting agreement."

By standard service-level porting agreement, CTIA is really talking about a proposed agreement created by the CTIA for its members. There is no industry-wide consensus on the terms and conditions of a service-level porting agreement. Other than the obvious legal issues arising from the CTIA's assertion, there is a notable problem with the CTIA's plan: if the parties cannot agree on the terms of a service-level porting agreement, there is no one to whom the parties can turn to resolve the impasse.

All LECs are required by section 251(b)(2) to provide "number portability in accordance with requirements prescribed by the Commission."¹⁸ When requested, incumbent LECs are also required to negotiate in good faith the particular terms and conditions of agreements to fulfill duties described in sections 251(b) and (c), including the duty to provide number portability.¹⁹

¹⁶ Petition, p. 1.

¹⁷ *Id.*

¹⁸ 47 U.S.C. § 251(b)(2).

¹⁹ 47 U.S.C. § 251(c)(1). See *Law offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 305 F.3d 89 (D.C. Cir. 2002) (*Trinko*) ("[S]ection 251 defines duties between telecommunications carriers. It is clear that the duties enumerated in section 251 regulate the relationships between

In last year's *Qwest Order*, this Commission ruled that, "[b]ased on these statutory provisions [sections 251 and 252], . . . an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)."²⁰ Consequently, an agreed upon document that sets out the terms and conditions by which incumbent LECs provide number portability is an interconnection agreement and must be filed with the appropriate state commission.²¹ Among other things, this mechanism guarantees the parties their right to negotiate and enter into a binding agreement "without regard to the standards set forth in subsections (b) and (c) of section 251."²² What's more, it provides a means of resolving disputes concerning those terms and conditions²³ and allows public scrutiny of any such agreements.²⁴ By means of its Petition, CTIA seeks nothing less than an abrogation of Congressional will as codified in sections 251 and 252.²⁵

telecommunications carriers, especially those that are seeking to enter the market for local phone service, rather than the relationships between telecommunications carriers and consumers. In fact, the Committee Report notes that section 251 'imposes a general duty to interconnect directly or indirectly *between all telecommunications carriers. ...*' *H.R. Conf. Rep. 104-458, 1996 WL 46795, at 121 (1996) (emphasis added).*)

²⁰ *Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Agreements under Section 252(a)(1)*, 17 FCC Rcd 19337, 19341 (2002) (*Qwest Order*).

²¹ 47 U.S.C. § 252(h).

²² 47 U.S.C. § 252(a)(1). *See Tinko*, 305 F.3d at 103 ("Such interconnection agreements do not necessarily reiterate the duties enumerated in section 251. Instead, the ILEC and requesting carrier have the option of contracting around the obligations set forth in subsections (b) and (c) of section 251. Section 252(a)(1) of the Telecommunications Act provides: 'upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers *without regard to the standards set forth in subsections (b) and (c) of section 251....*' 47 U.S.C. § 252 (a)(1) (emphasis added).").

²³ 47 U.S.C. § 252(b).

²⁴ 47 U.S.C. § 252(h).

²⁵ It is also true that incumbent LECs may file Statements of Generally Available Terms, pursuant to 47 U.S.C. § 252(f).

Conclusion

CTIA has not met its burden of proof with respect to the remedy it seeks. There is no basis on which the Commission can rule that the CTIA's plan to enshrine competitive inequality in inter-modal telephone number porting is or ought to be the law. Moreover, CTIA's position on interconnection agreements is contrary to the express provisions of sections 251 and 252, as well as the opinions stated in the recently released *Qwest Order*. For these reasons, CTIA's Petition should be denied.

Respectfully submitted,

SBC COMMUNICATIONS INC.

By: /s/ William A. Brown

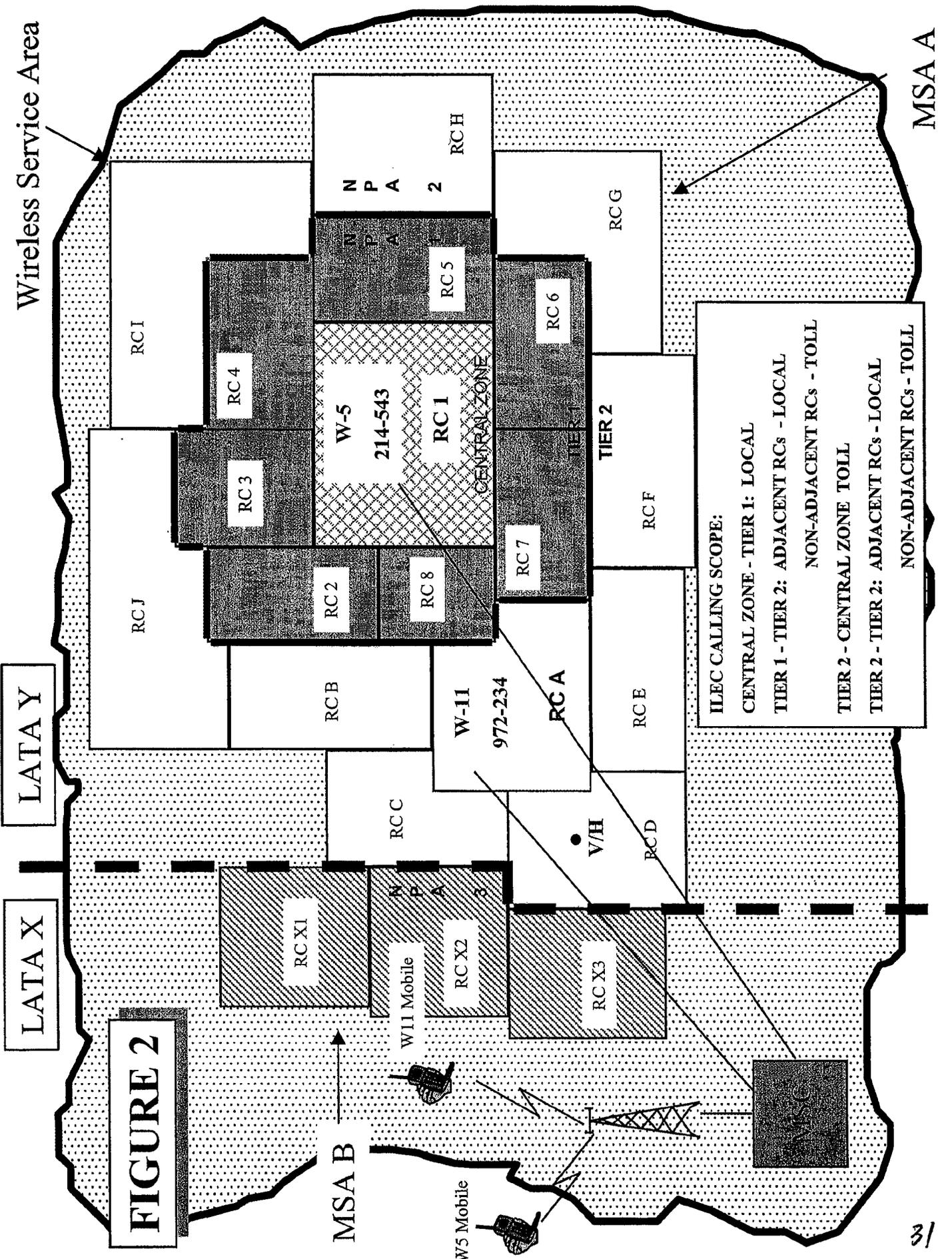
William A. Brown
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Its Attorneys

February 26, 2003

ATTACHMENT A



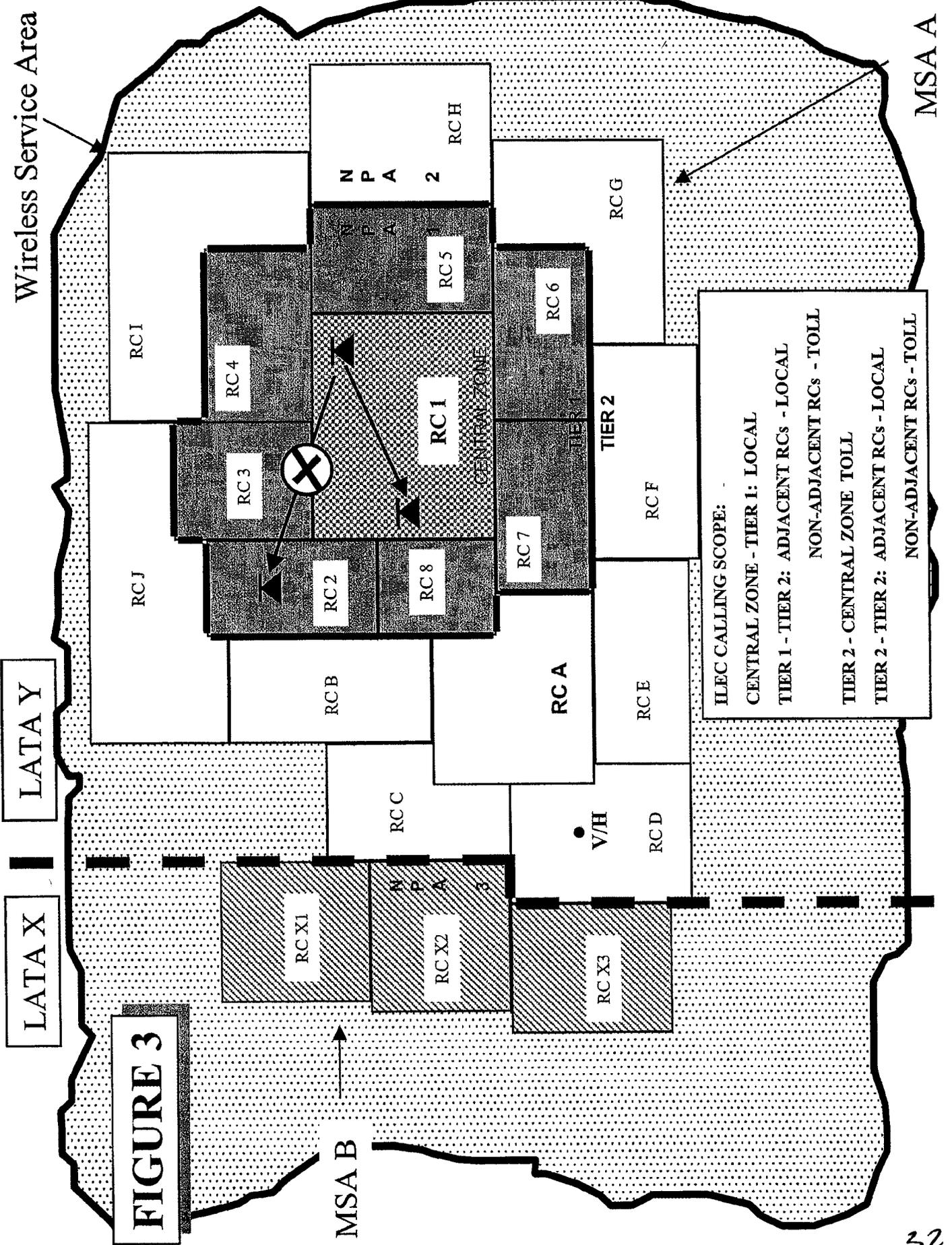
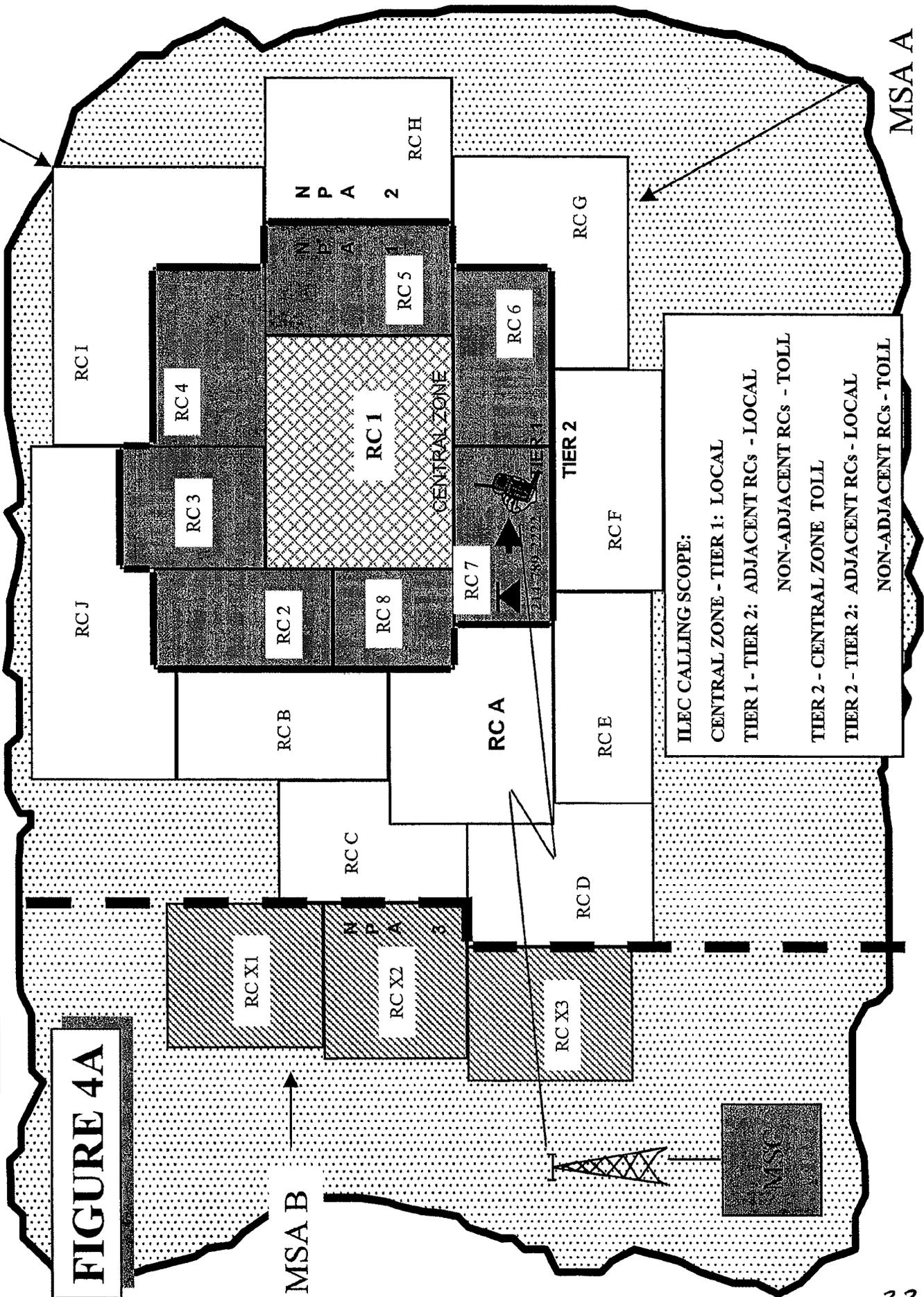


