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.

ISSUE 12

- **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

[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.

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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.

ISSUE 19

- **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]

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[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

[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?**

[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

[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]

ISSUE 26

- **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

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[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

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[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.