IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 03-4311

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SBC COMMUNICATIONS, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents

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PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISISON

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## STATEMENT OF RELATED CASES

The proceeding under review has not been before this or any other court previously, and counsel for the respondents are not aware of any related cases pending before this or any other court. The Federal Communications Commission is currently considering a number of changes to its rules governing intercarrier compensation, including the rules at issue in this case. *See* Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9648-49 (paras. 105-107) (2001) ("*Intercarrier Compensation NPRM*").

## ISSUES PRESENTED

In 1996, the FCC adopted a rule authorizing a competitive carrier to be paid the incumbent local exchange carrier ("ILEC") tandem interconnection rate as reciprocal compensation for terminating traffic on its network when the

competitive carrier's switch serves "a geographic area comparable to the area served by the incumbent LEC's tandem switch." 47 C.F.R. § 51.711(a)(3). Subsequently, a number of state commissions added a separate "functionality" requirement – above and beyond the geographic area test – to the showing they required competitive carriers to make in order to be entitled to the ILEC tandem rate. In 2001, the FCC staff issued a letter clarifying that rule 51.711(a)(3) meant what it said, and that a competitive carrier need only satisfy the comparable geographic area test in order to recover the tandem interconnection rate. Letter from Dorothy Attwood, chief of the Common Carrier Bureau, and Thomas J. Sugrue, chief of the Wireless Telecommunications Bureau, to Charles McKee, Sprint PCS, 16 FCC Rcd 9597 (2001) (App. 33) ("*Attwood Letter*"). SBC Communications, Inc. ("SBC") filed an application for Commission review of the staff letter, which the Commission denied in the *Order* that is before the Court for review. *Cost-Based Terminating Compensation for CMRS Providers*, 18 FCC Rcd 18441 (2003) ("*Order*") (App. 7). The issues presented by SBC's petition for review are:

1. Did the Commission reasonably conclude that its clarification of the rule was an interpretive ruling to which the notice and comment requirements of the Administrative Procedure Act do not apply?

2. Is SBC's challenge to the reasonableness of the rule itself untimely because it was not made within 60 days after promulgation of the rule in the 1996 *Local Competition Order*?

3. Is the rule as clarified consistent with the applicable statutes?

## STATUTES AND REGULATIONS

Pertinent materials not included in the brief for petitioner are located in the addendum to this brief.

## COUNTERSTATEMENT

### A. Statutory And Regulatory Framework

#### (1) The 1996 Act

Prior to the passage of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. 104-104, 110 Stat. 56, "States typically granted an exclusive franchise in each local service area to a local exchange carrier [], which owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network." *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act restructured local telephone markets by preempting state and local exclusive franchise arrangements, 47 U.S.C. § 253, and by requiring "incumbent local exchange carriers (ILECs) to share their networks and services with competitors seeking

entry into the local service market." *MCI Telecommunication Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 498 (3d Cir. 2001), *cert. denied,* 537 U.S. 941 (2002). Among other things, the 1996 Act required ILECs to make their networks available to competitors for "interconnection." *See* 47 U.S.C. § 251(c)(2).

The 1996 Act creates a federal-state partnership in opening telecommunications markets to competition. In that partnership, the Act and the FCC's implementing rules set the standards that state commissions apply when reviewing and arbitrating agreements between incumbent and competing carriers for the interconnection of their networks. 47 U.S.C. §§ 252(c), (d), (e), (f). *See generally, Iowa Utilities Bd.,* 525 U.S. 366.

Section 251(b)(5) of the 1996 Act requires interconnecting local exchange carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). With respect to the compensation that a carrier may recover for the transport and termination of traffic that originates with another carrier, the 1996 Act requires just and reasonable rates that provide for "the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." 47 U.S.C. §

252(d)(2)(A)(i). The Act effectively defines a reasonable rate as one that is "a reasonable approximation of the additional costs of terminating such calls," and prohibits any regulatory proceedings to establish such costs "with particularity." 47 U.S.C. §§ 252(d)(2)(A)(ii), 252(d)(2)(B)(ii).

### (2) The Local Competition Order

The 1996 Act required the Commission to adopt regulations to implement the Act, including its reciprocal compensation provisions. *See generally Iowa Utilities Bd.*, 525 U.S. at 377-78, 384. Within six months of the adoption of the 1996 Act, the Commission issued a comprehensive rulemaking decision to satisfy that requirement. *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").[1]

In the *Local Competition Order*, the Commission established a presumption that the reciprocal compensation rates that two interconnecting carriers may charge each other are symmetric, generally using the ILECs' rates as the proxy for other

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[1] *Modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils' Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part, Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002). Although many parties challenged various aspects of the *Local Competition Order*, no party petitioned for review of the Commission's rule for determining the availability of the tandem interconnection rate to interconnecting carriers for reciprocal compensation.

telecommunications carriers' additional costs of transport and termination. *Local Competition Order*, 11 FCC Rcd at 16031-44 (paras. 1069-1093); *see also* 47 C.F.R. § 51.711(a) (symmetrical reciprocal compensation rules). The Commission adopted symmetric rates because, among other things, they would be easy to administer, could prevent incumbent LECs from taking advantage of their "unequal bargaining position," and would not discourage carriers' incentives to reduce their costs. 11 FCC Rcd at 16040-41 (paras. 1086, 1087, 1088); *see also id*. at 16040 (para. 1086) ("A symmetric compensation rule gives the competing carriers correct incentives to minimize [their] own costs of termination because [their] termination revenues do not vary directly with changes in [their] own costs."). The Commission explained that it adopted the ILECs' rates as a proxy for the rates of other carriers because "[b]oth the incumbent LEC and the interconnecting carriers will be providing service in the same geographic area, so the[ir] forward-looking economic costs should be similar in most cases." *Local Competition Order*, 11 FCC Rcd at 16040 (para. 1085). This ratemaking scheme thus would permit carriers to recover through reciprocal compensation "a reasonable approximation" of their costs. *See* 47 U.S.C. § 252(d)(2)(A)(ii).

