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January 13, 2006

VIA HAND DELIVERY

Hon. Ron Jones, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*
Docket No. 04-00381

Dear Chairman Jones:

Enclosed please find a copy of a January 11, 2006 decision of the Indiana Utility Regulatory Commission. BellSouth provides this decision as supplemental authority for its positions. In relevant part, the Indiana Commission ruled that:

- Section 271 obligations have no place in a Section 251/252 interconnection agreement and state commissions have no jurisdiction to enforce or determine the requirements of Section 271. (p. 35).
- CLECs' requests to assert authority to interpret and enforce any unbundling obligations under Section 271 were rejected because "the few contrary decisions cited by the CLECs overlook the lack of any delegation of authority to state commissions under Section 271 and improperly seek to extend the scope of state commission authority with no statutory basis for doing so." (p. 36).
- ILECs are not required to commingle Section 251 UNEs with Section 271 network elements; neither Section 271 nor the FCC's interpretation requires commingling of Section 271 elements.
- The FCC's definition of business lines includes all UNE loops connected to a wire center, regardless of the type of customer. (p. 16).

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A copy of this letter has been provided to counsel of record.

Very truly yours,

Guy M. Hicks

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2006, a copy of the foregoing document was served on the following, via the method indicated:

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ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE INDIANA UTILITY REGULATORY COMMISSION'S INVESTIGATION OF ISSUES RELATED TO THE IMPLEMENTATION OF THE FEDERAL COMMUNICATION COMMISSION'S TRIENNIAL REVIEW REMAND ORDER AND THE REMAINING PORTIONS OF THE TRIENNIAL REVIEW ORDER	)	**CAUSE NO. 42857** **APPROVED:** JAN 1 1 2006

<u>BY THE COMMISSION:</u>
Larry S. Landis, Commissioner
William G. Divine, Administrative Law Judge

INDIANA UTILITY REGULATORY COMMISSION

ORDER

CAUSE NO. 42857

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INDIANA UTILITY REGULATORY COMMISSION

ORDER

CAUSE NO. 42857

1. **Procedural History.** On May 11, 2005, the Indiana Utility Regulatory Commission ("IURC" or "Commission") issued two Docket Entries simultaneously, one in Cause No. 42749, and the other in this docket, Cause No. 42857. In the Docket Entry in Cause No. 42749, the Presiding Officers determined that docket was to be held in abeyance.[1] The Docket Entry in this Cause established a new Commission investigation for consideration of matters related to implementation of those portions of the Federal Communication Commission's ("FCC's") Triennial Review Order ("TRO")[2] that had not been vacated by the D.C. Circuit Court of Appeals, and implementation of the FCC's Triennial Review Remand Order ("TRRO")[3]. All parties to Cause No. 42749 were made parties to this new proceeding. The parties were ordered to file a list of disputed issues for consideration in this docket based upon the outcome of negotiations ongoing in other states. If a complete list could not be filed by July 8, 2005, the parties were asked to file a status report explaining the progress and status of the negotiations in the other states.

AT&T Communications of Indiana, GP and TCG Indianapolis (collectively "AT&T") filed a Petition to Intervene in this Cause on July 6, 2005. The Presiding Officers issued a Docket Entry granting that petition, thereby making AT&T a party to these proceedings on July 20, 2005.

On July 8, 2005, Indiana Bell Telephone Company, Incorporated ("SBC Indiana" or "SBC"), an Incumbent Local Exchange Carrier ("ILEC"), and a number of participating Competitive Local Exchange Carriers ("CLECs") filed a *Joint Submission*

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[1] Cause No. 42749 involves a complaint by Indiana Bell Telephone Company, Incorporated against certain competitive telephone carriers. That complaint seeks Commission approval of an amendment to the interconnection agreements between SBC Indiana and these other carriers which, according to SBC, would make the interconnection agreements compliant with new Federal Communication Commission rules, including the Triennial Review Order. Major portions of the Triennial Review Order were vacated by the D.C. Circuit Court of Appeals.

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338 *et al.* (Aug. 21, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-36A1.doc.

[3] Order on Remand, *In re Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 *et al.* (February 4, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-290A1.doc.

of Status Report notifying the Commission that a final disputed issues list had yet to be finalized and giving an update as to the status of negotiations between the parties in this matter. A final issues list was filed on July 26, 2005, jointly by Easton Telecom Services, LLC; MCImetro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; Intermedia Communications, Inc.; AT&T Communications of Indiana, GP; TCG Indianapolis; BullsEye Telecom, Inc.; CityNet Indiana, LLC; DSLnet Communications, LLC; Fiber Technologies Networks, L.L.C.; McLeodUSA Telecommunications Services, Inc.; PNG Telecommunications, Inc.; and Sigecom, LLC, (collectively "CLECs"), and SBC Indiana.

AT&T filed a *Motion for Leave to Withdraw Intervention* on August 5, 2005, citing the successful negotiations with SBC Indiana on its Interconnection Agreement including the issues that formed the basis for AT&T's intervention. AT&T informed the Commission that it no longer intended to participate in these proceedings and wished to withdraw as an intervening party.

Pursuant to notice, and as provided in 170 IAC 1-1.1-15, a Prehearing Conference was held in this Cause on August 29, 2005, at 9:30 a.m., EST, in Room E306 of the Indiana Government Center South, Indianapolis, Indiana. Proof of publication of notice of the Prehearing Conference was incorporated into the record and placed in the official files of the Commission. The parties reached agreement on a procedural schedule to be followed and that final schedule was issued by the Commission in the Prehearing Conference Order on September 7, 2005.

In accordance with the Prehearing Conference Order, SBC Indiana filed its Initial Brief along with the Direct Testimony of its witnesses Deborah Fuentes Niziolek, Carol A. Chapman, and David J. Barch on October 7, 2005. On that same date, the CLECs also filed their Initial Brief and the Direct Testimony of their witnesses Edward Cadieux, James Smutniak, Michael Starkey, and Eric Strickland.

XO Communications Services, Inc. ("XO") filed a *Notice of Memorandum of Understanding Between XO Communications Services, Inc. and Indiana Bell Telephone Company d/b/a SBC Indiana* on October 11, 2005. The memorandum of understanding expressed the agreement of XO and SBC Indiana that XO would not actively participate in the docket and that XO would adopt, in its entirety, the TRO/TRRO conforming amendment approved by the Commission in this proceeding.

The CLECs pre-filed Rebuttal Testimony of witnesses Cadieux, Smutniak, and Starkey as well as their *Reply Brief* on October 28, 2005. SBC Indiana pre-filed Rebuttal Testimony of its witnesses Niziolek, Chapman, and Barch, along with *SBC Indiana's Reply Brief* on that same date.

In preparation for the evidentiary hearing as well as post-hearing briefing, a Docket Entry was issued on November 2, 2005, notifying the parties that the Commission had no clarifying questions for the parties' witnesses and requesting that the parties reach an agreement as to an organizational outline of the proposed Orders to aid the

Commission in a timely issuance of a Final Order. The parties filed their agreed-upon outline with the Commission by November 10, 2005.

On November 4, 2005, the Presiding Officers issued a Docket Entry asking the parties to file an updated version of the Proposed Interconnection Amendment that included language reflecting the current status of the issues, as some issues had been settled during the course of these proceedings. In accordance with the Docket Entry the updated amendment ("Agreement") was filed on November 10, 2005.

Pursuant to notice published as required by law, the Evidentiary Hearing commenced on November 10, 2005, in Conference Room 32 of the Indiana Government Center South, Indianapolis, Indiana. The proofs of publication of the notice of such hearing were incorporated into the record of this proceeding by reference. The record was opened for the admission of both parties' prefiled witness testimony and the accompanying affidavits.

Pursuant to the procedural schedule issued in the September 7th Prehearing Conference Order, the parties filed simultaneous proposed Orders on November 15, 2005.

The Commission, based upon the applicable law and the evidence herein, now finds as follows:

2. **Jurisdiction.** This Commission-initiated investigation is commenced pursuant to the Public Service Commission Act, as amended, including, but not necessarily limited to, Ind. Code 8-1-2-58, which provides:

> Whenever the Commission shall believe that any rate or charge may be unreasonable or unjustly discriminatory or that any service is inadequate, or can not be obtained, or that an investigation of any matters relating to any public utility should for any reason be made, it may, on its motion, summarily investigate the same, with or without notice.

Ind. Code 8-1-2-59 further provides the Commission with authority to conduct a formal hearing of a matter it investigates.

Ind. Code 8-1-2-1 (a) defines "public utility" to include telephone companies:

> "Public utility", as used in this chapter, means every corporation, company, partnership, limited liability company, individual, association of individuals, their lessees, trustees, or receivers appointed by the court, that may own, operate, manage, or control any plant or equipment within the state for the:
>
> (1) Conveyance of telegraph or telephone messages. . . .

While this investigation is initiated under state law, we are cognizant that Sections 251(d)(3) and 261 of the federal Communications Act of 1934, as amended by the Telecommunications Act of 1996 (47 U.S.C. § 151 *et seq.*) ("Act") operate to provide some oversight of this Commission-initiated investigation by federal courts. Since our rulings and Commission orders will be informed by, and will inevitably contain, interpretations of federal law, particularly with respect to the TRO and the TRRO, such oversight ensures consistency of Commission procedures, actions, and orders with regard to interconnection and unbundling requirements found in federal law.

SBC Indiana and the CLECs are public utilities and telephone companies within the meaning of the Indiana Public Service Commission Act, as amended. Accordingly, the Commission has jurisdiction over SBC Indiana and the CLECs, as well as the subject matter of this Cause, in the manner and to the extent provided by the laws of the State of Indiana and by the Act.

3. **Identification of Unresolved Issues.** The parties identified the disputed issues by submitting an updated version of the disputed issues list that they had developed and used in the parallel TRO/TRRO implementation proceeding before the Ohio Public Utilities Commission. The list of issues in dispute was included as an attachment to SBC witness Ms. Niziolek's testimony and later revised to reflect further negotiation. The most recent version of the disputed language was submitted jointly by the parties on November 10, 2005. The document submitted is a draft version of language to amend interconnection agreements, and shows, in redlined format, the ILEC and CLECs' proposed language. As noted previously, we will refer to this document in this Order as the "Agreement." In addition, we have maintained in this Order the same issue numbering scheme used by the parties. Therefore, as a result of a number of disputed issues having been settled during the course of this proceeding, the issues that we discuss in this Order are the remaining disputed issues, which are not in numerical order.

4. **Statutory Standards.** The goal of this proceeding is to approve contract language for an interconnection agreement that will implement the FCC's TRO and TRRO. Under Section 252 of the Act, a state commission "shall resolve each issue set forth in the petition and response, if any, by imposing appropriate conditions as required to implement subsection (c) [§ 252(c)] upon the parties to the agreement . . . ."[4]

In resolving any open issues and imposing conditions upon the parties to the agreement, Section 252(c) provides:

> a State commission shall–
>
> (1) ensure that such resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to Section 251;

[4] 47 U.S.C. § 252(b)(4)(C).

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

In light of the above standards, we summarize the parties' positions on the open issues and we resolve those issues as set forth below.

5. **Resolution of Issues.**

ISSUE 2

- **Statement of Issue: Is SBC required to provide Fiber-to-the-Home ("FTTH"), Fiber-to-the-Curb ("FTTC"), and Hybrid Loops on an unbundled basis for customers that are not defined as "mass market" customers, or, in the case of multiple dwelling units ("MDUs"), MDUs that are not "predominantly residential?" If so, how should the Agreement define "mass market customers" and "predominantly residential" MDUs?**

- **Disputed Agreement Language: Sections 0.1.2, 0.1.4, 0.1.5, 0.1.6**

1. **Positions of the Parties**

A. **SBC**

Issue 2 concerns the scope of SBC Indiana's unbundling obligations with respect to FTTH, FTTC, and Hybrid Loops. As defined by the FCC, a FTTH Loop is either (i) "a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end user's customer premises," or (ii) "in the case of predominately residential MDUs, a fiber optic cable, whether dark or lit, that extends to the multiunit premises' minimum point of entry (MPOE)."[5] A FTTC Loop is a "local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or, in the case of predominately residential MDUs, not more than 500 feet from the MDU's MPOE."[6] Finally, a Hybrid Loop is a "local loop composed of both fiber optic cable, usually in a feeder plant, and copper wire or cable, usually in the distribution plant."[7]

Issue 2 has to do with the scope of the FCC Rules for FTTH, FTTC and Hybrid Loops. SBC Indiana witness Ms. Chapman argues that the FCC has determined that

[5] 47 C.F.R. § 51.319(a)(3)(i)(A).

[6] 47 C.F.R. § 51.319(a)(3)(i)(B).

[7] 47 C.F.R. § 51.319(a)(2).

CLECs are not impaired without access to FTTH or FTTC loops if the following criteria[8] are met:

(a) SBC Indiana has deployed a FTTH/FTTC Loop;

(b) the FTTH/FTTC Loop is deployed in an overbuild that is parallel to, or in replacement of, an existing copper loop facility; and

(c) SBC Indiana has retired the existing copper loop facility.

SBC further argues that with respect to Hybrid Loops the FCC has held that incumbents need only provide unbundled access for the provision of voice grade (or narrowband) service by the means of "nondiscriminatory access to the time division multiplexing features, functions, and capabilities of the Hybrid Loop, including DS1 or DS3 capacity[9] (where impairment has been found to exist), on an unbundled basis."[10] SBC argues that the ILEC is not required to provide unbundled access to the "packetized fiber capabilities" of the loop.[11]

SBC Indiana argues that the CLECs are attempting to improperly restrict the FCC's rules regarding the unbundling of FTTC, FTTH, and Hybrid Loops, based upon the type and size of customer served, namely "mass market customers." SBC Indiana contends that the FCC did not limit the scope of its rules on FTTH, FTTC and Hybrid Loops to those loops serving "mass market customers." Rather, it argues that the FCC defined FTTC, FTTH, and Hybrid Loops based upon their physical characteristics, not whom they serve, by issuing Errata that expressly deleted the words "residential" and "residential unit" from the definition of a FTTH Loop.[12]

This issue also addresses the definition of the CLEC-proposed term: "mass market customer." SBC Indiana contends that the CLECs' proposed term "mass market customer" is irrelevant to the current rules for FTTH, FTTC, and Hybrid Loops. Thus, SBC Indiana states there is no need to define "mass market customer" at all. However, if the Commission does reach that issue, SBC Indiana urges it to reject the CLECs' proposed definition that includes all customers who are served by fewer than 4 DS0s,

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[8] 47 C.F.R. § 51.319(a)(3); Order on Reconsideration, 19 F.C.C.R. 20,293 (Oct. 18, 2004) ("*FTTC Reconsideration Order*").

[9] Digital Signal (DS) is the nomenclature for a hierarchy of digital signal speeds to classify capacities of digital lines and trunks. The fundamental speed level is DS-0 (64 kilobits per second), which is a voice grade channel. DS1 is 1.544 Megabits per second and can support 24 DS-0s. DS3 is 44.736 Megabits per second and can support 28 DS1s.

[10] 47 C.F.R. § 51.319(a)(2).

[11] TRO, ¶¶ 288-289.

[12] Errata, *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 19020, ¶¶ 37-38 (2003) ("Errata").

which SBC Indiana claims is inconsistent with the TRRO. SBC Indiana maintains, if the term is to be used and defined in the Agreement, a "mass market customer" should be defined as an end user who is either a residential customer, or a business customer served by no more than 23 DS0s, since the TRRO found the "mass market" cutoff for switching to be a DS1.

SBC Indiana asserts that the CLECs' proposed definition of "mass market customer," which is based upon a 4-DS0 "cutoff," is obsolete and inconsistent with the FCC's TRRO, due to its issuance after the TRO, which was necessitated when certain portions of the TRO were vacated by the D.C. Circuit Court. In the TRRO, the FCC eliminated unbundled access to local circuit switching for mass market customers, so that "[r]equesting carriers may not obtain new local switching" for mass market customers or enterprise customers. In so doing, SBC Indiana argues that the FCC held that the transition plan for mass market switching "applies to all unbundled local circuit switching arrangements used to serve customers at less than the DS1 capacity level."[13] Thus, SBC Indiana explains, the FCC's current cutoff for "mass market" switching is a single DS1, which is equivalent to 24 DS0s. SBC Indiana states that its proposed 24-DS0 cutoff tracks the FCC's current determination of "mass market," whereas the CLECs' proposal merely reflects the FCC's now-vacated finding in the TRO.

This issue also addresses the parties' disagreement regarding the appropriate definition of "predominantly residential." As noted above, the FCC's definition of FTTH and FTTC loops contains a special test for the context of "predominantly residential" multiple dwelling units. SBC Indiana witness Ms. Chapman contends that it has proposed a flexible, common-sense understanding of the term in Section 0.1.2 of the Agreement: an apartment building, condominium, cooperative, planned unit development, or like structure that allocates more than fifty percent of its rentable square footage to residences.

SBC Indiana challenges the CLECs' proposal to raise the bar from 50 percent to 75 percent as being contrary to the FCC's orders. The FCC referenced precedents in which it had previously determined "whether a property being served was commercial or residential . . . on the basis of its 'predominant use.'"[14] SBC Indiana states that "predominant" is commonly understood to mean more than fifty percent, as it proposes.

SBC Indiana argues that the CLECs' proposed 75-percent test is entirely arbitrary and has no basis in the *MDU Reconsideration Order*, or in common English usage. The FCC uses the "predominant usage" test to determine which of two categories applies: residential or commercial. Ms. Chapman states that, under the CLECs' definition, many buildings would fall into limbo, with no category, e.g., an apartment complex that allocates 60 percent of its rentable square footage to residences. Under the CLECs'

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[13] TRRO, n. 625

[14] Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 F.C.C.R. 15,856, ¶ 6 (Aug. 9, 2004) ("*MDU Reconsideration Order*").

proposal, that building would not be "residential" because it still falls below the CLECs' 75 percent threshold. Obviously, though, it would not be "commercial" either. SBC Indiana contends that the same limbo would swallow any building in which the residential percentage is between 25 and 75 percent. SBC Indiana argues the FCC did not create a classification test that would fail to classify such a large number of buildings.

B. CLECs

The core dispute between the parties in Issue 2 is whether the FCC's unbundling relief for FTTH, FTTC, and Hybrid Loops is limited to the mass market. The CLECs argue that the FCC has stated that limitation in its orders and that it has not been extended to the enterprise market, where the CLECs contend that the FCC's stated purpose for such unbundling relief does not exist.

In support of their position the CLECs note that the FCC's entire discussion of FTTH and "hybrid" copper-fiber loops appears in the section of the TRO entitled "Mass Market Loops."[15] The CLECs argue that the stated purpose of these rules was to provide incentives to the ILECs to construct new fiber loops to end users in markets where it was feared that unbundling obligations would otherwise dissuade such deployments: "removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market."[16] As the FCC later explained, its new FTTH rules were designed "to ensure that regulatory disincentives for broadband deployment are removed for carriers seeking to serve those customers - residential customers - that pose the greatest investment risk."[17]

Arguing against the extension of the limitations beyond the "mass market," the CLECs cite the FCC's determination that "the record shows additional investment incentives are not needed" to give ILECs the incentive to deploy broadband-capable loops to larger business customers, so the broadband unbundling limitations were not applied to the enterprise market.[18] In further support of their position, the CLECs cite the FCC's explanation in the TRO that "[it] stress[es] that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing [high-capacity services] which are generally provided to enterprise customers rather than mass market customers."[19] The CLECs also

[15] The FTTH section is at TRO, ¶¶ 273-284. The hybrid loop section is at TRO, ¶¶ 285-297. Both of these sections are part of the larger section on mass market loops (TRO, ¶¶ 211-297), and neither FTTH nor Hybrid Loops are mentioned in the separate section on enterprise loops (TRO, ¶¶ 298-342).

[16] TRO, ¶ 278.

[17] *MDU Reconsideration Order,* ¶ *5.*

[18] *Id.* at ¶ 8.

[19] TRO, ¶ 294.

cite to paragraph 49 of the TRRO, which states: "in other orders, we have substantially limited unbundled access to fiber-to-the-home, fiber-to-the-curb, and hybrid loops used to serve the mass market."

The CLECs address SBC Indiana's argument that the "mass market" limitation is overridden by the FCC Errata issued shortly after the release of the TRO, deleting references to "residential customers." The CLECs interpret the FCC Errata deletion of the reference to "residential customers" in the rules to serve the purpose of not excluding the application of the rule to "very small businesses," which the CLECs believe were included in the TRO and subsequent FCC statements mentioned above. The CLECs argue that the FCC Orders, themselves, have the force of law and that its UNE rules must be "read in conjunction with the rest of the Order."[20] As such, the CLECs conclude that the FCC's limitations on FTTH, FTTC and Hybrid Loop unbundling apply only to "mass market" loops.

The CLECs argue that the FCC did not define the cutoff between the "mass market" and "enterprise" customers. Instead, it left that determination to be made during the negotiation and arbitration process under Section 252 of the Act. While the precise definition of "mass market" was not established by the TRO, the CLECs contend that the FCC did provide guidance to the parties and the state commissions as to the boundaries of this definition. The FCC explained that "[m]ass market customers consist of residential customers and very small business customers."[21]

The parties agreed in negotiations to include all residential customers within the definition of "mass market," so the only remaining dispute is the definition of a "very small business customer." The CLECs submit a proposal that would include all business locations served by telecommunications capacity of less than four DS0s, while SBC would extend the definition of "very small business customer" to include all business locations served by telecommunications capacity of less than 24 DS0s. However, the CLECs argue that SBC Indiana failed to present any evidence that a customer purchasing 23 telephone lines could fairly be considered to be purchasing "the same kinds of services as do residential customers," or that such a customer would be "marketed to, and provided service and customer care, in a similar manner" as a residential customer.[22]

The CLECs argue that their proposal is more consistent with the FCC's instructions and its precedent, as well as with a common sense understanding of what is a "very small business customer" by citing the TRO language that "very small" business customers are distinct from small business customers generally and "typically purchase the same kinds of services as do residential customers, and are marketed to, and provided

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[20] *TSR Wireless, LLC v. US West Communications, Inc.*, 15 F.C.C.R. 11166, 11177-78, ¶¶ 20-21 (2000) (referring to the FCC order *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499 (1996) ("*Local Competition Order*")).

[21] TRO, ¶ 127.

[22] *Id.* at n. 432.

service and customer care, in a similar manner."[23] The CLECs contend that a business purchasing a capacity of 23 DS0s hardly meets this description, citing an example of SBC taking the position that the definition of "mass market" and "very small business" should not include business locations with as much as 13 DS0s of capacity.[24]

Thus, at the time, SBC instead proposed that the state commissions adopt a cutoff of less than four DS0s, which SBC explained, quoting from the *UNE Remand Order*, "appropriately 'captures the division between the mass market . . . and the medium and large business market.'"[25] The CLECs assert that they are proposing the same DS0 cutoff argued for by SBC just months ago, whereas SBC is now arguing for a definition it just recently derided.

With respect to the definition of "predominantly residential," the CLECs contend that the FCC adopted in the TRO an additional clarification to the mass market/enterprise dichotomy for MDUs that housed both mass market and enterprise customers. Rather than establish different access rules for different customers in the same building, the FCC granted ILECs broadband unbundling relief for "predominantly residential" MDUs and left unbundling obligations in place for other "non-predominantly residential" MDUs.

According to the CLECs, the FCC found that where enterprise commercial customers are present, SBC does not need additional incentives to deploy new broadband loops. By contrast, in the case of single-family homes, the FCC decided to exempt new fiber loops to such premises from full unbundling obligations in order to provide incentives to SBC to make new investments it otherwise might not make. Thus, the FCC found that no additional unbundling exemptions were needed for MDUs that have a substantial presence of business customers, which, like a stand-alone single-business premises, offers sufficient revenue potential for SBC to invest, even with the burdens of unbundling. Accordingly, the CLECs assert that only "predominantly residential" MDUs would become subject to the new unbundling exemptions, while standard unbundling rules would remain in effect both for buildings that are predominantly commercial and those that have a majority but not a predominance of residences.[26]

CLECs' witness Eric Strickland contended that SBC's proposed definition of predominately residential, which was couched as "an example", would interfere with the CLECs' ability to tell potential customers immediately whether they will be able to provide service to them, and at what price, by SBC's rejection of the order or termination of existing service on the grounds that it came to believe the customer's MDU fell into

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[23] *Id.*

[24] SBC Texas' Opening Brief at 70, *Impairment Analysis of Local Circuit Switching for the Mass Market*, Tex. Pub. Util. Comm. Case No. 28607 (May 14, 2004).

[25] *Id.* at 66, quoting the Third Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 15 F.C.C.R. 3696, ¶ 294 (1999) ("*UNE Remand Order*"). See also *UNE Remand Order*, ¶¶ 291, 293 (finding that the mass market consists "largely [of] residential customers.").

[26] *MDU Reconsideration Order*, ¶¶ 2-5.

some different "example" of a predominantly residential MDU. The CLECs claim their proposal is subject to an easily determined and verifiable test: all MDUs with more than 75% of their rentable square footage allocated to residences are "predominantly residential," while all others are not.

2. Commission Discussion and Findings.

There are three sub-issues here and we will address each separately.

The Commission finds the CLECs' proposed terms on the restrictions of unbundling requirements for FTTH, FTTC, and Hybrid Loops to apply only to "mass market" customers should be adopted. SBC's proposed definitions of FTTH and Hybrid Loops are broad enough to encompass DS1 and DS3 loops, since most such loops are provisioned over fiber or fiber-fed loops. But buried in the testimony of SBC witness Ms. Chapman, SBC admits that its proposal would deny CLECs access to DS1 loops under the guise of the FCC's Hybrid Loop rules. The TRO unambiguously rejected such a result:

> DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops . . . The unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass market customers.[27]

The FCC clearly did not intend to allow SBC to use the Hybrid Loop rules as a way to eliminate DS1 and DS3 unbundling. The FCC makes clear that the TRO did not intend to apply its FTTH and Hybrid Loop rules to DS1 and DS3 loops, as SBC proposes here. DS1 and DS3 loops are addressed in separate FCC rules from Hybrid Loops,[28] and in an entirely separate section of the TRO entitled "Enterprise Market Loops." FTTH and Hybrid Loops are addressed in a section entitled "Mass Market Loops." In many instances in the TRO, the FCC discusses FTTH and Hybrid Loops specifically in the context of a mass market application. We do not find in the FCC orders an intent to apply the FTTH and Hybrid Loop exemption to the enterprise market.

If the FCC's FTTH relief applied to every fiber loop, as SBC contends, the FCC's decision in the TRO to preserve dark fiber loops as a UNE would have been pointless, as would the FCC's subsequent clarification that fiber loops to multi-unit premises that include both enterprise and mass market customers would be eligible for unbundling relief only if the MDU was "predominantly residential." Had the FTTH rule applied to all loops, it would have already applied to all multi-unit premises. Only because the

[27] TRO, n. 956.

[28] The UNE loop rules are addressed in 47 C.F.R. § 51.319(a). Hybrid Loops are addressed in subsection 2 of this rule, whereas DS1 and DS3 loops are addressed in subsections 4 and 5, respectively.

FTTH rule applied to mass market customers did the FCC need to clarify how the rules should apply to buildings that included both mass market and enterprise customers. In fact, the *MDU Reconsideration Order* rejected the ILECs' request to apply the unbundling exemption to MDUs with a significant number of commercial (*i.e.*, enterprise) customers. The ILECs' request was rejected for the very same reason it gave in the TRO for not extending the broadband exemption to enterprise customers: because to do so would eliminate unbundling for enterprise customers where the record shows additional investment incentives are not needed.

Having found that the FCC's limitation of SBC Indiana's unbundling requirement for FTTC, FTTH and Hybrid Loops applies only to "mass market" customers, we now turn to the issue of the proper definition of "mass market customer." The parties have agreed to include all residential customers in the definition of mass market, so the only dispute over the definition of mass market customer is over the definition of the commercial segment of that market, which the FCC has defined to include "very small business customers."[29] The TRO explained that "very small" business customers "typically purchase the same kinds of services as do residential customers, and are marketed to, and provided service and customer care, in a similar manner."[30]

SBC proposes to define "mass market customer" as including "very small business customer[s] at a location with a transmission capacity of 23 or fewer DS-0s," which effectively means anything less than a DS1. But SBC's testimony does not provide sufficient evidence that a customer purchasing 23 telephone lines could fairly be considered to be purchasing "the same kinds of services as do residential customers," or that such as customer would be "marketed to, and provided service and customer care, in a similar manner" as a residential customer. The CLECs submitted evidence that a purchase of 4 or more lines would not be typical of a residential customer and that such a business customer would not be marketed to or served in a manner similar to a residential customer. Accordingly, we find the CLECs' definition of "mass market customer" should be adopted

We now turn to the definition of "predominantly residential" when referring to MDUs and the scope of the requirement to unbundle fiber loops. The parties seek to define "predominantly residential" in terms of the percentage of rentable square footage in an MDU that is allocated to residences. SBC Indiana proposes more than 50% allocated to residence use and the CLECs propose 75% allocated to residences. We find SBC Indiana's proposal should be adopted, not only because it is reasonable and comports with the common meaning of "predominantly," but also because the CLECs' proposal is unsupported and arbitrary.

SBC Indiana's 50% proposal has common-sense appeal, while the CLECs have not offered any convincing rationale for defining "predominantly" to mean 75%. Nothing in the record distinguishes this from a proposal to set the bar at 60% or 90%,

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[29] TRO, ¶ 127.