FIGURE 3

Wireless Service Area

LATA X LATA Y

FIGURE 4A



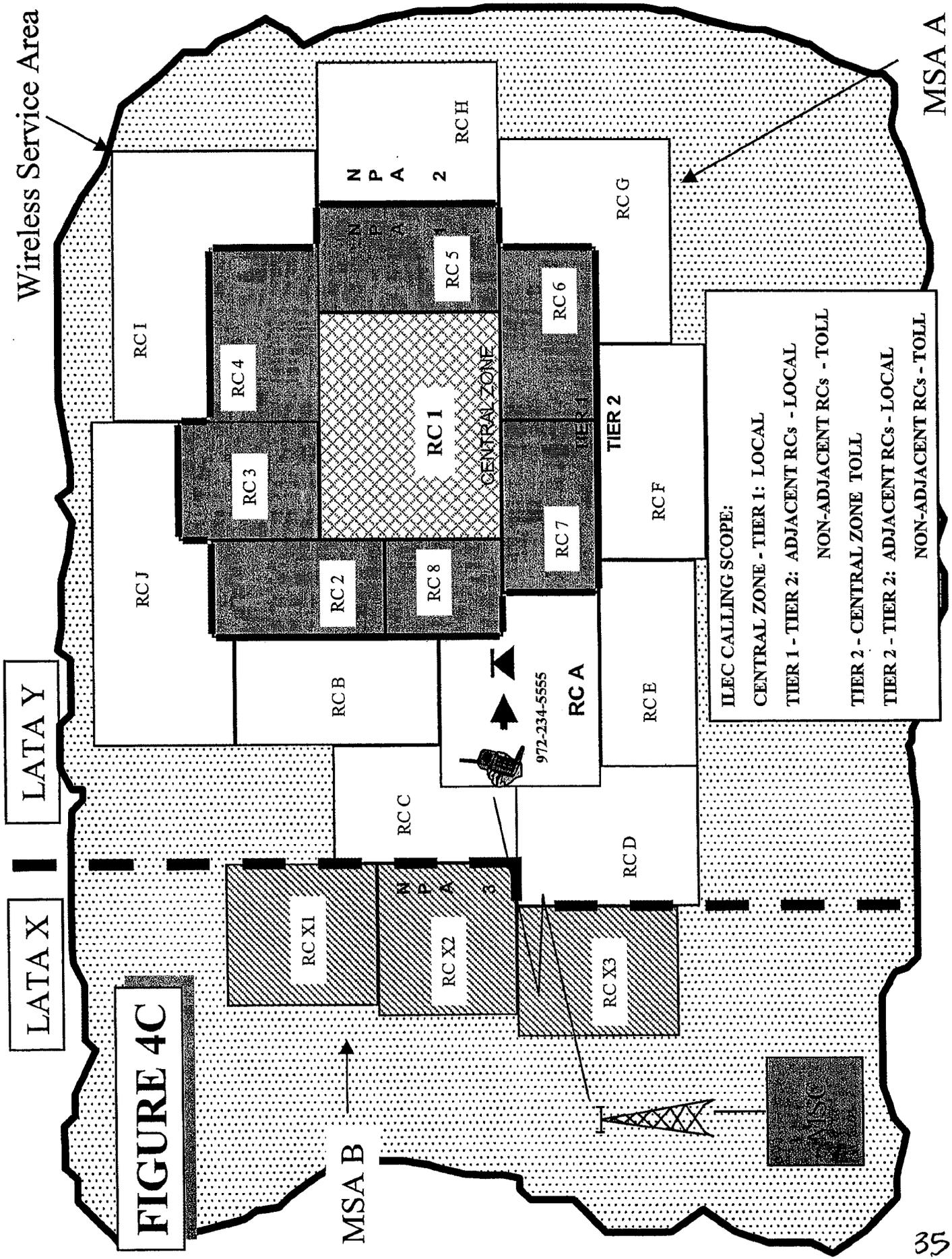


FIGURE 4C

ILEC CALLING SCOPE:
 CENTRAL ZONE - TIER 1: LOCAL
 TIER 1 - TIER 2: ADJACENT RCs - LOCAL
 TIER 2 - CENTRAL ZONE TOLL
 TIER 2 - TIER 2: ADJACENT RCs - LOCAL
 NON-ADJACENT RCs - TOLL
 NON-ADJACENT RCs - TOLL

Wireless Service Area

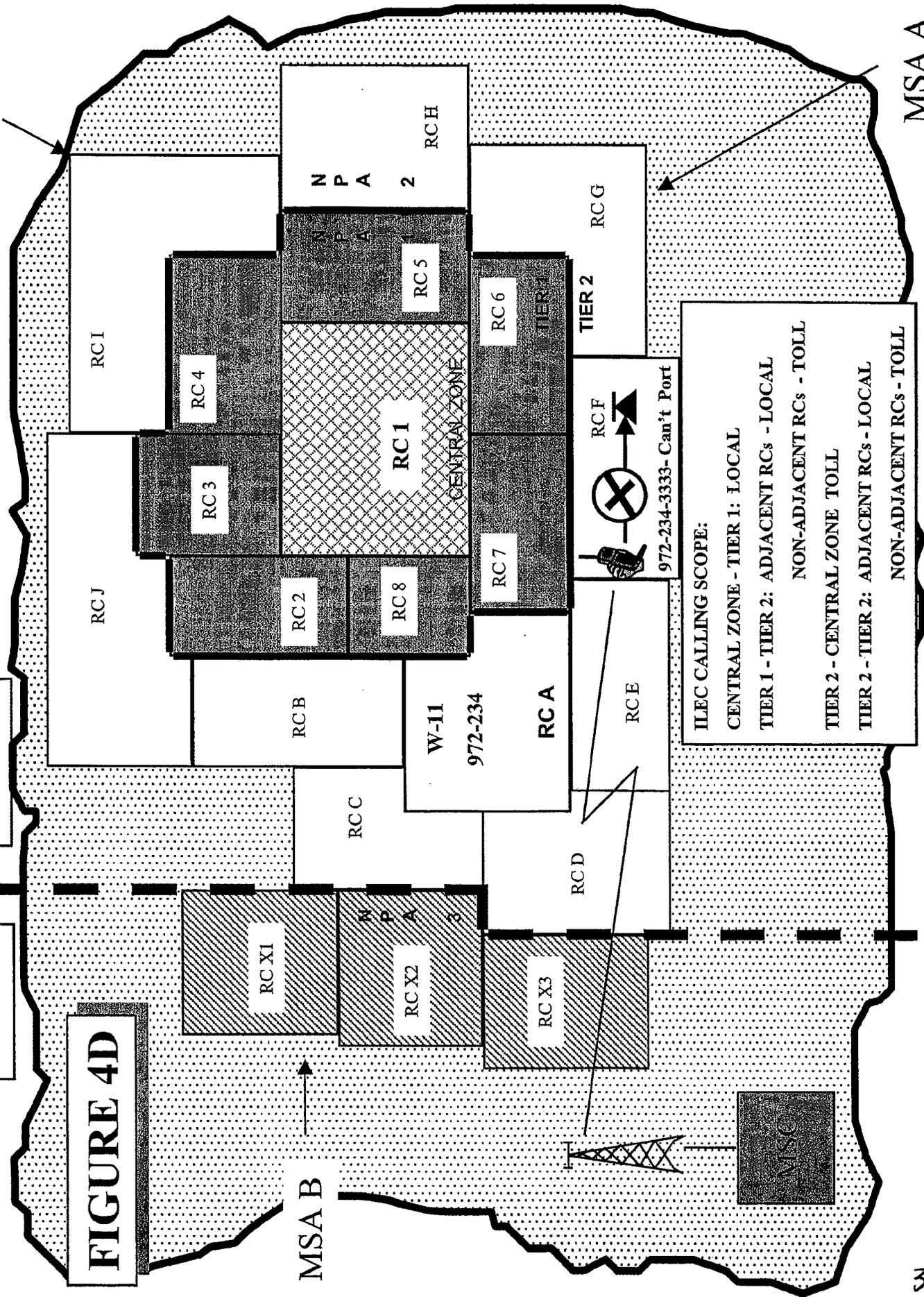
MSA A

LATA Y

LATA X

FIGURE 4D

MSA B



ILEC CALLING SCOPE:
 CENTRAL ZONE - TIER 1: LOCAL
 TIER 1 - TIER 2: ADJACENT RCs - LOCAL
 TIER 2 - CENTRAL ZONE TOLL
 TIER 2 - TIER 2: ADJACENT RCs - LOCAL
 NON-ADJACENT RCs - TOLL
 NON-ADJACENT RCs - TOLL

Control Number: 26080

Item Number: 6

SBC

April 14, 2003

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PUBLIC UTIL. COMMISSION
FILING CLERK

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Texas Regulatory

SBC Texas
1616 Guadalupe
Room 312
Austin, TX 78701-1213

April 14, 2003

Commission Filing Clerk
Public Utility Commission of Texas
1701 N. Congress Ave.
Austin, Texas 78701

Dear Commission Filing Clerk:

Re: Project No. 26080, ELC Petition – Graford to Graham and Jacksboro

Enclosed for filing in the above-referenced project are an original and nine copies of the FCC Memorandum Opinion and Order granting a Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS). The petitioning and petitioned exchanges are listed below. Southwestern Bell Telephone, L.P. d/b/a SBC Texas ("SBC") and United Telephone Company, d/b/a Sprint have not yet determined an implementation date, but will file that information as soon as it is available.

<u>Project Number</u>	<u>Exchange (ILEC)</u>	<u>Petitioned Exchanges (ILEC)</u>
26080	Graford (United)	Graham (SBC) Jacksboro (SBC)

Acknowledgment and date of receipt of this filing are requested. Attached for your use is a duplicate letter. Questions regarding this matter may be referred to me at 512-870-3693.

Sincerely,

Paula Ornelas
Area Manager-Rate Administration

Attachments

cc: Office of Public Utility Counsel, PUC
David Featherston, Director, Telecommunications Industry Analysis, PUC

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Southwestern Bell Petitions for)
Limited Modifications of LATA)
Boundaries to Provide Expanded Local)
Calling Service (ELCS))

WC Docket No. 02-373

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 2003

Released: April 11, 2003

By the Chief, Competition Policy Division:

I. INTRODUCTION

1. On November 14, 2002, Southwestern Bell Telephone Company (SWBT), pursuant to section 3(25) of the Communications Act of 1934, as amended (Act),¹ filed two petitions to provide two-way, flat-rated, non-optional, expanded local calling service (ELCS) between various exchanges in Texas.² SWBT's petitions request limited modifications of two local access and transport area (LATA) boundaries.³ For the reasons stated below, we grant SWBT's requests.

II. BACKGROUND

2. Requests for new ELCS routes are generally initiated by local subscribers. IntraLATA ELCS routes can be ordered by a state commission.⁴ Under section 3(25)(B) of the Act, requests for interLATA ELCS routes fall within the Federal Communications Commission's

¹ See 47 U.S.C. § 153(25).

² See Comment Sought on SWBT Request for Limited Modifications of LATA Boundary to Provide Expanded Local Calling Service Between Certain Exchanges in Texas, WC Docket. No. 02-373, Public Notice, DA No. 02-3325 (rel. Dec. 3, 2002). In the first petition, SWBT requests ELCS between the Graford and Graham exchanges. In the second petition, SWBT requests ELCS between the Graford and Jacksboro exchanges.

³ Section 3(25) of the Act defines LATAs as those areas established prior to enactment of the Telecommunications Act of 1996 by a Bell Operating Company (BOC), as permitted under the AT&T Consent Decree, or "established or modified by a BOC after such date of enactment, and approved by the Commission." 47 U.S.C. § 153(25).