When an ILEC terminates a call on its network, the call may be transferred to it at the ILEC's end-office switch that directly serves the customer receiving the call, or the call may go through the ILEC's tandem switch, from which it must then

be routed to the end-office switch that directly serves the customer receiving the call.[2] When a call goes through the ILEC's tandem switch, the ILEC incurs additional costs because it then has to transport the call from the tandem switch to the end-office switch. *Local Competition Order,* 11 FCC Rcd at 16042 (para. 1090). *See also Indiana Bell Tel. Co., Inc. v. McCarty*, --- F.3d ----, 2004 WL 406737 at *3 (7th Cir. March 05, 2004).

The Commission has long recognized that "[n]ew entrants cannot hope to replicate the incumbents' network switch for switch" and would instead deploy "newer technology" to terminate calls on their networks. *Id*.[3] Thus, interconnecting carriers might not have identical networks and might terminate calls over different kinds of facilities. Aware of this, the Commission in the *Local Competition Order* nonetheless adopted a general regime of symmetric reciprocal compensation rates and directed the states to establish "presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic…." 11 FCC Rcd at 16042 (para. 1089). Given the advantages it perceived from using symmetrical rates, the Commission found that the incumbent LECs'

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[2] An "end-office switch" is a "computer that directly serves the [] customer being called," while a "tandem switch" is "a computer hub that connects end-office switches." *Indiana Bell Tel. Co., Inc. v. McCarty*, --- F.3d ----, 2004 WL 406737 at *3 (7th Cir. Mar 05, 2004).

[3] *See also Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 490 (2002).

costs "serve as reasonable proxies for other carriers' costs of transport and termination for the purpose of reciprocal compensation." *Id.* at 16041 (para. 1088).

The Commission separately addressed the special circumstances that might arise when new technologies used by a competing carrier do not precisely replicate the traditional "tandem switch" routing that an ILEC uses:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

11 FCC Rcd at 16042 (para. 1090).

In those circumstances, the Commission required the states to use the ILEC's tandem rate "where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch…." *Id.* *See also* rule 51.711(a)(3). The relatively simple geographical area test thus was adopted as a proxy for a more complex functional analysis in

determining whether to apply the tandem rate even though the competing carrier might not actually use a traditional tandem switch.

The Commission articulated the substance of this rule in the final sentence of paragraph 1090 of the *Local Competition Order*, which is nearly identical to the text of the rule the agency adopted and codified, rule 51.711(a)(3). Pursuant to this articulation and the text of rule 51.711(a)(3), a non-ILEC carrier is entitled to recover the tandem interconnection rate for terminating traffic on its network upon a showing that its switch serves a geographical area comparable to that of the ILEC's tandem switch. The Commission did not establish a separate or additional requirement in the rule or in the text of paragraph 1090 that the interconnecting carrier's switch be "functionally equivalent" to the ILEC's tandem switch.

**(3) State Commission Proceedings**

The Commission's initial reciprocal compensation rules inadvertently encouraged some competitive carriers to "game the system" by soliciting business only from internet service providers ("ISPs"). *See generally WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C.Cir. 2002), *cert. denied*, *Core Communications, Inc. v. FCC*, 123 S.Ct. 1927 (2003). An ISP's dial-up customers call the ISP to connect with the Internet and typically remain on the line for an extended period of time. When the ISP subscribes to a CLEC for its local service and the dial-up customers of the ISP's services are local telephone customers of an ILEC, many minutes of

use of the CLEC's transport and termination services are recorded for reciprocal compensation calculations. As the D.C. Circuit recently found the Commission's initial reciprocal compensation regime was "flaw[ed]" because "ISPs typically generate large volumes of one-way traffic in their direction." *WorldCom, Inc. v. FCC*, 288 F.3d at 431. Some competitive carriers were able to earn substantial parts of their revenues by delivering traffic that originated on the ILEC network to the ISPs on the competitive carriers' own networks. This system attracted some competitive LECs "that entered the business simply to serve ISPs, making enough money from reciprocal compensation to pay their ISP customers for the privilege of completing the calls." *Id*.

This practice by some CLECs apparently was a factor in prompting some state utility commissions to seek to reduce what they perceived as excessive payments made to competitive carriers that were solely in the business of terminating calls to ISPs. *See Intercarrier Compensation Regime,* 16 FCC Rcd at 9649 n.173. In arbitration proceedings before state utility commissions after the *Local Competition Order* became effective, some state commissions interpreted paragraph 1090 as imposing upon a non-ILEC carrier two separate requirements as

a condition of recovering the tandem interconnection rate. *Id.*[4] Such a carrier would have to establish *both* that its switch serves a geographic area comparable to that of the ILEC, *and* that its switch functions in the same way as an ILEC tandem switch. *See*, *e.g.*, Arbitration Award, *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996,* Docket No. 21982, 2000 Tex. PUC LEXIS 95 (Tex. PUC July 13, 2003) at *45-47; *see also* Opinion and Order Concerning Reciprocal Compensation, *Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation*, N.Y. PUC LEXIS 398 at *96-97 (N.Y. PSC Aug. 26, 1999). Using this dual test resulted in some CLECs receiving the lower non-tandem rate for reciprocal compensation and thus receiving smaller amounts of compensation. Some district courts affirmed some of those state commission decisions. *See*, *e.g.*, *U S West*

[4] State commission decisions interpreting paragraph 1090 as requiring a competitive carrier to make more than a "comparable geographic area" showing are collected at page 8 n.3 of SBC's opening brief. *See* SBC Br. at 8 n.3.