[30] *Id.* at n.432.

which shows it is arbitrary. Indeed, under the CLECs' approach, a building that was 60% residential would not be "predominantly" residential, but it also would not be "predominantly" commercial. We find the more reasonable conclusion is to view "predominantly," like a "preponderance," in the context of having the greater number (*i.e.* more than 50%).

ISSUE 3

- **Statement of Issue: Should standalone UNE loops used to serve residential customers be counted as "business lines" for purposes of the wire center non-impairment determinations for high-capacity loops and transport? Should UNE loops used only to provide non-switched services be counted as "business lines" for purposes of the wire center non-impairment determinations for high-capacity loops and transport?**

- **Disputed Agreement Language: Section 0.1.12**

1. Positions of the Parties

A. SBC

The FCC's rules for impairment of DS1 and DS3 loops and dedicated transport are based in part on the number of business lines served in a given wire center. In Issue 3, the parties dispute how that number should be calculated, a subject addressed in Section 0.1.12 of the Agreement. SBC Indiana witness Chapman proposes that the number be calculated exactly in the manner described by the FCC in the TRRO, using the same Automated Reporting Management Information System ("ARMIS") data that the FCC said should be used. The CLECs propose an approach that would exclude (i) UNE loops used to serve residential customers, and (ii) UNE loops used to provide non-switched services to businesses. SBC Indiana opposes these limitations.

SBC witness Chapman cites FCC rule 47 C.F.R. § 51.5, which defines "business lines" as all (i) incumbent-owned switched access lines used to serve a business customer, plus (ii) all UNE loops connected to the wire center at issue, without regard to the customer served, as a clear indication as to how to calculate this number. Chapman contends that the FCC also specified that "business line" tallies should include access lines connecting end-user customers with ILEC end offices, should exclude non-switched special access lines, and should account for Integrated Services Digital Network ("ISDN") and other digital access lines by counting each 64 kbps-equivalent as one line.[31] The FCC explained that ILECs already possessed and used these data to satisfy other regulatory and reporting requirements. As further evidence of the FCC's intent with regard to the calculation of business lines, Chapman cites the fact the FCC used business lines from the "ARMIS 43-08" report, plus Unbundled Network Element-Platform ("UNE-P"), plus UNE-loops in making its initial impairment determinations in

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[31] 47 C.F.R. § 51.5.

the TRRO.[32] Chapman explains that the idea was to use data that are possessed by and readily available to incumbents, and that are simple to apply. Accordingly, Chapman explains, SBC Indiana has proposed a definition of business line counts that tracks the FCC's recipe, using ARMIS 43-08 line counts, UNE-P business line counts, and UNE loop counts, which are the same data that SBC provided and that the FCC relied upon for its analysis.

SBC Indiana states the CLECs are trying to add back complexities that the FCC eliminated. The CLECs suggest that the number of unbundled loops be reduced to exclude residential loops and loops used to provide non-switched service (even to businesses). SBC Indiana contends that the CLECs' exclusions are also inconsistent with the FCC's impairment analysis. In deciding the threshold number of business lines that would correlate with non-impairment (e.g., in deciding that a wire center with 38,000 business lines had sufficient revenue opportunities to support the deployment of DS3 loops), the FCC used the data that the incumbents provided. This data was calculated using the same definitions and sources that SBC Indiana proposes here, according to SBC Indiana witness Chapman. Chapman asserts that this is why the FCC used that definition in its rule–so that parties would maintain apples-to-apples consistency with its analysis. Otherwise, impairment might be found in wire centers where the FCC had deemed CLECs are not impaired in its remand proceedings. Had the FCC used the definition of business lines that the CLECs propose now, SBC Indiana contends, it would undoubtedly have chosen a lower number of business lines for its thresholds.

Further, Chapman maintains that the CLECs' proposal is contrary to the purpose of the FCC's rule. Chapman asserts that the FCC did not seek a theoretically perfect count of business lines for some academic purpose, but rather it wanted a rule that would be easy to administer, using data that are readily available to incumbents, knowing that the rule would not be absolutely precise. According to Chapman, the CLECs' exclusions would be impractical to administer, because they rely on data that are not uniformly available to incumbents nationwide, making the application of a national rule inconsistent due to the varying levels of data that each incumbent possesses.

B. CLECs

The CLECs offer a proposal they believe, as a matter of common sense and plain English, would limit the definition of business lines to lines purchased by business customers in a manner consistent with the first sentence of the FCC's definition of business lines, whereby SBC would only be able to count, as business lines, UNE loops that provide switched services.

In their rebuttal brief, the CLECs answer SBC's claim for an apples-to-apples comparison, by citing a February 18, 2005 letter in which SBC allegedly admitted to the FCC that the SBC data on which the FCC relied in the TRRO "used different criteria"

[32] TRRO, ¶ 105.

with respect to UNE loops than the FCC set forth in its definition of business line.[33] The CLECs contend that SBC Indiana's proposed lists of non-impaired wire centers are much longer than would be expected, given the FCC's estimate that only 5% of Bell Operating Company ("BOC") wire centers would be classified as a Tier 1 wire center for transport and that only one-half of one-percent of BOC wire centers would be deemed non-impaired for DS1 loops.[34] The CLECs further argue that an expanded definition of business lines to include residential UNE loops is inconsistent with the FCC's intent to measure business lines in a wire center, as indicated in the first sentence of the FCC rule and the text of the TRRO.

The CLECs cite the FCC's definition stating that a "business line" consists of only a switched line serving a business customer. 47 C.F.R. § 51.5, in relevant part, states:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC.

The CLECs also cite language in paragraph 103 of the TRRO limiting the count to business lines, because "business lines are a more accurate predictor than total lines because [competitive] transport deployment largely has been driven by the high bandwidth and service demands of businesses, particularly in areas where business locations are highly concentrated." The CLECs contend that residential UNE loops are no more likely to have "high bandwidth" and be associated with "highly concentrated" business densities than any other types of residential lines, which the FCC purposefully excluded from its count. Therefore, the Commission should not permit SBC to count a residential line as a "business line."

2. Commission Discussion and Findings

The FCC has limited the instances in which DS1 and DS3 loops and interoffice transport must be unbundled. The real-world scope of these limits will turn, in part, on how certain terms in the FCC's rules are defined. Thus, like Issue 2, Issue 3 involves a dispute over definitions, for the definition will affect the scope of SBC Indiana's unbundling duties.

Part of the FCC's test for when DS1 and DS3 facilities must be unbundled depends on how many business lines are served in a given wire center. The two disputes here concern the definition of "business lines." Specifically, should the definition include all UNE loops, or should it exclude (i) UNE loops used to serve residential customers, and/or (ii) UNE loops used to provide non-switched services? SBC Indiana says that the

[33] Letter from James C. Smith, Senior Vice President, SBC Services, Inc., to Jeffery J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, at n.2 (Feb. 18, 2005).

[34] TRRO, ¶¶ 115, 179.

answer is a decisive yes in the case of both disputed definitions, because the FCC expressly directed that for this purpose "business lines" includes *all* UNE loops. We agree, and so find. Plainly, the real-world tests should remain consistent with the approach the FCC used to set the thresholds for non-impairment. Had the FCC applied the different formula that the CLECs propose, it would undoubtedly have chosen a lower number of business lines for its thresholds.

The FCC's rule, 47 C.F.R. § 51.5, defines "business lines" to include all UNE loops connected to a wire center at issue, regardless of the type of customer served. Moreover, when the FCC conducted a sample run of how to compute "business lines" in a wire center in paragraph 105 of the TRRO, it used all UNE loops in the wire center, with no exclusions. One reason for this was that the FCC wanted to establish a simple, objective test that relied on data the ILECs already have and which could be easily verified. SBC Indiana's proposal for computing "business lines" uses the exact same data and categories that the FCC relied on in the TRRO. We will not ignore the FCC's use of all UNE loops in its dry run nor will we redefine "business lines" in a manner that conflicts with the FCC's approach. Finally, we agree with SBC Indiana that the CLECs' proposal to exclude certain UNE loops is inconsistent with the FCC's impairment analysis, which used the same type of data that SBC Indiana proposes to continue to use here. We also note that the Illinois and Ohio commissions both held for SBC on this issue in their *TRO/TRO Remand Order* implementation dockets.[35]

ISSUE 4

- **Statement of Issue: Should an entity that is subject to a binding agreement that, if consummated, would result in its becoming an affiliate of SBC, be counted as an SBC-affiliated fiber-based collocator for purposes of the non-impairment determinations for high-capacity loops and transport prior to the consummation of such an affiliation?**

- **Disputed Agreement Language: Section 0.1.15**

1. Positions of the Parties

A. SBC

According to SBC, the FCC's rules for high-capacity loops and dedicated transport establish non-impairment thresholds based upon the number of business lines and "fiber-based collocators" in a given wire center. The FCC chose these criteria

[35] Arbitration Decision, *Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order*, ICC Docket No. 05-0442, at 30 (Nov. 2, 2005) ("*Illinois TRO/TRRO Order*"); Arbitration Award, *In re Establishment of Terms and Conditions of an Interconnection Agreement Amendment*, PUCO Case No. 05-887-TP-UNC, at 16 (Nov. 9, 2005) ("*Ohio TRO/TRRO Order*").

because they correlate with the evidence of existing CLEC facilities and with the dense business districts where CLECs can and do deploy their own facilities. Issue 3 dealt with the definition of "business lines," while the dispute here concerns the definition of "Fiber-Based Collocator," which appears in Section 0.1.15 of the Agreement.

The FCC, at 47 C.F.R. § 51.5, defined "Fiber-Based Collocator" as follows:

> A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that
>
> (1) terminates at a collocation arrangement within the wire center;
>
> (2) leaves the incumbent LEC wire center premises; and
>
> (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.

SBC Indiana witness Chapman states that SBC's proposed definition, in Section 0.1.15 of the Agreement, precisely tracks the FCC's rule. By contrast, SBC Indiana contends that the CLECs propose to change the rule by excluding from the definition certain fiber-based collocators: namely, "any entity that is currently subject to a binding agreement that, if consummated, would result in its becoming an affiliate of SBC." Chapman argues that the intent of this exclusion is to remove AT&T, which entered into an Agreement and Plan of Merger with SBC on or about January 31, 2005. Chapman argues the CLECs' proposal should be rejected for the following reasons:

- The FCC's definition of "Fiber-Based Collocator" included no exclusions for potential mergers.
- The FCC's definition of "affiliate" includes no exclusions for potential changes in ownership interest.
- The SBC/AT&T merger has not been completed and, in fact, still requires final regulatory approval.

- Mergers are a common occurrence and the SBC/AT&T merger had been rumored prior to the release of the TRRO, so the FCC could have anticipated this or any other merger, if it so chose, for inclusion in the rule.

- The FCC developed the number of "Fiber Based Collocators" as a proxy and not a bright-line threshold to measure potential competition which is still relevant should SBC and AT&T merge, since another sophisticated carrier might well deploy facilities.

B. CLECs

The CLECs argue that a classification such as a non-impaired wire center is a serious matter, since, under FCC rules, once so classified, the classification generally cannot be reversed. The CLECs contend that the Agreement should therefore include reasonable safeguards to assure that wire centers are not deemed non-impaired based upon incorrect, illusory, or temporary facts or circumstances, such as when one of the "competitive" fiber-based collocators at a wire center is subject to a binding agreement to become affiliated with SBC. The CLECs cite the TRRO instructions "[i]n tallying the number of fiber-based collocators for purposes of our transport impairment analysis, parties shall only count multiple collocations at a single wire center by the same or affiliated carriers as one fiber-based collocation," as evidence that the count of fiber-based collocators should not be artificially inflated by counting multiple collocations provided by the same company through separate affiliates.[36] The CLECs argue that it is reasonable to anticipate the likelihood of a merger in considering the number of fiber-based collocators, based upon the existence of a legally binding agreement.

The CLECs argue that the existence of the state commission arbitration procedure is evidence against simply parroting the FCC rules. The CLECs argue that this Commission has knowledge of the legally binding agreement between SBC and AT&T that was not available to the FCC at the time the TRRO was adopted. The CLECs argue the question presented is whether the Commission should permanently close wire centers to unbundling based upon "evidence" of non-impairment divined from AT&T's collocations that it knows will likely soon be eliminated, or defer counting the AT&T collocations for a short time until it becomes clear whether or not the merger will occur.

In response to SBC Indiana's contention that the merger is not done until it is done, CLEC witness Cadieux points out that on October 27, 2005, the United States Department of Justice recommended that the SBC/AT&T merger be approved, clearing the way for the FCC to enter its order approving the merger shortly thereafter. The CLECs argue that their approach only runs the risk that SBC would have to offer UNEs at a few additional wire centers for a few additional months; whereas under the SBC proposal, the CLECs would permanently lose UNEs based upon counting AT&T as a separate collocator whether the merger ever closes or not.

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[36] TRRO, ¶ 102.

The CLECs argue that the facts as they exist today are that within a few hours or days the determination will be made whether SBC will swallow its largest local competitor, AT&T, resulting in far more than a modest change in competitive conditions contemplated by the TRRO. The CLECs contend that acting in a period of such brief but significant uncertainty, it would be prudent and responsible for the Commission to temporarily defer counting AT&T as an independent fiber-based collocator so that UNEs are not eliminated based upon illusory and ultimately inaccurate evidence of non-impairment. The CLECs believe that adoption of their proposal in Section 0.1.15 of the Agreement is dictated by common sense, fairness, and the public interest.

2. Commission Discussion and Findings

Subsequent to the adjournment of the Evidentiary Hearing and the filing of proposed Orders in this proceeding, the FCC issued an order approving the merger between SBC and AT&T. We take administrative notice of that order.[37] As a condition to merger approval, SBC agreed to recalculate the number of fiber-based collocation arrangements in SBC's region to identify those wire centers which meet the criteria for non-impairment pursuant to the TRRO. Based upon the FCC's approval of the merger, and with this merger approval condition, the Commission finds the CLECs' proposed terms in Section 0.1.15 of the Agreement should be adopted.

ISSUE 5

- **Statement of Issue: Should SBC be required to permit, and to perform the functions necessary to enable, CLECs to commingle elements purchased pursuant to 42 U.S.C. § 271 ("Section 271") with other SBC wholesale facilities and services, including but not limited to UNEs?**

- **Disputed Agreement Language: Sections 0.1.20, 5.9, 13.3**

1. Positions of the Parties

A. SBC

SBC believes that the FCC has established a "nationwide bar" on unbundled local switching and the UNE-P, a combination whose critical component is local switching. SBC Indiana asserts that the CLECs cannot evade that bar by invoking Section 271, because the FCC rejected their theory and held that the combination duty does not extend to Section 271 offerings. SBC Indiana contends that the FCC has made clear that ILECs are not required to commingle Section 271 items, citing paragraph 27 of the FCC Errata that removed explicit references to Section 271 with regard to commingling obligations in paragraph 584 of the TRO:

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[37] *In re SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control,* WC Docket No. 05-65, Appendix F(2) (Nov. 17, 2005).

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including ~~any network elements unbundled pursuant to Section 271 and~~ any services offered for resale pursuant to Section 251(c)(4) of the Act.

In response to the CLECs' claim that the deletion of this language means nothing, for the remaining language generically refers to "other wholesale facilities and services," which CLECs say includes Section 271 offerings, SBC argues that the FCC would not issue Errata to make its decision more vague and that the remainder of the commingling discussion only includes references to tariffed access service, not Section 271 checklist items.

SBC also asserts that the FCC reasoning in footnote 1990 of TRO's paragraph 655 rejected an SBC obligation to combine Section 271 elements due to statutory silence on such a requirement, and that reason equally applies to the commingling Section 271 elements.

SBC Indiana challenges the CLECs' argument that Sections 201 and 202 of the Act, would prohibit a "restriction on commingling," by asserting that:

- the purpose and scope of this proceeding is to implement the FCC's Section 251 rules, which SBC Indiana claims do not require commingling of Section 271 elements;
- the Commission has no jurisdiction to interpret or enforce Sections 201 and 202; and
- there can be no "restriction on commingling" unless there is an obligation to commingle in the first place, which SBC asserts does not exist.

B. CLECs

The CLECs argue that SBC's proposed terms would restrict the CLECs' ability to commingle Section 271 checklist items with other facilities or services, such as Section 251 UNEs or special access, obtained from SBC or CLECs or third-party facilities.

According to the CLECs, the TRO explicitly found that "a restriction on commingling would constitute an 'unjust and unreasonable practice' under Section 201 of the Act, as well as an 'undue and unreasonable prejudice or advantage under Section 202 of the Act.'"[38] The CLECs assert that a restriction on commingling of a Section 271 element is no more reasonable than similar restrictions on a Section 251 element or any other type of facility or service. The CLECs believe that even if SBC

[38] TRO, ¶ 581.

were to argue that the TRO's commingling rules do not apply to Section 271 elements, SBC's policy of refusing to permit or perform commingling for Section 271 elements is unreasonable or discriminatory.

In addition, the CLECs point to 47 C.F.R. § 51.309(f) which provides:

> Upon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or combination of unbundled network elements with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC.

The CLECs argue that Section 271 network elements are "facilities" that are obtained "at wholesale" from SBC, and as such should be able to be commingled with other facilities.

In addition, the CLECs also argue their position on this issue by citing language in the TRO:

> By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC *pursuant to any method other than unbundling under § 251(c)(3) of the Act*, or the combining of a UNE or UNE combination with one or more such wholesale services.[39]

Moreover, the CLECs argue that the TRO declaration that a "commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them either to operate two functionally equivalent networks"[40] also applies to a network made up of Section 251 UNEs and other services, and another consisting of Section 271 elements, due to SBC denying the CLECs the ability to commingle all these types of facilities together.

2. Commission Discussion and Findings

We agree with SBC Indiana that ILECs are not required to commingle Section 251 UNEs with Section 271 network elements. The FCC issued its Errata to the TRO that specifically removed language that would have required such commingling. We interpret that to mean that the FCC did not view Section 271 network elements to be subject to commingling. While the CLECs point to Errata changes in former footnote 1990 of the TRO, that does not change our opinion. Indeed, former footnote 1990 also holds that ILECs are not required to combine Section 271 network elements because Section 271 does not contain any such requirement. Since neither Section 271 nor the

[39] *Id.* at ¶ 579 (emphasis added).

[40] *Id.* at ¶ 581.

FCC's interpretation requires commingling of Section 271 network elements, the same analysis applies. We also note that requiring commingling with Section 271 network elements would enable CLECs to reassemble a platform of network elements obtained entirely from the ILEC. The FCC held in the TRRO that such a platform undermines the goals of the Act and impedes competition.

We also agree with SBC Indiana that Sections 201 and 202 of the Act do not support a commingling requirement. Aside from the fact that those are federal provisions enforced by the FCC rather than state commissions, we note that the FCC's commingling requirement was established in a proceeding to implement Section 251, not Sections 201 and 202. And even if Sections 201 and 202 did apply, we agree with SBC Indiana that they could not be used to support a finding of an unlawful restriction on commingling, for there can be no unlawful restriction where there is no duty to commingle in the first place.

ISSUE 6

- **Statement of Issue: Is SBC required to provide entrance facilities to CLECs for use in interconnection pursuant to Section 251(c)(2)? If so, what rate should apply? Also, what rate, if any, should apply if a CLEC requests to reclassify entrance facilities as interconnection facilities?**

- **Disputed Agreement Language: Sections 14.2, 14.3, 14.4**

1. Positions of the Parties

A. SBC

According to SBC witness Ms. Niziolek, a transport facility that runs from SBC Indiana's network (typically a central or tandem office) to that of another carrier is known as an "entrance facility," as it provides a point of "entry" for the carrier's traffic into SBC Indiana's network.[41] In the TRO, the FCC adopted "a more reasonable and narrowly-tailored definition of the dedicated transport network element" that "includes only those transmission facilities *within* an incumbent LEC's transport network; that is, the transmission facilities between incumbent LEC switches."[42] As the FCC recognized, that determination "effectively eliminates 'entrance facilities' as UNEs."[43] The FCC reaffirmed that result in the TRRO, in which it made a "national finding of non-impairment" for entrance facilities and "reject[ed] suggestions that would define entrance facilities as a new UNE."[44]

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[41] *See* TRO at ¶¶ 365-366 & n. 1116.

[42] *Id.* at ¶ 366.

[43] *Id.* at n. 1116.

[44] TRRO, n. 384.

Ms. Niziolek stated the CLECs suggest that they can obtain the exact same facilities, at the exact same UNE prices, by calling them "interconnection facilities" instead of "entrance facilities." Ms. Niziolek contends that the CLECs' relabeling misconstrues the nature of interconnection. As Ms. Niziolek explains, the CLECs want SBC Indiana to provide them with entrance facilities. Interconnection under Section 251(c)(2), however, does not refer to the ILEC providing any of its network elements to the CLEC. Rather, it refers to "the linking of two networks for the mutual exchange of traffic. The term does not include the transport and termination of traffic."[45] Thus, Ms. Niziolek explains, while interconnection allows a CLEC to "access" the ILEC's network, that access comes via an interconnection point between the two networks, not by leasing the ILEC's facilities. Leasing the ILEC's network elements goes by a different name: "unbundling."

Ms. Niziolek contends that the CLECs' reliance on paragraph 140 of the TRRO on this issue is misplaced. There, the FCC merely said that its refusal to unbundle entrance facilities "does not alter the right of competitive LECs to obtain interconnection facilities pursuant to Section 251(c)(2)." That language, Ms. Niziolek states, does not permit CLECs to lease the ILEC's entrance facilities for the purpose of interconnection. Rather, as the next sentence of paragraph 140 makes clear, what the CLECs have a right to is "access to these facilities;" that is, the right to interconnect to them at a specific point of interconnection, not the right to lease the actual ILEC facilities. Plainly, SBC contends, the FCC did not reject unbundled entrance facilities in one breath and then reinstate the same thing in the next.

Moreover, Ms. Niziolek asserts that the CLECs' proposal for interconnection language is out of place in this proceeding. This proceeding involves unbundled access, not the terms and conditions for interconnection. Interconnection and unbundling are separate concepts governed by separate Sections of the Act, separate FCC rules, and separate contract appendices.[46] SBC Indiana therefore states that interconnection-related language has no place in this proceeding.

B. CLECs

The CLECs note that SBC has widely deployed transport facilities, commonly known as "entrance facilities," that connect its central office switches to multi-carrier telecommunications buildings. CLEC witness Mr. Cadieux states that to date, CLECs have obtained entrance facilities from SBC both (1) to use to backhaul their own services from the central office to their own facilities and (2) to interconnect with SBC's network for the transmission and routing of telephone exchange service and exchange access

[45] 47 C.F.R. § 51.5 (definition of "Interconnection"); *Local Competition Order*, ¶ 176 ("the term 'interconnection' under Section 251(c)(2) refers *only* to the physical *linking* of two networks") (emphasis added).

[46] *See* 47 U.S.C. §§ 251(c)(2) and (3); 47 C.F.R. §§ 51.305 and 51.307, *et seq.*

service.[47] The CLECs were entitled to access for the first purpose as an unbundled network element under Section 251(c)(3), and for the second purpose under Section 251(c)(2). But little attention was paid by SBC or state commissions as to which of these two uses the CLEC sought access, because for years CLECs were entitled to entrance facilities for both purposes, at the same total element long run incremental cost ("TELRIC")[48] rate.

Mr. Cadieux states that "entrance facilities" that are no longer available as UNEs at TELRIC prices, and the "entrance facilities" that are used for "interconnection" and continue to be available, are distinct facilities used for distinct purposes. Mr. Cadieux clarifies that in the industry, the term "entrance facilities" is used to refer to transmission facilities that connect between one carrier's wire center or switch and another carrier's wire center or switch. Mr. Cadieux states these "entrance facilities" can be used for two different purposes:

(1) for backhaul purposes by the CLEC, *i.e.*, as part of a transmission path between a CLEC's customer and its switch (through the ILEC wire center serving the customer), providing the customer with dial-tone for outbound calls and a path for terminating traffic for incoming calls; or

(2) to provide a transmission path between the ILEC's switch and the CLEC's switch for the exchange of traffic between the two networks.

The "entrance facilities" that the CLECs recognize are no longer available as UNEs are the facilities described in (1) above, which are those that provide a dedicated transmission path between (i) the CLEC's collocation in the ILEC wire center serving the CLEC's customer and (ii) the CLEC switch, and are used for backhauling the CLEC's own traffic. These facilities do not exchange traffic between the carriers' networks. Mr. Cadieux argues that the CLECs previously obtained these facilities as dedicated transport UNEs, but recognize that going forward, they will have to obtain these facilities pursuant to other arrangements. In contrast, entrance facilities used as interconnection facilities continue to be available at TELRIC prices.

The CLECs note that this second category of facilities described by Mr. Cadieux is used for "the physical linking of two networks for the mutual exchange of traffic",

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[47] *See* TRO, ¶ 365 ("Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECs must explicitly make available for Section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks for the purpose of backhauling traffic.").

[48] TELRIC is the costing methodology the FCC has determined to best represent the pricing standard for interconnection and unbundled network elements under Section 252(d)(1) of the Act. In general, to determine the final rate for interconnection or for access to an unbundled network element, an incremental cost is calculated upon which a percentage of shared and common costs are added. The Commission has used this TELRIC methodology to set rates for interconnection and unbundled network elements in several proceedings, the most recent being the January 5, 2004 Order in Cause No. 42393.

which was the FCC's definition of "interconnection" under Section 251(c)(2) of the Act, as stated in paragraph 176 of the FCC's *Local Competition Order*. The FCC and Congress recognize that the physical facilities and equipment that are needed for interconnection include transport, as discussed herein; otherwise Section 251(c)(2) would be meaningless. Furthermore, in paragraph 176 of the *Local Competition Order*, the FCC was distinguishing between an ILEC's obligations pursuant to Sections 251(c)(2) and 251(b)(5) with respect to (1) the "facilities and equipment" needed to physically link two networks together for the mutual exchange of traffic and (2) reciprocal compensation arrangements associated with the transport and termination of telecommunications traffic between the two networks. The FCC indicated that the term "interconnection" under Section 251(c)(2) refers to the physical facilities that link two networks together (which are obviously needed for the mutual exchange of traffic), and further explained that the transport and termination of traffic between the two networks falls within the meaning of Section 251(b)(5) not Section 251(c)(2).

According to the CLECs, SBC's arguments fail to recognize that transport facilities are needed to "physically link" the two networks together and therefore are critical components of the facilities and equipment needed for interconnection. In the TRO, the FCC recognized this and stated that "all telecommunications carriers ... will have the ability to access transport facilities...to interconnect for the transmission and routing of telephone exchange service and exchange access, pursuant to section 251(c)(2)."[49] The FCC confirmed this conclusion in the TRRO.[50] Thus, the CLECs contend that, whenever CLECs request interconnection facilities (which includes dedicated interoffice transport and entrance facilities) from SBC, SBC must provide such facilities at TELRIC-based rates notwithstanding that the FCC in the TRO and TRRO relieved ILECs of offering entrance facilities and certain dedicated transport routes as Section 251(c)(3) UNEs.

The CLECs assert that these two types of facilities are readily distinguishable and are readily visible to SBC, and there should be no danger of SBC providing "interconnection facilities" to which CLECs are not entitled.

According to the CLECs, after the TRO eliminated the entrance facility UNE, it became important to clarify the scope of SBC's remaining obligations under Section 251(c)(2). The entirety of SBC's argument on this issue is based upon SBC's improper attempt to extend the limitation set forth in 47 C.F.R. § 59.319(e)(2)(i), which provides that entrance facilities are not required to be provided as a UNE under Section 251(c)(3), to limit its independent obligation to provide entrance facilities for the purpose of interconnection pursuant to Section 251(c)(2) of the Act. That section imposes the following obligations on ILECs:

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[49] TRO, ¶ 368.

[50] TRRO, ¶140.

> (2) Interconnection
>
> The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—
> (A) for the transmission and routing of telephone exchange service and exchange access;
>
> (B) at any technically feasible point within the carrier's network;
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

The CLECs claim that SBC's argument ignores both the clear mandates of Section 251(c)(2) and the FCC's statements in paragraph 368 of the TRO and paragraph 140 of the TRRO, which specifically recognize that CLECs are entitled to obtain entrance facilities for the purposes of interconnection at cost-based rates.

SBC attempts, according to the CLECs, to erase the very real distinction between entrance facilities used for interconnection and entrance facilities used to transport CLEC traffic to and from points on the CLEC network, which is non-interconnection traffic. But this distinction is not the creation of the CLECs, but rather a distinction recognized by the FCC and the Act. SBC has elsewhere argued that the CLECs' proposal would "nullify" the FCC's intent to remove entrance facilities from the list of Section 251(c)(3) UNEs. But SBC's problem lies not with the CLECs, but with the FCC and the Act itself. The FCC recognized both the distinction between uses of entrance facilities and SBC's continuing obligation to provide interconnection entrance facilities, unaffected by its determination with respect to non-interconnection entrance facilities:

> ...competitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users. These links constitute the incumbent LEC's own transport network. However, in order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their

> own equipment located elsewhere. *Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECs must explicitly make available for Section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks for the purpose of backhauling traffic.*[51]

In the TRRO, the FCC stated that:

> [w]e note in addition that our finding of non-impairment with respect to entrance facilities *does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)* for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to *these facilities* at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.[52]

Thus, it is the CLECs' assertion that the FCC made clear that Section 251(c)(2) gives CLECs the right to "obtain interconnection facilities" from SBC. The CLECs note that as a result, where SBC previously argued that Section 251(c)(2) never required it to provide facilities to a CLEC, SBC now has agreed to language that obligates it to provide access to "interconnection facilities" to allow CLECs to interconnect with SBC's network under Section 251(c)(2).