⁴ *United States v. Western Electric Company, Inc.*, 569 F. Supp. 990, 995 (D.D.C. 1983). "The distance at which a local call becomes a long distance toll call has been, and will continue to be, determined exclusively by the various state regulatory bodies." *Id.*

(Commission) exclusive jurisdiction over the modification of LATA boundaries.⁵ Applying a two-part test, the Commission will grant a request for an ELCS LATA modification where a petitioning BOC shows that the proposed modification is justified by a significant community of interest among the affected exchanges, and that the grant of the requested waiver will not have any anticompetitive effects.⁶ A BOC is deemed to have made a *prima facie* case that it meets the first prong of this test if the ELCS petition: (1) has been approved by the state commission; (2) proposes only traditional local service (*i.e.*, flat-rated, non-optional ELCS); (3) indicates that the state commission found a sufficient community of interest to warrant such service; and (4) documents this community of interest through such evidence as poll results, usage data, and descriptions of the communities involved. The ELCS petition meets the second prong of the test if it shows that the request involves a limited number of customers or access lines.⁷

3. The SWBT petitions propose to establish two-way, flat-rated, non-optional ELCS, and are accompanied by an order issued by the Texas Public Utility Commission (PUC) approving the two ELCS requests on the basis that sufficient communities of interest exist to warrant such service, a statement by SWBT that only traditional local service is proposed, poll results demonstrating that communities of interest exist between the respective exchanges,⁸ and a statement of the number of access lines involved.⁹

III. DISCUSSION

4. We conclude that SWBT has made its *prima facie* case and that its petitions satisfy the criteria established by Commission precedent. Applying the first part of the two-part test, we find that SWBT has shown that communities of interest exist among the affected exchanges. For example, many of the medical facilities, physicians, major repair and supply services, and places of employment used by the residents of Graford are either in Graham or Jacksboro.¹⁰ SWBT also proposes offering two-way, flat-rated, non-optional local service, a further indicator that communities of interest exist.

5. Applying the second part of the two-part test, we find that granting the SWBT petitions would have a minimal effect upon competition because the ELCS requests would affect a

⁵ *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US WEST Petitions to Consolidate LATAs in Minnesota and Arizona*, Memorandum Opinion and Order, 14 FCC Red. 14,392, 14,399 (1999).

⁶ *Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, Memorandum Opinion and Order, 12 FCC Red 10646, 10649-50 (1997). In this order, the Commission also delegated authority to the Common Carrier Bureau (now the Wireline Competition Bureau) to act on petitions to modify LATA boundaries. *Id.* at 10657-58. See also *Application for Review of Petition for Modification of LATA Boundary*, FCC 02-233, Order on Review, 17 FCC Red 16952 (2002).

⁷ *Id.* at 10659.

⁸ 96.27 percent of Graford customers returning ballots voted in favor of ELCS to Graham and 96.60 percent of those customers returning ballots voted in favor of ELCS to Jacksboro. SWBT Petition at 2.

⁹ The Graford exchange has 459 access lines, while the Graham exchange has 9,116 access lines and the Jacksboro exchange has 3,192 access lines, respectively. SWBT Petition at 2.

¹⁰ SWBT Petition at Attach. A, p. 2.

small number of access lines.¹¹ Most significantly, however, SWBT has opened its market to competition in Texas and, accordingly, has been granted authority to offer long distance service in that state.¹² As a result, we believe that granting SWBT's petitions serve the public interest by permitting minor LATA modifications where such modifications are necessary to meet the needs of local subscribers. Accordingly, we approve SWBT's petitions for limited LATA modifications to provide two-way, flat-rated, non-optional ELCS.

6. We grant this relief solely for the limited purpose of allowing SWBT to provide ELCS between the specific exchanges or geographic areas identified in these requests. The LATA is not modified to permit the BOC to offer any other type of service, including calls that originate or terminate outside the specified areas. Thus, two-way, flat-rated, non-optional ELCS between the specified exchanges will be treated as intraLATA service, and the provisions of the Act governing intraLATA service will apply.¹³ Other types of service between the specified exchanges will remain interLATA, and the provisions of the Act governing interLATA service will apply.

VI. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, pursuant to sections 3(25) and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153(25), 154(i), and authority delegated by sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the requests of Southwestern Bell Telephone Company for LATA modifications for the limited purpose of providing two-way, flat-rated, non-optional ELCS at specific locations, identified in WC Docket No. 02-373, ARE APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief, Competition Policy Division
Wireline Competition Division

¹¹ See *supra* n.9. In assessing the number of lines affected we note that the great majority of calls will be made from the Graford exchange into the Graham and Jacksboro exchanges. Accordingly, for purposes of this petition, the access lines we consider are the 459 access lines in the Graford exchange.

¹² Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354 (2000).

¹³ The BOC may provide ELCS service without meeting the section 271 requirements, see 47 U.S.C. § 271, and a separate affiliate is not required, see 47 U.S.C. § 272.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Request of Limited Modification of)
LATA Boundaries to Provide ELCS)
Between the Graford)
Exchange and the ~~Graham~~ and)
Jacksboro Exchanges.)

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DEC 02 2002

Secretary

PETITION

I. INTRODUCTION

Southwestern Bell Telephone Company (SWBT), pursuant to Section 3(25) of the Communications Act of 1934, as amended,¹ and in accordance with the guidelines established in the Commission's Memorandum Opinion and Order (MO&O) released July 15, 1997 in CC Docket No. 96-159,² hereby submits an application for a limited modification of LATA boundaries to provide ELCS between the Graford exchange and the Graham and Jacksboro exchanges in Texas.

II. SUPPORTING INFORMATION

As prescribed in paragraph 23 of the aforementioned Commission MO&O, SWBT provides the following information in support of its application:

1. Type of service: Flat-rate, non-optional Expanded Local Calling (ELC);
2. Direction of service: Two-way;
3. Exchanges involved: Graford in the Dallas LATA, Graham in the Wichita Falls LATA and Jacksboro in the Wichita Falls LATA;

¹ The Communications Act of 1934, as amended, 47 U.S.C. *et al.*

² Memorandum Opinion and Order, Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service at Various Locations, CC Docket No. 96-159, released July 15, 1997. By way of this MO&O the Commission adopted a format for and criteria under which such petitions would be granted. The format and criteria are detailed in paragraphs 23 and 24.

-
4. Name of carriers: Graford of United Telephone Company of Texas, d/b/a Sprint, Graham of Southwestern Bell Telephone Company and Jacksboro of Southwestern Bell Telephone Company;
 5. State commission approval(s): See Attachment A;
 6. Number of access lines or customers: Graford has 459 access lines, Graham has 9,116 access lines and Jacksboro has 3,192 access lines;
 7. Usage data: Usage data is not available to Southwestern Bell Telephone. SWBT does not currently carry traffic across LATA boundaries,
 8. Poll results: Percentage of Graford customers returning ballots who voted in favor of ELC to **Graham**: 96.27. Percentage of Graford customers returning ballots who voted in favor of ELC to Jacksboro: 96.60. Where SWBT is the petitioning exchange, there is *no* proposed rate increase. Where SWBT is not the petitioning exchange, SWBT does not have information as to any proposed rate increase.
 9. Community of interest statement: The Public Utility Commission of Texas includes a Community of Interest Finding in their Order(s). See Attachment A
 10. Map: See Attachment B; and,
 11. Other pertinent information: None

III. *PRIMA FACIE* SHOWING

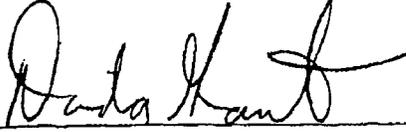
SWBT believes that it has made a *prima facie* case supporting grant of the proposed modification because the instant ELCS petition (1) has been approved by the state commission; (2) proposes only traditional local service (i.e., flat-rate, non-optional ELCS); (3) indicates that the state commission found a sufficient community of interest to warrant such service; (4) documents this community of interest through such evidence as **poll** results and descriptions of the communities involved; and (5) involves a limited number of customer or access lines.

IV. CONCLUSION

Wherefore, SWBT request that the Commission approve its application for a limited modification of LATA boundaries to provide ELCS between the Graford exchange and the Graham and Jacksboro exchanges.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By 

Davida Grant
Gary L. Phillips
Paul Mancini

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Washington, DC 20005
(202) 326-8903 - telephone
(202) 408-8763 - fax
Its Attorneys

November 14, 2002

DOCKET NO. 26080

PETITION FOR EXPANDED LOCAL § PUBLIC UTILITY COMMISSION
CALLING SERVICE FROM THE GRAFORD §
EXCHANGE TO THE EXCHANGES OF § OF TEXAS
GRAHAM AND JACKSBORO §

RECEIVED
02 SEP 15 11:25
FILING CLERK

INTERIM ORDER

Findings of Fact

1. On February 21, 2002, subscribers of the **Graford** Exchange filed a petition for **Expanded Local Calling Service (ELCS)** requesting **non-optional**, two-way, flat rate calling to the exchanges of **Graham** and **Jacksboro**.
2. The processes for petitioning and balloting included notice that if service to the **Graford** Exchange is approved by ballot, an additional monthly fee of up to **\$3.50** per residential line and **\$7.00** per business line on a **non-optional** basis would apply.
3. The **Graford** Exchange is in the **Dallas Local Access and Transport Area (LATA)** and is served by **United Telephone Company, d/b/a Sprint**. The petitioned exchange of **Graham** is in the **Longview LATA** and is served by **Southwestern Bell Telephone Company (SWBT)**. The petitioned exchange of **Jacksboro** is in the **Wichita Falls LATA** and is served by **SWBT**.
4. An affirmative vote of **96.27** percent of **Graford** Exchange subscribers responding to the ballot favored expanded the local calling scope to include the **Graham** Exchange. An affirmative vote of **96.60** percent of **Graford** Exchange subscribers responding to the ballot favored expanding the local calling scope to include the **Jacksboro** Exchange.

5

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5. On July 15, 1997, the Federal Communications Commission (FCC) issued an order, *In the Matter of Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, CC Docket No. 96-159, FCC 97-244, (rel. July 15, 1997) (*Memorandum Opinion and Order*), providing a procedure for requesting a limited LATA boundary modification.

6. Utilizing vertical and horizontal (V&H) geographic coordinates of the central switching offices pursuant to 16 T.A.C. § 23.49(c)(3)(B)(i), the central office of the petitioned exchange of *Graham* is 22.45 miles from the petitioning exchange and the central office. Utilizing vertical and horizontal (V&H) geographic coordinates of the central switching offices pursuant to T.A.C. § 23.49(c)(3)(B)(i), the central office of the petitioned exchange of *Jacksborn* is 19.79 miles from the petitioning exchange and the central office.

7. In addition to satisfying the geographic requirement of the Texas Public Utility Commission rules that the central switching office for a petitioned exchange be within 50 miles of the petitioning exchange, statements attesting to the existence of a community of interest between the petitioning and petitioned exchange were filed on February 21, 2002, for the petitioned exchanges of *Graham* and *Jacksborn*.

8. The *Graford* residents use the following vital services found in the exchanges of *Graham* and *Jacksborn*: medical facilities, physicians, repair and supply businesses, major employers, banking facilities, groceries, and general merchandise stores.

9. Based on the statement referenced in Finding of Fact No. 8, *Graford* is a community of interest between the petitioning *Graford* Exchange and the petitioned exchanges of *Graham* and *Jacksborn*.

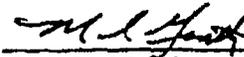
Ordering Paragraphs

In accordance with the findings of fact, the Commission issues the following Interim Order:

1. Petitioners from the Graford Exchange have shown a community of interest with the exchanges of Graham and Jacksboro.
2. SWBT is directed to file a request for a limited modification of the LATA boundary in accordance with the procedures outlined in the FCC order, *In the Matter of Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*. CC Docket No. 96-159, FCC 97-244, (rel. July 15, 1997) (*Memorandum Opinion and order*), ¶ 23 & 24 by September 30, 2002.
3. Within ten (10) days of the receipt of an Order or Notice from the FCC relating to this petition, SWBT is directed to file such Order or Notice in this project.

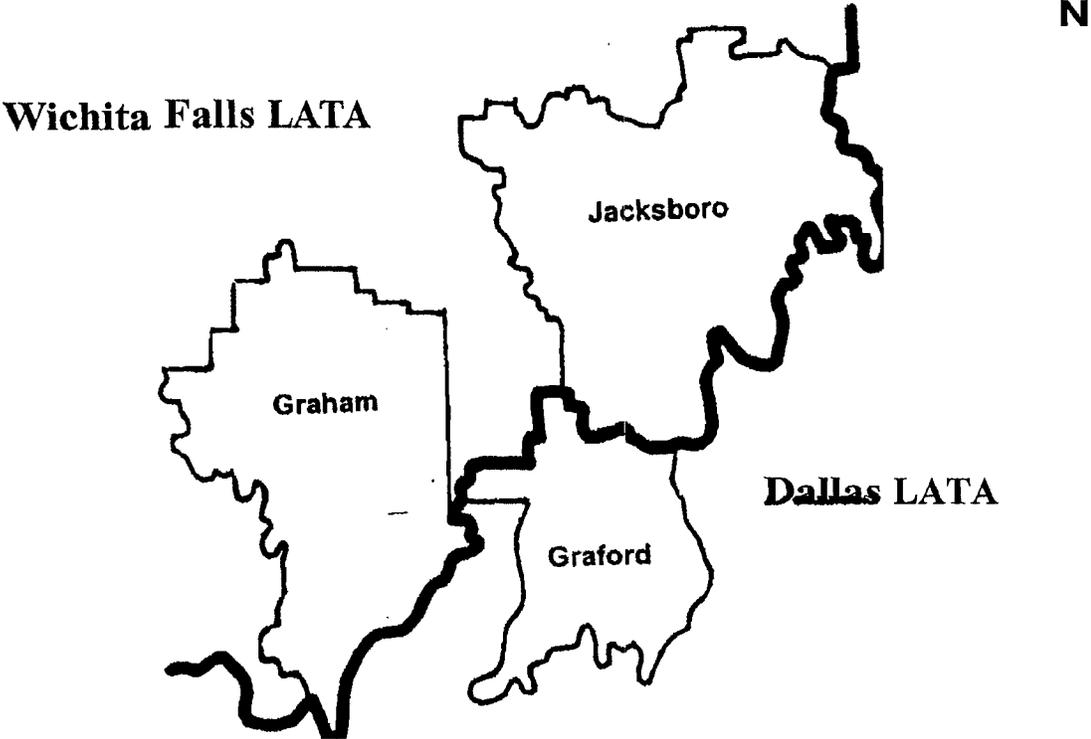
SIGNED AT AUSTIN, TEXAS the 16th day of September 2002.