*Communications, Inc. v. Public Serv. Comm'n*, 75 F.Supp.2d 1284, 1289 (D. Utah 1999).[5]

### B. The *Order* Under Review

#### (1) The Sprint PCS Letter

On February 2, 2000, Sprint PCS wrote a letter to the chiefs of the Commission's Common Carrier Bureau (now known as the "Wireline Competition Bureau") and Wireless Telecommunications Bureau seeking guidance on whether a wireless telephone service provider may "recover in reciprocal compensation all the additional costs it incurs in terminating local traffic originated on other networks." *See* Letter from Jonathan M. Chambers, Sprint PCS, January 26, 2000 (App. 18). The Sprint PCS letter was prompted by state commission decisions on reciprocal compensation that it claimed were inconsistent with the 1996 Act and the *Local Competition Order*. *Id*. at 18, 19-20.

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[5] To our knowledge, no federal court of appeals has embraced the ILECs' argument that paragraph 1090 of the *Local Competition Order* imposes a separate functionality requirement in addition to the comparable geographic area test for a competitive carrier to recover the tandem interconnection rate. See *Indiana Bell*, --- F.3d ----, 2004 WL 406737 at *4 ("the tandem reciprocal rate applies when the new market entrant's network has the ability to serve, although may not yet actually be serving, the same geographic area as the incumbent"); *U S West Communications, Inc. v. Washington Utilities and Transportation Commission*, 255 F.3d 990, 996 (9th Cir. 2001) ("The regulations require U.S. West to pay AT&T the tandem rate because AT&T MSCs serve a geographic area comparable to the area served by U.S. West's tandem switches").

The Commission issued a public notice seeking comment on the Sprint PCS letter on May 11, 2000 (App. 37). Fourteen parties submitted comments and 11 parties provided reply comments. *Attwood Letter*, 16 FCC Rcd at 9598 (App. 34). Several parties in their comments also asked the Commission to clarify the rule governing payment of the tandem interconnection rate for terminating traffic to commercial mobile radio service providers (CMRS or wireless or mobile carriers). *See*, *e.g.*, Comments of Western Wireless Corporation, June 1, 2000 (App. 48-49); *see also* Reply Comments of U S West Communications, Inc., June 13, 2000 (App. 62) (citing paragraph 1090 of the *Local Competition Order*).

**(2) The Intercarrier Compensation NPRM**

While the Sprint PCS letter request was pending, the FCC on April 27, 2001, released a Notice of Proposed Rulemaking, in which it undertook to reexamine the general subject of intercarrier compensation. *See Intercarrier Compensation NPRM*, 16 FCC Rcd 9610. The NPRM addressed many subjects, including the question of when an interconnecting carrier is entitled to recover the tandem rate for reciprocal compensation.

The Commission acknowledged that there had been some disagreement over the availability of the tandem interconnection rate – specifically, whether a competitive carrier must demonstrate functional equivalency as a separate requirement independent of, and in addition to, comparable geographic area

coverage in order to recover the tandem rate. *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9647, 9648 (paras. 103, 105). The Commission noted that, "in dealing with the problems presented by ISP-bound traffic, some states have incorporated a functional equivalency test into their interpretations of section 51.711(a)(3)." *Id*. at 9649 n.173. For example, both "the Texas PUC and the New York PSC concluded that large imbalances in traffic flows strongly suggest that a carrier is serving a higher proportion of convergent customers rather than a large distribution of customers similar to those served by an ILEC tandem switch." *Id*.

The Commission stated that the state commission decisions imposing a separate functional equivalency requirement in addition to the geographic area test were "inconsistent with our rule." *Intercarrier Compensation NPRM,* 16 FCC Rcd at 9649 n.173. The Commission pointed out that rule 51.711(a)(3) requires only that a carrier demonstrate that its switch serve "a geographic area comparable to that served by the incumbent LEC's tandem switch" in order to receive the tandem rate. *Id.* at 9648 (para. 105). Nevertheless, the Commission acknowledged the problems addressed in those state decisions, and it undertook to "consider whether to amend the rule to give states greater flexibility in applying a tandem interconnection rate to networks using newer, more efficient technologies." *Id*. at 9649 n.173. It invited comment, including explicitly comment on whether it should amend its rule to include the "the 'functional equivalency' concept . . . ."

*Id*. at 9649 (para. 107). The FCC has not yet resolved the issues raised in the NPRM.

### (3) The *Attwood Letter* And The *Order*

On May 9, 2001, the chiefs of the Common Carrier Bureau and the Wireless Telecommunications Bureau, acting on delegated authority, released the *Attwood Letter*, addressing the issues raised in the Sprint PCS letter and the responsive comments. 16 FCC Rcd at 9597 (App. 33). The letter noted that in its recently adopted *Intercarrier Compensation NPRM*, the Commission had confirmed that, "[w]ith respect to when a carrier is entitled to the tandem interconnection rate, . . . section 51.711(a)(3) requires only a geographic area test." 16 FCC Rcd at 9599 (App. 35). The letter concluded: "Therefore, a carrier demonstrating that its switch serves a 'geographic area comparable to that served by the incumbent LEC's tandem switch' is entitled to the tandem interconnection rate to terminate local telecommunications traffic on its network." *Id*.