While SBC acknowledges its obligation to provide "interconnection facilities," it asserts that entrance facilities are not interconnection facilities even when used for interconnection purposes. Mr. Cadieux first argues that SBC's argument is wrong because the entrance facility obligation under Section 251(c)(2) would only be available for the limited purpose of interconnection with SBC's network for the transmission and routing of telephone exchange service and exchange access service, and could not be used, as many entrance facility UNEs have been under the old UNE rules, for the sole purpose of backhauling the CLEC's own traffic. Second, the FCC's UNE orders have repeatedly stressed that its non-impairment determinations under Section 251(c)(3) do not in any way affect the ILECs' obligations under Section 251(c)(2),[53] or other provisions of the Act, such as Section 201[54] or 271.[55] Therefore, the FCC's elimination of the entrance

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[51] TRO, ¶ 365 (emphasis added).

[52] TRRO, ¶140 (emphasis added).

[53] *Id.*

[54] TRO, ¶ 581 (finding that ILECs must still permit commingling under Sections 201-202 even if it were not required by Section 251).

facility UNE has no bearing on SBC's independent obligations under Section 251(c)(2), which is exactly what the FCC said in paragraph 140 of the TRRO as quoted above.

Finally, the CLECs argue that if a CLEC has previously been obtaining an entrance facility under Section 251(c)(3), and is eligible to obtain the same facility, at the same rates, under Section 251(c)(2), it should be permitted to reclassify its existing facility as an interconnection facility without charge. Since there is no change in price or in the nature of the facility, there is no basis for SBC to impose disconnect/reconnect or other special charges on such a reclassification.

The CLECs also note that Michigan and Illinois have found for their position.[56]

2. Commission Discussion and Findings

SBC has widely deployed transport facilities, commonly known as "entrance facilities," that connect its central office switches to multi-carrier telecommunications buildings. To date, CLECs have obtained entrance facilities from SBC, both (1) to use to backhaul their own services from the central office to their own facilities and (2) to interconnect with SBC's network for the transmission and routing of telephone exchange service and exchange access service.[57] CLECs were entitled to access for the first purpose as an unbundled network element under Section 251(c)(3), and for the second purpose under Section 251(c)(2).

SBC's argument in opposition to the CLECs' language is essentially that when the FCC eliminated "entrance facilities" as a UNE, it also eliminated the CLECs' ability to obtain similar physical facilities for purposes of interconnecting the CLEC and ILEC networks.

As the CLECs indicated, the "entrance facilities" that are no longer available as UNEs at TELRIC prices, and the "entrance facilities" that are used for "interconnection" and continue to be available, are distinct facilities used for distinct purposes. Mr. Cadieux states these "entrance facilities" can be used for two different purposes:

> (1) For backhaul purposes by the CLEC, i.e., as part of a transmission path between a CLEC's customer and its switch (through the ILEC wire center serving the customer), providing the customer with dial-tone for outbound calls and a path for terminating traffic for incoming calls; or

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[55] *See* TRO, ¶ 652 ("BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251").

[56] Order, *In re Commission's own motion, to commence a Collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC MICHIGAN and VERIZON*, MPSC Docket No. U-14447, at 13 (Sept. 20, 2005) ("*Michigan TRO/TRRO Order*"); *Illinois TRO/TRRO Order* at 43-44.

[57] *See* TRO, ¶ 365.

(2) To provide a transmission path between the ILEC's switch and the CLEC's switch for the exchange of traffic between the two networks.

The "entrance facilities" that CLECs recognize are no longer available as UNEs are the facilities described in (1) above, which provide a dedicated transmission path between (i) the CLEC's collocation in the ILEC wire center serving the CLEC's customer and (ii) the CLEC switch, and are used for backhauling the CLEC's own traffic. These facilities *do not* exchange traffic between the carriers' networks. CLECs previously obtained these facilities as dedicated transport UNEs, but recognize that going forward, they will have to obtain these facilities pursuant to other arrangements. In contrast, entrance facilities used as interconnection facilities, which are the transmission links between the ILEC and CLEC switches over which traffic between the two carriers' networks is exchanged, continue to be available, at TELRIC prices. These two types of facilities are readily distinguishable and are readily visible to SBC. So under the CLECs' proposed language there should be no danger of SBC providing "interconnection facilities" to which the CLECs are not entitled.

With distinctions between entrance facilities used for interconnection purposes and entrance facilities used for other purposes established in the record, the CLECs' language for Sections 14.2 and 14.3 of the Agreement is appropriate. Without the CLECs' proposed language for these sections, SBC would be in a position to reject orders for any facilities generally known in the industry as "entrance facilities," even though those facilities are being used for interconnection of the parties' networks for the purpose of exchanging traffic, as described above. The CLECs' language for Section 14.2 recognizes that the "interconnection facilities" to which the CLECs are entitled may include facilities that are sometimes referred to as "entrance facilities." However, the CLECs' language clearly *does not* entitle the CLECs to obtain (and does not obligate SBC to provide) "entrance facilities" that are *not* used for "interconnection," *i.e.*, the physical linking of the CLEC and ILEC networks for the mutual exchange of traffic.

Similarly, the CLECs' language for Section 14.3 recognizes that when a CLEC obtains what is sometimes referred to as an "entrance facility" for use as an interconnection facility, the CLEC is entitled to obtain the facility at the rates for Unbundled Dedicated Transport set forth in the Agreement (*i.e.*, at TELRIC). This is fully consistent with Section 252(d)(1) of the Act, which requires that interconnection facilities be provided at TELRIC. Further, although SBC acknowledges via the agreed language in Section 14.1 that it continues to be obligated to provide interconnection facilities, it has not proposed any different rates for interconnection facilities than the UNE transport rates in the underlying Agreement. Thus, Section 14.3 as proposed by the CLECs should be adopted.

For these reasons, the Commission finds the CLECs' proposed language for Sections 14.2 and 14.3 of the Agreement should be adopted. However, we find the first phrase in Section 14.4, "For avoidance of doubt," is unnecessary and should be removed.

ISSUE 7

- **Statement of Issue: Should the Agreement include rates and terms for SBC's Section 271 obligations? If so, what should those rates and terms be?**

- **Disputed Agreement Language: Section 13**

1. Positions of the Parties

A. SBC

SBC Indiana argues that the purpose of an interconnection agreement arbitration is to "meet the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to Section 251,"[58] generally, and in this particular proceeding, specifically, to implement the regulations prescribed by the FCC in the TRO and TRRO. SBC Indiana cites to the FCC regulations stating that "[r]equesting carriers may not obtain new local switching as an unbundled network element,"[59] as evidence that requesting carriers likewise may not obtain unbundled loops or dedicated transport in the contexts for which the FCC has found they are not impaired.

SBC Indiana contends that in Issue 7 the CLECs are trying to override and render meaningless those regulations through its proposed Section 13.1 of the Agreement, which states that "[n]othwithstanding any other provision of the Agreement or of this Attachment," SBC Indiana would have to still provide unbundled access to the very elements for which the FCC barred such access. In other words, SBC Indiana argues that the CLECs' proposal for Agreement language would, despite implementation of a provision to reflect the FCC's declassification of UNEs pursuant to Section 251, still allow carriers to continue to access those same elements, only now under Section 271. SBC Indiana argues that the CLECs' position is unlawful for the following reasons:

- State commissions lack authority to interpret or enforce Section 271, which is reserved for the FCC, and the Commission's authority in this proceeding is to carry out the requirements of Section 251, not Section 271;

- The CLECs' proposal does not meet the requirement of Section 271 since the FCC rejected the UNE-P; and

- The FCC has exclusive jurisdiction to review prices under Section 271.

SBC Indiana argues that this is not a proceeding under Section 271, but a proceeding to implement Sections 251 and 252. As such, Sections 251 and 252 are where the analysis, and the Commission's authority, must begin and end. SBC Indiana

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[58] 47 U.S.C. § 252(c)(1).0

[59] 47 C.F.R. § 51.319(d)(2)(iii).

further cites the following:

- The obligation of incumbents and CLECs is only to negotiate "agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this Section and this subsection."[60]

- Likewise, the Commission's responsibility in resolving open issues is to "ensure" that its resolution and any conditions imposed "meet the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to Section 251."[61]

- In reviewing the agreement that results, Section 252(e)(2)(B) reiterates that the Commission is again to follow Section 251.

- *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F.3d 1269 (11th Cir. 2002), held that state commissions' authority is limited to the terms necessary to implement Section 251(b) and (c). Conversely, a rule mandating resolution of issues not covered by those parts of Section 251 would be "contrary to the scheme and text of th[e] statute, which lists only a limited number of issues on which incumbents are mandated to negotiate."[62]

SBC Indiana also asserts that Section 271, itself, reinforces the Commission's lack of authority to address or enforce Section 271 in this proceeding by citing the following:

- A Section 271 application is submitted to, and approved by, the FCC.[63]

- During the application process, Section 271 does not set forth any state commission role or authority other than as a consultant to the FCC.[64]

- "Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for interLATA authorization," and in making those decisions "the statute does not require the FCC to give the State commissions' views any particular weight."[65]
- Once an application is approved, as SBC Indiana's application has been, Section 271 provides authority only to the FCC to enforce continued BOC

[60] 47 U.S.C. § 251(c)(1).

[61] 47 U.S.C. § 252(c)(1).

[62] *MCI Telecomms. Corp.*, 298 F.3d at 1274.

[63] 47 U.S.C. §§ 271(d)(1) & 271(d)(3).

[64] 47 U.S.C. § 271(d)(2)(B).

[65] *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

compliance with the conditions for approval.[66]

- No provision in Section 271 confers any role on state commissions with respect to the ongoing obligations of the BOCs once they have received approval.

Accordingly, SBC Indiana concludes, to the extent any party believes SBC Indiana no longer meets the Section 271 checklist, the Act designates the FCC as the body to receive complaints and to determine the appropriate action, if any.[67]

SBC Indiana offers support for its argument by citing to court decisions that have recognized the FCC's exclusive authority and rejected CLEC attempts to have state commissions implement their visions of Section 271.[68] SBC Indiana also points to several state commissions that have reached the same result in proceedings like this one.[69]

SBC Indiana cites what it contends was the FCC establishment of a "nationwide bar" on the UNE-P because "UNE-P has been a disincentive to competitive LECs' infrastructure investment" and because further "unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition."[70] And with regard to combination generally under Section 271, SBC Indiana asserts that the FCC in the TRO held that Section 271 does not support a requirement for any combinations that include unbundled network elements "that no longer are required to be unbundled under Section 251."[71]

SBC Indiana also asserts that the CLECs' proposal on pricing, which advocates the continuation of TELRIC for 271 elements, fails for several reasons, including those

[66] 47 U.S.C. § 271(d)(6).

[67] *Id.*

[68] *BellSouth Telecommunications, Inc. v. Mississippi Public Service Commission*, 368 F. Supp. 2d 557, 566 (S.D. Miss. 2005). *See also* Memorandum Opinion and Order, *BellSouth Telecommunications v. Cinergy*, Civil Action No. 3:05-CV-16-JMH, at 12 (E.D. Ky. Apr. 22, 2005); *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004).

[69] Arbitration Award, *Arbitration of Non-Costing Issues for Successor Interconnection Agreement to the Texas 271 Agreement*, Docket No. 28821, at 18-20 (Texas Pub. Util. Comm'n June 20, 2005) ("*Texas Arbitration Order*"); *Order No. 13: Commission Order on Phase I*, Docket Nos. 05-BTKT-365-ARB *et al.*, ¶ 3 (Kansas Corp. Comm'n May 16, 2005) ("*Kansas Phase I Order*"); *Order No. 15: Commission Order on Phase II UNE Issues*, Docket Nos. 05-BTKT-365-ARB *et al.*, ¶¶ 13-14 (Kansas Corp. Comm'n July 18, 2005); *Ordinary Tariff Filing of Verizon New York, Inc. to Comply with the FCC's Triennial Review Order on Remand*, Case 05-0203, 2005 WL 607973, at *13 (Mar. 16, 2005); *In re DIECA Communications, Inc.*, 2005 WL 578197, at *9 (Utah Pub. Serv. Comm'n Feb. 8, 2005).

[70] TRRO, ¶ 218.

[71] TRO, n. 1990.

stated above. SBC argues that while the price for unbundled access under Section 251 is based on TELRIC, the pricing of checklist network elements under Section 271 is based on "the basic just, reasonable, and nondiscriminatory rate standard of Sections 201 and 202" of the Act.[72] SBC Indiana cites the FCC's rejection of CLEC proposals for cost-based TELRIC pricing on Section 271 items in the TRO, where the FCC concluded that such pricing would "gratuitously reimpose the very same requirements that another provision (Section 251) has eliminated."[73] SBC Indiana asserts that the FCC held that the review of rates for Section 271 network elements is a fact-specific inquiry that the FCC itself will undertake.[74]

SBC Indiana also cites to other state commissions that have agreed that the states lack authority to arbitrate the rates (or other terms and conditions) of Section 271 items that need not be made available pursuant to Section 251.[75] SBC Indiana next cites the FCC's holding that a state-imposed rate would be contrary to Section 271's substantive pricing standards[76] and that a BOC may satisfy Section 271's pricing requirements simply by showing that the rate is consistent with those in "arms-length agreements with other, similarly situated purchasing carriers" or is "at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff."[77] SBC Indiana contends that this principle applies with particular force to unbundled switching and the other network elements barred by the TRRO.

SBC Indiana argues it cannot be true that a mere difference in price would allow a state to eviscerate the federal "necessary" and "impairment" requirements; otherwise, a state could order the same blanket access regime that federal law has rejected by merely raising the price a smidgen above the federal price. SBC Indiana therefore asserts that the CLECs' approach would improperly elevate form over substance. The plain text of the federal "impairment" requirement forecloses that approach, providing that impairment is not a mere pricing regime but an "access standard" to be used in determining "what network elements should be made available for purposes of subsection [251](c)(3)."[78] Likewise, Section 251(c)(3) governs "access," and the "terms and conditions" of that access. Price cannot even be considered until the underlying obligation to provide access is established. Thus, the Act says that state commissions are to establish "the just and reasonable rate for network elements" only "for purposes of

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[72] *Id.* at ¶ 663.

[73] *Id.* at ¶ 659.

[74] *Id.* at ¶ 664.

[75] *Texas Arbitration Order*, at 18; *Kansas Phase I Order*, ¶ 3.

[76] *UNE Remand Order*, at ¶ 471.

[77] TRO, ¶ 664.

[78] 47 U.S.C. § 251(d)(2).

subsection [251](c)(3)."[79]

In response to the CLECs' claim that Congress actually *required* that Section 271 rates and terms be included in Section 252 interconnection agreements, SBC Indiana argues that Section 271(c)(2)(A) does not require that every Section 252 agreement, or any particular Section 252 agreement, satisfy every element of the checklist, nor does it authorize state commissions to insert checklist items into any Section 252 agreement (particularly after long-distance approval has been awarded), the way the CLECs contend. A Section 252 agreement is a component of an application under Section 271, and SBC Indiana states that the CLECs are simply turning the statute upside down in contending that Section 271 is a component of a Section 252 agreement.

B. CLECs

The CLECs assert that States can establish Section 271 rates in Section 252 arbitrations, and note that this authority is derived from the Act, claiming that this Commission has established SBC's Section 271 rates and terms in the past, including those SBC relied upon to obtain Section 271 interLATA authorization from the FCC. Moreover, the FCC has repeatedly ruled that SBC's obligation under Section 271(c)(2)(B) to provide access to certain network elements, including local switching, is independent of any Section 251 obligation to unbundle and provide those elements.[80] Therefore, there is no question that SBC has a statutory and regulatory duty to offer these elements; the question presented by this issue is whether Section 271 network elements should be offered under the Section 252 agreement process established by Congress, or in completely unregulated "commercial agreements," as advocated by SBC.

The CLECs claim that the Act plainly states that the Section 271 competitive checklist requirements, including the loops, transport, and switching that are independent of Section 251 determinations, must be implemented through interconnection agreements or Statement of Generally Available Terms ("SGATs") approved under Section 252.[81] FCC precedent on this point has been clear. In approving SBC's Section 271 application for Indiana, the FCC stated, as it had in prior Section 271 orders, that a BOC "must" satisfy its checklist obligations "pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions ... for each checklist item."[82]

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[79] *Id.* at § 252(d)(1).

[80] TRO, ¶ 652.

[81] 47 U.S.C. § 271(c)(1), (2).

[82] Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Authorization To Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, WC Docket No. 03-167, at Appendix F, ¶ 5 (Oct. 15, 2003).

The CLECs further cite to the record of the Senate committee that drafted the Section 271 competitive checklist, which noted that the checklist "set[s] forth what must, at a minimum, be provided [upon request] by a Bell operating company in any interconnection agreement approved under Section 251 to which that company is a party."[83] By citing the Act and FCC precedent, the CLECs contend that it is clear that Section 271 rates and terms should be included in Section 252 interconnection agreements, and that the Act vests primary jurisdiction with the states, not the FCC, to arbitrate disputes involving the rates and terms to be included in interconnection agreements.[84] In addition, the CLECs argue that the TRO emphasized that "BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates."[85] The CLECs contend that the FCC intended that Section 271 requirements would be implemented through interconnection agreements approved by state commissions under the Section 252 process.[86]

The CLECs argue that while the FCC has exercised authority over Section 271 rates by prescribing a "just and reasonable" standard that states are required to apply when establishing Section 271 rates, this does not preempt state authority to implement that standard. Instead, the CLECs contend the resulting paradigm is similar to that established by Congress and the FCC for Section 251 UNE rates, in which the FCC established TELRIC methodology and left implementation of that methodology to the state commissions in Section 252 proceedings.[87] The Commission therefore has equal authority to establish "just and reasonable" rates for "federal" Section 271 elements in a Section 252 arbitration proceeding as it does to establish TELRIC rates for "federal" Section 251 UNEs in such proceedings.

2. Commission Discussion and Findings

We join the many courts and commissions that have already held that Section 271 obligations have no place in a Sections 251/252 interconnection agreement and that state commissions have no jurisdiction to enforce or determine the requirements of Section 271. Like all state utility commissions, this Commission is a creature of statute and its authority and jurisdiction are limited to what is delegated by statute. While Section 252 of the Act delegates to us the authority to arbitrate and approve interconnection agreements in order to ensure they comport with Sections 251 and 252 and the FCC's implementing regulations, nothing in Sections 251 and 252, Section 271, or any other part of the Act gives authority to enforce Section 271. To the contrary, Congress gave the FCC exclusive authority to interpret and enforce Section 271, including any

[83] S. Rep. No. 104-23, at 43 (1995).

[84] *See* 47 U.S.C. §§ 252(d)(4), 252(e), 252 (e)(5).

[85] TRO, ¶ 652.

[86] *Id.* at ¶¶ 701, 703-704.

[87] *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 385 (1999).

requirements of the "competitive checklist." The Seventh Circuit has made clear that state commissions are not to attempt to assert authority under Section 271.[88]

The CLECs, however, are asking us to assert authority to interpret and enforce any unbundling obligations under Section 271. There is no statutory support for such authority. Simply put, Section 271 is not the province of state commissions, and the FCC has expressly stated that it, not state commissions, will determine the proper price for any Section 271 network element.[89] The authorities SBC Indiana has cited on this score are convincing and well-reasoned, while the few contrary decisions cited by the CLECs overlook the lack of any delegation of authority to state commissions under Section 271 and improperly seek to extend the scope of state commission authority with no statutory basis for doing so.

Accordingly, we find for SBC Indiana and decline to impose any terms or conditions for Section 271 network elements.

ISSUE 9

- **Statement of Issue: To what extent may SBC Indiana impose charges on transitioning the embedded base of declassified TRO, DS-0 local circuit switching, UNE-P, and high capacity loops and transport elements?**
- **Disputed Agreement Language: Sections 1.3.3, 2.1.3.3, 3.2.2.2**

1. Positions of the Parties

A. SBC

Issue 9 concerns the conversion of "embedded base" UNEs to alternative arrangements. There are two types of charges at issue: (i) charges for the cost of physical work to perform the conversion, and (ii) service order charges. In addition, the disputed Agreement language includes CLEC-proposed language regarding the manner in which conversions are to be accomplished.

SBC Indiana's proposed language for Sections 2.1.3.3 (UNE-P) and 3.2.2.2 (loops and dedicated transport) of the Agreement states that the CLEC will pay non-recurring charges if (i) "the order activities necessary to facilitate such transition involve physical work" (with the caveat that "physical work does not include the re-use of facilities in the same configuration") and (ii) those order activities "involve other than a 'record order'

[88] *Indiana Bell Tel. Co.*, 359 F.3d at 497 (holding that a state commission cannot "parlay its limited role in issuing a recommendation under Section 271, involving long-distance service, into an opportunity to issue an order . . . dictating conditions on the provisions of local service.").

[89] TRO, ¶¶ 659-664.

transaction." The CLECs oppose this language. However, Ms. Niziolek notes they have agreed to the exact same language, for the exact same charges, in the exact same situations, in Section 1.3.3 of the Agreement. Thus, Ms. Niziolek notes that SBC's proposed language in the disputed Sections should be adopted for the sake of consistency; otherwise, the Agreement will contain two sets of conflicting provisions, with one set authorizing charges and the other taking them away. At any rate, SBC Indiana contends that if it incurs the cost of physical work to serve a CLEC, it is entitled to compensation from the CLEC that caused, and benefits from, that cost.

The second category of charges applies whether or not there is physical work. Ms. Niziolek proposes that the CLECs pay any "applicable service order charge(s)." She states the CLECs contend that they should only pay a "Record Order" charge. According to Ms. Niziolek, the change in language reflects two differences, and two different CLEC attempts to avoid compensating SBC Indiana. Ms. Niziolek states the first difference is that SBC Indiana's proposal includes any tariffed service order charges that might apply to the new alternative arrangement to which the UNE is being converted, not just the charges associated with changing the UNE record. This proceeding is not one to investigate or modify SBC Indiana's access tariffs, and SBC Indiana states that the Commission has no authority to modify those tariffs; and indeed has no jurisdiction at all, in any proceeding, over any *inter*state access tariffs that might apply.

Second, according to SBC, the CLECs' proposal states that SBC Indiana may only assess the "record charge" for an electronic flow-through order, which is an order that is submitted electronically by the CLEC and processed electronically without any manual intervention by SBC Indiana. But, Ms. Niziolek explains, the CLECs do not submit all orders electronically, and any additional costs that SBC Indiana incurs to process manual orders (e.g., orders placed by facsimile) should be borne by the CLEC that chooses to submit orders in that fashion. Moreover, Ms. Niziolek states that not all electronically submitted orders can be processed electronically; some require manual work for translation and input. SBC Indiana contends that the CLECs know that, and they also know that SBC Indiana's Commission-approved rates include a component for that manual work.

The parties have already agreed in Sections 2.1.3.2 (UNE-P) and 3.2.2.2 (loops and dedicated transport) of the Agreement that SBC Indiana will complete transition orders "with any disruption to the end user's service reduced to a minimum"; further, "[w]here disruption is unavoidable due to technical considerations," SBC Indiana will act to "minimize any disruption detectable to the end user."

According to SBC, the dispute arises from the CLECs' attempt to go farther and mandate that conversion "take place in a seamless manner that does not adversely affect the customer's perception of service quality." SBC Indiana contends that the CLECs' proposal is unnecessary because the agreed language already provides the maximum feasible level of seamlessness.

Ms. Niziolek states that the CLECs' proposal apparently mandates a standard of perfection. While SBC Indiana strives to make every conversion seamless, it contends that perfection is not attainable. Ms. Niziolek contends that the agreed language in Sections 2.1.3.2 and 3.2.2.2 recognizes that some disruption is unavoidable and directs SBC Indiana to minimize any disruption that is detectable to the end user. SBC Indiana says that this is why Commission-approved performance standards do not require perfection in processing CLEC orders. Moreover, Ms. Niziolek notes that the CLEC proposal is vague and thus unworkable, in that it is based upon "the customer's perception of service quality."

B. CLECs

The CLECs propose in Sections 2.1.3.3 and 3.2.2.2 of the Agreement that, when converting UNEs (UNE-P and/or high capacity loops and transport) to alternative service arrangements that require only a record change by SBC, SBC impose a "record only" charge. CLEC witness Mr. Smutniak disagrees with SBC's contention that the parties have already agreed to language addressing the applicable nonrecurring charges to be applied for conversions and, therefore, that the CLECs' proposal in Issue 9 is unnecessary. He explains that Section 1 of the Agreement addresses different circumstances from Sections 2 and 3. The purpose of Section 1 is to address conversions solely for TRO affected elements, while the purpose of Sections 2 and 3 is to address circumstances for TRRO affected embedded base transitions, for which customer transitions have not yet fully taken place.

The CLECs note that a record charge relates to changing the information on an existing customer's billing records; a service order charge, on the other hand, involves updating all of SBC's systems based upon the assumption that service does not already exist in all instances. Under the CLECs' proposal, nonrecurring charges intended to recover labor costs for physical work would not apply where the migration of a UNE arrangement to another wholesale arrangement requires only a record change. The CLECs note that SBC's proposal would require CLECs to pay service order charges even though physical work is not actually required to transition UNEs to an alternative service arrangement.

The CLECs point out that currently, in geographic areas where CLECs have yet to fully complete their facilities build-out, CLECs have two options for transition: (1) order Total Service Resale or (2) order Local Wholesale Complete. If the Commission requires SBC to provide unbundled local switching as a network element under Section 271 as part of the parties' Agreement, the CLECs will have an additional option. Option 3 will be to order a commingled arrangement priced at something other than TELRIC. In all of these cases, the physical arrangement of facilities does not change. There is no "disconnection" or "reconnection" taking place.

For the two existing options, ordering Total Service Resale or ordering Local Wholesale Complete, the CLECs state that it is rare that an order submitted electronically does not flow through to completion. The need for manual intervention should be even less for a transition given that the ordering information the CLEC is providing to SBC is for an existing customer and the retention of that customer's service arrangement. Additionally, the CLECs note that since conversions from resale to UNE-P have historically only triggered a flow-through records charge, logic dictates that the same type of charge is appropriate for the same conversion in reverse.

Mr. Smutniak states that if SBC's position were to prevail, SBC would be able to charge a service establishment charge to CLECs as a result of simply modifying a billing arrangement from UNE-P to resale. Similarly, as Mr. Cadieux describes when discussing Issue 28, SBC would be able to charge for loop and transport conversions when there is no physical work involved, *i.e.,* the change is merely to billing. However, Mr. Smutniak contends the CLECs would not be able to recover that same service establishment charge from its customer because no new services were actually being established, no new facilities were installed, and from the customer's perspective, no change occurred in their telephone service. Mr. Smutniak notes that this scenario would result in a windfall to SBC without any commensurate recovery to the CLECs. The CLECs state that a service order charge is also inappropriate because the CLECs have already paid the nonrecurring charges associated with getting the circuit up and running. Mr. Cadieux argues allowing SBC to recover these costs again would constitute double recovery.

The CLECs also point out that many of the existing UNE-P arrangements will physically remain in place but will be called something else, like resale, and billed at a different rate. When a CLEC moves to its own switch and UNE Loops in the future, this section of the Agreement will not apply because the limiting language expires when the transition period expires. Additionally, for conversions that take place from UNE-P to UNE Loops between now and next March, SBC will not go uncompensated for work performed because the CLECs will pay for hot cuts associated with these conversions. The CLECs also point out that SBC has provided no information on its costs or provided evidence supporting its contention that its costs will not be recovered through the rates CLECs will pay if the CLECs' language is approved.

The CLECs contend that the FCC has already determined that a conversion is largely a billing function and that termination, reconnect and disconnect charges for conversions are discriminatory and prejudicial.[90] The FCC's recognition of this is based upon the fact that any conversion will necessarily begin with an established, working circuit that has already been engineered and constructed consistent with the nonrecurring charges appropriately applied and consistent with the format within which the circuit was originally ordered. Because the circuit is already up and running, and the CLEC has already paid the nonrecurring access tariff charges, there is no reason why SBC would need to physically alter the circuit such that it would incur additional manual provisioning costs. Further, SBC assumes that manual work will necessarily be involved in conversions, including work related to service orders, disconnecting circuits, and re-connecting circuits. However, the FCC concluded that "once a competitive LEC starts serving a customer," charges for such activities are "wasteful and unnecessary" and went

[90] TRO, ¶ 588.

as far as to promulgate rules in 47 C.F.R.§ 51.316 to disallow such charges. The CLECs argue that SBC should be able to simply revise its billing systems, as the FCC indicated, so that it can bill the CLEC under a different set of rates associated with the new status of the circuit. Mr. Cadieux notes that, since SBC has not provided any information showing that physical work must be involved in a special access to UNE conversion, for example, it is therefore inappropriate for the Agreement to grant SBC the authority to impose a number of unspecified charges for physical work associated with conversions.

Finally, the CLECs contend their proposal to require "seamless" conversions is based upon the FCC's conversion rules, which read in part as follows:

> (b) An incumbent LEC shall perform any conversion from a wholesale service or group of wholesale services to an unbundled network element or combination of unbundled network elements without adversely affecting the service quality perceived by the requesting telecommunications carrier's end-user customer.[91]

The CLECs state that the FCC's rules base the success of a conversion on the customer's perception and, therefore, SBC's complaint should be taken up with the FCC, not with the CLECs who have patterned their language after the FCC's rules.