PUBLIC UTILITY COMMISSION OF TEXAS

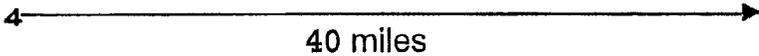


MARK GENTLE
ADMINISTRATIVE LAW JUDGE
POLICY DEVELOPMENT DIVISION

Graford to Graham and Jacksboro



1 inch = approx. 11 mi.





Control Number: 27802



Item Number: 13

Addendum StartPage: 0

DOCKET NO. 27802

PETITION FOR EXPANDED LOCAL CALLING SERVICE FROM THE CITY OF CARRIZO SPRINGS TO THE EXCHANGES OF BATESVILLE, EAGLE PASS, LAPRYOR, AND UVALDE §

PUBLIC UTILITY COMMISSION OF TEXAS

2003 AUG 29 PM 4:37 PUBLIC UTILITY COMMISSION CLERK

CARY FITCH d/b/a FITCH AFFORDABLE APPEAL OF ORDER NO. 9

INDEX

Table with 3 columns: Document, Pages, File Name. Rows include 'CARY FITCH d/b/a FITCH AFFORDABLE APPEAL OF ORDER NO. 9' and 'Petition of the City of Aubrey Exchange for Expanded Local Calling Service...'.

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DOCKET NO. 27802

PETITION FOR EXPANDED LOCAL	§	
CALLING SERVICE FROM THE CITY	§	PUBLIC UTILITY COMMISSION
OF CARRIZO SPRINGS TO THE	§	
EXCHANGES OF BATESVILLE,	§	OF TEXAS
EAGLE PASS, LAPRYOR, AND	§	
UVALDE	§	

CARY FITCH d/b/a FITCH AFFORDABLE
APPEAL OF ORDER NO. 9

TO THE HONORABLE COMMISSION:

Cary Fitch, d/b/a Fitch Affordable Telecom (hereinafter "Fitch"), by its undersigned counsel, respectfully files this Appeal of Order No. 3 under PUC PROC. R. § 22.123 regarding the above-entitled proceeding.

I. INTRODUCTION

1. This proceeding involves a petition for expanded local calling service from the City of Carrizo Springs for the exchanges of Batesville, Eagle Pass, LaPryor, and Uvalde.¹

2. On May 28, 2003, Fitch filed a Petition for Intervention and Request for Correction of Inadvertent Deficiency or for Finding of Deficiency. Fitch asserted that the petition as filed is deficient because it fails to list all NXX's in the petitioning and petitioned exchanges which violates § 55.043 of PURA. Fitch contended that it was necessary to intervene in order to receive competitively neutral and nondiscriminatory treatment for its NXX codes.

3. Fitch alleged that it was a wireless (CMRS) provider that has NXXs in Uvalde, Eagle Pass, and La Pryor, and that it was intervening to ensure that Carrizo Springs residents would be

¹ This is not, despite SBC's protests, a "Virtual NXX" case. Fitch will have both wireless network facilities and end use customers in the area, and will not be providing "Virtual NXX." However, even were SBC's allegation true, it would be irrelevant. See below, as well as Fitch's Reply to SBC and Staff Response to Order No. 2 and the attached affidavit.

able to reach Fitch's NXX's, and those of other CMRS and CLEC providers with NXXs in the petitioned exchange, along with those of the incumbent.

4. On August 21, 2003, Michael E. Field, Director, Docket Management, Policy Development Division, issued Order No. 3, denying Fitch's petition for intervention and deeming the ELCS petition sufficient. Order No. 3 recognized Fitch's allegations concerning NXXs, but held that the association of NXX codes does not constitute a justiciable interest.

5. Order No. 3 further noted that it was the responsibility of ILECs to ensure that all relevant NXX codes are included in the implementation of ELCS interest, and that Fitch "must negotiate traffic arrangements with the ILECS to ensure that its NXX codes will be honored in the calling areas."

6. Order No. 3 is unjustified, improper, and immediately prejudices a substantial or material right of a party and materially affects the course of the hearing for the reasons shown below and because it improperly denies Fitch's Petition.

II. POINTS OF ERROR

7. Order No. 3 is unjustified, improper, and immediately prejudices a substantial or material right of a party and materially affects the course of the hearing in the following particulars.

A. Order No. 3 improperly finds that Fitch has no justiciable interest.

8. Fitch has a justiciable interest both as a competitor of SBC and as a customer of an SBC competitor. Under clear Commission precedent, Order No. 3 must be reversed.

(1) Justiciable interest in general.

9. PUC PROC. R. 22.102(b) provides that a person has standing to intervene if that person:

- (1) has a right to participate which is expressly conferred by statute, commission rule or order or other law; or
- (2) has or represents persons with a justiciable interest which may be adversely affected by the outcome of the proceeding.

10. Agency standing should be liberally construed so that the agency may be apprised of diverse viewpoints in order to determine where the public interest lies and how it should be furthered. *Fort Bend County v. Texas Parks & Wildlife Com'n*, 818 S.W. 2d 898, 899 (Tex. Civ. App. -- Austin 1991, no writ); *RR Com'n v. Ennis Transportation Co.*, 695 S.W. 2d 706, 710 (Tex. Civ. App. -- Austin 1985, writ ref'd n.r.e.).

11. The Commission has a liberal intervention policy regarding the application of the definition of justiciable interest. *Petition of Lamb County Electric Cooperative, Inc. for a Cease and Desist order Against Southwestern Public Service Company*, Docket No. 14454, Order No. 6 (Dec. 8, 1991). The Commission has interpreted the term 'judicial interest' liberally when determining standing. *Application of Entergy Corporation and Gulf States Utilities Company for Sale, Transfer or Merger*, Docket No. 11292, Examiner's Order No. 11, 18 P.U.C. BULL. 1014 (Sept. 17, 1992).

12. The Commission's broad intervention policy is well-known. *Petition of the City of Aubrey Exchange for Expanded Local Calling Service to the Crossroads, Lincoln Park and Krugerville Exchanges Pursuant to Subst. R. 23.49(c)*, Docket No. 13045, Examiner's Order No. 8 at 2, 20 P.U.C. Bull. 527, 1994 WL 762783 at *3, 1994 WL 932456 at *3 (August 4, 1994).

13. A liberal intervention policy enables the Commission to be apprised of diverse viewpoints and to tell where the public interest lies and how it may be furthered. *Application of Southwestern Bell Telephone Company to Approve Deletion of the Carrier Common Line and Interexchange Carrier Access Charge Credits*, Docket No. 10463, Examiner's Order No. 9, 17

P.U.C. BULL. 3050 (Dec. 3, 1991); *Application of Entergy Corporation and Gulf States Utilities Company for Sale, Transfer, or Merger*, Docket No. 11292, Examiner's Order No. 11, 18 P.U.C. BULL. 1014 (Sept. 17, 1992).

(2) Justiciable interest as a competitor – possible adverse economic impact.

14. The Commission has in the past addressed the right of ILEC competitors to intervene in ELCS proceedings, and its decision is squarely on point in this case. In 1994, MCI was allowed to intervene in an ELCS proceeding because of the possible adverse economic impact on its business as a non-ILEC intra-exchange IXC, *even though the examiner found that the possible adverse economic impact was not an issue in the ELCS proceeding*. The Examiner found that the possible adverse economic impact gave rise to a justiciable interest *even though it was an irrelevant issue in the proceeding* because the IXC had an interest in ensuring that the ELCS proceeding stayed within its statutory parameters. *Petition of the City of Aubrey Exchange for Expanded Local Calling Service to the Crossroads, Lincoln Park and Krugerville Exchanges Pursuant to Subst. R. 23.49(c)*, Docket No. 13045, Examiner's Order No. 8 at 2, 20 P.U.C. Bull. 527, 1994 WL 762783 at *3, 1994 WL 932456 at *2-3 (August 4, 1994). (Copy attached.)

15. Fitch's position in this proceeding is greatly similar to that of MCI in *City of Aubrey*.² It is a wireless (CMRS) provider with NXXs in Uvalde, Eagle Pass, and La Pryor. It wishes to intervene to protect itself from adverse economic impact as an ILEC competitor, and to ensure that Carrizo Springs residents will be able to reach Fitch's NXX's, and those of other CMRS and CLEC providers with NXXs in the petitioned exchange, along with those of the incumbent. It wishes to ensure that the proceeding complies with applicable law and that the

² The differences militate in Fitch's favor. MCI's interest was noted by the Examiner as possibly "hostile to the very goals" of the ELCS proceeding. Fitch favors the ELCS proceeding, and wishes to ensure that it complies with applicable law.

ILEC fulfills its responsibility, noted by Order No. 3, to ensure that all relevant NXX codes are included in the implementation of ELCS.

16. The association of NXX codes clearly has a competitive and economic impact on Fitch. It is obvious that if a customer calling from the petitioning exchanges mentioned in the ELCS petition has ELCS only to the petitioned exchanges mentioned in the petition, and not to those, including Fitch's, in the exchanges but not mentioned in the petition, then Fitch is at an economic and competitive disadvantage with regard to the ILEC, some of whose NXXs are listed in the ELCS petition.

17. Allowing such a disadvantage is not within the statutory parameters given the Commission. In particular, such a result would split exchanges in violation of PURA § 55.043, would be discriminatory and anticompetitive in violation of PURA §§ 55.003, 55.005, and 55.006; and would violate the FCC's dialing parity rules set out in 47 C.F.R. § 51.207.

(3) Justiciable interest as a competitor – federal and state rights.

18. Fitch has another justiciable interest as a competitor – ensuring that its rights under state and federal law and rules are protected.

19. As noted above, Fitch has rights under state law because not including all NXXs in the affected areas would split exchanges in violation of PURA § 55.043, would be discriminatory and anticompetitive in violation of PURA §§ 55.003, 55.005, and 55.006.

20. Fitch also has rights under federal law to interconnection under § 332 as well as §§ 251 and 252 of the FTA and to its choice of interconnection methods and to dialing parity.

21. In the 1996 *Local Competition Order*, the FCC codified new interconnection rules in Part 51 as part of its implementation of § 251 and 252.³ The FCC concluded, however, that in light of Congress' retention of § 332(c)(1)(B), the federal agency retained separate authority over LEC-CMRS interconnection pursuant to that section.⁴ Because the FCC viewed §§ 251, 252, and 332 of the Act as furthering a common goal with respect to interconnection, the Commission declined at that point to further act on or define the scope of its § 332 interconnection authority, but instead amended 47 C.F.R. § 20.11 to provide for reciprocal compensation between LECs and CMRS providers.⁵ The FCC reaffirmed this principle in the *TSR* decision, and the DC Circuit agreed that § 332 provided an independent grant of authority for interconnection, and independent federal rights.⁶

22. As noted in Fitch's Reply to SBC and Staff Response, CMRS interconnection is in some respects different than ILEC-CLEC interconnection. While CLECs have the right to select a single point of interconnect in a LATA, they still derive trunking to local tandems, access tandems and, where necessary, end offices. CMRS carriers, however, have the right to choose to interconnect, and have trunking only to, the "LATA access tandem." The CMRS carrier is the party that decides the form of interconnection; the ILEC cannot dictate the architecture.⁷ Since

³ Memorandum Opinion and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, FCC 96-325, CC Docket Nos. 96-98, 95-185, FCC Rcd 15499, 16195 (1996) ("Local Competition Order").

⁴ Local Competition Order at ¶¶ 1023.

⁵ 47 C.F.R. §§ 20.11(c). See also Local Competition Order at 16195.

⁶ Memorandum Opinion and Order, *TSR Wireless, LLC, et al., v. US West Communications, Inc., et al.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, FCC 00-194 (Rel. June 21, 2000), *aff'd Qwest Corp. v. FCC*, 252 F.3d 462; 2001 U.S. App. LEXIS 13389 (D.C. Cir. 2001).

⁷ Memorandum Opinion and Order, *In the Matter of William G. Bowles Jr. P.E. d/b/a Mid Missouri Mobilfone, Complainant, v. United Telephone Company of Missouri*, File No. E-96-04, DA 97-1441 ¶ 5 (Rel. July,

the CMRS carrier's choice of architecture is granted by federal law, the PUC cannot deny this choice. In this case, the result is that Fitch is entitled to Type 2A interconnection from SBC.

23. CMRS carriers have a federal right to obtain numbering resources from NANPA.⁸ The CMRS carrier needs only to have authority to provide or resell CMRS service in the area represented by the geographic rate center with which the NXX is associated.⁹ Neither a state commission nor an ILEC can challenge or ignore the CMRS carrier's rate center assignment based on a preference that the CMRS carrier interconnect in some particular way or out of distaste for the federally allowed network architecture selected by the CMRS carrier.