SBC applied for review of the *Attwood Letter* by the full Commission, claiming that the staff had violated the procedural requirements of the APA, and that the staff's decision was inconsistent with the 1996 Act and the Commission's rules and orders. *See* Application for Review of SBC Communications Inc., June 8, 2001 (App. 65, 74-80). The Commission rejected those claims in the *Order*, which was released on September 3, 2003. With respect to the APA claim, the

Commission held that clarification of the applicable rule – announced in the *Intercarrier Compensation NPRM* and followed in the *Attwood Letter* – was an interpretive ruling to which the notice and comment requirements of the APA did not apply. *Order* at paras. 22-25 (App. 15-17). The Commission also concluded that this interpretation – which required only satisfaction of the comparable geographic area test to establish functional equivalency of a CLEC's switch – was faithful to the plain language of the rule and was consistent with the relevant statutory provisions governing reciprocal compensation. *Id.* at paras. 17-21 (App. 13-15).

SBC filed its petition for review in this Court on November 3, 2003.

## STANDARD OF REVIEW

The FCC is due "substantial deference in its implementation of the Communications Act, and 'even greater deference' when interpreting its own rules and regulations." *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 257-58 (D.C. Cir. 2001) (citation omitted). *See also Beazer East, Inc. v. United States EPA*, 963 F.2d 603, 606 (3d Cir. 1992) ("When we review an administrative agency's interpretation of its own regulations, we defer to the agency's construction of the language of its own regulation, 'unless it is plainly erroneous or inconsistent with the regulation.'") (citation omitted). An agency's determination that "its order is interpretive," and thus not subject to APA requirements for the adoption of a new

legislative rule, "'in itself is entitled to a significant degree of credence.'" *See, e.g., Viacom International Inc. v. FCC*, 672 F.2d 1034, 1042 (2nd Cir. 1982) (quoting *British Caledonian Airways, Ltd. v. CAB*, 584 F.2d 982, 992 (D.C. Cir. 1978)).

The petitioners have a heavy burden to show that the *Order* is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also New Jersey Coalition for Fair Broad. v. FCC*, 574 F.2d 1119, 1125 (3d Cir. 1978). Under this "highly deferential" standard, a reviewing court presumes the validity of agency action and must affirm unless the agency failed to consider relevant factors or made a clear error in judgment. *Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000). *See also Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) ("[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

## SUMMARY OF ARGUMENT

This is not a difficult case. In the *Order* under review, the Commission did no more than clarify that rule 51.711(a)(3) means what it says: that a competitive carrier is entitled to be paid the ILEC tandem interconnection rate as reciprocal compensation when the competitive carrier's switch serves a "geographic area comparable to the area served by the incumbent LEC's tandem switch." 47 C.F.R.

§ 51.711(a)(3). The Commission complied with all of the applicable procedural requirements of the APA in issuing the *Order*, and, substantively, the *Order* is consistent with the requirements established by Congress for setting reciprocal compensation rates.

SBC asserts that the Commission did not comply with the APA's notice and comment requirements in issuing the *Order*. SBC acknowledges that the Commission did not repeal or revise an existing rule, or adopt a new rule – the sort of "legislative" actions by an agency that require compliance with the notice and comment requirements. SBC claims instead that the discussion in paragraph 1090 of the *Local Competition Order* was an authoritative interpretation of the rule that established a separate "functionality" requirement supplementing the rule's comparable geographic area requirement. SBC then argues that the Commission abolished that separate functionality requirement in the *Order* under review, and that the Commission may not change such an authoritative interpretation of its rule without notice and comment.

SBC's claim is unavailing because it is based upon an incorrect reading of paragraph 1090 of the *Local Competition Order*. The last sentence of that paragraph is nearly identical to the Commission's rule, and establishes that a competing carrier need only satisfy the comparable geographic area requirement in

order to recover the tandem interconnection rate. As the Commission explained in the *Intercarrier Compensation NPRM*, paragraph 1090 does not establish a separate functionality requirement for recovery of the tandem interconnection rate. The Commission in this *Order* did no more than reiterate this reading of paragraph 1090 and confirm that rule 51.711(a)(3) means what it says. The Commission reasonably concluded that its clarification of the rule was an interpretive ruling to which the notice and comment requirements of the APA did not apply, and its determination is "entitled to a significant degree of credence." *Viacom International Inc. v. FCC*, 672 F.2d at 1042.

On the merits, SBC's claim that the rule is unlawful because it results in rates that are not based upon the actual costs incurred by carriers in terminating traffic, as allegedly required by the 1996 Act, is no more availing. First, because SBC never presented its statutory claim to the Commission, it may not now make this its argument to the Court. *See* 47 U.S.C. § 405. Second, SBC's challenge to the reasonableness of the rule itself is untimely because it was not made within 60 days after promulgation of the rule in the 1996 *Local Competition Order*. 28 U.S.C. § 2344. The time for direct review of the rule expired years ago, and it is not reopened by a request for a declaratory order on its meaning. *See ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 285-86 (1987).

If the Court reaches the merits of SBC's arbitrary and capricious claim, it must reject the argument as unfounded. SBC's argument is based upon its interpretation of the term "costs" in section 252(d)(2)(A), isolated from the rest of the words in the statute. However, section 252(d)(2)(A) authorizes reciprocal compensation rates that are based upon a "*reasonable approximation*" of costs. 47 U.S.C. § 252(d)(2)(A)(ii) (emphasis added). Even more to the point, section 252(d)(2)(B)(ii) actually prohibits "any rate regulation proceeding to *establish with particularity* the additional costs of transporting and terminating calls." *See* 47 U.S.C. § 252(d)(2)(B)(ii) (emphasis added). Congress thus did not contemplate, and clearly did not require, a calculation of the "actual" costs of transporting and terminating calls. The *Order* should be affirmed.