2. Commission Discussion and Findings.

The disputed language in Sections 1.3.3, 2.1.3.3 and 3.2.2.2 of the Agreement encompasses four separate issues: (1) Can SBC require an order charge and a record charge when a conversion occurs, e.g., UNE-P to Total Resale or Wholesale Complete or Special Access to a UNE combination?; (2) Does SBC have the ability to request any charge for physical work?; (3) Can SBC charge termination charges when a CLEC converts from a tariffed service like special access to a UNE combination?; and (4) Is SBC required to make the conversion seamless? The language in the three sections of the Agreement is very broad and takes into account nonrecurring charges for many types of service. Below we address each of the four issues. We also note that we have no jurisdiction over the rates for conversion from UNE-P to Local Wholesale Complete. Thus our findings only cover conversion from UNE-P to Total Service Resale.

We agree with the CLECs that a conversion from UNE-P to Total Service Resale should only be a billing charge and not an ordering charge. Ms. Niziolek indicates that when a billing record change occurs, the CLEC would submit a record only Local Service Request. We also agree with the CLECs that a conversion from special access to a UNE combination should only entail a records change as it is a simple billing change.

Regarding the cost of physical work, we find for SBC Indiana based upon Ms. Niziolek's testimony discussing that a transition from UNE-P to UNE-L or the

[91] 47 C.F.R. § 51.316(b).

elimination of a DS3 circuit from the Enhanced Extended Links ("EELs") would require physical work. If physical work is required, SBC Indiana is entitled to be compensated. We also find that the alternate language proposed by the CLECs for Section 2.1.3.3 of the Agreement is insufficient to change the result and is not superior to SBC's proposed language.

We take no position as to whether SBC Indiana may assess termination charges from its interstate access tariff, as we have no jurisdiction over any charges under SBC Indiana's interstate tariffs. In regard to intrastate access tariffs, this is not the appropriate venue to raise changes to an intrastate access tariff. Any objections to rates, terms, or conditions for intrastate access should be raised in a separate proceeding where, among other things, issues such as whether the IURC should break the mirror (a policy by which intrastate access charges "mirror" interstate access charges) can be examined.

As for the manner of performing conversions, we agree with SBC Indiana that the CLECs' proposal to require "seamless" conversions is unreasonable and unnecessary because the parties have already agreed to language that ensures the maximum feasible level of seamlessness. That language requires SBC Indiana to keep service disruptions "to a minimum" and to "minimize" any disruption to the end user. That is the most that can reasonably be expected in any complex network; the standard cannot be perfection, as SBC Indiana's Commission-approved performance standards already recognize. The language that the parties have already agreed to (see, e.g., Sections 2.1.3.2 or 3.2.2.2 of the Agreement) will adequately protect both the CLECs and their customers.

Now that the Commission has resolved the general issues we turn to the specific language. In general we find the language in the specific sections too broad. In Section 1.3.3 of the Agreement, the dispute is between the term "service" or "record," yet it does not take into account the different types of services and the specific nonrecurring charges. Furthermore, the way the specific sentence is drafted, it only makes sense to use SBC's term "service" as the phrase after the dispute says "the applicable service order will be the only applicable charge." In order to accommodate our findings on the difference between a service order and a record order we find the appropriate language should be:

> To the extent that physical work is not involved in the transition and the transition involves only a billing change, the applicable record charge will be the only applicable charge. If the transition involves more than a billing change, the applicable service order charge will be the only applicable charge.

Based upon our review of Section 2.0 of the Agreement, Section 2.1.3.3 deals with charges incurred when a CLEC converts from UNE-P to an alternative SBC service arrangement such as Total Resale, Local Wholesale Complete, UNE-Loop, etc. Thus, the reference to any tariff or special access is not warranted. We also find the terms "all" in the SBC proposed language and "any" in the CLEC proposed language too broad and not in keeping with our findings. For example, we have found that conversion from UNE-P to Total Resale is a simple billing function, but conversion from UNE-P to UNE-Loop may entail physical work. We find the following language for Section 2.1.3.3 of the Agreement should be adopted:

> When a CLEC converts from UNE-P to Total Resale the CLEC will only pay a record order charge. SBC will determine the charges for a conversion from UNE-P to Local Wholesale Complete. For a conversion from UNE-P to UNE-Loop, SBC may charge for physical work and any other applicable order charges.

Section 3.0 of the Agreement deals with transitioning away from high-capacity loops and transport such as Dark Fiber, DS1 loops, and DS3 loops. Unlike a simple transition from UNE-P to Total Resale or special access to UNE combinations, transitions from these facilities to other services will not be a simple billing process. Therefore, we reject the CLECs' proposed language. In this case we believe SBC's proposed language in Section 3.2.2.2 of the Agreement is sufficiently broad to cover the transitions.

ISSUE 10

- **Statement of Issue: What rates should apply to unbundled local switching ("ULS") or UNE-P services if an embedded base ULS/UNE-P customer's service has not been disconnected or migrated by the deadline to be specified in the Agreement?**

- **Disputed Agreement Language: Section 2.1.3.4**

1. Positions of the Parties

A. SBC

Section 2.1.3.4 of the Agreement and Issue 10 concern the consequences if a CLEC fails to convert its UNE-P customers to an alternative arrangement by the March 11, 2006, expiration date. Ms. Niziolek explains that SBC Indiana proposes that it will re-price such arrangements to market-based rates, that is, the prices established by arms' length agreements with other CLECs. The CLECs contend that the price should be the regulated rates for Total Service Resale obtained pursuant to Section 251(c)(4).

Ms. Niziolek contends that the CLECs' proposal should be rejected for two reasons. First, if any CLEC truly wants to convert its UNE-P arrangements to resale, the FCC's rules give it ample time to say so and then implement that choice by March 11, 2006, one year from the effective date of the TRRO. The language here deals only with the situation in which the CLEC fails to act by that date. Given that CLECs have been well aware of the FCC's order for some time, Ms. Niziolek argues, they are in no position to dictate terms if they fail to act within the FCC's year-long transition period. Indeed, Ms. Niziolek notes that if CLECs were permitted to dictate the default transitional arrangement, they would have little incentive to submit conversion orders on time, and a strong incentive to wait until the last minute, thereby forcing SBC Indiana to do all the work at the very end of the transitional period.

Second, Ms. Niziolek contends that the CLECs' proposed regime cannot be implemented as a practical matter because SBC Indiana cannot convert all the features on a mass market ULS/UNE-P account to a resold account. She states a resold line can only contain telecommunication services that SBC Indiana makes available on a retail basis. A CLEC, however, may currently be offering a feature to a ULS/UNE-P end user that is not available on a resold basis, such as voicemail. Thus, if SBC Indiana converts a UNE-P line to resale, the end user may lose functionality. Ms. Niziolek notes that the CLECs themselves have the details about their end users' features and services, and only the CLECs can capture such features and services in their conversion orders. Absent an actual CLEC order, SBC Indiana states that it cannot establish a resold line on the "default" basis the CLECs propose.

B. CLECs

The CLECs propose that the price for Total Service Resale be the "default price" for any UNE-P arrangements that remain in place after the conversion deadline. The CLECs advocate that this approach is reasonable, predictable, and results in fair and full compensation to SBC.

The CLECs note that SBC's approach is premised on a flawed assumption that CLECs who fail to transition by the deadline are either derelict or are otherwise malevolently motivated. To the contrary, Mr. Smutniak provided testimony to show that SBC has repeatedly ignored or otherwise refused to respond to at least one Indiana CLEC's requests to transition all UNE-P arrangements to Total Service Resale. Mr. Smutniak notes that SBC's proposed language would have the CLECs agree to an unknown rate, which could be hundreds or even thousands of dollars per line, even when a transition fails due to SBC. The CLECs state that it is unreasonable to punish them with unduly high rates because they were unable, despite their best efforts (or due to SBC's error) to transition 100% of their UNE-P lines by the deadline. Mr. Smutniak states that because one of the CLECs' options is to order Total Resale Service, and because the Commission has determined the rates for this service fully recover SBC's costs, these rates fulfill the objective of establishing a predictable, fair and reasonable "default" alternative.

Mr. Smutniak objects to SBC's proposal to charge market-based rates on several grounds. First, the CLECs state that SBC has failed to disclose whether, or at what prices, SBC's month-to-month offering exists. Second, the CLECs note that SBC has never explained the basis for its claim that a "market" exists for local switching, or shown that its rates for switching are "reasonable" or "competitive" with local switching offerings made available by other entities in Indiana. Mr. Smutniak states that there is no such "market." Mr. Smutniak testified that he is not aware of any other company from which the CLECs can purchase the same service offered by SBC. The CLECs note that the fact that some CLECs have signed Local Wholesale Complete agreements with SBC when there is no competitive source available does not mean that SBC's rates are "market" rates. Third, Mr. Smutniak indicates that leaving the price for this service at an undetermined, undisclosed level, defeats the purpose of a contract, which is to reflect the meeting of the minds between two contracting parties. Therefore, the CLECs argue that using SBC's so-called "market rates" as the default alternative would not establish a predictable default price, nor would it establish a just and reasonable price as the default.

Mr. Smutniak points out that SBC's resistance to accepting the CLECs' proposal is curious in light of Verizon Indiana's voluntary decision to re-price remaining UNE-P lines to resale-equivalent pricing effective March 12, 2006. Mr. Smutniak states that notably, SBC nowhere says that it will force CLECs to execute the Local Wholesale Complete contracts and subscribe to that service, only that it will "charge the then-prevailing month-to-month rates" applicable to its Local Wholesale Complete offering.

As to SBC's claim that an end user might lose some functionality, such as voicemail, if resale were the default arrangement, Mr. Smutniak points out that they are not asking SBC to convert the UNE-P arrangements that remain in place on March 12, 2006, to resale, but are asking SBC to re-price them at resale until they are disconnected or transitioned. Even if the possibility exists for lost functionality, Mr. Smutniak states that the CLECs are aware of it and will take care to transition customers accordingly.

2. Commission Discussion and Findings

The issue here is what rate will apply to a UNE-P arrangement that is not converted by the FCC deadline of March 11, 2006. SBC Indiana seeks to "re-price such arrangements to market-based rates," while the CLECs seek automatic conversion to resale rates.

We find that SBC Indiana's position is more reasonable and should be adopted. As SBC Indiana notes, if a CLEC wants to convert UNE-P arrangements to resale, the FCC has given it a year to do so. Thus, the CLECs themselves have control over the timing of their request to switch from UNE-P arrangements to resale prices, and nothing in the TRRO gives them a right to a presumption of resale pricing if they fail to act.

However, the CLECs raise an important issue. The proposed language by SBC, whereby the conversion is to "market-based rates" creates an illusion that a market exists in which a CLEC can turn to several ILECs when a conversion is needed. This is clearly not true as the CLECs have no other alternative other than SBC when a conversion occurs. Thus, SBC ultimately determines the rate. Therefore, we reject SBC's proposed language of "market-based rates" and find the appropriate language is "determined by SBC."

ISSUE 11

- **Statement of Issue: If a CLEC migrates embedded ULS/UNE-P customers to another functionally equivalent SBC service platform (e.g., resale), should the transition rate specified by the FCC in the TRRO apply to those migrated lines until the end of the transition period, *i.e.,* until March 11, 2006, if the transition occurs sooner than March 11, 2006?**

- **Disputed Agreement Language: Section 2.1.4**

1. Positions of the Parties

A. SBC

This issue arises from the TRRO's nationwide bar on new unbundled local switching and the UNE-P, and its transition period for carriers to convert the "embedded base" of UNE-Ps to alternative arrangements.[92] The price for UNE-P "obtained pursuant to this paragraph [the transition plan] shall be the higher of: (A) the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar; or (B) the rate the state . . . commission establishes, if any, between June 16, 2004, and the effective date of the [TRRO] . . . plus one dollar."[93] The transition plan expires on March 11, 2006.

What pricing applies if the CLEC converts its UNE-P customers to an alternative arrangement *before* March 11, 2006? SBC Indiana contends that its proposal is straightforward: Ms. Niziolek contends that when the alternative arrangement goes into effect, the agreed price for that arrangement also goes into effect. The CLECs, however, contend that the FCC's transition price should remain in place, even after the transition has been completed, until March 11, 2006.

Ms. Niziolek argues that the FCC has squarely foreclosed the CLECs' proposal. The TRRO states that "the transition mechanism adopted here is simply a default process" that is "supersed[ed]" by negotiated alternative arrangements. She then reiterates that "[t]he transition mechanism . . . also does *not* replace or supersede any commercial arrangements carriers have reached for the continued provision of UNE-P." Thus, the FCC stated quite clearly that "competitive LECs will continue to have access to UNE-P at TELRIC plus one dollar *until the incumbent LEC successfully migrates those UNE-P customers* to the competitive LEC's switches or to alternative access arrangements negotiated by the carriers."[94] Conversely, the transition rule applies only to UNE-P "obtained pursuant to this paragraph" (the transition plan), not to products

[92] TRRO, ¶ 227.

[93] 47 C.F.R. § 51.319(d)(2)(iii).

[94] TRRO, ¶ 199 (emphasis added).

obtained pursuant to an agreement.[95] Ms. Niziolek contends that this conclusion makes sense because transition prices are just that: *transition* prices, not *post*-transition prices. If a carrier agrees to an alternative arrangement at some other price, SBC Indiana believes the carrier should pay that price.

B. CLECs

The CLECs counter SBC's argument by pointing out that the FCC's discussion of agreed-upon rates dealt specifically with agreements that existed at the time the TRRO was released, not future agreements between the parties.

> The transition mechanism adopted today also does not replace or supersede any commercial arrangements *carriers have reached* for the continued provision of UNE-P or for a transition to UNE-L.[96]

Thus, the CLECs note that the FCC clearly stated it was not overriding any agreement a CLEC had reached *prior to* the time the TRRO was released. The FCC said it was not imposing a transition plan that would be contrary to what CLECs and ILECs already had agreed to; instead, it said that existing agreements would not be changed by the TRRO.

The CLECs maintain that their proposed language in Section 2.1.4 of the Agreement is consistent with paragraph 228 of the TRRO because it does not supersede or replace any contractual arrangement a CLEC has with SBC. Instead, they note that it applies to CLECs that have no other contractual agreement that addresses the transition in Indiana. The CLECs point out that SBC's position requires CLECs who had no commercial agreement with SBC before the TRRO, and who have not contractually agreed since the TRRO, to submit to SBC's terms without negotiation as envisioned by the FCC.

Mr. Smutniak also criticizes SBC's implication that the CLECs' proposed language would lead to "absurd, unfair and unlawful results" because not all CLECs would have identical results. Requiring an identical result is inconsistent with the Act's focus on individual interconnection agreements between CLECs and ILECs. It is inconsistent with paragraph 228 of the TRRO in which the FCC expressly allows CLECs and ILECs to negotiate their own transition arrangements. He added that the implication that it would be wrong to have CLECs pay different prices, even though they are buying the exact same product, rings hollow in light of the fact that many services that are identical from a technical perspective are priced differently by SBC once it is labeled a "product." Mr. Smutniak also notes that SBC erroneously assumes that CLECs who wait to transition are acting irresponsibly. He stated that it is quite possible that one CLEC

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[95] 47 C.F.R. § 51.319(d)(2)(iii).

[96] TRRO, ¶ 228 (emphasis added).

may have opted into SBC's Local Wholesale Complete offering prior to the release of the TRRO in order to obtain certainty and predictability for its operations and its costs, while another CLEC may have rejected the same offering because its business plan is to convert to its own switching and UNE-L and it planned to convert within a timeframe it hoped the FCC would set in the TRRO as the transition period. According to Mr. Smutniak, these motives have nothing to do with "acting responsibly" or "delay."

Mr. Smutniak states that SBC's view would create incentives for the CLECs to wait until the latest possible time to place orders to migrate their embedded UNE-P base, while at the same time SBC would have every incentive to overstate and exaggerate implementation challenges in order to get as many UNE-P customers converted as early as possible in order to charge the higher rate at the earliest possible time. Rather than create this disruptive and dysfunctional scenario, the CLECs point out that the FCC chose to eliminate such incentives by applying the ULS/UNE-P Transition Rate to the CLECs' embedded base of UNE-P customers until the end of the twelve-month transition period, even when those customers are migrated to an SBC functionally equivalent service arrangement prior to the end of the transition period, in order to complete all migrations by the FCC-mandated date of March 11, 2006.

2. Commission Discussion and Findings

The issue here is what price applies to a UNE-P arrangement that is converted to a different arrangement *before* the end of the FCC's transition period for ULS. SBC Indiana states that the price for the new service arrangement should go into effect immediately; that is, the CLEC should pay for the service it is actually receiving. The CLECs, by contrast, state that the FCC's transition price should remain in effect until the end of the transition period, no matter when the UNE-P is converted to something else.

The CLECs' proposal finds no support in the TRRO or any interpretation of that order, and we therefore reject it. SBC Indiana's language, on the other hand, is logical, fair, and consistent with the FCC's intent, and we find it should be adopted. The FCC plainly stated that CLECs will continue to have access to the UNE-P at TELRIC-based rates plus one dollar "until the incumbent LEC successfully migrates those UNE-P customers" to alternative arrangements.[97] This makes sense, for the FCC's transition prices logically apply only until the transition of any given arrangement is complete. The point of the transition period is to give CLECs enough time to establish alternative arrangements for serving their customers and avoid service disruptions. The goal was not merely to string out UNE pricing for a full 12 months. In other words, the transition periods are a way for the FCC to make the transition away from UNE-P less chaotic; they have nothing to do with a desire to keep UNE prices in place. Indeed, the FCC made that clear when it increased the price for de-listed UNEs during the transition period, providing a signal to CLECs to move on to other arrangements. Simply put, a CLEC should pay for the service it is purchasing. If that is the transitional UNE-P, it can pay

[97] TRRO, ¶ 199.

the UNE-P rate plus one dollar, but when it is something else, such as resale service or a tariffed service, it should pay the price that applies to that service.

This finding is consistent with the March 9, 2005 Docket Entry in Commission Cause No. 42749, which deals with TRO and TRRO issues that precede this Cause. That Docket Entry addresses similar concerns by CLECs:

> Joint CLECs have also expressed concern that the agreement being offered by SBC Indiana for continued service after March 10, 2005, would require immediate imposition of rates higher than the transition pricing established in the TRRO. We do not find this to be an unreasonable position for SBC Indiana to take. Clearly, the intent of the one-year transition period, and its associated pricing, is to allow for a planned, orderly, and non-disruptive migration of existing UNE-P customer off of UNE-P to an alternative arrangement at an established price for the transition period. Our interpretation is that the transition period is not designed to be a period in which CLECs that negotiate an agreement to continue their service with SBC Indiana are then entitled to continue with the same transition pricing. Once a CLEC agrees to continue its existing service arrangement, the issue of transitioning, and associated reasons for transition pricing cease.

While it is true that under these findings those CLECs that have made the decision to transition to alternative arrangements prior to the March 11, 2006 deadline face potentially higher prices for the services and elements they receive from SBC Indiana, these CLECs are not faced with the uncertainty faced by those CLECs that have not yet made that decision. In addition, those CLECs who have delayed until the last moment to finalize arrangements for the provision of service to their existing customers, and, as such, have enjoyed a potentially lower rate via the transitional pricing, now face the possibility of service interruptions to their customers and/or rates determined by SBC (See Issue 10 above) should they be unable to fully transition their customers to alternative arrangements prior to the March 11, 2006 deadline.

<u>**ISSUE 12**</u>

- **Statement of Issue: Should a CLEC be prohibited from obtaining more than ten unbundled DS1 dedicated transport circuits on each route where DS3 dedicated transport is available as a UNE?**

- **Disputed Agreement Language: Section 3.1.4.1**

  1. **Positions of the Parties**

A. SBC

The FCC's DS1 dedicated transport rule, 47 C.F.R. § 51.319(e)(2)(ii)(B), states that "a requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis." SBC Indiana contends that its proposed language in Section 3.1.4.1 of the Agreement properly reflects this rule, by stating that "[i]n accordance with Rule 51.319(e)(2), SBC is not obligated to provision to a CLEC more than ten unbundled DS1 Dedicated Transport circuits on each route on an unbundled basis."

SBC Indiana further asserts that the CLECs' proposed language attempts to unlawfully modify the FCC's DS1 dedicated transport rule, by adhering to the limit of ten DS1 dedicated transport UNEs only where "there is no Section 251 unbundling obligation for DS3 Dedicated Transport," and, where DS3 dedicated transport is available as a UNE, imposing no DS1 limit at all. The CLECs' proposed language, SBC Indiana states, appears nowhere in the FCC's rules, and is contrary to the plain language of those rules.

SBC Indiana also asserts that the CLECs' proposal is contrary to the FCC's reasoning. The FCC based the DS1 cap on evidence showing "that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s. . . such that it effectively could use a DS3 facility."[98] SBC Indiana witness Chapman testified that a volume cap of 10 DS1 dedicated transport circuits makes perfect sense because at volumes greater than 10, the efficient CLEC will place those dedicated transport circuits on a single DS3 circuit. Indeed, as the FCC noted, CLECs themselves submitted economic data showing that the cut-over point (*i.e.*, the point at which it is cheaper to buy a single DS3 than multiple DS1s) is around 10 DS1s.[99]

SBC Indiana further explains that the ten DS1 cap makes sense even where DS3s are available as UNEs, which is the situation in which the CLECs seek to nullify the FCC's rule and instead impose no cap on DS1s. According to SBC Indiana, the Commission should not permit CLECs to purchase numerous DS1 dedicated transport circuits without taking advantage of the efficiencies of aggregating DS1 dedicated transport circuits onto DS3 circuits. SBC Indiana states that such an approach is contrary to the FCC's analysis, as well as the economic cross-over data that the CLECs themselves submitted to the FCC.[100] Ms. Chapman concludes that there is no reason why CLECs should be permitted to order DS1 circuits in mass quantities on a single route, and there is certainly no reason why SBC Indiana should be put to the inefficiency of provisioning such volumes and using up more terminating facilities in the central office than is necessary to support an efficient CLEC.

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[98] TRRO, ¶ 128.

[99] *Id.*; *see also id.* at n. 358.

[100] *Id.*

SBC Indiana also explains that the CLECs' reliance on paragraph 128 of the TRRO, rather than on the FCC's regulation and its analysis, is misplaced. In that paragraph, the FCC states that where "there is no unbundling obligation for DS3 transport . . . we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits." SBC Indiana points out that the FCC does not go on to say, however, that where there is DS3 unbundling, there is no limit on the number of DS1s a CLEC may purchase. That is, SBC Indiana states, the sentence that the CLECs point to does not address the situations presented here–where there *is* an unbundling obligation for DS3 transport. In contrast, the FCC's regulation (47 C.F.R. § 51.319(e)(2)(ii)(B)) does address that situation, by plainly stating that there is a cap of 10 DS1 circuits, without reference to whether DS3 transport is or is not available. Thus, SBC Indiana contends, the CLECs' position boils down to the indefensible position that the FCC's regulation, which the Commission is bound to apply in this proceeding (47 U.S.C. § 252(c)(1)), should be rewritten.

Moreover, SBC Indiana adds, the remainder of the paragraph cited by the CLECs goes on to explain the FCC's reasoning: "When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply." According to SBC Indiana, a carrier "effectively could use a DS3 facility" whether that facility is available on an unbundled basis or through alternative sources. Thus, the "DS3 impairment conclusions should apply" as follows: if there is impairment, the carrier may obtain unbundled DS3 transport from the incumbent; if there is no impairment, the carrier may obtain DS3 transport from an alternative source. Either way, SBC Indiana asserts it makes no sense for the carrier to choose an inefficient number of DS1 transport circuits.

Also, SBC Indiana witness Chapman asserts that allowing the CLECs to request unlimited DS1s on a particular route where DS3s are available as UNEs would allow CLECs to circumvent the FCC's DS3 dedicated transport cap of 12 DS3s. Under the CLECs' proposal, a CLEC with 12 unbundled DS3 dedicated transport circuits on a route could still obtain hundreds of DS1 circuits, which is the equivalent of many more DS3s. In other words, SBC Indiana explains, the carrier could use DS1 circuits to effectively "double up" the capacity it is allowed to obtain on an unbundled basis.

Finally, SBC Indiana explains that the CLECs' argument regarding DS1 EELs is a red herring. Mr. Cadieux claims that if CLECs can obtain a maximum of ten DS1 transport circuits on an unbundled basis on any given route, then a CLEC would be limited to ten DS1 EELs. SBC Indiana explains that that claim, however, ignores the fact that CLECs may obtain EELs that consist of unbundled DS1 loops combined with unbundled DS3 dedicated transport. Accordingly, if a CLEC wishes to obtain EELs supporting more than 10 unbundled DS1 loops, the CLEC can aggregate the DS1 loops on a DS3-level transport circuit.

B. CLECs

While acknowledging that the FCC has established a cap on the number of DS1 transport circuits that a CLEC can obtain as Section 251 UNEs, the CLECs argue that under the TRRO, the 10 circuit limitation for DS1 transport applies only on those transport routes where DS3 transport is not available as a Section 251 UNE (*i.e.*, on those routes where CLECs are not impaired with respect to DS3 transport). The genesis of the CLECs' proposed language is the parallel Illinois arbitration proceeding, where SBC has already agreed to the language at issue.

The FCC addresses the 10 DS1 circuit cap both in its new rules and in the text of the TRRO. The applicable rule is 47 C.F.R. § 51.319(e)(2)(ii)(B). While the rule provision does not explicitly address the limitation on the applicability of the DS1 transport cap, the CLECs posit that the related text of the TRRO does so in a clear and unambiguous fashion. Paragraph 128 of the TRRO states as follows:

> ***Limitation on DS1 Transport.*** On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits. This is consistent with the pricing efficiencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s. When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.

The CLECs maintain that the FCC is explicit that the limitation of 10 DS1 UNE transport circuits only applies on those particular routes where the ILEC is no longer obligated to provide DS3 UNE transport but where impairment exists for DS1 transport.

The CLECs argue the sole reason for the limitation of the 10 DS1 UNE transport circuits is to protect the efficacy of the application of FCC determinations regarding limits on DS3 UNE transport circuits. The CLECs reason that because the FCC has set forth the criteria whereby SBC Indiana will be relieved of DS3 transport unbundling obligations, the DS1 limitation only makes sense in instances where there is a limitation on the DS3. According to the CLECs, if there were no cap on DS1 UNE transport in instances where there were no DS3 unbundling obligations, the lack of DS3s would not properly act to relieve SBC Indiana of unbundling for DS3 capacity circuits, since CLECs could merely obtain multiple numbers of DS1 UNE transport circuit in capacity well in excess of DS3, in what would be a clear frustration of the FCC determination on DS3 unbundling. Thus, the cap is necessary to fill the potential "hole" in the DS3 non-impairment finding. This "hole" only exists on routes where the Section 251 unbundling obligation has been removed for DS3 transport, *i.e.*, on routes where neither end-point is a Tier 3 wire center. According to the CLECs, a straightforward reading of paragraph 128 indicates that it is this potential "hole" that the DS1 transport cap is intended to plug.

The CLECs express the concern that if the DS1 transport cap is applied in an over-broad manner, it will have a negative effect on the use of DS1 EELs and on competition in the small and medium-sized business customer market where the use of DS1 EELs is most prevalent. As explained in the testimony of Mr. Cadieux, DS1 EELs are often used by CLECs to provide voice, broadband internet, and bundled voice/broadband internet services to small and medium-sized business customers. With respect to EELs, the FCC concluded, among other things, that the loop/transport combinations facilitate the growth of facilities-based competition in the local market, extend CLECs' geographic reach and promote innovation.[101] The CLECs contend that SBC's proposal to extend the DS1 cap to all transport routes would artificially constrain the availability of DS1 EELs and is inconsistent with the FCC's policy favoring the availability of EELs. DS1 EELs allow CLECs to extend the geographic scope of their services beyond the most dense wire centers where collocations are often deployed to include wire centers with more moderate density.

If SBC's position were adopted, the CLECs claim they would no longer be able to obtain facilities in a manner that SBC provides such facilities to itself, except through a commingled DS1 UNE loop with Special Access DS1 transport facility. However, this arrangement may not be an economically feasible alternative for serving small business customers. This is because SBC's DS1 special access services are priced substantially above TELRIC DS1 transport rates. Moreover, the CLECs contend that it is not clear whether SBC will establish ordering and provisioning systems and processes for such commingled arrangements that will approach those that have been available for several years for DS1 EELs.

The CLECs also respond to SBC Indiana's contention that CLECs would still have access to EELs despite the DS1 limit by using DS3 transport on routes where DS3 is available. According to CLEC witness Cadieux, the conversion from DS1 to DS3 transport requires physical disconnection and reconnection of circuits, with potentially substantial amounts of CLEC and ILEC resources needed, particularly if the project involves a significant number of circuits across many transport routes. Finally, the CLECs cite potentially significant non-recurring charges associated with disconnecting DS1 transport circuits and establishing DS3 circuits. The CLECs believe there is no policy reason to force CLECs and ILECs into this type of activity on routes where both DS3 and DS1 transport continue to be available as Section 251 UNEs.

2. Commission Discussion and Findings

The Commission finds that SBC Indiana's proposed language, rather than the CLECs', should be included in the parties' Agreement. The pertinent FCC regulation, 47

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[101] TRO, ¶ 576.

C.F.R. § 51.319(e)(2)(ii)(B), establishes a maximum cap of ten unbundled DS1 dedicated transport circuits on any given route, without qualification and without regard to the status of DS3 unbundling. The CLECs' attempt to graft a qualification onto the FCC's rule, so that the cap applies only where DS3 dedicated transport is not available as a UNE, is inconsistent with the plain language of the FCC's rule.