24. The same holds true for subscriber number assignment. "There are no state or federal requirements to associate a NPA-NXX for a new subscriber based on their residence, billing, or other location."¹⁰ Even SBC concedes that this is the case. Before the FCC, SBC acknowledges that "there are no state or federal requirements to associate an NPA-NXX for a new subscriber based on [the subscriber's] residence, billing or other location." SBC correctly

1997); In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, ¶ 12, FCC 86-85 LEXSEE 59 Rad. Reg. 2d (P&F) 1275 (Rel. Mar. 5, 1986) ("FCC Policy Statement").

⁸ *In the Matter of Numbering Resource Optimization; Connecticut Department of Public Utility Control Petition for Rulemaking to Amend the Commission's Rule Prohibiting Technology-Specific or Service-Specific Area Code Overlays; Massachusetts Department of Telecommunications and Energy Petition for Waiver to Implement a Technology-Specific Overlay in the 508, 617, 781, and 978 Area Codes; California Public Utilities Commission and the People of the State of California Petition for Waiver to Implement a Technology-Specific or Service-Specific Area Code*, FCC 99-122, CC Docket No. 99-200; RM No. 9258; NSD File No. L-99-17; NSD File No. L-99-36, 14 FCC Rcd. 10322, 1999 FCC LEXIS 2451 ¶ 111 (Rel. Jun. 2, 1999) ("NRO NPRM").

⁹ *Report and Order and Further Notice of Proposed Rule Making, In the Matter of Numbering Resource Optimization*, CC Docket No. 99-200, FCC 00-104, note 178, 15 FCC Rcd 7574; 2000 FCC LEXIS 1691; 20 Comm. Reg. (P & F) 1 LEXSEE 15 FCC Rcd 7574 (Rel. Mar. 2000). Fitch lawfully obtained the NXXs in issue, and the rate center assignments for these NXXs must be honored.

¹⁰ North American Numbering Council LNPA Working Group Report on Wireless Wireline Integration, p. 33 May 8, 1998 (NANC Report to FCC) available at <http://www.fcc.gov/wcb/tapd/Nano/rptnancr.doc> (emphasis added). The NANC is a Federal Advisory Committee under 5 U.S.C. App. 2.

points out that NXX rate center assignment is made by CMRS carriers only to “facilitate wireline to wireless call rating.”¹¹

25. The FCC’s local dialing parity rule, 47 C.F.R. § 51.207,¹² mandates that when a call is from an SBC end user to a Fitch number associated with a rate center in the same mandatory local calling area as the calling party’s NXX, SBC must retail rate the call as local, and cannot impose toll charges. Not including Fitch’s NXXs in the ELCS area would violate this rule.

26. ELCS is “traditional local” for federal purposes, including local dialing parity. Once ELCS is approved the entire area as expanded constitutes the mandatory local calling scope, and the ILEC’s service to its end users within that area is basic local service. The FCC considers ELCS and EAS to be nothing more than action by the state to expand the basic service local calling area so long as the expansion is mandatory and not optional.¹³ SBC routinely represents to the FCC that Texas ELCS is “traditional local” service.

¹¹ Comments of SBC Communications, Inc. in Opposition to the Petition for Declaratory Ruling of the Cellular Telecommunications & Internet Association, p. 3, FCC Docket 95-116, filed February 26, 2003 (attached to Cary Fitch affidavit).

¹² Sec. 51.207 Local dialing parity.

A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer’s or the called party’s telecommunications service provider.

¹³ See, e.g., *In the Matter of Southwestern Bell Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS)*, DA-1129, WC Docket No. 02-373, Memorandum Opinion and Order (Apr. 2003). That case involved SBC in Texas, in Docket 26080. SBC filed the FCC order in that Docket on April 14, as Item Number 6. Before the FCC, SBC represented that ELCS is “traditional local service.” The FCC agreed. DA-1129 ¶ 2. Both SBC’s petition at the FCC and the FCC’s order are attached to Fitch’s affidavit attached to the Fitch Reply.

27. Fitch has, thus, rights, not just in terms of economic impact, but under state and federal law, which may be affected in this proceeding, which it is entitled to protect, and which give it a justiciable interest.

(4) Justiciable interest as a customer of a competitor.

28. Fitch is more than an SBC competitor. Fitch is also a customer of an SBC competitor in the area covered by the ELCS petition.

29. Fitch is a subscriber to Sprint PCS service, and has an Eagle Pass number – one of the affected exchanges. This service supports Fitch’s efforts to initiate service in that part of the state. Fitch would like very much for end users in Carrizo Springs to be able to reach that number on a local basis. *See* Fitch’s Reply to SBC and Staff Response to Order No. 2 and the attached affidavit. If the NXX for Fitch’s PCS service is not treated equally to those mentioned in the ELCS petition, Fitch is competitively and economically disadvantaged. Fitch has an interest, purely as a customer, in having its number treated the same as numbers in other NXX codes in the exchanges. This, standing alone, provides a justiciable interest, unless consumers comprising the “public” on whose behalf the Commission decides the “public interest” have no right to participate in cases that affect them.

B. Order No. 3 mistakenly concludes that Fitch’s interest may be addressed by negotiation with the ILECS.

30. As part of its denial of intervention, Order No. 3 repeats (and apparently adopts) Staff’s suggestion that “if Fitch is concerned about its associated NXX codes being included in the ELCS provided by the ILECS, then it must negotiate traffic arrangements with the ILECs to ensure their NXX codes will be honored in the calling areas.” This conclusion is incorrect for at least three reasons.

31. First, the existence of a possible alternative negotiation process does not operate to extinguish a justiciable interest. If it did, no litigant would *ever* have standing. (It can be argued that Order No. 3's formulation extinguishes standing entirely, since it is a justiciable interest that often gives rise to the *ability* to negotiate.) The existence of a negotiation alternative is simply irrelevant to the issue of whether or not a justiciable interest exists.

32. Second, the alternative offered by Staff is illusory. Fitch has been trying to interconnect with SBC so as to exchange traffic with SBC in the San Antonio LATA. To date those efforts have been fruitless. SBC has refused to interconnect. *See* Fitch's Reply to SBC and Staff Response to Order No. 2 and the attached affidavit.

33. Third, Fitch is entitled under both state and federal law for its NXX codes to be honored in the calling areas. This right is enforceable before state and federal commissions and in federal court. Its existence is not predicated on ILEC agreement to it in negotiation, nor can it be extinguished by the hypothetical possibility that an ILEC will agree to it in negotiation. The FCC's *TSR* decision expressly holds that a CMRS carrier need not have a § 252 agreement as a condition precedent to enjoying its rights as a CMRS carrier.¹⁴ This Commission cannot, therefore, condition Fitch's rights receive local traffic on having a § 252; nor can it force Fitch to negotiate a § 252 traffic exchange agreement before Fitch can exchange local traffic. Fitch has a justiciable interest in this proceeding; that justiciable interest is ripe and not dependent on a traffic exchange agreement.

¹⁴ *TSR, supra* ¶¶ 27-29.

C. Order No. 3 misconstrues the applicable legal standards in deeming the ELCS application sufficient.

34. Order No. 3 appears to adopt by reference the argument of Staff (that it is not necessary to list all NXXs, that Chapter 55, Subchapter C of PURA applies only to ILECs, and that non-ILECs may choose not to participate in ELCS) in finding that failure to list all NXX codes for the petitioning and petitioned exchange does not render the petition insufficient.

35. Fitch has argued extensively that listing of all NXXs in the petitioning and petitioned exchanges is required by PURA § 55.043, which states that the Commission may not split a petitioning or petitioned exchange in establishing a toll-free calling area. Order No. 3 does not dispute this point, but rather finds that “it is the responsibility of the incumbent local exchange company (ILEC) affected by the petition to ensure that all relevant NXX codes are included in the implementation of ELCS.”

36. It is not clear what Order No. 3 tells us, since it fails to articulate a standard, apparently leaving that up to the ILEC. Among the unlisted NXXs are a number of SBC NXXs and one SBC Mobile NXX, as well as a number of competitor’s NXXs, including Fitch’s. Will the proceeding address these NXXs? Will it only address SBC NXXs? Will it only address the *listed* SBC NXXs? Regardless of the answer, it is *not* “it’s SBC’s job to do this right.” The answer is one that must be supplied by the Commission.

37. In addition, Fitch has consistently argued that the omission of NXX codes can be easily remedied. More to the point, Fitch seeks to add its *own* NXX codes. Given that position, it is simply not relevant, in regard to Fitch’s NXX codes, to conclude that only ILECs are subject to the provisions of Chapter 55, Subchapter C of PURA. Independently of whether or not *all* the relevant SBC NXXs and the NXXs of other competitors must be listed in the ELCS petition, Fitch has *volunteered* to have its NXXs listed, and is entitled to have them listed.

III. PRAYER

38. Fitch has a clear justiciable interest. The ELCS petition is deficient for failing to list the affected NXXs. Fitch asks that the Commission reverse Order No. 3.

Respectfully Submitted,

FITCH AFFORDABLE

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e-mail: wsmc@aus.scmplaw.com

David Bolduc
Texas State Bar No. 02570500
e-mail: dbolduc@aus.scmplaw.com

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512/485-7920
512/485-7921 FAX

By: _____

W. Scott McCollough
State Bar No. 13434100

ATTORNEYS FOR FITCH AFFORDABLE TELECOM CO.

CERTIFICATE OF SERVICE

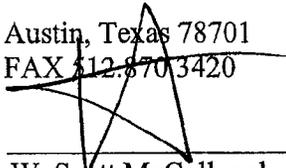
The undersigned certifies that a copy of the foregoing instrument was served upon all parties of record in this proceeding, including the following, on this 29th day of August, 2003, and in compliance with P.U.C. Proc. R. § 22.328.

Mario A. Martinez
City Manager
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Query Text:	JUSTICIABLE /1 INTEREST & EXPANDED /1 LOCAL /1 CALLING /1 SERVICE
Lines:	199
Documents:	1
Images:	0

Re City of Aubrey
Project No. 13045
Exam. Order No. 8

Texas Public Utility Commission
August 04, 1994

Before Andries, hearings examiner.

BY THE COMMISSION:

August 4, 1994 Examiner's Order No. 8

*1 Examiner's order granted interexchange carrier's motion to intervene in **expanded local calling service** proceeding. Examiner's order was not appealed to Commission.

[1] PROCEDURE -- PARTIES -- STANDING Interexchange carrier's status as 'affected person,' within meaning of PURA § 3(h), is not relevant to intervention in **expanded local calling service** proceeding because (1) P.U.C. SUBST. R. 23.49(c)(9) refers to 'interested person' rather than 'affected person,' and (2) proper test in contested cases not involving PURA § 54 is whether entity seeking to intervene has '**justiciable interest**' in proceeding. (Page 529) [2] In **expanded local calling service** proceeding which does not encompass any issue relevant to local exchange customers taking service outside petitioning exchange, interexchange carrier that is not a local exchange customer within petitioning exchange does not have **justiciable interest** in proceeding simply because it is a customer of local exchange carrier. (Page 530) [3] Interexchange carrier has threshold **justiciable interest** in **expanded local calling service** proceeding as competitor of local exchange carrier in intraLATA toll market, particularly given Commission's liberal intervention policy. (Page 532)

EXAMINER'S ORDER NO. 8 RULING ON MCI'S MOTION TO INTERVENE

On July 7, 1994, MCI Telecommunications Corporation (MCI) filed its Petition for Leave to Intervene (the motion to intervene) in this **expanded local calling service** (ELCS) project, stating that, as a customer and competitor of both Southwestern Bell Telephone Company (SWBT) and GTE Southwest, Inc. (GTE), it has a **justiciable interest** in this project. On July 11, the Examiner issued an Order to Show Cause why the motion to intervene should not be denied for failure to explain how MCI's status as a customer and competitor creates a **justiciable interest**. MCI responded on July 18 (the Response), stating that its **justiciable interest** derives from the adverse economic impact it sustains from expanded local calling which creates an interest 'in ensuring that the scope of any ELCS application is within the confines of Section 93A' of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1994). There have been no responses filed by any other party to either MCI's petition or response.

MCI's Petition for Leave to Intervene is GRANTED because (1) the Commission has a liberal intervention policy; (2) under P.U.C. SUBST. R. 23.49(c)(9), '(a)ny interested person with a **justiciable interest** may intervene'; and (3) as an interexchange carrier (IXC) and competitor of SWBT and GTE in the intraLATA toll market, MCI arguably has a threshold **justiciable interest** in ensuring that any grant of expanded local calling does not exceed the authority of PURA § 93A. While MCI

has established a **justiciable interest** as a competitor of SWBT and GTE, it has failed to demonstrate standing in this proceeding as a customer of SWBT and GTE. [FN1]

***2 I. MCI's Standing to Intervene as a Customer of SWBT and GTE**

MCI was instructed in the show cause order to explain how it could be adversely affected by this proceeding by the mere fact that it is a customer and competitor of SWBT and GTE. In responding to how it is affected as a customer, MCI stated that it does not need to show how it is affected as a customer, that the mere fact that it is a customer gives it the necessary standing to intervene. The Examiner disagrees. Being a customer of a local exchange carrier (LEC) does not, by itself, give standing to intervene in any proceeding in which that LEC is a party; for example, MCI, by virtue of being a SWBT customer, would not have standing to intervene in a complaint brought by a residential customer of SWBT involving a billing dispute. [1] In this regard, it should be pointed out that MCI has made the argument in both its motion and in its response that it has standing because it is an 'affected person' as defined by PURA § 3(h). This argument is not persuasive for two reasons: (1) as was stated in the show cause order, the provision in the ELCS rule regarding intervention refers to an 'interested person' not to an 'affected person' and, therefore, any definition of 'affected person' is irrelevant to determine standing to intervene in an ELCS proceeding; and (2) in Application of Dallas Power and Light Company, Texas Electric Service Company, and Texas Power and Light Company for Rate/Tariff Revisions, Docket Nos. 4782, 4783, and 4785, 9 P.U.C. BULL. 169 (June 1, 1983) it was held that the status of 'affected person' within PURA § 3(h) is not the criterion under which motions to intervene in contested cases not involving PURA § 54 are resolved. The proper test is whether the movant has a '**justiciable interest**', an interest which would justify the relief sought by the movant, and whether the movant seeks relief within the Commission's power to grant.' (See also, Application of Entergy, cited in footnote 1, page 2)

The only way MCI could arguably have a **justiciable interest** as a customer in this proceeding is if it were a local exchange customer in the petitioning exchange, entitled to vote during the balloting process, and subject to the mandatory fees imposed by P.U.C. SUBST. R. 23.49(c)(6)(B)(i). [FN2] Nowhere in MCI's pleadings does it state that it is a customer within the petitioning exchange. MCI is obviously an access customer of the LECs, but access rates are neither an issue in this proceeding nor are they affected by this proceeding.