## ARGUMENT

### I. The Commission Satisfied All Applicable Procedural Requirements In Its Clarification Of An Existing Rule.

For purposes of identifying the rates for reciprocal compensation between interconnecting local carriers, section 51.711(a)(3) provides:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

47 C.F.R. § 51.711(a)(3). This is the entire text of the Commission's only regulation addressing the appropriate rate for this circumstance. It appears in a

section of the rules generally establishing that the rates for reciprocal compensation are symmetrical, that is, the same for both carriers in both directions. 47 C.F.R. § 51.711.

In the *Order* under review, the Commission reaffirmed its earlier clarification that section 51.711(a)(3) means what it says: that a competitive carrier may receive reciprocal compensation from an interconnecting incumbent carrier at the symmetrical tandem rate so long as the competitive carrier's switch serves a geographical area that is comparable to the area served by the incumbent LEC's tandem switch. SBC contends that the Commission did not merely clarify, but adopted a new rule without the notice and *Federal Register* publication that the APA requires. Pet. Br. at 17-25.

The APA requires the agency to give "[g]eneral notice of proposed rule making," to take and consider comment on the proposal, and to publish the final rule in the *Federal Register* when it makes a new legislative-type regulation. 5 U.S.C. § 553. Legislative-type regulations that are subject to these requirements "work substantive changes in prior regulations," *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003), or "create new law, rights, or duties," *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991). The APA explicitly exempts "interpretive" rules from these requirements. 5 U.S.C. § 553(b)(3)(A).

Thus, agencies have the authority "to clarify . . . existing rules without issuing a new NPRM and engaging in a round of notice and comment." *Sprint Corp. v. FCC*, 315 F.3d at 373. An agency can declare its understanding of what a regulation requires without notice and comment. *See Fertilizer Institute*, 935 F.2d at 1308. As the Commission stated in the *Order*, the "requirements of notice and opportunity to comment do not apply to interpretive rules – rules that do 'not contain new substance but merely express the agency's understanding' of a statute or rule." *Order* at para. 22 (citation omitted) (App. 16).[6]

The D.C. Circuit has stated that one of the key inquiries in determining whether an agency rule is legislative or interpretive is "whether the [agency's action] effectively amends a prior legislative rule." *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). "If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative." *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992) (internal quotations omitted) (alteration in original). By contrast, a rule is interpretive if it "confirm[s] a regulatory requirement, or maintain[s] a consistent agency policy." *Id*., 979 F.2d at

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[6] See also 5 U.S.C. § 554(e) (agency may issue declaratory ruling to remove uncertainty); 47 C.F.R. § 1.2 (FCC may issue declaratory rulings).

237. Furthermore, "an agency's conclusion that its order is interpretative 'in itself is entitled to a significant degree of credence.'" *Viacom International Inc. v. FCC*, 672 F.2d at 1042 (citation omitted).

The Commission adopted rule 51.711(a)(3) in 1996 as part of its *Local Competition Order*. The agency's discussion of the rule in the *Local Competition Order* – but not the text of the rule itself – is the source of SBC's contention that the *Order* substantively amended the showing that a non-ILEC carrier must make in order to recover the ILEC tandem rate for terminating traffic on its network. The Commission in the 1996 order generally directed the states to set symmetrical rates for reciprocal compensation. *Local Competition Order*, 11 FCC Rcd at 16040-44. The Commission recognized that the costs of transport and termination might "vary depending on whether tandem switching is involved," and that new technologies used by some carriers might complicate the determination of whether the switches of those carriers performed "functions similar to those performed by an incumbent LEC's tandem switch . . . ." *Id*. (para. 1090).

The Commission provided specific instructions to the states for determining the rates in those cases: "Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC

tandem interconnection rate." *Id.* The codified rule adopted by the Commission to address this circumstance, 47 C.F.R. § 51.711(a)(3), provided the same instructions in almost precisely the same words, making clear that the test for applying the tandem rate was whether the interconnecting carrier's switch "serves a geographical area comparable to the area served by the incumbent LEC's tandem switch . . . ."

Some parties – including some state commissions – read the Commission's discussion in paragraph 1090 of the *Local Competition Order*, however, as establishing a two-part test for whether the tandem rate applied when carriers used new technologies to provide transport and termination. They concluded that an interconnecting carrier seeking to receive payments under the tandem rate would have to show *both* that its switch served a geographical area comparable to the ILEC's tandem switch *and* that its own switch performed functions equivalent to those performed by the ILEC's tandem switch. SBC Br. at 8 & n.3. SBC calls this second showing a "functional equivalency" test. *Id.* at 8. SBC purports to find this part of the test in the discussion of new technologies in the *Local Competition Order* (para. 1090), and contends that the Commission in the *Order* on review abandoned that part of the test without the required APA procedures for legislative rulemaking.

The Commission now has addressed the substance of SBC's reading of the tandem switching rate requirement two times. First, in a notice of proposed rulemaking that initiated a review of intercarrier compensation regulations, the Commission noted that some states had applied a "functional equivalency" test to determine whether tandem rates were applicable. *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9646-49 (paras. 102-107 & n.173). The Commission stated that these state decisions were "inconsistent with our rule." *Id*. at n.173. Nonetheless, the Commission undertook to consider "whether to amend [section 51.711(a)(3)] to give states greater flexibility in applying a tandem interconnection rate to networks using newer, more efficient technologies." *Id.* at n. 173. *See generally id.* at paras. 105-107.