The single sentence of paragraph 128 upon which the CLECs rely cannot reasonably be interpreted to nullify the plain language of the FCC's rule. While the FCC states that a cap of ten DS1s applies where "there is no unbundling obligation for DS3 transport," nowhere does the FCC say that the opposite is also true: that where DS3 dedicated transport is available as a UNE, there is *no* cap on DS1 unbundling on a particular route. Moreover, as SBC Indiana demonstrated, it would not make any sense to allow unlimited DS1 unbundling on a particular route where DS3s are available as UNEs, because that would be grossly inefficient, as well as contrary to the CLECs' own analysis that they presented to the FCC to show that about ten DS1s is the cross-over point at which it is more efficient to purchase a single DS3 rather than use multiple DS1s.

The Commission agrees with the Illinois, Michigan, and Ohio commissions that, pursuant to the FCC's rule, the DS1 cap is applicable regardless of the DS3 impairment status of a route.[102]

<u>ISSUE 13</u>

- **Statement of Issue: If a CLEC has not self-certified for the initial list of wire centers designated as having met the threshold criteria for non-impairment for loops and/or transport, the CLEC must transition off of applicable UNEs within a defined transition period as governed by the Agreement. Can the CLEC, with respect to seeking new UNEs from such wire centers, provide a self-certification after the defined transition period has expired?**

- **Disputed Agreement Language: Section 4.1**

1. Positions of the Parties

A. SBC

SBC Indiana explains that Issue 13 involves the time period within which a self-certification must be made for wire centers initially designated by SBC Indiana in the immediate aftermath of the TRRO as satisfying the FCC's non-impairment criteria. SBC Indiana states that this issue relates to language in Section 4.1 of the Agreement, which reflects the 60-day deadline for CLECs to challenge SBC Indiana's designation that a wire center is "non-impaired." SBC Indiana's proposed language in Section 4.1 is intended to address self-certification with respect to wire centers that SBC Indiana has

[102] *See Illinois TRO/TRRO Order* at 92; *Michigan TRO/TRRO Order* at 25-26; *Ohio TRO/TRRO Order* at 55-56.

already designated as non-impaired as of March 11, 2005, *i.e.*, the wire centers subject to the TRRO's 12 and 18-month transition plans. SBC Indiana states that its language provides CLECs a reasonable period of time to make a self-certification, which is until the end of the applicable transition period (March 11, 2006 or September 11, 2006).

SBC Indiana maintains that it identified the relevant wire centers as non-impaired months ago, so the CLECs have already had months to self-certify and dispute SBC Indiana's identification. Moreover, pursuant to the agreed language of the Agreement, the embedded base of UNEs in the applicable wire centers must be transitioned to alternative arrangements by the end of the transition period unless a CLEC provides a self-certification. SBC Indiana asserts that if the CLECs do not self-certify before the end of the transition period, and the embedded base is transitioned to alternative arrangements, a CLEC should not be allowed thereafter to self-certify in order to obtain new UNEs in the wire center. Rather, SBC Indiana contends, after the end of the 12 or 18-month transition period, the industry, including SBC Indiana, other CLECs, and the Commission should have the certainty of knowing that the impairment status of these wire centers has been established.

B. CLECs

The CLECs oppose SBC's proposed terms in Section 4.1 of the Agreement. The CLECs note that Paragraph 234 of the TRRO creates a presumption that a wire center is deemed non-impaired until established otherwise, by allowing a CLEC to self-certify a UNE order for any wire center where it believes it is entitled to do so. SBC's proposal would turn that presumption on its head by providing that CLECs would permanently waive their right to self-certify for any wire center that SBC had designated as non-impaired as of March 11, 2005, if the CLEC does not do so before the end of the applicable transition period.

The CLECs state they are not proposing an unfettered right to submit self-certifications. As indicated in the undisputed language in Section 4.1.1 of the Agreement, if the Commission has previously issued a ruling, in connection with SBC's dispute of a CLEC's self-certification for the wire center, that the wire center is in fact non-impaired, another CLEC would be precluded in the future from submitting a self-certification for that wire center. Additionally, as with any other self-certification by a CLEC for a DS1/DS3 loop or transport UNE, the CLEC is required, in accordance with the TRRO, to perform a reasonably diligent inquiry to determine, to the best of CLEC's knowledge, whether the wire center meets the non-impairment thresholds before submitting its self-certification and order for the UNE.[103] This requirement is embodied in the undisputed language for Section 4.1.1.

Finally, as also indicated in the undisputed language for Section 4.1.1, a CLEC that has Section 251 DS1/DS3 loop and/or transport UNEs at a wire center that SBC has designated as non-impaired as of March 11, 2005, must dispute that designation through

[103] TRRO, ¶ 234.

a self-certification during the applicable transition period (*i.e.*, by March 11, 2006), or migrate its customers served by those UNEs to alternative arrangements by the end of the transition period. Therefore, as a practical matter, it is unlikely that a self-certification would be submitted for such a wire center after the applicable transition period by a CLEC that had DS1 or DS3 loop or transport UNEs at the wire center as of March 11, 2005, or during the applicable transition period.

The CLECs' position on Issue 13 is primarily directed towards those CLECs whose present business plans do not cause them to have or need DS1/DS3 loop or transport UNEs at a wire center that SBC has designated as non-impaired as of March 11, 2005, until after the expiration of the applicable transition period. The CLECs contend that those CLECs should not have to submit self-certifications for SBC wire centers designated as non-impaired as of March 11, 2005, even though they have no present interest in doing business in areas served by those wire centers, simply to protect their ability to challenge SBC's designation of the wire center at some point in the future should a business need arise. In the future, according to the CLECs, a CLEC that had no UNEs at a wire center that SBC declared to be non-impaired as of March 11, 2005, could have a business need to obtain DS1/DS3 loop or transport UNEs at that wire center. In this situation, the CLEC should not be precluded from submitting a self-certification and contesting SBC's designation of the wire center.

2. Commission Discussion and Findings

The Commission agrees with the CLECs and finds SBC's proposed terms for Section 4.1 of the Agreement should be rejected.

Under SBC's proposal, a CLEC will have to submit self-certifications for SBC wire centers designated as non-impaired as of March 11, 2005, by no later than March 11, 2006, even though they have no present interest in doing business in areas served by those wire centers. If the SBC proposal were adopted, these CLECs would have to self-certify simply to protect their ability to challenge, at some point in the future, SBC's designation of the wire center as non-impaired, should a business need arise. But since such a business need may never arise in the future at the particular wire center for a particular CLEC, filing a self-certification now (and SBC's action in disputing it) would result in a dispute proceeding that otherwise would never have had to occur. SBC's language, therefore, ultimately would lead to needless disputes and litigation between CLECs and SBC.

SBC's arguments ignore provisions that limit the likelihood and extent of CLECs making self-certifications to order UNE loops and transport at a non-impaired wire center after the end of the transition period. First, under the agreed language for Section 4.1, if the Commission has previously upheld SBC's designation of the wire center in a dispute proceeding, then all future self-certifications are foreclosed. Thus, if a CLEC with UNEs currently in a wire center that SBC has designated as non-impaired disputes (via self-certification) SBC's designation, and the Commission rules that SBC's designation is correct, Issue 13 is thereafter moot for that wire center. Second, the CLEC, as required by the FCC's rules, must in fact make a diligent inquiry and have a good-faith basis for believing that SBC's designation is erroneous. Third, SBC's scenario of a CLEC that has DS1/DS3 loop or transport UNEs in a wire center during the TRRO transition period, disconnects those UNEs or transitions them to other arrangements without disputing SBC's designation of the wire center, and then at some point *after* March 11, 2006, submits a self-certification and order for a *new* DS1/DS3 loop or transport UNE in that wire center, is highly unrealistic. The only circumstances in which such a scenario might occur is if the CLEC comes into possession of credible facts that SBC's original designation of the wire center was erroneous and continues to be erroneous, in which case SBC's designation should be subject to dispute via self-certification, regardless of the passage of time.

ISSUE 14

- **Statement of Issue: How frequently may SBC update its list of non-impaired wire centers?**

- **Disputed Agreement Language: Section 4.1.1.1**

1. Positions of the Parties

A. SBC

The issue the CLECs pose under Issue 14 is how often SBC Indiana should be allowed to assert that additional wire centers satisfy the FCC's non-impairment criteria (e.g., if a wire center experiences growth in the number of business lines and/or fiber-based collocators) such that unbundling of certain UNEs is no longer required pursuant to the FCC's rules. According to SBC Indiana, the answer to that question is simple: whenever SBC Indiana believes that additional wire centers satisfy the FCC's criteria. The FCC's rules state that ILECs are not required to unbundle high capacity loops and transport in wire centers that satisfy certain criteria.[104] Accordingly, SBC Indiana states that if those criteria are satisfied in a wire center, CLECs are no longer entitled to unbundling in the wire center and SBC Indiana is entitled to unbundling relief. All of this, of course, is subject to the CLECs' ability to self-certify, so SBC Indiana assures us that there is no question of unilateral action here.

In Section 4.1.1.1 of the Agreement, the CLECs propose that SBC Indiana "may not update the list [of non-impaired wire centers] more frequently than one time during any given six month period." SBC Indiana opposes the CLECs' language, arguing that the CLECs' proposed limitation does not appear anywhere in the FCC's rules.

SBC Indiana asserts that the CLECs' proposed language unlawfully conflicts with the FCC's rules. For instance, the FCC's rule states that DS1 loop unbundling is not required in any wire center "[o]nce a wire center exceeds both of these thresholds" of at

[104] *See* 47 C.F.R. § 51.319(a)(4)(i), (a)(5)(i), (e)(2)(ii), (iii), and (iv).

least 60,000 business lines and four fiber-based collocators.[105] The rule, SBC states, does not condition unbundling relief based upon when other wire centers have been deemed non-impaired, and it does not say that relief in one wire center means a six-month freeze on relief in others. In other words, the FCC's rules do not state that DS1 loop unbundling is not required once the thresholds are satisfied *unless* within the prior six months the ILEC has identified other wire centers that exceeded the FCC's thresholds for high capacity loop or dedicated transport unbundling, in which case DS1 loop unbundling is still required in the wire center until a six-month period expires. SBC witness Ms. Chapman indicates that the CLECs' proposal to add that qualification to the FCC's rules is unlawful and would serve no purpose other than to stall the unbundling relief to which SBC Indiana is entitled under federal law.

B. CLECs

CLEC witness Mr. Cadieux proposes that the Commission adopt terms that would allow updates to the list of non-impaired wire centers to take place in a structured manner so as not to unduly disrupt end users and allow the CLECs to develop and utilize business plans in an appropriate manner.

The CLECs assert that SBC's proposal is unsupported by a reasonable interpretation of the FCC's rules. According to the CLECs, SBC relies upon 47 C.F.R. § 51.319(a)(4)(i), (a)(5)(i), (e)(2)(ii), (iii) and (iv), but it mischaracterizes these references. The CLECs contend that these references do not mandate any particular timeframe, and the Commission has authority to manage the procedure for its own dockets, including managing the process pertaining to self-certifications and challenges to self-certifications.

2. Commission Discussion and Findings

The Commission rejects the CLECs' proposed language and finds SBC's proposed language should be included in the Agreement. The CLECs' proposed language, stating that SBC Indiana may not update the list of wire centers that SBC asserts are non-impaired more frequently than every six months, appears nowhere in the FCC's rules or the TRRO and is an artificial construct. We do not believe SBC's continual updating will unduly disrupt end users or not allow CLECs to develop and utilize their business plans. The FCC's rules expressly state, e.g., "no future . . . loop unbundling" is to occur in a wire center "[o]nce a wire center exceeds both of these thresholds."[106] The FCC's rules do not say that unbundling shall continue for six months even in a wire center where the thresholds have been exceeded, in the event that *other* wire centers were previously deemed non-impaired.

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[105] 47 C.F.R. § 51.319(a)(4)(i).
[106] 47 C.F.R. § 51.319(a)(4)(i).

ISSUE 15

- **Statement of Issue: If a CLEC does not self-certify within 60 days of SBC issuing an Accessible Letter designating that the threshold has been met in additional wire centers, the CLEC must transition off of applicable UNEs which were already provisioned at the time the Accessible Letter was issued. Can the CLEC, with respect to seeking new UNEs from the newly designated wire centers, provide a self-certification more than 60 days after SBC issues the Accessible Letter?**

- **Disputed Agreement Language: Sections 4.1.1.4, 4.1.1.6, 4.10**

1. Positions of the Parties

A. SBC

Issue 15 involves the time period within which a self-certification must be made for wire centers that, sometime in the future, SBC Indiana designates as satisfying the FCC's non-impairment criteria. According to SBC Indiana, the FCC did not mandate a specific process by which wire centers should be added to the list of unimpaired wire centers in the future. SBC Indiana states that it proposes a straightforward process: if SBC Indiana believes additional wire centers have satisfied the non-impairment thresholds, SBC Indiana will notify CLECs by an Accessible Letter and by a website posting. For the next 30 days, SBC Indiana will continue to accept CLEC orders for the impacted high-capacity loops or transport even without CLEC self-certification. A CLEC would have 60 days after issuance of the Accessible Letter to self-certify that it is entitled to obtain the affected loops or transport as a UNE, notwithstanding SBC Indiana's identification of the wire center as non-impaired. If a CLEC self-certifies within 60 days, the parties will follow the dispute resolution process. If a CLEC does not self-certify within 60 days, it must transition the affected high-capacity loops or transport. Finally, in Section 4.1 of the Agreement, SBC proposes that a "CLEC may not submit a self-certification for a wire center after the applicable transition period... for the [network element] impacted by the designation of the wire center has passed."

SBC Indiana contends that its proposed process provides CLECs a reasonable period of time after SBC Indiana has designated a wire center as non-impaired to conduct a reasonably diligent inquiry and, if appropriate, to self-certify and begin the Commission dispute resolution process. In SBC Indiana's view, the FCC's non-impairment criteria require a time-sensitive determination as to whether a given wire center, at a given point in time, has the threshold number of business lines and/or fiber-based collocators. If CLECs are going to dispute an SBC Indiana wire center designation, that dispute should occur in close proximity to the time of SBC Indiana's designation. Otherwise, Ms. Chapman asserts, it could be difficult for the parties, and ultimately the Commission, to review the conditions as they existed at the time of designation.

Further, SBC Indiana points out that transitioning circuits to and from UNEs imposes costs on all parties. If SBC Indiana identifies a particular wire center as non-impaired and no CLEC disputes that designation, SBC Indiana and the CLECs will expend time and money to transition the UNEs in that wire center to alternative arrangements. If, after the transition period expires, a CLEC could then submit a self-certification to challenge the designation, all of that effort and expense would be potentially wasted.

SBC Indiana states further that its proposal is even-handed. It requires SBC Indiana to dispute a CLEC's self-certification in a timely manner. In particular, Section 4.1.3 requires SBC Indiana to notify CLECs of its intent to challenge a self-certification within 30 days, and to file a complaint within 60 days. It would be unreasonable and inequitable, Ms. Chapman explains, to impose a limit on SBC Indiana's response time while allowing CLECs an unlimited period to respond to SBC Indiana's notification of a non-impairment designation.

In contrast, SBC Indiana notes that the CLECs' proposed language would impose no time limit on a CLEC's ability to self-certify. Since self-certification effectively permits a CLEC to order high-capacity circuits in the relevant wire center, SBC Indiana warns of the possibilities for mischief. A CLEC could self-certify to delay the transition and then withdraw its self-certification before the Commission has an opportunity to address the issue and resolve the status of the wire center.

SBC Indiana disagrees with the CLECs' suggestion that there should be no limit on self-certifications made after a transition period is complete, because a CLEC's business decision may not justify a timelier self-certification. That argument, SBC Indiana asserts, is not logical. In order to be placed on the "non-impaired" list in the first place, a wire center must have a significant number of fiber-based collocators and/or a large number of business lines. Accordingly, Ms. Chapman explains, any wire center placed on the list is an attractive target for CLECs, and has significant revenue potential. This is the very type of wire center where CLECs tend to focus their business plans. Further, Ms. Chapman testified, even if a few CLECs are not interested in such a wire center, others will undoubtedly have an interest in challenging SBC Indiana's designation if such a challenge would be meritorious. Moreover, Ms. Chapman states, it is illogical to permit a CLEC to self-certify after the entire CLEC community has transitioned off a UNE and demonstrated that it is able to operate without access to the UNE in question.

SBC Indiana also explains that the CLECs are wrong to suggest that SBC Indiana would not be prejudiced if the amendment allowed for self-certification after the transition period expires. Ms. Chapman notes that SBC has not insisted that CLECs submit a self-certification before each and every high-capacity loop and dedicated transport order, as the TRRO contemplates, but instead has proposed that CLECs submit a self-certification only for those wire centers SBC Indiana has indicated it believes satisfy the FCC's non-impairment criteria. However, Ms. Chapman states, CLECs should be limited to a reasonable period of time to self-certify if they disagree with SBC Indiana's designation, to give SBC Indiana certainty. Moreover, Ms. Chapman repeats that it would be unreasonable and inequitable to allow CLECs unlimited time to respond, via self-certification, to SBC Indiana's notice of a wire center designation, while limiting SBC Indiana to 60 days to respond to a CLEC's self-certification.

Finally, SBC Indiana states that, contrary to the CLECs' suggestion, its proposal would not "force unnecessary litigation." To the contrary, SBC Indiana asserts, all that SBC's proposal does is ensure that disputes are resolved on a timely basis, rather than strung along indefinitely. Ms. Chapman believes that if there are disputes regarding a wire center, those disputes should be resolved before the transition of circuits, via timely self-certification and dispute resolution. Otherwise, the parties could be forced to undertake the expense of completing a transition that should not have been required.

B. CLECs

Similar to its arguments raised in response to Issue 13 above, the CLECs assert that under their proposal, a CLEC that has DS1/DS3 loop or transport UNEs in a wire center when SBC designates the wire center as non-impaired must dispute SBC's designation within 60 days by filing a self-certification; otherwise, the CLEC must disconnect or transition its UNEs to alternative arrangements by the end of the applicable transition period. Additionally, if the Commission at any time resolves a dispute between SBC and a CLEC over the designation by ruling that the wire center is in fact non-impaired, all future CLEC self-certifications for that wire center are foreclosed. Finally, the TRRO and the FCC rules do not place any time-based limitation on a CLEC's right to submit orders for DS1/DS3 loop and transport UNEs with self-certifications, based upon the required reasonably diligent inquiry and good faith basis for believing that the wire center in fact remains impaired. Each of these factors will limit the likelihood of CLECs submitting extensive numbers of self-certifications to order high capacity loop and transport UNEs at wire centers SBC has declared to be non-impaired, after the end of the applicable transition period. The CLECs maintain that their position will protect the rights of a CLEC that has a business need to submit a self-certification for a particular wire center, and a good-faith basis for doing so, after the applicable transition period.

2. Commission Discussion and Findings

The area of disagreement with Issue 15 is, following the expiration of the applicable transition period, whether a CLEC must self-certify within 60 days of SBC issuing an Accessible Letter designating a particular wire center as non-impaired, if the CLEC does not already have DS1/DS3 loop or transport UNEs at that wire center. For the reasons discussed above for Issue 13, the Commission agrees with the CLECs that they should not be limited to 60 days under such circumstances. Specifically, we find the CLECs proposed language in Section 4.1.1.4 should be adopted and SBC's language rejected, SBC's language in Section 4.1.1.6 should be rejected, and Section 4.10 which includes new CLEC language should be adopted.

ISSUE 16

- **Statement of Issue: If a CLEC does not self-certify within 60 days of SBC issuing an Accessible Letter designating that the threshold has been met in additional wire centers, the CLEC must transition off of applicable UNEs which were already provisioned at the time the Accessible Letter was issued. How long is this transition period for the CLEC, and during this transition period can the CLEC order applicable UNEs from the newly designated wire centers?**

- **Disputed Language: Section 4.1.1.5**

1. Positions of the Parties

A. SBC

Section 4.1.1.5 addresses the transition from high-capacity loops or transport when SBC Indiana has identified an additional wire center where such unbundling is no longer required, and the CLEC does not dispute SBC Indiana's identification. The parties disagree regarding the details of the necessary transition, in particular (a) the appropriate length of the transition, and (b) whether CLECs may continue ordering new DS1 loops for existing customers during the transition.

SBC Indiana witness Ms. Chapman proposes a 90-day transition period for CLECs to transition to alternative arrangements when wire centers satisfy the FCC's non-impairment criteria in the future. The CLECs, on the other hand, propose to use 12 or 18-month transition periods, the same time periods established by the TRRO for the UNEs that were de-listed on March 11, 2005.

SBC Indiana explains that the TRRO's 12 and 18-month transition periods do not apply to future additions of wire centers to the non-impaired list. Rather, those lengthy transition periods apply only to the initial, much larger embedded base of UNEs de-listed on the effective date of the TRRO (March 11, 2005). For instance, 47 C.F.R. § 51.319(a)(4)(iii) states: "For a 12-month period beginning on the effective date of the [TRRO], any DS1 loop UNEs that a competitive LEC leases from the incumbent LEC as of that date" is subject to the TRRO's transition scheme. That is, the 12-month transition process applies only for a "12-month period beginning on" March 11, 2005, and applies only to UNEs that a CLEC leased "as of" March 11, 2005.

Further, SBC Indiana contends that it would make no sense to apply the lengthy 12 or 18-month transition process to future de-listings. The FCC created such lengthy transitions because the TRRO immediately de-listed large numbers of UNEs in numerous wire centers. In the future, additional wire centers will likely be de-listed in a piecemeal fashion. According to SBC Indiana, CLECs cannot reasonably claim that they require the same lengthy transition periods for future de-listings of much smaller numbers of UNEs.

According to SBC, the FCC also indicated that the initial 12 and 18-month transition periods were necessary in order for carriers "to modify their interconnection agreements, including completing any change of law processes."[107] After the parties' Agreement becomes effective, however, that process will be complete, and the Agreement will already provide a process for implementing future wire center de-listings. That is, the parties will not need to modify their Agreement to implement additional wire center de-listings, so the CLECs cannot plausibly claim that they need the same lengthy 12 and 18-month transition periods.

SBC Indiana proposes that, in the event unbundling is no longer required in a particular wire center, "[d]uring the applicable transition period, CLEC may not obtain *new* [affected high capacity loop or dedicated transport UNEs]." The CLECs oppose this SBC language, and instead propose that "DS1 Loops will continue to be provisioned for a period of 12 months . . . for existing customers." SBC Indiana contends that its proposed language is consistent with the TRRO, while the CLECs' proposed language would violate federal law.

According to Ms. Chapman, the plain language of the FCC's rules clearly bars the provision of new high-capacity loops or dedicated transport UNEs where the FCC's non-impairment criteria are satisfied. It is equally clear that those rules do not make any exception for new DS1 loops used to serve existing customers, as opposed to any existing DS1 loops already used to serve existing customers, which loops are subject to the transition period. For instance, SBC asserts that the FCC's DS1 and DS3 loop rules state that "[o]nce a wire center exceeds [the FCC's non-impairment] thresholds, no future [DS1/DS3] loop unbundling will be required in that wire center."[108] The rules do not make any exception for the addition of new loop UNEs to serve existing customers.

Similarly, SBC Indiana relies on the text of the TRRO, which states that CLECs are not permitted to order new UNEs in a non-impaired wire center during the transition period. Addressing its initial transition periods, the FCC explained that "[t]hese transition plans shall apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs pursuant to Section 251(c)(3) where the Commission determines that no Section 251(c) unbundling requirement exists."[109] It is SBC Indiana's position that CLECs are not permitted to order new UNEs, whether for an existing customer or a new customer, during the transition period, or at any time after the FCC's non-impairment criteria are satisfied.

[107] TRRO, ¶ 143.

[108] 47 C.F.R. § 51.319(a)(4)(i), (5)(i).

[109] TRRO, ¶ 142. *See also id.* at ¶ 195 ("[t]hese transition plans shall apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs pursuant to Section 251(c)(3) where the Commission determines that no Section 251(c) unbundling requirement exists").

B. CLECs

The CLECs assert that their proposed terms are necessary to account for the future changes in the wire center designations that may occur after 2005 if a wire center has a change in the number of business lines or fiber-based collocators. When Section 251 UNEs are eliminated by this process in the future, the TRRO recognizes that CLECs are entitled to "appropriate" transition terms.[110]

According to the CLECs, the FCC explained in the TRRO that CLECs need sufficient time "to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase or lease facilities."[111] Deployment of loop facilities is a time-consuming process, and the FCC has repeatedly emphasized that sufficient transition periods are appropriate to avoid "flash cuts" that are disruptive to carriers and their customers.[112] The FCC found that for high-capacity loops and transport "the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase, or lease facilities."[113] In setting an 18-month transition period for dark fiber, the FCC said: "because it may take time for competitive LECs to negotiate IRUs [Indefeasible Rights of Use] or other arrangements with incumbent or competitive carriers, we find that a more lengthy transition plan is warranted for transitioning carriers from the use of UNE dark fiber to alternative facilities."[114] As Mr. Cadieux testified, the CLECs will need to make the same types of adjustments when loop and transport UNEs are eliminated in the future as they make today. Thus, he concludes the analysis and conclusions reached by the FCC in the TRRO, in setting 12-month and 18-month timeframes for the initial transition periods, should apply to the transition periods for any subsequent wire center designation.

According to the CLECs, SBC has not provided any compelling evidence that a transition could reasonably be completed in 90 days, as it proposes here. Given weather conditions and unforeseen delays in available facilities, the CLECs do not believe that conversions for multiple CLECs in a given office, can take place 30 days from the end of a 60 day notice period as proposed by SBC.

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[110] *See id.* at n. 399 ("We recognize that some dedicated transport facilities not currently subject to the non-impairment thresholds established in this Order may meet the thresholds in the future. We expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."); n. 519 (same for loops).

[111] *Id.* at ¶ 196.

[112] *Id.* at ¶ 226.

[113] *Id.* at ¶ 143.

[114] *Id.* at ¶ 144.

The CLECs note that the FCC specifically allowed the 12 to 18-month transition periods to allow both the ILECs and CLECs time to perform necessary tasks, including decisions concerning where to deploy, purchase, or lease facilities.[115]

2. Commission Discussion and Findings

The Commission agrees with the CLECs, and finds that the CLECs' proposed terms in Section 4.1.1.5 should be incorporated into the Agreement.

Although the classification of most of the wire centers that will be affected by the TRRO will be established in the initial implementation of the Order and are unlikely to change, future changes after 2005 are possible if a wire center has a change in the number of business lines or fiber-based collocators. When Section 251 UNEs are eliminated by this process in the future, the TRRO recognizes that CLECs are entitled to "appropriate" transition terms. SBC has noted, correctly, that the 12 and 18-month periods adopted in the TRRO do not automatically apply to future transitions. However, the TRRO clearly requires SBC to provide an "appropriate" transition, and it sets forth standards that show that the transition offered by SBC is inadequate.

The CLECs' proposed language is adopted because the FCC's analysis and conclusions in the TRRO, setting the 12-month and 18-month transition period time-frames for DS1/DS3 loop and transport and dark fiber UNEs at wire centers that meet the non-impairment criteria as of March 11, 2005, should also apply to any subsequent designations of wire centers as non-impaired. Transitioning at each wire center requires individualized analysis, planning, and procurement of and contracting for alternative arrangements (e.g., self-provisioning for obtaining facilities from a third-party provider).

It is likely that SBC has many wire centers that will never meet the FCC's non-impairment tests, in that they will never have enough business lines and fiber-based collocators to qualify as non-impaired. Yet, under SBC's argument, all CLECs should today be making contingency plans to transition from their DS1/DS3 UNE loop and transport facilities to alternative arrangements in all wire centers. This is an unreasonable expectation that is not called for under the TRRO.

SBC also argues that transition periods for wire centers designated as non-impaired after March 11, 2005, should be shorter because the CLECs will be performing the same tasks in the future as the tasks necessary to transition Section 251 high capacity loop and transport UNEs at wire centers that are designated as non-impaired before March 11, 2005. We disagree. Although CLECs (as a group) may be performing the same tasks to transition UNEs to alternate arrangements that CLECs (as a group) previously performed at other wire centers, there is no reason to believe the necessary tasks, such as obtaining rights-of-way and construction permits, identifying potential alternative suppliers or vendors, getting price quotes and negotiating contracts, and (particularly if a CLEC decides to self-provide) constructing new facilities, can be

[115] *Id.* at ¶ 143.

completed in any less time. Additionally, each wire center's facility arrangements are different and generally require distinct engineering analysis and approaches on a case-by-case basis. Further, particular CLECs that have loop or transport UNEs in a particular wire center designated as non-impaired after March 11, 2005, may not have had UNEs in other, previously designated wire centers.

The Michigan, Illinois, and Ohio Commissions have all found for the CLECs on this issue, recognizing that the work that will need to be accomplished to transition off UNEs cannot reasonably be accomplished in the short timeframe SBC proposes here. We agree, and find that SBC has presented no compelling argument that would justify its proposal. In contrast, the CLECs have presented ample evidence that the transition periods set forth in the TRRO would be appropriate transition periods going forward.