No doubt MCI is a local exchange customer of SWBT and GTE somewhere in Texas. As such, MCI would be subject to the imposition of a state-wide fee. Because P.U.C. SUBST. R. 23.49(c)(6)(B)(ii) & (c)(12) contemplate the imposition of fees on all LEC customers within the state to recover ELCS costs, MCI would have a legitimate interest in the generic projects set up for LECs to review ELCS cost studies for the purpose of imposing fees on a state-wide basis. There is, however, no such state-wide setting of fees in this proceeding and, therefore, MCI, as a local exchange customer within another exchange, is not affected by this proceeding. [2] Because MCI has not stated that it is a local exchange customer within the petitioning exchange and because this proceeding does not encompass any issue relevant to any local exchange customer outside the petitioning exchange, MCI fails to state a **justiciable interest** in this proceeding as a customer of the LECs.

***3 II. MCI's Standing to Intervene as an IntraLATA Competitor of SWBT and GTE**

As discussed in Section I, MCI gave short shrift to the issue of how it is affected by this proceeding as a customer of the LECs. Rather, its argument supporting its standing to intervene rested almost entirely on its status as an interexchange carrier (IXC) and an intraLATA competitor of the LECs. On pages two and three of its Response, MCI states:

' MCI has a keen interest in the further development of competition in the intraLATA toll market. The proliferation of ELCS is the antithesis of competition in the intraLATA toll market. Conversion of a toll-calling area to an ELCS decimates what little competition exists in that area and results in the re-monopolization of those areas by the LEC.

'Because of this, MCI is highly interested in ensuring that the scope of any ELCS application is within the confines of Section 93A of the PURA. '

Competitive impact on IXCs and the decreasing intraLATA toll market are not issues in an ELCS proceeding. [FN3] The only purpose of a proceeding brought under P.U.C. SUBST. R. 23.49(c) (the ELCS rule or the rule) is to determine, under the very precise and objective standards outlined therein, whether or not a petition for expanded local calling is entitled to approval. Any adverse economic impact on an IXC is not an element of the qualifications required for approval and is therefore completely irrelevant to an ELCS proceeding. By addressing the calling needs of rural Texans and omitting any mention of resulting harm to IXCs, the Texas Legislature has laid to rest the issue of whether economic harm to an IXC is an issue in an ELCS proceeding. MCI's only recourse in addressing its economic harm directly is either through legislative change or through a constitutional attack on the statute in a district court; it is not within this proceeding. [3] However, an adverse economic impact on an IXC can give rise to a **justiciable interest** even though it is an irrelevant issue in the proceeding. Because of the possible adverse impact of expanded local calling, an IXC, as MCI argues, would have an interest in ensuring that a petition for expanded local calling does not go beyond its statutory parameters. Even though the Commission Staff is currently performing the task of staying within the bounds of the statute very well and shows no signs of needing a monitor, MCI's monitoring interest would at least be consistent with the Staff's efforts and also consistent with the Examiner's mandate to uphold PURA and Commission rules. The Examiner therefore concludes that, even though MCI's role in an ELCS proceeding may be no more than a monitoring one and one that may even be hostile to the very goals of the proceeding, MCI has demonstrated at least a threshold **justiciable interest** in this proceeding and, given the Commission's well-known broad intervention policy, requires that MCI's motion to intervene be granted.

III. MCI's role in this proceeding

*4 The Examiner grants MCI's motion to intervene reluctantly. That reluctance comes from MCI's admitted hostility to the very existence of this project, its purposes and its goals and from the Examiner's concern that what MCI can't do directly through litigating its economic harm, it may try to do indirectly through disruption and delay.

This leads the Examiner to set up some guidelines. To begin with, because the ELCS rule is so detailed and precise and the standards so objective, the tasks left for the Commission Staff and the Examiner to perform are virtually no more than ministerial, leaving very little to litigate. The only mention made of contestable issues within the rule is found in P.U.C. SUBST. R. 23.49(c)(5)(D)(i) & (c)(7) regarding implementation plans and fee schedules. MCI will not be allowed to contest issues which are not 'contestable.

Second, the Commission Staff and General Counsel are heavily burdened with the volume of ELCS projects which have been filed. In order to fill the mandate of the Legislature that expanded local calling be provided expeditiously, MCI is cautioned that it will be held to its stated interest, namely, that it is interested in ensuring that an ELCS petition stay within the scope of PURA § 93A which is, at

least prior to an affirmative ballot, essentially a monitoring role rather than a litigious one. MCI is encouraged to conduct its activities during monitoring with as little disruption of the administrative process as possible.

SIGNED AT AUSTIN, TEXAS the 4th day of August 1994.

FOOTNOTES

FN1 In granting MCI's motion to intervene, the Examiner has been influenced by the Commission's liberal intervention policy. A liberal intervention policy enables the Commission to be apprised of diverse viewpoints interest lies and how it may be furthered, Application of Southwestern Bell Telephone Company to Approve Deletion of the Carrier Common Line and Interexchange Carrier Access Charge Credits, Docket No. 10463, Examiner's Order No. 9, 17 P.U.C. BULL. 3050 (Dec. 3, 1991); Application of Entergy Corporation and Gulf States Utilities Company for Sale, Transfer, or Merger, Docket No. 11292, Examiner's Order No. 11, 18 P.U.C. BULL. 1014 (Sept. 17, 1992). A less liberal Commission policy could easily have led to a different result in this proceeding.

FN2 MCI is obviously an access customer of the LECS, but access rates are neither an issue in this proceeding nor are they affected by this proceeding.

FN3 Cf. Joint Petition of Southwestern Bell Telephone Company and GTE Southwest, Inc. to Provide Extended Area Service to Certain Communities in the Lower Rio Grande Valley, Docket No. 11840, Examiner's Order No. 10, 19 P.U.C. BULL. 1 (June 25, 1993), where competitive issues were held to be outside the scope of an extended area service proceeding.

END OF DOCUMENT

CC Docket 04-77

Affordable Telecom Comments

Exhibit 2

SBC Opposition to Affordable Telecom Intervention in TPUC Docket 27802



Control Number: 27802



Item Number: 8

Addendum StartPage: 0

SBC TEXAS
June 13, 2003

DOCKET NO. 27802

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PETITION FOR EXPANDED LOCAL § PUBLIC UTILITY COMMISSION
CALLING SERVICE FROM THE CITY §
OF CARRIZO SPRINGS TO THE §
EXCHANGES OF BATESVILLE, §
EAGLE PASS, LA PRYOR, AND §
UVALDE § OF TEXAS

**RESPONSE OF SBC TEXAS TO FITCH AFFORDABLE'S PETITION
FOR INTERVENTION AND REQUEST FOR CORRECTION OF
INADVERTENT DEFICIENCY OR FOR FINDING OF DEFICIENCY**

COMES NOW, Southwestern Bell Telephone, L.P. d/b/a SBC Texas, and files this response to the above-referenced petition filed by Cary Fitch d/b/a Fitch Affordable on May 28, 2003, pursuant to the schedule established by the Administrative Law Judge in Order No. 2. SBC Texas respectfully submits that Fitch Affordable's petition should be denied.

I. Response to Petition for Intervention

Any interested person may file a request to intervene in an expanded local calling service ("ELCS") project.¹ However, in order for the petition to be granted the interested person must have (a) a right to participate that is expressly conferred by statute, Commission rule or order, or other law, or (b) a justiciable interest which may be adversely affected by the outcome of the proceeding.² No statute, rule, order, or other law expressly confers upon Fitch Affordable the right to participate in this proceeding. Therefore, Fitch Affordable must show that it may be adversely affected by the outcome of this proceeding in order for its petition to be granted.

¹ P.U.C. SUBST. R. §26.219(c)(5).

² P.U.C. PROC. R. §22.103(b).

For the reasons set forth below, Fitch Affordable does not have a justiciable interest that may be adversely affected by the outcome of this proceeding, because its NXXs in the Batesville, Eagle Pass, La Pryor, and Uvalde exchanges are not eligible to participate in an ELCS arrangement emanating from Carrizo Springs. Consequently, its petition for intervention should be denied.

Because it does not have a physical presence in any of the petitioned exchanges, Fitch Affordable's petition necessarily is premised on the notion that all NXXs associated with the petitioned exchanges qualify for ELCS, regardless of whether the carrier to whom the NXXs are assigned has a physical presence there. However, the Commission recently examined this issue in another proceeding and determined that such "virtual" NXX codes do not qualify for ELCS. In *Complaint, Request for Expedited Ruling, Request for Interim Ruling, and Request for Emergency Action of ASAP Paging, Inc. Against CenturyTel of San Marcos, Inc.*, P.U.C. Docket No. 25673, SOAH Docket No. 473-02-2503 ("*ASAP Paging Case*"), the Commission examined whether calls from a petitioning exchange to NXXs associated with a contiguous exchange that are assigned to a carrier who does not have a physical presence in the contiguous exchange qualify for ELCS under the Public Utility Regulatory Act ("PURA")³ and the Commission's Substantive Rules.⁴ On June 5, 2003, the Commission approved the Proposal for Decision ("PFD") written by the SOAH Administrative Law Judge, with modifications as discussed at the Open Meeting. In the PFD, the SOAH ALJ clearly concluded that calls to virtual NXXs in the petitioned exchanges do not qualify for ELCS. A key excerpt from the PFD is as follows:

³ PURA, Chapter 55, Subchapter C.

⁴ P.U.C. SUBST. R. §26.219.

The ALJ concludes that for calls to be eligible for ELCS, they must actually originate and terminate, in some manner, within exchanges that are located in a specific ELCS territory. ASAP has not cited any authority to support its position that a call must be rated ELCS if the called NXX is 'associated' with an ELCS exchange, regardless of whether the call actually travels to or terminates within an ELCS exchange. While carriers may have traditionally relied on NXXs for retail rating, that was because the NXX traditionally designated the geographic location of the central office switch to which the call was routed. However, as noted in the Revised Arbitration Award in Docket No. 24015, when a carrier such as ASAP allows its customers to choose their NXX irrespective of geographic location, "there is no longer a correlation between the geographic location of the customer and the NPA-NXX." Therefore, because ELCS eligibility has strict geographic limitation and requirements, but ASAP's assignment of its NXXs has no correlation to the geographic location of its customers, the ALJ concludes that ELCS eligibility cannot be based solely upon the NXX assigned to the customer by ASAP. Instead, ELCS eligibility depends on the location of the calling and called parties. For these reasons, the ALJ concludes that calls from San Marcos to ASAP's NXXs do not qualify for ELCS and that CenturyTel may properly charge its end-users toll for such calls.⁵

During the Open Meeting, Commissioner Parsley stated, "this looks like an improper use of these virtual NXX assignments and a way to try to game the system to get out from paying tolls."⁶

Fitch Affordable's petition for intervention raises the same issue that was addressed and resolved in the *ASAP Paging case*. Just like ASAP Paging had not established a physical presence in the petitioned exchange in Docket No. 25673, Fitch Affordable has not established a physical presence in the petitioned exchanges in this proceeding. In addition, just like ASAP Paging, Fitch Affordable does not have end users assigned to or stationary within the geographical areas of the petitioned exchanges. Similarly, just like ASAP Paging was

⁵ Proposal for Decision, *ASAP Paging Case*, pp. 50-51 (emphasis added).

⁶ Open Meeting Transcript, June 5, 2003, page 65, lines 12-15. Although the final order has not yet been released because the Commission requested briefing on an unrelated issue dealing with registration, the Commission clearly voted "to approve the PFD consistent with our discussion." Therefore, since the Commissioners did not change the PFD's conclusion that calls to virtual NXXs in petitioned exchanges do not qualify for ELCS, that portion of the PFD was approved.

interconnected with SBC Texas only at a tandem office (Austin) that was located far away from the petitioned and petitioning exchanges, Fitch Affordable is interconnected with SBC Texas only at a tandem office (San Antonio) that is located far away from the petitioned and petitioning exchanges.⁷ Also, just as in the *ASAP Paging case*, calls placed from Carrizo Springs to Fitch Affordable's NXX codes will not travel to or terminate in any of the petitioned exchanges. Moreover, just as with *ASAP Paging*, Fitch Affordable has not taken steps to ensure that calls are properly routed and delivered, such as establishing wireless or wireline facilities in the petitioned exchanges to ensure proper routing and transport of calls from these exchanges to Fitch Affordable's point of interconnection in San Antonio.