Second, in the *Order* on review, the Commission responded to a request for declaratory ruling by clarifying that rule 51.711(a)(3) means what it says and what the Commission had said in the last sentence of paragraph 1090 of its *Local Competition Order*.[7] The Commission did not repeal or amend rule 51.711(a)(3), adopt a new rule repudiating or changing the rule, or even revise its understanding of the rule in either the *Intercarrier Compensation NPRM* or the *Order* on review. In response to disagreements over what the rule meant, the Commission merely

[7] The *Order* affirmed the *Attwood Letter*, in which the agency's staff had reached the same conclusion.

clarified its understanding of the rule. *See Cellnet Communications, Inc. v. FCC,* 965 F.2d 1106, 1110-11 (D.C. Cir. 1992) (clarification even of ambiguous rule does not require APA notice and comment). Such a decision is interpretive, and not subject to the APA requirements. *See Chao v. Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003) ("If the agency is not adding or amending language to the regulation, the rules are interpretive.").

Conceding as it must that the language contained in the rule itself in this case does not support its claim, SBC contends that the discussion in paragraph 1090 of the *Local Competition Order* separately established a "functionality" requirement that supplements the rule. SBC then argues that the Commission abolished that separate requirement in the *Order* under review. SBC asserts that the discussion in paragraph 1090 of the *Local Competition Order* amounts to a contemporaneous interpretation of the FCC's rule, and argues that "an agency has no more freedom to change such an interpretation without notice and comment than it does to change the underlying language of the rule itself." Br. at 19.

SBC is correct in arguing that an agency cannot abandon its previous authoritative interpretation of a rule without APA rulemaking procedures. *Cf. Caruso v. Blockbuster-Song Music Entertainment Center,* 193 F.3d 730, 736-37 (3d Cir. 1999) (court should not defer to agency interpretation if "an alternative

reading is compelled" by statement of agency's intent at time of rule's promulgation). But the language of paragraph 1090 of the *Local Competition Order*, on which SBC relies as an authoritative interpretation of the rule, does not support SBC's argument.

In that paragraph, after pointing out that costs might vary "depending on whether tandem switching is involved," the Commission directed the states to consider "whether new technologies … perform functions similar to those performed by an incumbent LEC's tandem switch" and thus, whether calls terminating on a network using those technologies should be compensated at the ILEC's tandem rate. The Commission went on in the last sentence of paragraph 1090 to identify the means by which the states were to make that determination:

> Where the interconnection carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the [incumbent] LEC tandem interconnection rate.

11 FCC Rcd 16042 (para. 1090). Rule 51.711(a)(3) describes the test for the states to apply in almost identical language.

Because the Commission put only the last sentence of paragraph 1090 into the rule, it obviously considered that a sufficient test by itself for determining when the tandem rate should apply. The Commission addressed the language on which SBC relies in the *Order*:

> [W]e find no inconsistency between the discussion in [paragraph 1090 of] the *Local Compensation Order* … and the language in the promulgated rule. The *Local Compensation Order* does refer to a functional analysis that states should apply, but then imposes a geographic area test as a sufficient condition for receiving the tandem rate…. The comparable geographic area test acts as a special case of the functional analysis, *i.e.,* if the geographic area test is satisfied then functional similarity is established for purposes of determining the appropriate reciprocal compensation rate.

*Order* at n.63. A CLEC's new technology switch that serves the same area as an ILEC's tandem switch, in other words, provides "similar functions" within that area to the functions provided by the ILEC's tandem switch. Because the language of the rule itself is unambiguous and the descriptive language of paragraph 1090 taken as a whole is readily reconcilable with the rule, the Commission here did not abandon an authoritative interpretation of the rule in its clarification *Order*.

SBC's reliance on *Caruso*, 193 F.3d 730, is unavailing. In *Caruso*, the government agency's initial rule – Standard 4.33.3, which addressed the placement of wheelchair locations in facilities such as the Blockbuster-Sony Music Entertainment Centre – did not include "a requirement that wheelchair users be able to see over standing patrons." 193 F.3d at 736; *see also id*. at 731-37. A subsequent interpretation of that rule to include such a requirement was issued by the Justice Department and relied upon by a private plaintiff alleging a violation of the rule. The Court held that accepting the DOJ "interpretation" of that rule – which would have required the facility to enable wheelchair users to have such a

line of vision – would have resulted in the adoption of a new regulation without the requisite notice and comment. *Id*. at 737. The court correctly held that the APA requirements applied in that situation – which was not a mere clarification of an existing rule – and were not satisfied.

Finally, SBC claims that the APA requirements were applicable nonetheless, even if the FCC never had interpreted the rule otherwise, because the Commission's clarification "affirmatively alters the law" in a number of states that had required a showing of functionality. SBC claims that the FCC's clarification thus results in "'substantial adverse impact' on SBC." Pet. Br. at 22. But any time the Commission clarifies a rule of which parties have disparate interpretations, its order will have an impact on the disputing parties. SBC's claim, moreover, is based upon the fact that some state commissions had given different interpretations to the Commission's rule and the related discussion in the *Local Competition Order*. That is the reason the Commission saw a need to clarify, however, and does not establish that a change in the law was taking place. State commissions do not have authority "to issue binding interpretations of FCC regulations." *Farmers Telephone Company, Inc. v. FCC*, 184 F.3d 1241, 1250 (8th Cir. 1999).

The irony lurking in SBC's APA argument is that the FCC could have "clarified" its rule to SBC's satisfaction only by issuing a notice of proposed

rulemaking, taking comment on the proposals, and publishing a new rule in the *Federal Register*. SBC does not claim – as it could not – that the "functional equivalency" test is contained within the language of rule 51.711(a)(3) itself or that any other current FCC rule requires such a test. In order to add that test – even if the Commission concluded as a matter of policy that it should – the rule would have to be amended and APA procedures would have to be followed. The Commission is bound by its rules unless and until it changes them through applicable procedures. "Although the Commission must have flexibility to adjust a regulatory scheme as concerns and problems arise in an obviously complex and developing area, it must conform its conduct to the APA notice requirement." *Sprint Corp.*, 315 F.3d at 377. The agency may not use its "clarification" powers to do a substantive rulemaking job. *Id*. In this case, as we have shown, the Commission undertook to consider just the regulatory adjustment SBC favors in the *Intercarrier Compensation NPRM,* 16 FCC Rcd at 9649 (para. 107).