This finding that CLECs may continue ordering new DS1 loops for existing customers during the transition period is consistent with the finding in the March 9, 2005 Docket Entry in Commission Cause No. 42749 that CLECs should have the ability to maintain their existing customer base during a transition period, including ordering new features and elements for existing customers. Specifically, the Presiding Officers in that Cause found:

> In light of the purposes of the TRRO's transition period, it is a reasonable conclusion that the FCC did not intend that a CLEC's ability to continue serving its existing UNE-P customer base during the transition period would be qualified with the inability to provide existing customers with routine telecommunications needs requiring moves, changes or adds. To conclude otherwise would be disruptive to both the customer and to the CLEC. These disruptions are avoidable and their avoidance is consistent with the purposes for having a transition period. We find, therefore, that the intent of the TRRO requires SBC Indiana, for the duration of the transition period, to honor UNE-P orders for a CLEC's embedded customer base in a manner consistent with SBC Indiana's processing of such orders prior to the effective date of the TRRO.

ISSUE 18

- **Statement of Issue: How should transitions from high capacity loops and transport be handled and what charges should apply?**
- **Disputed Agreement Language: Section 4.3**

1. Positions of the Parties

A. SBC

The agreed language for Section 4.3 states that the "applicable wholesale rates" will apply to cross-connects that are attached to loops or dedicated transport facilities. Under Issue 18, the CLECs have proposed to insert the qualifier "[a]s of the date of conversion of such DS1/DS3 High Capacity Loops, DS1/DS3 Dedicated Transport, or Dark Fiber Transport." SBC Indiana states that the purpose of the CLECs' proposed language is unclear. SBC Indiana notes that no CLEC witness provided direct testimony on this issue.

Ms. Chapman further responds that the rates that are "applicable" for the cross-connect should apply at all times, both before and after the transition. For example, SBC Indiana illustrates that while the applicable cross-connect rate prior to the transition may be a TELRIC-based rate plus the additional 15% provided for in the FCC's transition pricing rule, the applicable cross-connect rate after the transition may be an access rate. SBC Indiana concludes that the CLECs' proposed language is improper, as it would suggest that the applicable rates will not be "applicable" until after the transition.

In short, SBC Indiana states, it is lawfully entitled to the rates that are "applicable" for the cross-connect before the transition as well as after.

B. CLECs

The CLECs note that when a CLEC submits a request for the transition of DS1/DS3 loops, DS1/DS3 dedicated transport or dark fiber dedicated transport arrangements into the applicable wholesale rates, those rates should begin to apply on the date upon which the conversion actually occurs. The CLECs contend that their proposed language will ensure that there will be no retroactive application of the wholesale rates.

It is SBC's standard practice to promptly issue a bill once an Access Service Request/Local Service Request ("ASR/LSR") has been completed, turned over, and accepted by the requesting carrier. According to the CLECs, the language SBC proposed does not indicate when the charges will be assessed. Instead, the sentence that precedes the CLECs' proposed sentence states only that, "requested transition of DS1/DS3 Loops, DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport arrangements shall be performed in a manner that reasonably minimizes disruption or degradation to CLEC's customer's service, and all applicable charges that may apply." Because requested transitions of DS1/DS3 loops, DS1/DS3 dedicated transport, and dark fiber arrangements would be initiated via an ASR/LSR, there is the potential that SBC may attempt to charge a CLEC effective immediately upon the date of its request for the cross-connect, as opposed to taking effect on the date of the actual conversion. The CLECs contend that their proposed language simply states the parties' understanding of when the wholesale rates will apply, which is the date of the actual conversion for such elements.

2. Commission Discussion and Findings

The Commission agrees with CLECs, and finds that the CLECs' proposed terms in Section 4.3 should be incorporated into the Agreement. The CLECs propose a bright line test to determine when CLECs should be billed any new rates that may occur due to a conversion. We agree that SBC is entitled to the rates for cross-connects before the transition as well as after, but the CLECs' proposed language simply makes it clear that any changes in rates that occur due to a requested conversion should only occur after the actual conversion is accomplished. The proposed language precludes SBC from charging a different rate before the date of the actual conversion.

<u>ISSUE 19</u>

- **Statement of Issue: Should SBC be required, on a quarterly basis, to post on its website information advising when it believes a wire center has reached 90% of the number of business lines needed for the wire center to be classified as a Tier 1 or a Tier 2 wire center, and to specify which wire centers it considers to have 2 or 3 fiber collocators?**

- **Disputed Agreement Language: Section 4.8**

1. Positions of the Parties

A. SBC

The CLECs propose to require SBC Indiana, on a quarterly basis, to post a list on its website that identifies (1) every wire center that meets 90% of the non-impairment threshold for the number of business lines and (2) every wire center that has two or three fiber-based collocators. SBC Indiana opposes that proposal, explaining that it would impose an unreasonable and significant, if not impossible, burden on SBC Indiana, and would also require SBC Indiana to divulge highly confidential, competitively sensitive information.

SBC Indiana witness Ms. Chapman elaborates that wire center-specific business line data is highly sensitive information because it indicates quarterly line growth or loss trends at particular wire centers. She adds wire center-specific information is not filed as part of ILEC ARMIS filings, and is not publicly disclosed. Further, as a practical matter, Ms. Chapman points out that it cannot provide business line information on a quarterly basis for the simple reason that the ARMIS data for business lines is only updated annually.

As for fiber-based collocator information, SBC Indiana states that it incurred significant expense to physically inspect wire centers to determine the locations that met the FCC's non-impairment thresholds. Ms. Chapman states SBC Indiana did not physically inspect all of its wire centers, but only those where SBC Indiana believed there was a substantial likelihood that the non-impairment criteria would be met. Thus, SBC Indiana has not performed the work necessary to determine the number of fiber-based collocators present in each of the wire centers where the thresholds have not been met. To meet the CLECs' request, Ms. Chapman explains that SBC would have to perform a significant amount of work to determine the wire centers that have only two fiber-based collocators.

SBC Indiana concludes that the CLECs' proposal would require SBC Indiana to continually monitor each of its wire centers to identify any instance in which a second fiber-based collocator was established, even though the presence of two fiber-based collocators would not result in the elimination of any unbundling obligation.

B. CLECs

Issue 19, like Issue 14, involves SBC's designation of additional wire centers as non-impaired after March 11, 2005, for purposes of availability of DS/DS3 loops and transport at such wire centers as Section 251 UNEs. The CLECs argue that if SBC posts the information specified in Section 4.6 of the Agreement on a quarterly basis, the CLECs will receive an early warning about those wire centers with a status that is on the verge of changing from Tier 3 to Tier 2 or Tier 2 to Tier 1. This will enable CLECs, particularly those with high capacity loop and transport UNEs in place at such wire centers, to begin to adjust their business plans, so that they are better positioned for an orderly transition to alternative arrangements if and when the status of the wire center in fact changes and becomes non-impaired. Posting of this information will also give warning to CLECs that do not presently have a presence in one or more of these wire centers, but are contemplating starting to do business in one of these wire centers, that in the near future high capacity loop and transport UNEs may become unavailable at these wire centers.

The CLECs also assert that posting the information specified in the CLECs' language for Section 4.8 of the Agreement on a quarterly basis will not impose a burden on SBC. The CLECs expect that SBC will be tracking, on an ongoing basis, the data that determines when a wire center changes Tier status, so that SBC will be in a position to declare additional wire centers non-impaired at the earliest possible time permitted. Moreover, posting of this information will give the CLECs periodic access for planning purposes to the same data that is available to SBC.

According to the CLECs, the proposed language does not require SBC to divulge confidential information, any more than does SBC's posting of the exact same type of information on its website once it believes a wire center does meet a non-impairment threshold, as SBC has volunteered to do. The proposed language would not require the disclosure of the identity of any collocators, only whether two or three collocators are present in any given wire center.

SBC also contends that it cannot post all of the requested information on a quarterly basis because the ARMIS data is only available annually. However, in response, the CLECs note that to the extent some of the information remains the same quarter to quarter, SBC only has to repost the previous information.

2. Commission Discussion and Findings

The Commission finds the CLECs' proposal, to require SBC Indiana to post a list on a quarterly basis identifying every wire center that meets 90% of the non-impairment threshold for business lines and every wire center that has two or three fiber-based collocators, should be rejected. SBC Indiana has demonstrated that the CLECs' proposal would impose an unreasonable and significant, and in some cases impossible, burden. For instance, ARMIS business line data is available only on an annual basis, not quarterly. With respect to fiber-based collocators, SBC Indiana explains that it has not inventoried every one of its wire centers to determine the number of fiber-based collocators. The Commission notes that the CLECs' proposal rests upon the assumption that SBC Indiana has the requested data available to it. The Commission finds that assumption is unsupported. Rather, the CLECs' proposal would require SBC Indiana to undertake the burden of continually monitoring the relevant conditions in each of its wire centers.

<u>ISSUE 20</u>

- **Statement of Issue: Should SBC be required to provide a commingled arrangement if it or an SBC Regional Bell Operating Company ("RBOC") affiliate provides it "anywhere in the nation?"**

- **Disputed Agreement Language: Section 5.1**

1. Positions of the Parties

A. SBC

SBC challenges the CLECs' request that language be included in the Agreement that would allow the CLECs access to whatever type of commingling arrangements that are available by "SBC if any of its 13 ILEC states provides [that] arrangement to any CLEC in response to a BFR request [bona fide request]" (unless the arrangement includes an access service that is not provided to any Indiana customer). SBC Indiana witness Niziolek proposes that this obligation be qualified, so that only arrangements that are voluntarily provided in other states need be provided in Indiana, while arrangements provided under compulsion are left open. Ms. Niziolek states that uniformity is generally desirable, and SBC Indiana is willing to provide those commingled arrangements that SBC provides elsewhere, if those arrangements are voluntarily provided elsewhere. According to SBC Indiana, the real dispute in this issue is about commingled arrangements that SBC provides somewhere solely under compulsion of another state commission's order. The CLECs want SBC Indiana to provide those arrangements too. Under that proposal, SBC Indiana indicates, any state in SBC's 13-state footprint that rules in favor of a CLEC becomes a super-state commission whose order also controls in Indiana, no matter what this Commission or any other state commission or the FCC might think.

According to SBC Indiana, the problem with the CLECs' overbroad proposal is self-evident. Essentially, SBC Indiana explains, the CLECs are saying that if an SBC incumbent loses some commingling dispute in any one state, it automatically loses that dispute in Indiana, even if Indiana and/or the other SBC states have resolved the dispute in favor of SBC. SBC Indiana states that such a result does not meet the requirements of the Act, or of any other law. It is SBC's position that since this Commission resolves Indiana disputes, it may consider precedents from other states, but it is not bound by them.

SBC Indiana also notes that the CLECs' proposal is not reciprocal. If SBC wins a commingling dispute elsewhere, the CLECs propose that the decision adverse to them should have no effect in Indiana.

B. CLECs

The CLECs claim that SBC's position on this issue is based upon unfounded speculation that the SBC systems and processes in Indiana might be different for some type of commingling than what is available in Illinois, Michigan, Arkansas or any other jurisdiction within SBC's 13-state territory. Further, if a certain type of commingling is available in SBC territory in another SBC state, then this would show that such a commingling is technically feasible and that the CLEC is entitled to this. Accordingly, in such a situation there is no need for a CLEC to go through the expensive and time-consuming Bonafide Request ("BFR") process. Unnecessarily using the BFR process will drive up CLEC costs, impose time barriers to prevent CLECs from competing, and diminish competition.

2. Commission Discussion and Findings

The Commission rejects the CLECs' proposed language, and finds SBC Indiana's language should be adopted. The Commission notes that SBC Indiana has agreed to provide to CLECs in Indiana commingling arrangements that its ILEC affiliates voluntarily provide in other states. The Commission concludes that it would not be appropriate to also require SBC Indiana to provide commingled arrangements that are provided under compulsion in other states. As SBC Indiana correctly explains, this Commission is not bound by the decisions of other state commissions. Moreover, this Commission is unwilling to allow other state commissions to act as a super-commission whose commingling orders control in Indiana, no matter what this Commission might think. As the Ohio commission recently concluded, "[o]ther state commissions reach their decisions based upon data and facts presented to them and, similarly, this Commission needs to evaluate whether these facts and data support reaching the same conclusion in Ohio."[116] The same is true for this Commission in Indiana.

[116] *Ohio TRO/TRRO Order* at 71.

ISSUE 21

- **Statement of Issue: Should the Agreement address the relationship between the Agreement and SBC's special access tariffs?**

- **Disputed Agreement Language: Sections 5.8 and 4.9**

1. Positions of the Parties

A. SBC

SBC Indiana opposes the CLECs' proposed language in Section 4.9 of the Agreement, which would abrogate SBC Indiana's contracts and tariffs for access services by eliminating or reducing early-termination liabilities under those agreements or tariffs in the event a wire center is determined to be non-impaired for high-capacity loops or dedicated transport. SBC Indiana also opposes the CLECs' proposal in Section 5.8, which would require SBC Indiana to provide the CLECs with 60 days' notice prior to making any changes that would affect the availability or provisioning of commingled arrangements.

SBC Indiana witness Niziolek explained that the charges for special access services, and the notice period for special access tariffs, are governed by SBC Indiana's special access tariffs and contracts. SBC Indiana argues that the purpose of the instant proceeding, however, is to resolve Section 251/252 interconnection disputes arising out of the TRO, the TRRO, and related FCC orders, and to amend SBC Indiana's interconnection agreements, not to investigate or modify SBC Indiana's access tariffs or contracts. Therefore, SBC Indiana asserts that the CLECs' attempt to inject issues relating to those tariffs or contracts into this proceeding is inappropriate. SBC Indiana further points out that the legal relationship between SBC Indiana and special access customers is defined by tariff, and "[t]he rights as defined by the tariff cannot be varied."[117] Further, SBC Indiana asserts that the Commission does not have the jurisdiction to adopt the CLECs' proposals to the extent they concern SBC Indiana's interstate access services or interstate tariffs. Only the FCC has such authority.

SBC Indiana further argues that the CLECs' proposal should be rejected because it would require SBC Indiana to discriminate in the CLECs' favor and against all other carriers and special access customers in the state. Ms. Niziolek testified that under the CLECs' proposal, SBC Indiana would essentially have two notice requirements and two early-termination rules for its access tariffs: one required by FCC and Commission rules, and another required by the individual interconnection agreements. According to SBC Indiana, the filed-rate doctrine precludes it from providing different terms and conditions to similarly-situated customers.[118]

[117] *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 (1986).

[118] *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998) ("[T]he policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that anti-

With respect to termination liability, SBC Indiana also provided several examples where the FCC has rejected CLEC attempts to evade early-termination charges:

- "We note, however, that any substitution of unbundled network elements for special access would require the requesting carrier to pay any appropriate termination penalties required under volume or term contracts"[119];

- "We reject comments by US LEC/XO that . . . early termination penalties . . . are obstacles to their ability to convert special access circuits to EELs"[120];

- "[O]ur current rules do not require incumbent LECs to waive tariffed termination fees for carriers requesting special access circuit conversion"[121];

- "We reject AT&T's proposed language and decline to override the termination penalties contained in Verizon's special access tariff. AT&T voluntarily purchased special access services pursuant to Verizon's tariff and took advantage of discount pricing plans that offered lower rates in return for a longer term commitment. We will not nullify these contractual arrangements that AT&T previously accepted"[122]; and

- "[E]arly termination penalties" are not an obstacle to a CLEC's "ability to convert special access circuits to EELs" and do not violate FCC rules.[123]

SBC Indiana argues that the TRO's provisions on "commingling" do not change the FCC's pronouncements, because commingling simply "allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service."[124] SBC argues that does not allow a CLEC to change the terms and conditions of the access service. SBC Indiana points out that the FCC expressly stated the opposite when it held

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discriminatory policy which lies at 'the heart of the common-carrier Section of the Communications Act.'") (citations omitted).

119 *UNE Remand Order*, 15 F.C.C.R. 3696, ¶ 486 n.985 (1999).

120 *In re Joint Application by Bellsouth Corp. et al. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 F.C.C.R. 9018, ¶ 200 (2002).

121 *In re Application of Verizon Pennsylvania Inc., et al. for Provision of In-Region, InterLATA Services in Pennsylvania*, 16 F.C.C.R. 17,419, ¶ 75 (2001).

122 *In re Petition of WorldCom, Inc.*, CC Docket Nos. 00-218 et al., 2002 WL 1576912, ¶ 348 (July 17, 2002).

123 *In re Joint Application by BellSouth Corp. et al. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 F.C.C.R. 17,595, ¶ 212 (2002).

124 TRO, ¶ 583.

that "commingling will not enable a competitive LEC to obtain reduced or discounted prices on tariffed special access services."[125]

SBC Indiana also rebutted the CLECs' accusations that SBC Indiana has forced CLECs off of DS1/DS3 High Capacity Loops, thus forcing a CLEC's investment in the SBC provided special access transport or collocation to be stranded. SBC Indiana witness Chapman stated that the FCC, not SBC Indiana, made DS1/DS3 loops unavailable. According to SBC Indiana, the CLECs were willing to enjoy the benefits of discounts in exchange for their long-term commitments on the access services at issue, knowing that the FCC might eliminate unbundling for the high-capacity loops to which those services were connected and, thus, the CLECs must also abide by the early-termination provisions that go along with those discounts.

SBC Indiana also opposes the CLECs' proposed language in Section 5.8 of the Agreement, which would require SBC Indiana to provide the CLECs with 60 days notice before making any changes to its access tariffs affecting the availability or the provisioning of commingled arrangements. SBC Indiana asserts that the CLECs' proposal for 60 days notice is contrary to 47 C.F.R. § 61.58(a)(2)(i), which requires tariff filings changing terms and conditions to be filed on 15 days notice. SBC Indiana states that the CLECs' proposal is also unnecessary, because CLECs will receive the required notice and will have ample time to lodge any objections with the FCC and the Commission.

SBC Indiana also opposes the CLECs' proposal in Section 5.8 that would require SBC Indiana to "grandfather" commingled arrangements in the event that an access service which is part of the commingled arrangement is withdrawn. According to SBC Indiana, there are many valid reasons for it to withdraw an access service. For example, a service could have insufficient demand; it could rely upon outdated technology; or it could be superseded by new services. Ms. Niziolek testified that the decision to grandfather a particular service is fact-specific and can only be made based upon the particular facts presented at the time SBC Indiana proposes to withdraw a service. SBC Indiana reiterates that it is required to provide advance notice before withdrawing any service, and points out that because withdrawal is subject to FCC review (for interstate services) and Commission review (for intrastate services), any questions about grandfathering can be addressed at that time. Therefore, Ms. Niziolek contends that the CLECs' request for an advance, across-the-board, permanent grandfathering of withdrawn access services is commercially unreasonable on its face.

Finally, SBC Indiana asserts that the Commission should reject the CLECs' proposal to prohibit SBC Indiana from changing its operations and procedures where such change would "operationally or practically impair or impede" the ability of CLECs to implement new commingled arrangements, on the grounds that such language is vague and overly restrictive. SBC Indiana states that the CLECs' proposed language that SBC Indiana "cooperate fully" with CLECs "to ensure" that its practices do not "operationally

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125 *Id.*

or practically impair or impede" a CLEC's ability to implement new commingling arrangements (a standard that varies based upon the expertise and abilities of each CLEC), has no concrete meaning, which could give rise to future disputes.

SBC Indiana also contends that the CLECs' proposal is overly restrictive, because no matter how reasonable one of SBC Indiana's practices may be for the CLEC industry, it would be prohibited if it "impeded" a single CLEC, even if that CLEC's operations are inefficient and unreasonable. Ms. Niziolek further testified that SBC Indiana's operational policies are already addressed in industry forums such as the Change Management Process, and thus, it would be improper to give CLECs a contractual right to unilaterally block changes that have already gone through Commission-endorsed and FCC-approved processes.

B. CLECs

According to the CLECs, this issue and the CLECs' proposed terms in Section 4.9 of the Agreement address the situation in which a CLEC provides service out of a particular wire center using high capacity UNE loops combined with special access transport but, due to a non-impairment determination, the high capacity UNE loops are no longer available. As a result, it is not economical for a CLEC to serve customers using the existing special access transport and for the CLEC to then seek to discontinue the special access. The CLECs' proposed terms are intended to protect the CLEC from excessive charges when SBC causes a CLEC to be forced off of DS1/DS3 High Capacity Loops, and thus forces the CLEC's investment in the SBC-provided special access transport or collocation to be stranded. In that circumstance, the amount of termination payments which the CLEC should pay for the termination of the special access transport and collocation arrangements should be reasonable and based upon what the termination payments would have been for a term comparable to the length of time that the special access arrangements were actually in place. Because SBC is the cost causer of the termination penalties, the CLEC should not be saddled with a disproportional amount of termination penalties.

The CLECs note further that SBC does not state that the CLEC formula for determining the termination penalties is unreasonable. It instead only rests on a legal argument that this Commission has no jurisdiction over special access charges and, thus, the Commission should not address these issues. According to the CLECs, what SBC Indiana has failed to recognize is that the FCC vested the state commissions with authority to implement its TRO and TRRO with interconnection agreement amendments. The situation at issue directly relates to the implementation of the TRRO and should be addressed in the Agreement.

Further, the CLECs reject SBC's claim that the 60-day notice provision is discriminatory. All CLECs in the state, that so desire, can enter into the amendment at issue. Accordingly, no CLEC is being discriminated against. Here, commingled arrangements are covered by the Agreement, which is the appropriate place to address notices that impact the availability of commingled arrangements. The CLECs claim SBC has not even asserted that it would be burdensome or impractical for it to provide the 60-day notice.

With respect to SBC's claims that there might be valid reasons why it should be allowed to grandfather commingled arrangements that have been ordered prior to an access tariff change, the CLECs argue that SBC has failed to recognize that there might be invalid reasons, such as trying to quash competition. The CLECs claim it was not their intent to prevent SBC from going through change management to eliminate certain commingled arrangements, and if SBC had raised this issue during the collaborative meetings then this issue could have been addressed.

2. Commission Discussion and Findings

The Commission finds SBC Indiana's positions on Issue 21 should be adopted. We agree with SBC Indiana that the CLECs' proposed language in Sections 4.9 and 5.8 of the Agreement inappropriately seeks to modify the terms and conditions of SBC Indiana's tariffs and contracts for special access services.

As a threshold matter, we find that it is inappropriate to consider issues concerning SBC Indiana's special access services, which are governed by SBC Indiana's special access tariffs and contracts, within the context of this proceeding, the purpose of which is to resolve the parties' Section 251/252 interconnection and unbundling disputes arising out of the TRO, the TRRO, and related FCC orders, and to amend the parties' interconnection agreements. We are precluded from modifying SBC Indiana's tariffs or interfering with the legal relationship between SBC Indiana and its special access customers, whose rights are defined by tariff. Moreover, we have no jurisdiction to modify tariff charges or contract provisions insofar as they involve SBC Indiana's interstate access services.[126]

The CLECs' proposals regarding notice and early termination are also unlawful under the filed-rate doctrine, because they would force SBC Indiana to provide the CLECs that enter into the Agreement with more favorable terms and conditions than those accorded to other carriers and special access customers in the state, whose service will continue to be governed by the FCC's and Commission's rules. For example, 47 C.F.R. § 61.58(a)(2)(i) requires tariff filings changing terms and conditions to be filed on 15 days notice. The CLECs, however, propose 60 days notice. Therefore, if we adopt the CLECs' proposal the CLECs would get 45 more days above and beyond the notice provided to other carriers. In addition, we find that the CLECs' proposal is unnecessary, because the CLECs will receive the required notice and will have ample time to submit any objections to the FCC and the Commission.

With respect to early-termination charges, the Commission declines to adopt language that would conflict with the provisions in SBC Indiana's tariffs. We note that

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[126] *See Illinois TRO/TRRO Order* at 142 (Illinois Commission found that it "does not have the jurisdiction to alter requirements contained in FCC tariffs").

the Illinois Commission recently rejected the CLECs' attempts to include proposed language dealing with early-termination charges that differed from SBC's tariffs on the grounds that it would create a conflict between the enforcement of the interconnection agreement and enforcement of the tariff.[127]

Further, as described in SBC Indiana's position, the FCC has repeatedly rejected attempts by CLECs to avoid early-termination charges. Additionally, in paragraph 583 of the TRO, the FCC rejected the notion that commingling will allow a CLEC "to obtain reduced or discounted prices on tariffed special access services."

We are also not persuaded by the CLECs' attempts to lay blame on SBC Indiana for the CLECs' stranded investments in special access transport and collocation, because as SBC Indiana correctly points out, it was the FCC that eliminated DS1/DS3 loop unbundling in enforcing the requirements of the Act. The Commission finds that the CLECs knew, or should have known, that the FCC may have eliminated unbundling for high-capacity loops when they sought to take advantage of the discounts available in exchange for entering into long-term commitments, and accordingly, we reject the CLECs attempts to avoid the early-termination provisions that go along with those discounts. Our decision is supported by the FCC's pronouncement in the TRO that it "expect[s] competitive LECs to take into account the possibility of future conversions to UNE combinations before entering into a long-term contract (with associated discounts) for wholesale services."[128] The Ohio Commission also recently rejected the CLECs' position on this issue for the same reason, finding that:

> CLECs were aware that the FCC was in the process of revisiting the issue of high capacity loops as UNEs and, therefore, the potential existed for the determination that they would be deemed to no longer be UNEs. Therefore, those CLECs that entered into special access agreements with a longer term did so aware of the potential consequences of that decision and should not now benefit from the FCC's revisiting of the issue of high capacity loops. These CLECs should not now benefit from lower transport rates of a long term agreement with the early termination fee of a shorter agreement.[129]

The Commission also rejects the CLECs' proposed language prohibiting SBC Indiana from changing its operations and procedures if doing so would "operationally or practically impair or impede" the ability of CLECs to implement new commingled arrangements. We agree with SBC Indiana that the CLECs' proposal is too vague, and

[127] *Id.* at 134.

[128] TRO, n.1811.

[129] *Ohio TRO/TRRO Order* at 75.

could lead to unnecessary disputes before the Commission. The CLECs' proposal is also overly restrictive, because it would automatically preclude SBC Indiana from changing its operations or procedures, no matter how prudent the change may be, if a single CLEC contended that it was "impeded." Furthermore, SBC Indiana's operational policies are addressed in industry forums such as the Change Management Process, and we find that it would be improper for a CLEC to be able to unilaterally block changes that result from such processes.

Finally, the CLECs presented no evidence or argument in support of their proposed language requiring SBC Indiana to "grandfather" commingled arrangements when SBC Indiana withdraws an access service that is part of the commingled arrangement. Therefore, we reject the CLECs' proposal on that issue.

ISSUE 22

- **Statement of Issue: What process should be used if a CLEC disputes the conclusions of an auditor's report determining whether a CLEC has met the FCC's eligibility criteria for Enhanced Extended Links ("EELs")? Also, should a CLEC be required to remit payment to SBC or permitted to withhold payment pending the dispute?**

- **Disputed Agreement Language: Section 6.3.8.4**

1. Positions of the Parties

A. SBC

SBC Indiana stated that Issues 22 and 23 deal with the FCC's "eligibility criteria" for EELs. For background, SBC Indiana explained that an EEL is "a UNE combination consisting of an unbundled loop and dedicated transport."[130] In the TRO, the FCC adopted "additional eligibility criteria" for combinations of "high-capacity" (DS1 and DS3) loops and transport.[131] "A central goal of the service eligibility criteria . . . is to safeguard the ability of bona fide providers of qualifying service to obtain access to high-capacity EELs while simultaneously addressing the potential for gaming."[132] The same criteria apply to high-capacity commingled arrangements.[133] SBC Indiana further noted that the *USTA II* decision upheld the FCC's eligibility criteria, and no party challenged the TRO provisions requiring certification of compliance with those criteria.[134]

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[130] TRO, ¶ 571.

[131] *Id.* at ¶ 591.

[132] *Id.* at ¶ 595.

[133] 47 C.F.R. § 51.318(b).

[134] *United States Telecom. Ass'n v. F.C.C.*, 359 F.3d 554, 592-93 (D.C. Cir. 2004) ("*USTA II*").

SBC Indiana identified three mandatory criteria adopted by the FCC: First, the requesting carrier "must have a state certification of authority to provide local voice service."[135] Second, "the requesting carrier must have at least one local number assigned to each circuit and must provide 911 or E911 capability to each circuit."[136] SBC Indiana explained that the third criterion is a series of "circuit specific architectural safeguards to prevent gaming:"

> (a) each circuit must terminate into a collocation governed by Section 251(c)(6) at an incumbent LEC central office within the same LATA as the customer premises;
>
> (b) each circuit must be served by an interconnection trunk in the same LATA as the customer premises served by the EEL for the meaningful exchange of local traffic, and for every 24 DS1 EELs or the equivalent, the requesting carrier must maintain at least one active DS1 local service interconnection trunk; and
>
> (c) each circuit must be served by a Class 5 switch or other switch capable of providing local voice traffic.[137]

SBC Indiana contends that in order to carry out the FCC rule, "requesting carriers must certify to meeting all three criteria (authorization, local number and E911 assignment, and architectural safeguards) to qualify for the high-capacity circuit" and the CLEC's certification is "subject to . . . certification and auditing requirements."[138]

SBC Indiana explained that Issue 22 concerns Section 6.3.8.4 of the Agreement, which addresses the consequences of an independent auditor's finding that a CLEC failed to meet the eligibility criteria, and thus, was not entitled to an EEL. SBC Indiana noted that while both parties agree that the CLEC "must true-up any difference in payments paid to SBC and the rates and charges CLEC would have owed" for an equivalent commercial product, the issue remains as to whether the CLEC must pay that difference if it disputes the auditor's findings, pending resolution of the dispute (as SBC Indiana proposes), or whether the CLEC can withhold payment until the dispute is resolved (as the CLECs contend).