For all of the above reasons, Fitch Affordable's virtual NXX codes in the petitioned exchanges do not qualify for ELCS. Fitch Affordable's attempt to avail itself of the benefits of ELCS for these NXXs is an attempt to "game the system" just like in the *ASAP Paging case*. Accordingly, since these virtual NXX codes do not qualify for ELCS in the first place, Fitch Affordable has not shown that it has a justiciable interest that would be adversely affected by the outcome of this case. As a result, its petition for intervention should be denied.

II. Response to Request for Correction of Inadvertent Deficiency or for Finding of Deficiency.

Fitch Affordable's request for correction of "inadvertent" deficiency or for finding of deficiency is based on the same fundamental premise that has been shown above to be without merit – namely, that virtual NXX codes qualify for ELCS. However, since the Commission recently concluded that virtual NXX codes do not qualify for ELCS, there is no reason to "correct" Carrizo Springs' petition and no basis for a finding that its petition is deficient.

⁷ Attached hereto is a diagram showing the relationship between the petitioning and petitioned exchanges and how Fitch Affordable is interconnected with SBC Texas.

Accordingly, Fitch Affordable's request for correction of inadvertent deficiency or for finding of deficiency should be denied for the same reasons discussed in Section I above.

Respectfully submitted,

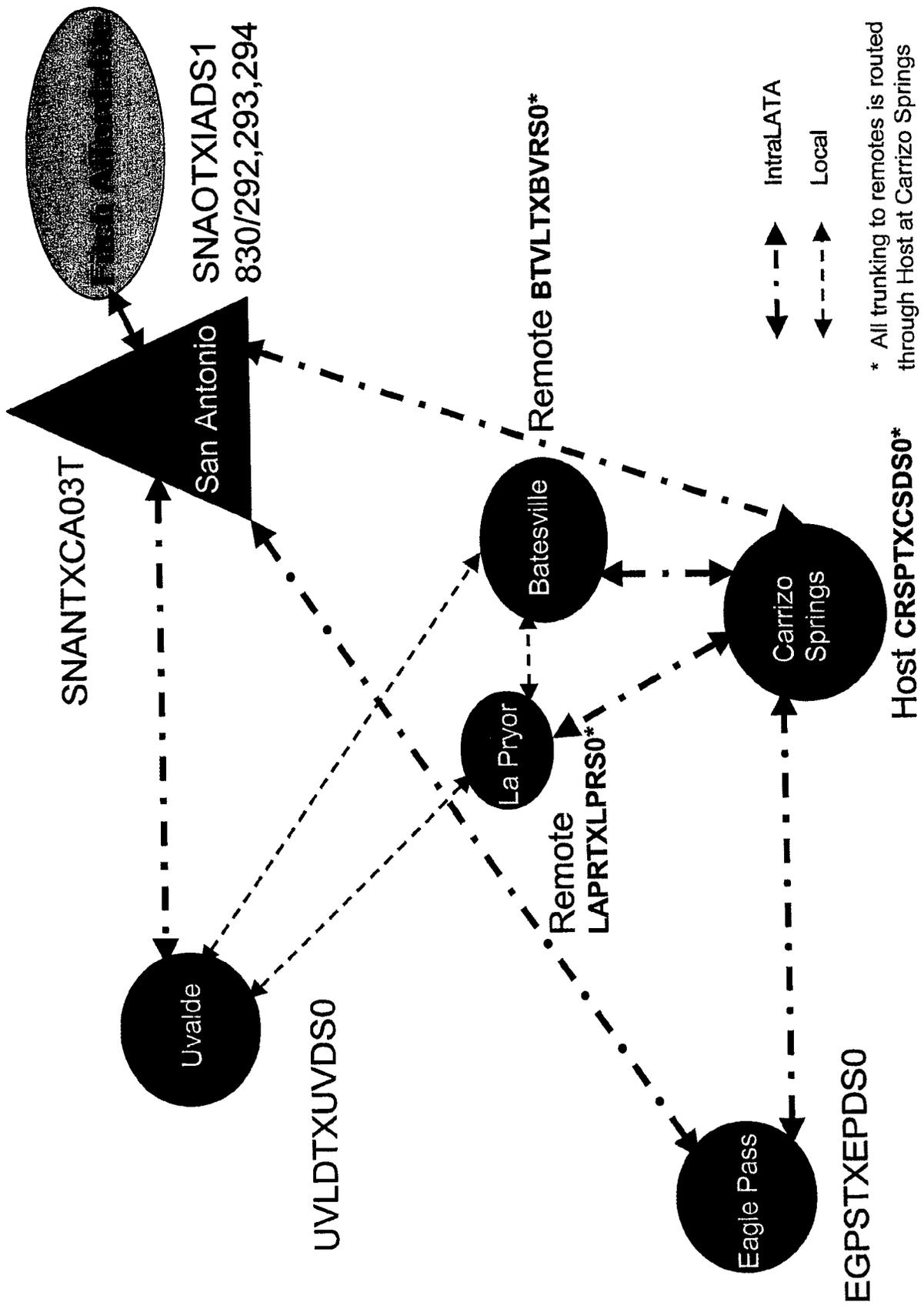
ANN E. MEULEMAN
General Counsel-Austin

A handwritten signature in cursive script that reads "Thomas J. Ballo". The signature is written in black ink and is positioned above a horizontal line.

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CC Docket 04-77

Affordable Telecom Comments

Exhibit 3

**SBC Response to Affordable Telecom Appeal of ALJ's Order No. 9 in TPUC Docket
27802**

(Attachment to Response omitted)



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SBC
September 8, 2003

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RESPONSE OF SBC TEXAS TO FITCH AFFORDABLE'S APPEAL OF ORDER NO. 9¹

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¹ Fitch actually is appealing Order No. 3.

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DOCKET NO. 27802

PETITION FOR EXPANDED LOCAL § PUBLIC UTILITY COMMISSION
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EXCHANGES OF BATESVILLE, §
EAGLE PASS, LA PRYOR, AND §
UVALDE § OF TEXAS

RESPONSE OF SBC TEXAS TO FITCH AFFORDABLE'S APPEAL OF ORDER NO. 9

COMES NOW, Southwestern Bell Telephone, L.P. d/b/a SBC Texas ("SBC"), and files this response to the above-referenced appeal filed by Cary Fitch d/b/a Fitch Affordable ("Fitch") on August 29, 2003², pursuant to P.U.C. PROC. R. §22.123(a)(4). Fitch is appealing an August 21st Administrative Law Judge's ("ALJ's") order that denied its motion to intervene in this proceeding. As discussed below, the ALJ's order was correct. Fitch does not have a justiciable interest that may be adversely affected by the outcome of this proceeding. As a result, Fitch is not eligible to participate in this docket, and Fitch's appeal should be denied.

Fitch's appeal relies on the same arguments Fitch made in its motion to intervene, which were rejected by the Staff and ALJ. SBC responded to Fitch's arguments in SBC's June 13th response to Fitch's motion to intervene, and SBC's previous response applies equally here. In the interest of not burdening the record, SBC hereby incorporates by reference and reasserts each of the arguments it previously made in its response to Fitch's motion to intervene.³ One of these arguments deserves to be reemphasized, however, as discussed next.

² Unless otherwise noted, all dates in this response are 2003.

³ For convenience, a copy of SBC's June 13th response to Fitch's motion to intervene is attached.

Fitch continues to ignore the most obvious flaw in its intervention request: its NXX codes in the petitioned exchanges are not eligible to participate in the expanded local calling service (“ELCS”) requested by Carrizo Springs. As SBC noted in its prior response, Fitch’s NXX codes in these exchanges are “virtual” NXX codes. In the *ASAP Paging Case*,⁴ the Commission unanimously determined that virtual NXX codes are ineligible to participate in ELCS. The Commission stated:

The ALJ concludes that for calls to be eligible for ELCS, they must actually originate and terminate, in some manner, within exchanges that are located in a specific ELCS territory. ASAP has not cited any authority to support its position that a call must be rated ELCS if the called NXX is ‘associated’ with an ELCS exchange, regardless of whether the call actually travels to or terminates within an ELCS exchange. While carriers may have traditionally relied on NXXs for retail rating, that was because the NXX traditionally designated the geographic location of the central office switch to which the call was routed. However, as noted in the Revised Arbitration Award in Docket No. 24015, when a carrier such as ASAP allows its customers to choose their NXX irrespective of geographic location, “there is no longer a correlation between the geographic location of the customer and the NPA-NXX.” Therefore, because ELCS eligibility has strict geographic limitation and requirements, but ASAP’s assignment of its NXXs has no correlation to the geographic location of its customers, the ALJ concludes that ELCS eligibility cannot be based solely upon the NXX assigned to the customer by ASAP. Instead, ELCS eligibility depends on the location of the calling and called parties. For these reasons, the ALJ concludes that calls from San Marcos to ASAP’s NXXs do not qualify for ELCS and that CenturyTel may properly charge its end-users toll for such calls.⁵

While discussing the disposition of the *ASAP Paging Case* at the June 5th Open Meeting, Commissioner Parsley stated: “[T]his looks like an improper use of these virtual NXX

⁴ *Complaint, Request for Expedited Ruling, Request for Interim Ruling, and Request for Emergency Action of ASAP Paging, Inc. Against CenturyTel of San Marcos, Inc.*, P.U.C. Docket No. 25673, SOAH Docket No. 473-02-2503.

⁵ Proposal for Decision, *ASAP Paging Case*, pp. 50-51 (emphasis added). The Commission approved the Proposal for Decision at open meetings held on June 5th and July 25th. The final, approved copy of the order has not yet been released.

assignments and a way to try to game the system to get out from paying tolls.”⁶ In the same vein, Fitch’s attempt to avail itself of the benefits of ELCS for its virtual NXXs in the petitioned exchanges is the same kind of attempt to “game the system” that occurred in *ASAP Paging*. Accordingly, since these virtual NXXs do not qualify for ELCS, Fitch has no justiciable interest that would be adversely affected by the outcome of this case. As a result, its appeal of Order No. 3 should be denied.

Finally, there is no merit to Fitch’s contention that Examiner’s Order No. 8 in the *City of Aubrey*⁷ case supports Fitch’s intervention request in this case. In that case, MCI was “reluctantly” granted intervention only after the Examiner found that MCI actually had a justiciable interest. In contrast, in the present case Fitch does not have a justiciable interest because its virtual NXXs are ineligible for ELCS. Moreover, the Examiner in *City of Aubrey* cautioned MCI that its participation would be limited to “essentially a monitoring role rather than a litigious one” and encouraged MCI to “conduct its activities during monitoring with as little disruption of the administrative process as possible.” In contrast, in this proceeding Fitch has adopted a litigious posture and disrupted the ELCS administrative process.

CONCLUSION

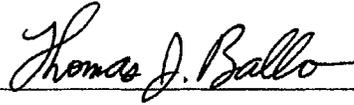
For the above reasons and for those set forth in SBC’s June 13th response to Fitch’s motion to intervene, the Commission should deny Fitch’s appeal of Order No. 3.

⁶ Open Meeting Transcript, June 5th, p. 65, lines 12-15.

⁷ *Petition of the City of Aubrey Exchange for Expanded Local Calling Service to the Crossroads, Lincoln Park and Krugerville Exchanges Pursuant to Subst. R. 23.49(c)*, PUC Docket No. 13045, Examiner’s Order No. 8, PUC Bull. 527 (August 4, 1994).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all counsel of record on this 8th day of September, 2003.



CC Docket 04-77

Affordable Telecom Comments

Exhibit 4

TPUC Staff Response to Affordable Telecom Intervention in TPUC Docket 27802



Control Number: 27802



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PUC DOCKET NO. 27802

PETITION OF EXPANDED LOCAL §
CALLING SERVICE FROM THE §
CITY OF CARRIZO SPRINGS TO §
THE EXCHANGES OF BATESVILLE §
EAGLE PASS, LA PRYOR & UVALDE §

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OF TEXAS

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COMMISSION STAFF'S RESPONSE TO PETITION FOR INTERVENTION
AND REQUEST FOR CORRECTION OF INADVERTENT DEFICIENCY OR
FOR FINDING OF DEFICIENCY

COMES NOW, the Staff (Staff) for the Public Utility Commission of Texas (PUC or Commission), in the public interest, and files its Response as required by Order No. 2 in this docket and shows the following:

I.

On May 28, 2003, Cary Fitch d/b/a Fitch Affordable (Fitch Affordable) filed a petition for intervention and request for correction of inadvertent deficiency or for Finding of Deficiency. Fitch Affordable asserts the petition as filed is deficient because it fails to list all NXX's in the petitioning and petitioned exchanges, which violates Public Utility Regulatory Act (PURA) 55.043. Fitch Affordable contends that its NXX codes should be included in the expanded local calling scope for the aforementioned exchanges in addition to those of the incumbent local exchange company (ILEC). Fitch Affordable contends that it is necessary to intervene in order to receive equal treatment for its NXX codes.

II.

Staff notes that the process used to administer requests from telephone subscribers for two-way toll-free expanded local calling service (ELCS) is enunciated in PUC Sub. Rule §26.219 and conducted pursuant to PURA, Chapter 55, Subchapter C.

The Commission has processed numerous ELCS petitions and has not required the petitioners to list all NXX codes for either the petitioning or petitioned exchanges. Such a requirement, Staff contends, would be overly burdensome and unnecessary. The NXX codes are used to identify which community wants ELCS (the petitioning exchange) and the communities to which ELCS is sought (the petitioned exchanges). It

is the responsibility of the ILECs affected by the petition to ensure that all relevant NXX codes are included in the implementation of ELCS. In addition, only incumbent local exchange companies are subject to the provisions of PURA, Chapter 55, Subchapter C. Therefore, it would be inappropriate to include all NXX codes associated with the petitioning and petitioned exchange in an ELCS petition because non-ILECs may choose to not participate in ELCS.