## II. The *Order* Is Consistent With The Requirements Established By Congress For Reciprocal Compensation

SBC asserts that the "substantive result" of the *Order* "is unlawful" because it is "contrary both to the language of the 1996 Act and to the FCC's own regulations." SBC Br. at 25. As explained above, however, the language of rule 51.711(a)(3) is pellucid: a CLEC is entitled to receive the tandem interconnection

rates if its switch "serves a geographic area comparable to the area served by the incumbent LEC's tandem switch." The Commission acted reasonably in reading that language in accordance with its ordinary meaning, and the other rules to which SBC points, *see* SBC Br. at 32, in no way qualify it.

### A. SBC's Challenge To The Reasonableness Of Rule 51.711(a)(3) Are Not Properly Before The Court.

Initially, we point out that SBC never presented its statutory claim – that the Commission's tandem rate rule is arbitrary and capricious because the 1996 Act "provides that the only compensable costs are those that a carrier actually incurs in performing [] 'transport and termination,'" *see* SBC Br. at 26 – to the Commission. Certainly SBC did not make this argument in its application for Commission review of the *Attwood Letter*. *Cf.* Application for Review of SBC Communications, Inc., CC Docket Nos. 95-185, 96-98 & WT Docket No. 97-207 (June 8, 2001) (App. 74-78). SBC claims that this argument was raised by USTA in reply comments before the FCC released the *Attwood Letter*, and by Verizon in its reply in support of SBC's application for review. SBC Br. at 2 (citing App. 52-55, 95-96).

However, those pleadings also make no mention of the argument that the tandem rate rule is inconsistent with the 1996 Act. The Commission not having had an opportunity to address this claim, SBC cannot now raise it in this Court. 47

U.S.C. § 405. *See*, *e.g.*, *Service Elec. Cable TV, Inc. v. FCC*, 468 F.2d 674, 676-77 (3d Cir. 1972) (claim based upon affidavits the "Commission never had an opportunity to pass upon" barred by section 405); *see also Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) ("Section 405 of the Communications Act provides that the Commission must be afforded an 'opportunity to pass' on an issue as a condition precedent to judicial review.").

In addition, the reasonableness of rule 51.711(a)(3) itself is not open for review in this proceeding. The time for direct review of that rule expired years ago, and is not reopened by a request for a declaratory order on its meaning. 28 U.S.C. § 2344 (petition for review must be filed within 60 days). *See generally ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 285-86 (1987). Under such cases as *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546-47 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959), therefore, the only open substantive issue is whether the rule is within the Commission's statutory power. *See also*, *e.g.*, *Consolidation Coal Co. v. Donovan*, 656 F.2d 910, 914-16 (3rd Cir. 1981) (petition for review of mine-safety regulation was untimely because it was filed more than 60 days after regulation was promulgated, and amended). Rule 51.711(a)(3) plainly is within the Commission's statutory power. The Commission was under a direct statutory command to establish regulations to implement the 1996 Act – including the reciprocal compensation provisions. 47 U.S.C. §

251(d)(1). And, as we demonstrate below, section 252(d)(2)(A) allows – indeed, requires – the use of "reasonable approximations" of ILEC costs in setting reciprocal compensation rates. *See* 47 U.S.C. § 252(d)(2)(A)(ii). SBC does not make any serious argument to the contrary.

### B. Rule 51.711(a)(3) As Clarified Is Reasonable And Lawful.

SBC claims that the rule is unlawful because it results in rates that are not based upon the actual costs incurred by carriers in terminating traffic, as allegedly required by the 1996 Act. SBC Br. at 25-30. SBC's argument is based upon its interpretation of the term "costs" in section 252(d)(2)(A), isolated from the rest of the words in the statute. In fact, section 252(d)(2)(A) authorizes reciprocal compensation rates that are based upon a "*reasonable approximation*" of costs. 47 U.S.C. § 252(d)(2)(A)(ii) (emphasis added). Even more to the point, section 252(d)(2)(B)(ii) actually prohibits "any rate regulation proceeding to *establish with particularity* the additional costs of transporting and terminating calls." *See* 47 U.S.C. § 252(d)(2)(B)(ii) (emphasis added). Congress thus did not contemplate, and clearly did not require, a calculation of the "actual" costs of transporting and terminating calls.

The question for the Court at this point is whether the Commission's rules governing reciprocal compensation establish rates that recover a "reasonable

approximation" of the CLECs' costs. It is a basic principle of statutory construction that "a word is known by the company it keeps," and this rule of construction is "wisely applied where a word is capable of many meanings." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); *see also Deal v. United States*, 508 U.S. 129, 132 (1993) ("the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"); *Sekula v. FDIC*, 39 F.3d 448, 454 (3d Cir. 1994) ("[o]ne must look at the entire provision, rather than seize on one part in isolation"); *Bethlehem Steel Corp. v. OSHA*, 540 F.2d 157, 160 (3d Cir. 1976) ("the meaning of a word in a statute cannot be determined in isolation").