According to SBC Indiana, its proposal tracks the FCC's order and enforces the FCC's rules. Moreover, SBC Indiana states that under the TRO, the triggering event for the EELs true-up is the independent auditor's report, not the conclusion of all subsequent dispute resolution proceedings. In particular, the FCC stated: "To the extent the

[135] TRO, ¶ 597.

[136] *Id.*

[137] *Id.*

[138] *Id.*

independent auditor's report concludes that the competitive LEC failed to comply with the service eligibility criteria, that carrier must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, and make the correct payments on a going-forward basis."[139] SBC Indiana asserts that requiring a true-up at the time of the independent auditor's report is reasonable because the FCC's rules require SBC Indiana to provision an EEL upon the CLEC's certification of compliance, even if the CLEC may eventually prove to be noncompliant. SBC Indiana must therefore bear the risk of the CLECs' non-compliance and default. But once an independent, objective professional has found the CLEC to be noncompliant, SBC Indiana asserts that it should no longer have to bear the risk. Instead, Ms. Niziolek testified that the CLEC should pay the amounts at issue to SBC Indiana or at least into escrow, so that SBC Indiana will be able to receive payment in the event a dispute is resolved in its favor but the CLEC is no longer able to pay.

B. CLECs

The CLECs propose language that will allow them to dispute the findings of the auditor per the general dispute resolution terms of the underlying agreement. If a CLEC were to dispute an independent auditor's findings that the CLEC did not comply with the eligibility criteria for a High-Cap EEL, the CLEC should not be required to pay any disputed amounts until that dispute has run its course. The CLECs further oppose SBC's terms that would force the CLECs to pay SBC for any disputed amount up front and then fight over whether that money was actually owed SBC. Additionally, SBC's proposed language does not contemplate any process for disputing an auditor's report. If the auditor (who will be selected by SBC without any input from the CLEC) makes any factual mistakes or draws any false legal conclusions, the CLEC would be required to comply with the auditor's result and would have no opportunity to appropriately challenge that result before the Commission.

The CLECs argue that the FCC recognized the importance of looking to the related provisions of interconnection agreements in implementing the auditing at issue in this proceeding. The FCC noted that "the details surrounding the implementation of these audits may be specific to related provisions of interconnection agreements or to the facts of a particular audit, and that the states are in a better position to address that implementation."[140] Accordingly, where there are dispute resolution provisions in underlying interconnection agreements, these should be followed before the audit report is put into effect. To alleviate any SBC concern of extended dispute processes, the CLECs are willing to bring the dispute immediately to this Commission and waive the 30-day executive negotiation period which would otherwise be a condition precedent to bringing such a dispute before this Commission.

As an alternative, the CLECs have proposed that the Commission import agreements reached in the Illinois negotiations and arbitration process for Section 6.3.8.4

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[139] TRO, ¶ 627.

[140] TRO, ¶ 625.

of the Agreement. In the parallel Illinois proceeding, both SBC and the Illinois CLECs have agreed to the following language:

> SBC shall provide CLEC with a copy of the independent auditor's report within 2 business days from the date of receipt. The independent auditor's report shall state the scope of the audit that was performed. If CLEC disagrees as to the findings or conclusions of the auditor's report, CLEC may bring a dispute directly to the ICC. Prior to bringing a dispute to the ICC under this section, however, CLEC shall provide notice of the dispute to SBC so that the Parties can discuss possible resolution of the dispute. Such dispute resolution discussions shall be completed within fourteen (14) days of the date the auditor's report was provided to CLEC and CLEC may not initiate a dispute resolution proceeding at the ICC until after expiration of this fourteen (14) day period. The Dispute Resolution process set forth in the General Terms and Conditions of the Agreement shall not apply to a dispute of the findings or conclusions of the auditor's report. If the auditor's report concludes that CLEC failed to comply with the Eligibility Criteria for a High-Cap EEL, CLEC must true-up any difference in payments paid to SBC and the rates and charges CLEC would have owed SBC beginning from the date that the non-compliance of the High-Cap EEL with the Eligibility Criteria, in whole or in part, began. CLEC shall submit orders to SBC to either convert all noncompliant High-Cap EELs to the equivalent or substantially similar wholesale service or disconnect non-compliant High-Cap EELs. Conversion and/or disconnect orders shall be submitted within 30 days of the date on which CLEC receives a copy of the auditor's report and CLEC shall begin paying the trued-up and correct rates and charges for each converted High-Cap EEL beginning with the next billing cycle following SBC's acceptance of such order, unless CLEC disputes the auditor's finding and initiates a proceeding at the ICC for resolution of the dispute in which case no changes shall be made until the ICC rules on the dispute. However CLEC shall pay the disputed amount into an escrow account, pending resolution. With respect to any noncompliant High-Cap EEL for which CLEC fails to submit a conversion or disconnect order or dispute the auditor's finding to the ICC within such 30-day time period, SBC may initiate and effect such a conversion on its own without any further consent by CLEC. If converted, CLEC must convert the non-compliant High-Cap EEL to

> an equivalent or substantially similar wholesale service, or group of wholesale services. Reasonable steps will be taken to avoid disruption to CLEC's customer's service or degradation in service quality in the case of conversion. Following conversion, CLEC shall make the correct payments on a going-forward basis. In no event shall rates set under Section 252(d)(1) apply for the use of any High-Cap EEL for any period in which High-Cap EEL does not meet the Eligibility Criteria for that High-Cap EEL. Furthermore, if CLEC disputes the auditor's finding and initiates a proceeding at the ICC and if the ICC upholds the auditor's finding, the disputed amounts held in escrow shall be paid to SBC and SBC shall retain any disputed amounts already paid by CLEC.[141]

According to the CLECs, it would benefit both SBC and the CLECs to have consistent terms in both states, related to the same processes. Thus, importing the language from the Illinois agreement would be both proper and efficient.

2. Commission Discussion and Findings

We agree with the CLECs that adoption of their alternative terms for Section 6.3.8.4 is appropriate

We conclude that the CLEC's alternative offer, which is based on the agreements reached in Illinois, is a reasonable resolution of this dispute. This language allows the CLECs an opportunity to dispute the auditor's report and at the same time provides SBC Indiana, via requirements for true-up of charges for non-compliant services and the use of an escrow account for disputed amounts, with the protection it seeks from financial risk associated with a CLEC retaining all disputed funds until the resolution of a dispute regarding an auditor's report is complete. Indeed, the CLECs' proposed alterative language largely mirrors SBC Indiana's proposed language in this case (e.g., conversion time frames, application of appropriate rates going forward, and the use of escrow account when a CLEC disputes the charges).

For the foregoing reasons, we reject SBC Indiana's proposed terms in Section 6.3.8.4 and find the parties should use the alternative proposal submitted by the CLECs based upon the Illinois agreements.

<u>ISSUE 23</u>

- **Statement of Issue: To what extent should a CLEC reimburse SBC for the cost of the auditor in the event of an auditor finding of noncompliance?**

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[141] Section 6.3.7.4 of the Illinois Amendment.

- **Disputed Agreement Language: Section 6.3.8.5**

1. Positions of the Parties

A. SBC

SBC Indiana states that, like Issue 22, this issue involves the situation in which an independent auditor concludes that a CLEC has not complied with the FCC's mandatory eligibility criteria for EELs obtained from SBC Indiana. But for Issue 23, the dispute concerns who pays for the auditor. According to SBC Indiana, the CLEC should pay the bill in this situation, because SBC Indiana has agreed to pay the bill in full in the event the auditor finds no violations.

SBC Indiana opposes the CLECs' proposal that they pay only "a fraction" of the bill, based upon a "the number of High-Cap EELS that the auditor's report finds to be non-compliant divided by the total number of all High-Cap EELs leased by the CLEC that were the subject of the audit." SBC Indiana asserts that the CLECs' proposed methodology has no support in the FCC's rules or the TRO. To the contrary, SBC Indiana notes that the FCC has stated that "the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor" if the auditor finds non-compliance, without any mention of deductions or calculations.[142] According to SBC Indiana, the FCC's result makes sense, because the CLEC is required to certify before ordering that it has met the eligibility criteria.[143] SBC Indiana adds that the eligibility criteria are objective and relate to facts the CLEC knows, such as: whether the circuit has a local telephone number assigned; whether it terminates in the CLEC's collocation space; and whether the CLEC's switch is capable of carrying voice-grade traffic.[144] In short, the CLEC essentially knows the outcome of the audit in advance, and where the CLEC has done its due diligence and certified honestly the auditor should not find any violations. However, if the CLECs fail to conduct the requisite due diligence and certify incorrectly, or if they certify in bad faith, SBC Indiana contends that it should not be forced to pay.

SBC Indiana further disputes the CLECs' proposal because it erroneously assumes that, in paying for a search, one should pay only for the particular instances in which the search was successful. But neither SBC Indiana nor the auditor knows in advance which circuits violate the criteria; only the CLEC knows that for sure. Therefore, SBC Indiana contends that in order to find specific violations, the auditor must necessarily search a broad pool of circuits. SBC Indiana further explained that much of the cost of an audit is fixed (e.g., the cost of developing a test plan and gaining an understanding of the relevant systems, processes, and documents), and is incurred

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[142] *Id.* at ¶ 627.

[143] 47 C.F.R. § 51.318(a).

[144] 47 C.F.R. § 51.318(b)(2).

without regard to the number of circuits tested. Therefore, if it takes testing of 100 circuits to find the 50 violators, then the full cost is incurred because of the violations.

B. CLECs

The CLECs' language proposes to reimburse SBC "to the extent an auditor" finds the CLEC to be out of compliance. The CLECs' claim that their proposed language is a straight forward pro-rata reimbursement, and is consistent with the directive from the FCC that the CLEC must reimburse the ILEC for the cost of the independent auditor "to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria … ."[145]

The CLECs oppose SBC's language because that language would have the CLEC reimburse SBC well beyond the extent to which an auditor may find the CLEC to be out of compliance. According to the CLECs, the SBC language would force the CLEC to reimburse SBC for 100% of the auditor's costs if only 1% of the circuits examined were out of compliance.

The CLECs agree that while they should pay a reasonable share of the costs associated with an audit that determines that certain eligibility criteria were not met, SBC's proposed language will lead to further disputes on what is "material" noncompliance. According to the CLECs, nowhere in the Agreement do the parties attempt to define which of the eligibility criteria is material; which criteria, if not met, would constitute material non-compliance; or how many of the criteria must not be met in order for the EEL to fail "in all material respects."

2. Commission Discussion and Findings

The Commission finds that SBC Indiana's proposal is reasonable and should be adopted. SBC Indiana has agreed to pay the auditor in full, in the event that an audit reveals no violations, and thus it is only fair that the CLECs be required to pay in full should the audit reveal violations.

We reject the CLECs' proposal to pay only a fraction of the auditor's costs based upon the number of non-compliant circuits divided by the number of circuits subject to the audit. We find that under the TRO, CLECs are responsible for the full cost of the independent auditor when the auditor finds noncompliant circuits. In addition, the eligibility criteria with which CLECs must certify compliance are objective and based upon facts the CLEC knows or should know. Thus, the CLEC should be able to accurately certify compliance, and SBC Indiana should not have to be responsible for any part of the auditor's costs where the CLEC erroneously certifies compliance. Moreover, we find that the CLECs' proposal is based upon the fallacy that the auditor's costs are tied to the specific number of violations found. The evidence demonstrates that the auditor must search a broad pool of circuits in order to find specific noncompliant

[145] TRO, ¶ 627

circuits, and the CLECs are in the best position to know which circuits are noncompliant. In addition, many audit costs (such as the cost of designing a test plan) are fixed, and thus incurred regardless of the number of circuits tested and violations found.

The Ohio Commission recently affirmed this view when it rejected the CLECs' proposal on the same issue, finding that:

> The FCC is clear that the CLEC must reimburse the ILEC for the cost of an independent auditor when the CLEC is found to be in non-compliance. . . . In these situations, the Commission agrees with SBC that the CLEC is the cost causer of the audit and that auditing circuits that turn out to be in compliance is necessary to get to the root of the CLEC's failure to properly order these circuits.[146]

<u>**ISSUE 26**</u>

- **Statement of Issue: To what extent are the costs of routine network modifications recoverable by SBC other than through existing Commission-approved TELRIC rates?**

- **Disputed Agreement Language: Section 8.1.6**

1. Positions of the Parties

A. SBC

Issue 26 concerns "routine network modifications" ("RNMs"), which the TRO defined as "those activities that incumbent LECs regularly undertake for their own customers" and include "rearrangement or splicing of cable; adding a doubler or repeater; adding an equipment case; adding a smart jack; installing a repeater shelf; adding a line card; and deploying a new multiplexer or reconfiguring an existing multiplexer."[147] SBC Indiana explained that where an incumbent LEC is required to unbundle its transmission facilities, the TRO requires it "to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has already been constructed."[148] In addition, the FCC permits incumbent LECs to recover the cost of these routine network modifications, so long as there is no double recovery of those costs (e.g., if an incumbent recovers the costs for RNMs through a recurring charge, it may not also recover the costs through a non-recurring charge).[149]

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[146] *Ohio TRO/TRRO Order* at 80.

[147] TRO, ¶ 634.

[148] *Id.* at ¶ 632.

[149] *Id.* at ¶ 640.

In its proposed language, SBC lists three specific RNMs for which it believes it should be able to recover its costs: "(i) adding an equipment case, (ii) adding a doubler or repeater including associated line card(s), and (iii) installing a repeater shelf, and any other necessary work and parts associated with a repeater shelf, to the extent such equipment is not present on the loop or transport facility when ordered."

According to SBC Indiana, Issue 26 consists of two related sub-issues: (1) whether the CLECs may nullify SBC Indiana's right to compensation under the FCC's rule and (2) whether the CLECs may graft artificial hurdles and exceptions onto the FCC's rule.

SBC Indiana opposes the CLECs' attempt to bar its ability to recover some charges. For example, under the CLECs' proposed language, Mr. Barch argued SBC Indiana would not be allowed to seek compensation "in any event" for certain network modifications, such as: adding an equipment case; adding a doubler or repeater; installing a repeater shelf; or, splicing dark fiber. Ms. Niziolek contends that the "in any event" language will preclude SBC Indiana from seeking compensation even in those instances where modification costs are not already included in the normal prices.

SBC Indiana countered the CLECs' testimony showing that the charges for the three listed services are not being recovered from SBC's current recurring or nonrecurring charges. With respect to the cost of repeaters, CLEC witness Mr. Starkey contends that such costs are already recovered somewhere, either in capital costs, maintenance or other expense. He then concludes that additional charges for repeaters would "allow [SBC Indiana] the double recovery the FCC prohibits." SBC Indiana indicates that this is not the case. Mr. Barch indicates the costs for repeaters and associated equipment that are required for all copper DS1 unbundled loops were not included in the development of SBC Indiana's TELRIC based prices. He states those costs were expressly excluded because the associated equipment is not considered appropriate for a forward-looking network. Thus, Mr. Barch argues SBC Indiana's testimony in IURC Cause No. 42393 expressly states that the forward-looking costs for DS1 copper loops are based upon "the use of High-bit-rate Digital Subscriber Line–Two Wire ('HDSL-2'7 technology . . . that . . . allows a DS1 level signal to be transmitted up to 12,000 feet without the use of repeaters)." A CLEC may want to have repeaters anyway, but the FCC's rules permit SBC Indiana to seek compensation for the associated extra cost.

SBC Indiana asserts that the CLECs' proposal is contrary to the FCC's order allowing incumbents "the opportunity to recover the cost of the routine network modifications we require here."[150] Moreover, Ms. Niziolek contends that the Commission should reject the CLECs' attempts to litigate whether double recovery would occur for some network modifications within the context of this proceeding, because this proceeding is not a cost docket and the Commission does not have specific,

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[150] *Id.*

concrete charges before it. In SBC Indiana's view, the important point for the Commission to consider is the fact that in some instances, charges for network modifications will be appropriate, and the CLECs' proposed language would bar SBC Indiana from recovering its costs in those circumstances. SBC Indiana asserts that this is true even though the CLECs' own witness Mr. Starkey acknowledged that "[i]t is difficult to envision all potential [modifications]" and that "it is possible" that some modifications will not be "already accounted for in SBC's TELRIC-based rates." Therefore, SBC Indiana argues that the CLECs' proposal is contrary to the FCC's rules and should be rejected.

Mr. Barch contends that SBC's proposed language in Section 8.1.6 of the Agreement explicitly tracks the FCC rule, allowing it to assess charges for RNMs, but only "in instances where such charges are not included in any costs already recovered through existing, applicable recurring and non-recurring charges." SBC Indiana urges the Commission to reject the CLECs' claim that SBC Indiana must obtain advance approval from the CLEC or the Commission for each charge. SBC Indiana states that if every extra charge was the subject of litigation, the FCC's cost recovery rule would be rendered unworkable and ineffective. SBC Indiana would also be forced to forego many legitimate, albeit small, charges just to avoid the costs of litigating each charge with the CLECs. According to SBC Indiana, the FCC's rules do not impose such a barrier to the incumbent's right to compensation, and accordingly, the CLECs' proposal should be rejected.

B. CLECs

Mr. Starkey explained that RNMs are activities that SBC regularly undertakes for its own customers to modify its network as necessary to provide requested services. He also noted that the parties have already agreed on contract language that spells out what activities qualify as RNMs under the FCC's rules. However, the CLECs disagree that SBC should be permitted to charge them for performing RNMs without first substantiating the charges SBC proposes to assess, either by negotiating these rates with CLECs, or by obtaining Commission approval if the parties cannot agree.

Mr. Starkey explained that SBC's language generally assumes that the costs for RNMs are not already recovered by SBC's existing TELRIC-based UNE rates and, as a result, SBC contends that it should be allowed to assess individual case basis ("ICB") RNM rates without CLEC input or Commission oversight. In contrast, the CLECs' language assumes that a vast majority of RNM costs are already recovered through SBC's existing UNE rates, and would allow additional RNM cost recovery once SBC demonstrates that the costs of specific RNMs are not already recovered in SBC's existing UNE rates. As Mr. Starkey testified, the standard principle of the CLECs' proposed language is to ensure that SBC appropriately recovers its RNM costs, but that no double recovery occurs, consistent with the FCC's directives on RNM cost recovery.

The CLECs urged the Commission to reject SBC's proposed Section 8.1.6 of the Agreement for a number of reasons. First, Mr. Starkey explained that SBC had failed to meet its burden of proving that additional cost recovery for RNMs is appropriate, and had consequently failed to justify its proposed language granting SBC unlimited authority to assess additional ICB RNM charges on CLECs. Mr. Starkey noted that the FCC rules require ILECs to "*prove to the state commission* that the [TELRIC-based] rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, *using a cost study* that complies with the methodology set forth in this section and § 51.511."[151] Mr. Starkey stated that SBC had failed to provide any support for its position that additional RNM charges are needed, and had offered no RNM cost study, as required by 47 C.F.R. § 51.505(e).

Second, Mr. Starkey explained that 47 C.F.R. § 51.505(e)(2) requires that any state proceeding related to ILECs' TELRIC rates "shall provide notice and opportunity for comment to affected parties," and "shall result in the creation of a written factual record that is sufficient for purposes of review." Mr. Starkey explained that SBC's proposed language would not satisfy either requirement. In fact, Mr. Starkey noted that SBC opposes the CLECs' language that would require SBC to adhere to these FCC rules.

Third, Mr. Starkey asserted that in the vast majority of instances, SBC's RNM costs are already recovered in its existing rates, and additional ICB rates would therefore result in impermissible double recovery. Mr. Starkey testified that, consistent with the FCC's expectations and based upon his experience with and knowledge of SBC's TELRIC costs and cost models, SBC's existing UNE rates already recover SBC's RNM costs through the "maintenance" or "other expense" components of the Annual Cost Factors ("ACFs"), or in SBC's Engineer, Furnish and Install ("EF&I") investment figures (depending on the particular RNM in question). Mr. Starkey provided specific citations to SBC's TELRIC cost studies from IURC Cause No. 42393 to support his conclusions, noting the two differentiated methods SBC uses to identify direct costs associated with transmission facilities (both loops and transport) are EF&I investment and ACFs.

Mr. Starkey further elaborated on the flaws in SBC's assertions regarding the need to recover DS1 repeater-related costs. Mr. Starkey testified that while SBC witness Mr. Barch was correct that SBC's Loop Cost Analysis Tool ("LoopCAT") cost model does not assume the use of repeaters in SBC's forward-looking network, this is irrelevant because the installation and maintenance factors SBC ultimately applies to its investments to generate monthly, total installed costs are not generated from the same hypothetical data as used in LoopCAT. Instead, SBC's installation and maintenance factors are a relatively simple comparison of actual historical expenses compared to actual historical investments, and because SBC does, in its actual network, purchase and install DS1 repeaters, the expenses for those installations are already included in the accounts used to derive the installation and maintenance factors in SBC's TELRIC cost studies. As Mr. Starkey stated, regardless of whether SBC's LoopCAT model (or other forward-looking design) includes repeaters or not, to the extent that SBC applies either its ACFs or its installation factors to the resulting "forward looking investment," the expenses associated with modifying or maintaining the equipment in SBC's actual

[151] 47 C.F.R. § 51.505(e) (emphasis added).

network are recovered, including expenses associated with acquiring and installing repeaters for DS1 circuits.

The CLECs noted that SBC has already conceded in Ohio,[152] Wisconsin[153] and Michigan[154] that imposing additional charges for specific RNMs would result in double recovery because their costs were already being recovered in SBC's ACFs. Mr. Starkey testified that these admissions should apply equally to the RNM costs that SBC has proposed to recover on an ICB basis here. Mr. Starkey also discussed that SBC's position on "chargeable" RNMs (those for which the costs are not already recovered in SBC's TELRIC rates) has been a veritable moving target in its Accessible Letters, and that SBC has repeatedly been forced to abandon initial attempts to charge for RNMs.

2. Commission Discussion and Findings

The Commission must resolve two issues: first, are the three specific services in Section 8.1.6 of the Agreement being recovered through SBC Indiana's current recurring or nonrecurring charges; and second, if the charges are not being recovered, what are the appropriate rates? We find that SBC Indiana, through the testimony of Mr. Barch, has provided sufficient evidence that the three specific routine network modifications listed in Section 8.1.6 of the Agreement are not already included in its UNE rates. However, SBC Indiana has not indicated that any other RNMs, such as those listed in Section 8.1.2, are not being recovered through its recurring or nonrecurring charges. Thus, SBC Indiana's proposed language that may allow them to charge for other RNMs is too broad.

In determining the appropriate rates, SBC has indicated this is not a cost docket proceeding and the Commission does not have specific, concrete charges before it. SBC's proposed language allows it to set ICB rates unless parties can negotiate rates or rates are set by the IURC. The CLECs' proposed language indicates SBC will not assess a charge until the parties agree or the IURC determines that SBC is allowed to assess such charges. We find that the CLECs' language is not consistent with the above finding that SBC is allowed to charge for the three specific services listed in Section 8.1.6. However, SBC Indiana's language contradicts language agreed to by the parties. Specifically, the agreed language states: "SBC shall provide routine network modifications at the rates, terms, and conditions set out in this Appendix, and the state specific Appendix Pricing." Thus, we are puzzled why SBC is proposing to charge ICB rates as interim rates. Based upon this, we find it appropriate to have the parties work together to develop interim rates for the three services for the next 20 days. At that time, if interim rates cannot be developed, the parties will file their proposals for interim rates with the Commission. The IURC will set interim rates and begin a proceeding to develop

[152] *See* Opinion and Order, *In re Review of SBC Ohio's TELRIC Costs for Unbundled Network Elements*, PUCO Case No. 02-1280-TP-UNC, at 111-12 (Nov. 3, 2004).

[153] Final Decision, *Petition of Wisconsin Bell, Inc. d/b/a SBC Wisconsin, to Establish Rates and Costs for Unbundled Network Elements*, PSCW Docket No. 6720-TI-187, at 71 (October 13, 2004).

[154] *Michigan TRO/TRRO Order*, at 44.

permanent rates. However, as always, the parties are encouraged to develop negotiated permanent rates. Based upon the previous findings, the following language for Section 8.1.6 of the Agreement should be adopted:

> SBC may charge for (i) adding an equipment case, (ii) adding a doubler or repeater including line card(s), and (iii) installing a repeater shelf, and any other necessary work and parts associated with a repeater shelf, to the extent such equipment is not present on the loop or transport facility when ordered. SBC shall include these rates in the state specific Appendix Pricing. The IURC has not established permanent rates for these three services. Unless parties agree on interim rates, the interim rate will be set by the IURC. Unless parties agree to permanent rates, the IURC will set permanent rates.

ISSUE 27

- **Statement of Issue: Should batch hot cut terms and conditions be included in the Agreement?**
- **Disputed Agreement Language: Section 9**

1. Positions of the Parties

A. SBC

SBC Indiana asserts that this issue concerns the CLECs' proposal for the many new and highly controversial "batch hot cut" processes. SBC Indiana explained that a "hot cut" is the manual disconnection of the customer's loop from the SBC Indiana switch and the physical re-wiring of that loop to the CLEC switch, while simultaneously reassigning (*i.e.*, porting) the customer's original telephone number from the incumbent LEC switch to the competitive LEC switch. Ms. Chapman testified that a "batch hot cut" involves hot cuts done on a bulk basis, where the timing and volume of the cut-over is managed.

SBC Indiana contends that this proceeding is limited to implementing changes that occurred as a result of the TRO and TRRO. SBC Indiana argues that there is no requirement for a batch hot cut process in the TRRO. SBC Indiana states that while the TRO asked state commissions to consider the possible adoption of a batch cut process for each geographic market (47 CFR § 51.319 d(2)(ii)), that delegation of authority was held unlawful by the D.C. Circuit in *USTA II*.[155] SBC Indiana further explained that on August 8, 2004, the FCC released its *Interim Order* adopting interim unbundling rules, and on February 4, 2005, the FCC issued its new rules in the TRRO. SBC Indiana asserts

[155] *USTA II*, 359 F.3d at 568.

that neither the *Interim Order* nor the TRRO requires any batch cut procedure. SBC Indiana contends that the FCC recognized in its *Interim Order* that its implementation of the original TRO rules, including batch hot cut requirements that were vacated by *USTA II*, was no longer possible. Further SBC Indiana argues that the FCC found that the incumbents have developed "new, improved hot cut processes" that "significantly address" the difficulties the FCC noted in the TRO, and SBC Indiana contends that these processes, which are available to all CLECs, "result in lower hot cut NRCs [non-recurring costs]" and offer "extended business hours during which hot cuts can be performed."[156]

SBC Indiana cites three additional reasons why the Commission should not adopt the CLECs' proposal on this issue. First, SBC argues that the FCC's analysis further confirms that batch hot cut issues are unnecessary to address concerns about the ILECs' ability to convert the embedded base of UNE-P customers in a timely manner given the 12-month transition period adopted by the FCC.[157] Second, SBC Indiana contends that the FCC rejected CLEC proposals to further modify the batch hot cut process to address specific hot cut scenarios.[158] In other words, the FCC considered, but rejected, several of the very types of changes that the CLECs propose here. And third, SBC argues that the FCC's previous review, for purposes of evaluating its application to provide in region long distance service subject to Section 271, found that the incumbents' hot cut performance is sufficient for checklist compliance.[159] SBC Indiana contends that this evaluation specifically addressed and confirmed SBC Indiana's ability to adapt its practices and capabilities to meet changes in demand.

SBC Indiana explained that the CLECs have proposed significant changes that, once adopted, would take considerable time to clarify, develop and implement. SBC Indiana observes that under the FCC's transition rules, the migration of the embedded base is to be completed by March 11, 2006, and is to begin much earlier than that. SBC Indiana asserts that it is highly unlikely that it would be able to implement the proposed changes before the transition is complete.

B. CLECs

The CLECs propose that the Commission incorporate terms and conditions relating to batch hot cuts, as a means to implement the FCC's TRRO, particularly considering the forced migration of millions of CLEC UNE-P lines to alternative arrangements.

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[156] TRRO, ¶¶ 210, 213 & n.571.

[157] *Id.* at ¶ 216.

[158] *Id.* at ¶ 217.

[159] *Id.* at ¶ 214.

The CLECs first contend that SBC is attempting to cloud this issue by confusing the FCC's discussion of whether CLECs are impaired because of the ILECs' hot cut procedures with the need to have adequate hot cut procedures to implement the transition after the CLECs were deemed non-impaired. Thus, while it is true that the FCC departed from its previous conclusion in the TRO, that impairment could exist without access to ULS due to the lack of availability of ILEC batch hot cut processes, the FCC was also clear that state commissions could further refine the available ILEC batch hot cut processes.

The CLECs assert that it is critical that prices, terms and conditions for batch hot cuts and all-day cuts be adopted in the Agreement that results from this proceeding. Based upon the FCC's decisions in the TRO and the TRRO that CLECs are no longer entitled to ULS/UNE-P from ILECs to serve either enterprise or mass market customers, CLECs must migrate their embedded bases of customers served by ULS/UNE-P to other arrangements by March 11, 2006. A CLEC currently serving its end user customers using ULS/UNE-P from SBC has the option to (a) convert such arrangements to a wholesale local service from SBC, (b) convert such arrangements to SBC Section 251 resale, (c) migrate the UNE-P customers to another CLEC that is providing local wholesale service, (d) migrate the UNE-P customers to a third-party provided wholesale switching operation, (e) install its own switching and migrate the UNE-P customers to the CLEC's switching or (f) abandon its customers. Given the relatively short time frame in which to accomplish these migrations, batch hot cuts and all-day cuts will be a critical means by which a CLEC can convert its current UNE-P customers to the three available alternatives (c, d, or e), which promote the facilities-based competition model that was one of the objectives of the Act. The absence of batch hot cut or all-day cut alternatives will make it materially more costly and inefficient for a CLEC to use these options.