It is Staff's opinion that Fitch Affordable's request to intervene in this proceeding should be denied. Fitch Affordable has not demonstrated that it has any interest in this proceeding.¹ Fitch Affordable is a wireless CMRS (non-ILEC) service provider that has NXX codes associated with rate centers in the exchanges of Uvalde, Eagle Pass, and La Pryor. The association of NXX codes does not constitute a justiciable interest. The telephone subscribers of an exchange that has less than 10,000 access served by an ILEC may petition for wire-line expanded local calling service to surrounding exchanges served by ILECs. Only the ILECs will be subject to the implementation of ELCS enunciated in PUC Sub. Rule §26.219. Generally, CMRS carriers have not been allowed to participate in an ELCS petition that allows ILEC subscribers to talk to other ILEC subscribers over the wire-line network for rates and charges for which Fitch Affordable would not be responsible. Staff recommends that if Fitch Affordable is concerned about its associated NXX codes being included in the ELCS provided by the ILECs, then it must negotiate traffic arrangements with the ILECs to ensure their NXX codes will be honored in the calling areas. That would be an appropriate remedy that should satisfy Fitch Affordable's concerns.

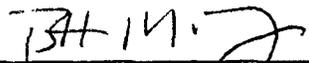
In summary, Commission Staff recommends that Fitch Affordable motion to intervene should be **DENIED** and the petition be deemed **SUFFICIENT**.

¹ Pursuant to PUC Procedural Rule 22.103, a person has standing to intervene if that person has a justiciable interest which may be adversely affected by the outcome of this proceeding.

Respectfully Submitted,

Thomas S. Hunter
Division Director
Legal and Enforcement Division

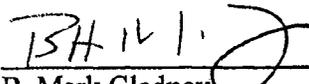
Patrick Tyler
Director-Telecommunications
Legal and Enforcement Division



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(512) 936-7268 telecopier

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing document was served on all parties of record in this proceeding via U.S. regular mail, postage prepaid, or facsimile transmission in accordance with P.U.C. PROC. R. 22.74, on this the 13th day of June 2003.



B. Mark Gladney

CC Docket 04-77

Affordable Telecom Comments

Exhibit 5

**ALJ Order Denying Intervention and TPUC Order Denying Appeal in TPUC Docket
27802**



Control Number: 27802



Item Number: 12

Addendum StartPage: 0

DOCKET NO. 27802

2003 AUG 21 AM 11:24

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PETITION FOR EXPANDED LOCAL CALLING SERVICE FROM THE CITY OF CARRIZO SPRINGS TO THE EXCHANGES OF BATESVILLE, EAGLE PASS, LAPRYOR, AND UVALDE

§
§
§
§

PUBLIC UTILITY COMMISSION OF TEXAS
PUBLIC UTILITY
FILING CLERK

**ORDER NO. 3
DENYING MOTION TO INTERVENE, DEEMING PETITION SUFFICIENT
AND REACTIVATING TIMELINE**

On May 15, 2003, a petition for expanded local calling service (ELCS) from the City of Carrizo Springs exchange to the exchanges of Batesville, Eagle Pass, LaPryor, and Uvalde was filed pursuant to P.U.C. SUBST. R. 26.219 and Chapter 55, Subchapter C of PURA.¹

On May 28, 2003, Cary Fitch d/b/a Fitch Affordable (Fitch) filed a petition for intervention and request for correction of inadvertent deficiency or for Finding of Deficiency. Fitch asserted that the petition as filed is deficient because it fails to list all NXX's in the petitioning and petitioned exchanges which violates § 55.043 of PURA. Fitch contended that it was necessary to intervene in order to receive equal treatment for its NXX codes.

Order No. 2, dated May 30, 2003, suspended the timeline to allow sufficient time for parties to respond to Fitch's petition for intervention.

On June 13, 2003, Commission Staff (Staff) filed its response and recommendation. Staff asserted that the Commission has processed numerous ELCS petitions and has not required the petitioners to list all NXX codes for either the petitioning or petitioned exchange. Such a requirement, Staff contended, would be overly burdensome and unnecessary. The NXX codes are used to identify which community wants ELCS and the communities to which ELCS is sought. It is the responsibility of the incumbent local exchange company (ILEC) affected by the petition to ensure that all relevant NXX codes are included in the implementation of ELCS. In addition, only ILECs are subject to the provisions of Chapter 55, Subchapter C of PURA.

¹ The Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001 – 64.158 (Vernon 1998 & Supp. 2003) (PURA).

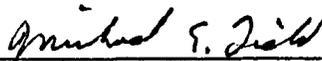
Therefore, Staff asserted, it would be inappropriate to include all NXX codes associated with the petitioning and petitioned exchanges in the ELCS petition because non-ILECs may choose to not participate in ELCS.

Staff recommended that Fitch's request to intervene in this proceeding be denied. Fitch has not demonstrated that it has a justiciable interest in this proceeding. Fitch is a wireless CMRS (non-ILEC) service provider that has NXX codes associated with rate centers in the exchanges of Uvalde, Eagle Pass, and La Pryor. The association of NXX codes does not constitute a justiciable interest. Staff recommended that if Fitch is concerned about its associated NXX codes being included in the ELCS provided by the ILECs, then it must negotiate traffic arrangements with the ILECs to ensure their NXX codes will be honored in the calling areas.

Based on Staff's recommendation, Fitch's motion to intervene is denied and the petition is deemed sufficient. The reactivated revised timeline attached to this proceeding reflects all relevant deadlines and shall be followed by all parties.

SIGNED AT AUSTIN, TEXAS the 21st day of August 2003.

PUBLIC UTILITY COMMISSION OF TEXAS



MICHAEL E. FIELD
DIRECTOR, DOCKET MANAGEMENT
POLICY DEVELOPMENT DIVISION

SR 26.219 Timeline To Establish ELCS and ELCS Fees

DAY

- 0 Request for ELCS is filed by petitioning exchange (§26.219(c)(1)-(2)).
- 5 ORA notifies affected ILECs of request 5 days after ORA receives a copy of the request (§26.219(c)(3)).
- 15 8-21-03 Presiding officer rules on sufficiency, changed circumstances, geographic proximity and community of interest (§26.219(d)).
- 20 8-26-03 Presiding officer dismisses requests from exchanges with more than 10,000 access lines (§26.219(c)(1)). Requests for exemption due from ILECs (§26.219(e)(1)).
- 30 9-5-03 Deadline for ELCS requestor to cure deficiencies (§26.219(d)(1)).
- 40 9-15-03 Presiding officer rules on exemption requests. §26.219(e)(3)) and, if appropriate, orders ILEC to ballot (§26.219(f)).
- 55 9-30-03 Notice to be published once in each newspaper in petitioning exchange and in *Texas Register* not later than 15 days before ballots are mailed (§26.219(c)(4)).
- 65 10-10-03 Intervention deadline is 10 days after last date of newspaper publication (§26.219(c)(5)).
- 70 10-15-03 Ballots mailed by ILEC no later than 30 days after presiding officer's order to commence balloting (§26.219(f)(2)).
- 75 10-20-03 Presiding officer rules on intervention requests within 10 days of request date (§26.219(c)(5)). ILEC files master list no later than 35 days after the presiding officer's order to commence balloting (§26.219(f)(3)).
- 85 10-30-03 Return ballots to be postmarked no later than 15 days from the date the ballot is mailed to the customer (§26.219(f)(2)(G)).
- 100 11-14-03 Ballot report due from ORA no later than 15 days after the date the return ballots must be postmarked (§26.219(f)(4)).
- 110 11-24-03 Presiding officer dismisses requests that failed ballots within 10 days after ORA's ballot report (§26.219(f)(4)(B)).
- 130 12-15-03 ILEC application to establish ELCS fees due within 30 days after ORA's ballot report (§26.219(f)(4)(A)(i)).
- 145 12-29-03 Presiding officer approves interim rates no later than 15 days after the ILEC files its application to establish ELCS fees §26.219(f)(4)(A)(iii)).

- 160 1-13-04 Presiding officer approves, modifies or denies implementation schedule no later than 30 days after the ILEC files its application to establish ELCS fees (§26.219(f)(4)(A)(iv)).
- 175 1-28-04 Deadline to request docketing is within 30 days of the interim approval order from the presiding officer (§26.219(h)).
- 205 2-27-04 If no request to docket, the presiding officer grants final approval to or modification of fees within 60 days of the interim approval order (§26.219(i)).
- 260 4-22-04 Approximate deadline for implementation of ELCS - within 5 months of the presiding officer's order acknowledging ballot results on Day 110 (§26.219(f)(4)(A)(ii)).



Control Number: 27802



Item Number: 16

Addendum StartPage: 1

P.U.C. DOCKET NO. 27802

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PETITION FOR EXPANDED LOCAL §
CALLING SERVICE FROM THE CITY §
OF CARIZZO SPRINGS TO THE §
EXCHANGES OF BATESVILLE, §
EAGLE PASS, LA PRYOR, AND §
UVALDE §

PUBLIC UTILITY COMMISSION
FILING CLERK
MISSION
OF TEXAS

ORDER DENYING APPEAL

This Order denies Cary Fitch d/b/a Fitch Affordable's appeal of the Commission administrative law judge's (ALJ's) Order No. 3.

In Order No. 3, the ALJ denied Fitch's motion to intervene in this proceeding based on a determination that state law pertaining to expanded local calling service (ELCS) applies solely to incumbent local exchange carriers (ILECs),¹ and therefore, as a commercial mobile radio service (CMRS) provider with NPA-NXXs associated with exchanges in the proposed ELCS area, Fitch lacks a justiciable interest in the proceeding.

The Commission upholds the ALJ's Order denying Fitch's intervention in this proceeding, but the Commission finds that its decision in *ASAP Paging*² is controlling. Here, the called customer, Fitch, is located in San Antonio, outside of the proposed ELCS area. Consequently, calls to Fitch cannot be rated for ELCS.³ Accordingly, Fitch lacks a justiciable interest in the proceeding and the Commission denies its appeal.

¹ See Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 55.041-.048 (Vernon 1998).

² *Complaint, Request for Expedited Ruling, Request for Interim Ruling, and Request for Emergency Action of ASAP Paging, Inc. Against CenturyTel of San Marcos, Inc., Docket No. 25673* (Oct. 10, 2003).

³ *Id.*, Order at 7, 19-20.

SIGNED AT AUSTIN, TEXAS the 23rd day of October 2003.

PUBLIC UTILITY COMMISSION OF TEXAS



REBECCA KLEIN, CHAIRMAN



JULIE PARSLEY, COMMISSIONER



PAUL HUDSON, COMMISSIONER

CC Docket 04-77

Affordable Telecom Comments

Exhibit 6

**TPUC Comments in CC Dockets 99-200, RM No. 9258, NSD File No. L-99-17, NSD File
No. L-99-36 (August, 1999)
(Excerpt)**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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AUG 06 1999
FCC MAIL ROOM

In the Matter of	§	
	§	
Numbering Resource Optimization	§	CC Docket No. 99-200
	§	
Connecticut Department of Public Utility	§	RM No. 9258
Control Petition for Rulemaking to	§	
Amend the Commission's Rule Prohibiting	§	
Technology-Specific or Service-Specific	§	
Area Code Overlays	§	
	§	
Massachusetts Department of	§	NSD File No. L-99-17
Telecommunications and Energy Petition	§	
For a Waiver to Implement a Technology-	§	
Specific Overlay in the 508, 617, 781 and	§	
978 Area Codes	§	
	§	
California Public Utilities Commission	§	NSD File No. L-99-36
And the People of the State of California	§	
Petition for a Waiver to Implement a	§	
Technology-Specific or Service-Specific	§	
Area Code	§	

**INITIAL COMMENTS OF
THE PUBLIC UTILITY COMMISSION OF TEXAS**

I. INTRODUCTION

On June 2, 1999, the Federal Communications Commission (FCC) filed a public notice in a Notice of Proposed Rulemaking (NPRM) seeking comment on a variety of measures intended to increase the efficiency with which telecommunications carriers use telephone numbering resources.

system, carriers should be required to make a clear showing of need before obtaining any NXX codes, including initial codes. Any process for obtaining codes should be designed to minimize harm to competition. However, the present system which allows new entrants to reserve blocks well in advance of use does not work. The PUCT suggests that, in order to obtain an initial code in a rate center, carriers should be required to provide the following: 1) valid interconnection agreement (or evidence that it will have one within 6 months); 2) a copy of the requesting carrier's state certification to serve the rate center for which the code is requested; and 3) evidence that it will have facilities in the rate center within 6 months. Proof of the facilities requirement could include a copy of an order for equipment, a contract for UNEs, or other such documentation. The carrier should also be required to provide to the applicable state commission a description of its business plan (with appropriate confidentiality protective measures in place).

Carriers should be required to file their applications for initial codes with NANPA and the applicable state commission, if that commission has requested to receive such applications. NANPA should perform the initial review of the application and follow-up with the carrier and, where appropriate, the state commission on any missing or questionable information contained in the application. State commissions should have the option, but not the obligation, to participate in this process with NANPA. Due to resource constraints, some states will likely defer to NANPA on some or all code request applications. Other state will choose to be more active in this process and may request that they be given the authority to make the final determination on all code requests.