Section 252(d)(2)(A) does not define the word "costs" as "actual costs." With a term as ambiguous as "costs" – the Supreme Court recently described it as a "'chameleon,'" *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646, 1667 (2002) ("*Verizon*") (citation omitted) – SBC in order to prevail must demonstrate that Congress intended the "unadorned term" to have the specific meaning SBC prefers to the exclusion of all others, or at the least that the FCC's reading is unreasonable. *See also Verizon,* at 1666-67 (rejecting argument that the "plain meaning" of cost in 47 U.S.C. § 252(d)(1) is "historical" or "embedded" cost). SBC has not met this burden.

The statutory setting for the term "costs" in the reciprocal compensation context indicates that Congress intended to permit reciprocal compensation rates that are *not* based upon actual costs as determined through complex cost studies. Instead, Congress required that the rates for reciprocal compensation be based upon "a *reasonable approximation* of the additional costs of terminating" calls that originate on another carrier's network. 47 U.S.C. § 252(d)(2)(A)(i),(ii) (emphasis added). The Commission's general symmetric rates rule and its particular rule regarding the tandem rate when different technologies are used easily satisfy that standard. *See generally Local Competition Order*, 11 FCC Rcd at 16040-42 (paras. 1085-1092).

Congress also instructed the Commission and the state commissions that they were *not* authorized "to engage in any rate regulation proceeding to *establish with particularity* the additional costs of transporting and terminating calls." 47 U.S.C. § 252(d)(2)(B)(ii) (emphasis added). Yet that is exactly the sort of proceeding that would be necessary to determine with precision the "actual costs" of transport and termination that are associated with reciprocal compensation. To the contrary, Congress directed the Commission to adopt an approach in which rates would be based upon a "reasonable approximation" of the costs of terminating calls. That is exactly what the Commission did in the *Local Competition Order* in general by prescribing "symmetric" rates, and in rule

51.711(a)(3) in particular by requiring the tandem rate where the geographical areas served by switches are comparable.

SBC did not challenge the comparable geographic area test when the Commission adopted it in 1996, and it cannot now complain that the Commission acted in an arbitrary and capricious manner by refusing to repeal or amend the rule in response to a request to clarify its meaning. The Commission could not have repealed the rule in response to a request that it clarify what the rule meant because, among other things, the Commission would have had to put its proposal out for notice and comment in order to comply with the APA. *See*, *e.g.*, *Sprint Corp.*, 315 F.3d at 373-74. As pointed out above, the Commission has undertaken to consider revising the rule in an ongoing proceeding, and explicitly and properly has sought comment on whether it should include a separate "functional equivalency" concept in rule 51.711(a)(3). *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9649 (para. 107). That is the appropriate regulatory response to the arguments SBC made before the agency and the arguments SBC is making to this Court.

SBC's complaints amount to a disagreement now with the results of policy choices the Commission made in the 1996 *Local Competition Order*. The Commission's decision to adopt the comparable geographic area rule for recovery

of the tandem interconnection rate as a proxy for functional equivalence was reasonable when made. The Commission explained then that, although the new carriers' networks might be different from ILEC networks because of advances in technology, *see Local Competition Order*, 11 FCC Rcd at 16042 (para. 1090), it would not require CLECs to "establish with particularity" their costs and would not impose on state agencies the burden of evaluating those costs. Consistent with its congressional mandate, the Commission made a reasonable decision to sacrifice some level of "particularity" for administrative simplicity in its rules setting rates for reciprocal compensation, including the comparable geographic area rule. *See* 11 FCC Rcd at 16041 (para. 1088). SBC has not made, and cannot make, a case for undoing the Commission's reciprocal compensation regime in a proceeding to review a clarification order.

SBC's argument, therefore, reduces to the contention that the Commission's choice of a proxy was unreasonable for the types of switches at issue here. But that is a factual issue that would have had to be decided on the record before the agency in the *Local Competition Order*. As noted, the time for such review is long past. Indeed, SBC's brief, *see* Br. at 27-30, relies on factual and legal developments that occurred long after the rule was issued. SBC's remedy for such changes in circumstances is not a tortured reading of the language of the current rule, but a new rulemaking proceeding, such as the one that the Commission is

now conducting. *See N.L.R.B. Union v. Federal Labor Relations Authority*, 834 F.2d 191, 195-96 (D.C. Cir. 1987). As SBC itself argues in its APA claim, the Commission cannot change an existing rule without such a proceeding.

The ongoing *Intercarrier Compensation* rulemaking proceeding at the FCC provides the appropriate forum in which SBC may seek to change the rule. The Commission concluded in the *Intercarrier Compensation NPRM* that the state agency decisions relied upon by SBC in its brief (see Br. at 28-30) were inconsistent with rule 51.711(a)(3). *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9649 n. 173. Nevertheless, the Commission undertook in the NPRM to consider changing rule 51.711(a)(3), and it requested comment, including comment specifically on whether it should incorporate a separate "functional equivalency" test. *Id*. SBC may seek repeal or modification of the geographic area proxy in the *Intercarrier Compensation* proceeding, and it may seek review of any decision in that proceeding that aggrieves SBC. *Id*. at 9649 (para. 107). That proceeding, in effect, provides SBC with any relief it might reasonably expect if it were to prevail in this Court's review, which properly could result at most only in a remand for the Commission to undertake precisely the review of the rule that already is under way.

## CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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March 18, 2004

IN THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

| | | |
|---|---|---|
| SBC COMMUNICATIONS, Inc.<br><br>PETITIONER<br><br>V.<br><br>FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA<br><br>RESPONDENTS | ) | NO. 03-4311 |

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 8724 words.

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**CERTIFICATE OF ADMISSION**

Pursuant to 3rd Circuit LAR 28.3(d) and 46.1(e), I certify that I am a member of the bar of this court.

_____

Rodger D. Citron