The CLECs further argue that in light of the large numbers of UNE-P customers that must be converted or migrated to other arrangements by March 11, 2006, it is critical for the details of these processes to be determined in this proceeding, which is scheduled to be completed by year end, rather than through a separate process which may not be completed in a timely manner relative to the TRRO transition period. If UNE-L (*i.e.*, the use of non-SBC switching with an unbundled local loop leased from SBC to serve the customer) is to be a viable alternative for migrating large numbers of lines away from UNE-P, then CLECs will need to convert a large number of access lines from SBC switching to the CLEC's own switching or a third-party provider's switching in a short time frame using an efficient, cost effective process.

In response to SBC's claims that it already offers batch hot cut processes to CLECs that the FCC indicated were sufficiently adequate to not be a cause of impairment for the CLECs without access to ULS, the CLECs assert that while hot cut processes may be adequate to sustain a non-impairment finding going forward, it is not the same thing as a finding that the existing processes are sufficient to handle the massive, simultaneous one-time movement of lines throughout the state by every CLEC that has used UNE-P. The fact that the FCC concluded that SBC's batch hot cut offerings are sufficiently adequate that CLECs are not impaired without access to mass market ULS/UNE-P certainly does not mean that SBC is under no obligation to negotiate possible changes to its batch hot cut offerings with CLECs to implement the TRRO. The CLECs cite paragraph 233 of the TRRO, which specifically requires the parties to negotiate terms that are necessary and appropriate to implement the TRRO.

2. Commission Discussion and Findings

The Commission finds for SBC Indiana on this issue, and rejects the CLECs' proposed language in Section 9.

As a threshold matter, we are persuaded by SBC Indiana's arguments that the batch hot cut process is beyond the scope of this proceeding. As SBC Indiana correctly observes, the purpose of this proceeding is to implement the changes that occurred as a result of the TRO and TRRO, and there is no requirement for a batch hot cut process in either of those orders. While the TRO directed state commissions to consider the possible adoption of a batch cut process for each geographic market (47 CFR § 51.319 d(2)(ii)), that delegation of authority was overruled by the D.C. Circuit in *USTA II.* There is also no batch cut procedure required by either the FCC's *Interim Order* or the TRRO. In short, there is no longer any FCC batch cut rule, nor is there a delegation of authority from the FCC to the Commission to resolve this issue.

The Commission also finds that it would be inappropriate to consider the batch cut process as a UNE-P "implementation" issue under paragraph 233 of the TRRO. SBC Indiana correctly observes that paragraph 233 of the TRRO addresses implementation and directs the parties to implement changes to their interconnection agreements "consistent with our conclusions in the order." And the FCC's "conclusion in the order" is that the batch cut processes already offered by SBC Indiana (and other ILECs) are sufficient to support the migration of embedded base UNE-Petitioner customers to other arrangements within the 12-month transition period. Accordingly, it is not necessary for us to consider new or different batch cut processes for implementation of the UNE-P transition.

The FCC found that concerns regarding the ILECs' ability to convert the embedded base of UNE-P customers in a timely manner are "rendered moot" by the 12-month transition period adopted by the FCC.[160] Because the 12-month transition period obviates the need for any new or different batch cut terms to be developed in the implementation process, there are no batch hot cut issues for us to address.

<u>ISSUE 28</u>

- **Statement of Issue: What charge should apply to conversions that require manual handling?**

- **Disputed Agreement Language: Section 10.1.3.1**

[160] TRRO, ¶ 216.

1. Positions of the Parties

A. SBC

SBC Indiana asserts that this issue is closely related to Issue 9 above. While Issue 9 relates to conversions of UNEs to wholesale services, this issue concerns the conversion of wholesale services to UNEs. SBC Indiana explained that the CLECs propose that SBC Indiana be prohibited from assessing any non-recurring charges other than an "Electronic Service Order (Flow Through) record charge." SBC Indiana proposes competing language that would require the CLEC to pay the non-recurring charges included in the Agreement's Pricing Schedule and/or Tariff for the UNEs or UNE combinations to which a particular wholesale service is to be converted. According to SBC Indiana, its proposal is reasonable and should be adopted because it should be allowed to recover its costs for processing the orders, which are caused by the CLECs, regardless of whether the order is processed in compliance with the FCC's rules or whenever a conversion occurs. SBC Indiana's position regarding this dispute is further addressed above in Issue 9.

B. CLECs

The CLECs' position is discussed above in Issue 9.

2. Commission Discussion and Findings

In Issue 9, the Commission discussed the general findings on the four disputed areas regarding nonrecurring charges, such as ordering charges for transitions from UNEs to other services. We find that our discussion and findings in Issue 9 should also govern the findings in Issue 28. These same four issues in Issue 9 constitute the disagreements here. In fact, the general heading for Section 10.1, of which 10.1.3.1 is a subsection, is Conversions of Wholesale Services to UNEs. Furthermore, Section 3.2.2.2, which is disputed in Issue 9, has very similar language to Section 10.1.3.1. For example, in both sections the CLECs proposed language includes "conversion shall take place in a seamless manner that does not affect the customer's perception of service quality." In Issue 9 we found the parties have already agreed to language that adequately addresses whether a conversion will be seamless. Similarly, we find language in Section 10.1.3 adequately addresses conversions and trying to minimize disruptions. We also found: (1) SBC may assess termination fees from its interstate access tariff; (2) this is not the appropriate venue for changes to the intrastate access tariff; (3) if physical work is required, SBC is entitled to be compensated; and (4) a conversion from special access to a UNE combination should only entail a records change as it is a simple billing change.

<u>ISSUE 29</u>

- **Statement of Issue: Should SBC be required to offer a reasonable alternative to a CLEC before it can retire a copper loop that a CLEC is currently using to provide service to a customer? If so, what terms should apply?**

- **Disputed Agreement Language: Section 11.1.3**

1. Positions of the Parties

A. SBC

SBC Indiana explained that the FCC's rules limit unbundled access to an incumbent's FTTH and FTTC loops where those facilities "overbuild" existing copper facilities (among other contexts). According to SBC Indiana, the FCC rules also give incumbents the right to retire copper loops that have been replaced by FTTH and FTTC overbuild facilities, subject to certain notice requirements.[161] The rules state that "[p]rior to retiring any copper loop or copper subloop that has been replaced with a fiber-to-the-home loop or a fiber-to-the-curb loop, an incumbent LEC must comply with: (A) The network disclosure requirements set forth in Section 251(c)(5) of the Act and in § 51.325 through § 51.355; and (B) Any applicable state requirements."[162] SBC Indiana contends that these rules are reflected in the language to which the parties have already agreed in Section 11.1.3 of the Agreement.

SBC Indiana proposes additional language for Section 11.1.3, providing CLECs the option of requesting a line station transfer ("LST") to a non-fiber loop facility when available. SBC Indiana witness Chapman asserts that this option has never been required by the FCC or any of its rules. Rather, SBC Indiana voluntarily proposed this language in order to settle this issue, as SBC Michigan was able to do in a parallel arbitration proceeding.

SBC Indiana contends that the CLECs now propose to twist SBC Indiana's voluntary offer to provide LSTs where available, into an affirmative requirement. SBC Indiana opposes the CLECs' proposed language, which states that SBC Indiana may retire copper loops only where it performs the LST offered above, unless it obtains an advance Commission determination that the CLEC's rejection of SBC Indiana's proposed alternative is unreasonable and contrary to public interest.

SBC Indiana asserts that there is no basis for the CLECs' proposal. The FCC rules only require notice of retirements, not CLEC or Commission approval. SBC Indiana points out that in the event it retires copper loops that have been replaced by FTTC or FTTH loops, it must provide access to a 64-kbps transmission path over the replacement loop. Thus, SBC Indiana avers that in establishing its notice provisions, the FCC specifically rejected the CLEC notion that incumbents should be required to obtain Commission approval prior to the retirement of copper loops, as the CLECs propose here. The FCC explained at paragraph 281 of the TRO that:

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[161] *See* TRO, ¶ 281; *see also FTTC Reconsideration Order.*

[162] 47 C.F.R. § 51.319(a)(3)(iii), as amended by the *FTTC Reconsideration Order.*

> [w]e decline to impose a blanket prohibition on the ability of incumbent LECs to retire any copper loops or subloops they have replaced with FTTH loops. Several parties also propose extensive rules that would require affirmative regulatory approval prior to the retirement of any copper loop facilities. We find that such a requirement is not necessary at this time because our existing rules, with minor modifications, serve as adequate safeguards.

SBC Indiana argues that the CLECs' proposal also poses practical and operational problems. Ms. Chapman explained that Section 11.1.3 applies only where SBC Indiana has built new FTTC or FTTH loops over existing copper facilities. Since SBC Indiana would have already deployed replacement facilities in those cases, there will obviously be instances where SBC Indiana will not have alternative non-fiber loops to offer CLECs, thus forcing SBC Indiana to pursue prior Commission approval. However, the retirement of copper loops is primarily an economic issue. Ms. Chapman further testified that SBC Indiana generally retires loop facilities when the cost of maintaining them becomes so excessive that the loops cannot continue to be used effectively or efficiently. Therefore, SBC Indiana contends that the CLECs' proposal is a request to force SBC Indiana to maintain a network that is no longer efficient or cost-effective, and to have CLECs and the Commission step in to micromanage SBC Indiana's network management decisions. SBC Indiana argues that it is unwarranted to impose such an obligation under any circumstance, but it is particularly unreasonable when SBC Indiana's prices for unbundled loops are based upon the cost of a forward-looking efficient network.

B. CLECs

According to the CLECs, the FCC has for years had in place certain notice procedures ("network disclosure rules") that ILECs must follow if they wish to retire a copper loop. However, in the TRO, the FCC recognized that the new broadband unbundling exemptions give ILECs additional incentives to retire copper loops in order to deny UNE access to CLECs. Accordingly, the TRO explicitly recognized that states could establish additional requirements with respect to copper retirement, and that "[w]e expect that the state review process, working in combination with the Commission's network disclosure rules noted above, will address the concerns...regarding the potential impact of an incumbent LEC retiring its copper loops."[163] The CLECs claim SBC's position is that only the FCC's network disclosure rules should apply even though the FCC itself found that state oversight was an important complement to its rules in order to safeguard consumer and competitive interests.

Rather than propose broad new requirements, the CLECs assert they have proposed only very modest and limited additional safeguards for copper retirement to address the particular scenario, whereas SBC proposes to retire a copper loop that a CLEC is presently using to serve an end-user customer. Among this limited category, the

[163] TRO, ¶ 284.

parties were able to reach agreement on the additional requirements that will apply to non-DSL lines. In those instances, SBC has agreed to perform a LST where an alternative copper or non-packetized hybrid ("TDM") loop is available. Mr. Strickland stated that solution is inadequate for DSL lines, because, due to technological limitations, CLECs would be unable to provide DSL service over Hybrid Loops under the limitations to be set forth in the Agreement. Mr. Strickland argued that if SBC proposed to retire a copper loop and only offered to perform an LST to a Hybrid Loop, the CLEC would be forced to disconnect the customer's DSL service.

The CLECs believe that the Commission has ample reason and basis to accept the FCC's invitation to impose additional requirements on copper retirement to protect Indiana consumers from disconnection of their DSL service. Mr. Strickland opined that consumers might not be able to replace the disconnected CLEC service with comparable service from SBC because CLECs offer different types of DSL services at different prices from the offerings of SBC, especially for small business customers. Mr. Strickland argued that the interests of such end-user customers deserve consideration in the equation, when considering whether SBC should be permitted to retire the copper loop.

The CLECs' proposal would give SBC two options if it wished to retire a copper loop used by a CLEC to provide DSL services. First, SBC could move the CLEC to an alternative UNE loop that would enable the CLEC to continue to provide comparable service to its customer without significant additional CLEC construction or deployment. This option serves the public interest best since it would allow the end-user customer to continue to receive their existing DSL service. But to grant SBC additional protection, the CLECs have also offered an option that would allow SBC to retire a loop, even if it would result in disconnection of the CLEC DSL service, if it could demonstrate a compelling need to retire the loop. According to the CLECs, if SBC cannot give any compelling reason for its desire to retire an in-service loop, there is no harm in deferring the retirement during the period in which an Indiana consumer is obtaining services over that loop.

2. Commission Discussion and Findings

The Commission rejects the CLECs' proposal on this issue. Nothing in the FCC's rules supports the CLECs' proposed language. The FCC has specifically rejected CLEC proposals for advance approval of loop requirements "because our existing rules, with minor modifications, serve as adequate safeguards."[164] The FCC's clear indication about state commission involvement in loop retirement policies was not to establish independent state commission authority based upon federal law but merely to be respectful of applicable state statutory and regulatory requirements. Yet, the CLECs have not cited any applicable state legal or regulatory requirements that provide the legal basis on which this Commission could adopt their recommendations. In terms of the concerns about a customer's continued availability to broadband services when copper loops have been retired, we note that prior to the retirement of the copper loops there must be an overbuild with fiber optic cable that provides greater bandwidth. We see no reason why a

[164] *Id.* at ¶ 281.

customer's broadband service would be diminished by the offering of new broadband services via fiber optic cable. In fact, there is every reason to believe the broadband services would be superior to those that could be provisioned via copper loops. Accordingly, we find for SBC Indiana on this issue.

ISSUE 30

- **Statement of Issue: If a CLEC has requested access to a loop to a customer's premises that SBC serves with an Integrated Digital Loop Carrier ("IDLC") Hybrid Loop, under what conditions can SBC impose non-recurring charges other than standard loop order charges and, if applicable, charges for routine network modifications?**

- **Disputed Agreement Language: Section 11.2.5**

1. Positions of the Parties

A. SBC

SBC Indiana explained that the dispute relates to the compensation SBC Indiana may receive for the cost of unbundling an IDLC. SBC Indiana does not propose any language for this situation, thus leaving in place whatever compensation arrangements exist under its current interconnection agreements. According to SBC Indiana, its position is reasonable and should be adopted, because the TRO and TRRO did not even purport to change the law on compensation (or for that matter, on IDLC generally), so they should not result in any change to the agreements on this issue.

SBC Indiana opposes the CLECs' modified proposal, which provides that SBC Indiana can only charge "the least cost technically feasible method of unbundled access." SBC Indiana asserts that this proposal, like the CLECs' original proposal, is improper and unnecessary. First, SBC Indiana notes that its existing agreements already define its right to recover costs for IDLC unbundling, and thus, the CLECs' proposed language is redundant and thus unnecessary. SBC Indiana further contends that to the extent the CLECs' proposed language modifies existing agreements, it is improper as those agreements are binding and there has been no change of law to warrant such a modification.

Second, SBC Indiana contends that the CLECs' proposal is contrary to the FCC's order that incumbent LECs have discretion to manage their networks and decide how best to provision loops. In paragraph 297 of the TRO, the FCC clearly stated that "incumbent LECs must present requesting carriers a technically feasible method of unbundled access," not that requesting carriers are empowered to demand any particular method. SBC Indiana notes that in the arbitration between Verizon Virginia and Cavalier, the FCC's Wireline Competition Bureau rejected a CLEC proposal that would have required the incumbent "to conduct trials of the specific hairpin/nail-up and multiple switch hosting unbundling processes" advocated by the CLEC (even though the hairpin option was among those mentioned in footnote 855 of the TRO).[165] As the Bureau explained, the TRO "gives incumbent LECs the choice whether to unbundle Integrated DLC loops when spare facilities are available, and the choice of technically feasible methods of Integrated DLC loop unbundling."[166] According to SBC Indiana, because "the [TRO] does not require Verizon to use the particular methods proposed by Cavalier," the CLECs' proposal "is at odds with the [TRO]."[167] SBC Indiana asserts that the FCC leaves the choice of method to SBC Indiana's discretion, and the CLEC is not entitled to second-guess the incumbent's engineering judgment.

B. CLECs

The CLECs contend that the TRO makes clear that SBC is not excused from its obligation to provide unbundled Hybrid Loops where it has deployed IDLC systems. The FCC "recognize[d] that providing unbundled access to hybrid loops served by a particular type of DLC system, e.g., Integrated DLC systems, may require incumbent LECs to implement policies, practices, and procedures different from those used to provide access to loops served by Universal DLC systems."[168] Despite this finding, the FCC explicitly held that "[e]ven still, we require incumbent LECs to provide requesting carriers access to a transmission path over hybrid loops served by Integrated DLC systems."[169] This rule does not necessarily require SBC to unbundle an IDLC loop, so long as it provides the requesting CLEC with some other unbundled loop serving the same customer premises. According to the CLECs, SBC has not proposed any terms to implement this requirement of the TRO.

The CLECs argue that their proposal does not mandate any particular form of access where IDLC loops are present; instead, it affords SBC the discretion to choose which form of access to provide, subject only to the reasonable requirement developed by the arbitrators in the Illinois arbitration that SBC could not impose additional charges beyond the least cost option for providing access. The purpose of this requirement is to prevent SBC from "satisfying" its obligation to provide access to IDLC loops by offering to CLECs the most expensive solution SBC can think of, even when less expensive solutions are possible. The arbitration decision in the *Illinois TRO/TRRO Order* explained that this "compromise proposal allows SBC the discretion to manage its network but protects CLECs from unneeded construction charges when alternatives exist."[170]

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[165] *In re Petition of Cavalier Telephone LLC*, 18 F.C.C.R. 25,887, ¶ 133 (Dec. 12, 2003).

[166] *Id.*

[167] *Id.* at ¶¶ 131, 133.

[168] TRO, ¶ 297.

[169] *Id.*

[170] *Illinois TRO/TRRO Order*, at 199.

The CLECs stated that the TRO notes that in most cases, the ILEC would be able to provide unbundled access using a spare copper loop or through a reconfiguration of the DLC into UDLC architecture.[171] The TRO, however, makes clear that "if neither of these options is available, incumbent LECs must present requesting carriers a technically feasible method of unbundled access."[172] The CLECs are therefore puzzled that SBC has disputed the first sentence of their proposed Section 11.2.5, which reads, "Where CLEC requests a loop to a premises to which SBC has deployed an IDLC Hybrid Loop, SBC must provide CLEC a technically feasible method of unbundled access."

The CLECs describe the remainder of their proposal as a simple safeguard to protect against SBC attempts to impose unjustified charges for special construction when in fact no special construction is necessary. The CLECs have agreed to grant flexibility to SBC to decide which "technically feasible method" of access to offer the CLECs, so that SBC can maintain control over its network design. However, SBC should not be permitted to use this flexibility as a ruse to effectively deny a CLEC access by offering the slowest, most expensive "alternative" it can devise. Therefore, the CLECs claim their proposal is based upon the premise that SBC cannot offer only the "technically feasible method" of the construction of a new copper loop, at the CLECs' expense, when any quicker, less expensive alternative is also readily possible. According to the CLECs, this rule is necessary to prevent SBC from claiming that special (not standard) non-recurring charges (*i.e.*, loop construction costs) should apply when in fact none are necessary to provide an unbundled loop.

The CLECs maintain it is important to note that SBC, by its own admission, will almost never be forced to choose between loop construction and unbundled IDLC. The TRO cited a letter from SBC in which "SBC explains that, for 99.88% of SBC's lines served over Integrated DLC, competitive LECs have access to Universal DLC or spare copper facilities as alternatives to the transmission path over SBC's Integrated DLC system."[173] The CLECs claim the most important purpose of their proposal is not to govern the very rare instances in which it might be necessary for SBC to choose between providing access to an IDLC or building a new copper loop. Instead, they claim the primary objective of their proposal is to assure that SBC does not try to subject the CLECs to special construction charges in the 99.88% of the instances in which no such charges are appropriate even under SBC's existing provisioning guidelines. In other words, the CLECs fear that without their proposed safeguard, SBC may try to use the complexities of IDLC unbundling as a smokescreen to claim that special construction would be needed in some of the 999 of every 1000 loop orders in which spare copper or UDLC are available.

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[171] TRO, ¶ 297.

[172] *Id.*

[173] TRO, n. 854.

2. Commission Discussion and Findings

SBC and the CLECs disagree whether any language regarding IDLC Hybrid Loops is necessary. Furthermore, the CLECs are concerned about any additional costs SBC is trying to impose on the CLECs. Specifically, the CLECs do not want SBC to charge a CLEC for the cost of building a new loop when other less costly means of providing access to the CLEC are readily available.

SBC argues that the Commission should not consider the CLECs' proposal because it might alter the existing contractual relationship between the parties regarding an issue on which SBC claims there has been no change of law. We disagree. While it is true that the *Local Competition Order* found that SBC is required to unbundle IDLC loops, the TRO expanded its consideration of such loops in light of the new Hybrid Loop rules, and in light of concerns that have arisen subsequent to 1996 about ILEC attempts to deny or overcharge for access to IDLC loops. We agree with the CLECs that its proposal is ripe for consideration as an "open issue" in this proceeding, which the Commission must resolve pursuant to Section 252(b)(4)(C) of the Act. Based upon this determination we find the first sentence in Section 11.2.5 of the CLECs' proposal appropriate.

The second sentence of Section 11.2.5 of the Agreement relates to recovery of costs when a CLEC buys a UNE loop for which SBC has deployed an IDLC Hybrid Loop. While it is true, based upon the evidence, that SBC should rarely, if ever (0.12% of the time), need to build a new copper loop to provide access, we find the phrase "SBC may not impose special construction costs or other nonstandard charges" to be too restrictive. In the event that SBC truly did need to construct a new loop to provide access and incurs specific charges to construct the loop, the CLECs' introductory phrase "SBC can only charge the CLEC the least cost technically feasible method of unbundled access" would allow it to do so. However, we find the phrase following "SBC can only charge the CLEC the least cost technically feasible method of unbundled access" should be deleted.

ISSUE 31

- **Statement of Issue: Should Section 11.2 of the Agreement, which relates to Hybrid Loops, include language derived from footnote 956 of the TRO?**

- **Disputed Agreement Language: Section 11.2.**

1. Positions of the Parties

A. SBC

SBC Indiana opposes the CLECs' proposed language for Section 11.2 of the Agreement. This Section governs Hybrid Loops and begins with the following language: "The unbundling obligations associated with DS1 and DS3 loops are in no way limited by this Section 11.2 or the Rules adopted in the [TRO] with respect to hybrid loops typically used to serve mass market customers."

SBC Indiana asserts that the CLECs' proposed language should be rejected, because although it purports to be "derived from footnote 956" of the TRO, it is not faithful to footnote 956. SBC Indiana explained that the footnote refers only to "DS1 loops," and that the CLECs added the reference to DS3 loops.[174] According to SBC Indiana, the CLECs then mischaracterize the discussion and context of footnote 956, which expressly states that DS1 loops are to be available "unless otherwise specifically indicated" and references the Section of the TRO that includes the discussion on FTTH loops.[175]

SBC Indiana added that the language "derived" by the CLECs is woefully out-of-date. In particular, Ms. Chapman observes that the footnote states that Hybrid Loops are "typically used to serve mass market customers." SBC Indiana points out that whether or not that was true at the time of the TRO, the rule for Hybrid Loops that is in effect today applies to all customers. Ms. Chapman further explained that after the TRO, the FCC expressly deleted the rule's limitation to residential end users, as explained under Issue 2. Further, the FCC expanded the rules for FTTH loops to cover FTTC loops, as is also described under Issue 2. Finally, SBC Indiana contends that whether or not the FCC's observation was true at the time of the TRO, it relates to provisioning practices at the time, and such practices change over time in this dynamic industry.

B. CLECs

The CLECs testified that Issue 2 above addresses the parties' dispute over whether SBC may refuse to make Hybrid Loops available to CLECs to serve customers that are not defined as Mass Market Customers. According to the CLECs, regardless of whether the Commission decides to limit the application of the Hybrid Loop rules to the "mass market" in Issue 2, it is even clearer that the Hybrid Loop rules do not apply to DS1 loops, which have their own separate rules, standards and unbundling obligations. While DS1 loops are often provided over mixed fiber-copper facilities, the TRO established an entirely different set of rules for DS1 loops than for Hybrid Loops, with different standards and a different framework. The UNE loop rules are addressed in 47 C.F.R. § 51.319(a). Hybrid Loops are addressed in subsection (2) of this rule, whereas DS1 and DS3 loops are addressed in subsections (4) and (5), respectively. Accordingly, in the section of the TRO addressing DS1 loops, the FCC explained:

> DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops, e.g., two-wire and four-wire HDSL or SHDSL, fiber optics, or radio, used by the incumbent LEC to provision such loops and regardless of the customer for which the requesting carrier will serve unless otherwise

[174] TRO, n. 956.

[175] *Id.*

> specifically indicated. *See supra* Part VI.A.4.a.(v) (discussing FTTH). The unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass market customers. *See supra* Part VI.A.4.a.(v)(b)(i).[176]

The CLECs propose the following in Section 11.2 of the Agreement: "The unbundling obligations associated with DS1 and DS3 loops are in no way limited by this Section 11.2 or the Rules adopted in the TRO with respect to hybrid loops typically used to serve mass market customers." Since this sentence was taken almost directly from the TRO, the CLECs thought that it would be an undisputed clarification. According to the CLECs, the FCC clearly did not intend to allow SBC to use the Hybrid Loop rules as a Trojan Horse to eliminate DS1 and DS3 unbundling, and the CLECs have therefore proposed terms that make clear their right to continue to obtain DS1 and DS3 loops, even if SBC provisions them over Hybrid Loops.

2. Commission Discussion and Findings

At issue here is the FCC's TRO decision that the ILECs' obligations to provide DS1 loops "are in no way limited by" its Hybrid Loop rules. While SBC tries to persuade this Commission that the FCC today would not reach the same conclusions that it did in the TRO, we disagree. The TRO established an entirely different set of rules for DS1 loops than for Hybrid Loops, with different standards and a different framework.

First, SBC notes that footnote 956 "refers only to 'DS1 loops'" and not to DS3 loops, which the CLECs have included in their proposed language. While it is true that DS3 loops are not specifically referenced, neither are they specifically excluded, leading logically to the conclusion that *if* this language from the TRO is applicable to DS1 loops, then it is also applicable to DS3 loops. We agree with the CLECs that SBC has offered no logical reason that the FCC would carve DS1 loops out of the Hybrid Loop rules but leave higher-capacity DS3 loops governed by the rules that would otherwise apply only to mass market DS0 loops.

Second, we disagree with SBC's argument that the CLECs are trying to hide something by omitting reference to some of the words the FCC used in footnote 956. The CLECs' proposed language in Section 11.2 is specifically limited to Hybrid Loops; therefore, there is no reason to include the portion of footnote 956 that refers to FTTH loops, and the CLECs' "subtraction" of this FTTH reference is appropriate. By contrast, the CLECs' proposed Section 11.2 does not leave out any words from the FCC's statement on the non-applicability of the Hybrid Loop rules on DS1 loops.

Finally, SBC argues that the CLECs' proposal is "woefully out of date." We disagree. The Hybrid Loop rules have not changed since they were adopted by the TRO.

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176 *Id.*

The two examples SBC gives to suggest that the FCC statement at issue is out of date are (1) the Errata clarification that removed the word "residential" from the FTTH rule and (2) the *FTTC Order*, which applied the FTTH relief to FTTC loops. Neither of these subsequent changes altered the scope of the Hybrid Loop rules. Instead, the boundary between the rules that apply to Hybrid Loops and DS1 loops is unchanged from when the FCC issued the TRO, and that demarcation is explicitly stated in footnote 956 of the TRO, which the CLECs have incorporated into their proposed Section 11.2.

We find that the TRRO implicitly confirms the CLECs' position since the DS1 and DS3 loops are addressed in entirely separate sections of the FCC's rules from Hybrid Loops. Further, in its lengthy discussion of DS1 and DS3 loops, the FCC's TRRO does not even hint that these loop types are subject to the Hybrid Loop rules. Instead, the DS1 and DS3 rules provide that ILECs "shall" provide access to these loops at all qualifying wire centers, subject only to the 10-per-building loop cap. Therefore, we agree that the CLECs' proposal is not out of date, but is in accordance with the FCC's latest order and should be adopted.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. The disputed issues between the parties are resolved in accordance with the findings and conclusions set forth above.

2. Agreements between SBC Indiana and each of the CLECs, that implement the findings and conclusions herein, shall be filed within 30 days of the effective date of this Order. While this Cause is not a Section 251/252 proceeding, we find it appropriate to process the resulting Agreements consistent with both that federal law and our own relevant procedures. Therefore:

   a. Pursuant to the Commission's August 21, 1996 Amended Interim Procedural Order in Cause No. 39983, the review phase for each SBC Indiana/CLEC Agreement begins on the date each Agreement is filed.

   b. To facilitate review, the Commission will post the submitted Agreements to its website.

   c. Any non-negotiating entity desiring to file written comments about any Agreement shall do so within 15 days of the date the review phase begins.

   d. Pursuant to 47 U.S.C. 252(e), if the Commission does not approve or reject the Agreement, with written findings as to any deficiencies, the Agreement shall be deemed approved thirty (30) days after the date the review phase begins.

3. This Order shall be effective on and after the date of its approval.

<u>HARDY, HADLEY, SERVER AND ZIEGNER CONCUR; LANDIS ABSENT</u>:
APPROVED: JAN 11 2006

I hereby certify that the above is a true and correct copy of the Order as approved.

Paula L Barnett

Paula L. Barnett
Acting Secretary to the Commission