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

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

ISSUE 27

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

- **Disputed Agreement Language: Section 9**

1. Positions of the Parties

A. SBC

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

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

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

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

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

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

B. CLECs

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

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[156] TRRO, ¶¶ 210, 213 & n.571.

[157] *Id.* at ¶ 216.

[158] *Id.* at ¶ 217.

[159] *Id.* at ¶ 214.

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

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

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

In response to SBC's claims that it already offers batch hot cut processes to CLECs that the FCC indicated were sufficiently adequate to not be a cause of impairment for the CLECs without access to ULS, the CLECs assert that while hot cut processes may be adequate to sustain a non-impairment finding going forward, it is not the same thing as a finding that the existing processes are sufficient to handle the massive, simultaneous one-time movement of lines throughout the state by every CLEC that has used UNE-P. The fact that the FCC concluded that SBC's batch hot cut offerings are sufficiently adequate that CLECs are not impaired without access to mass market ULS/UNE-P

certainly does not mean that SBC is under no obligation to negotiate possible changes to its batch hot cut offerings with CLECs to implement the TRRO. The CLECs cite paragraph 233 of the TRRO, which specifically requires the parties to negotiate terms that are necessary and appropriate to implement the TRRO.

2. Commission Discussion and Findings

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

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

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

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

ISSUE 28

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

- **Disputed Agreement Language: Section 10.1.3.1**

[160] TRRO, ¶ 216.

1. Positions of the Parties

A. SBC

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

B. CLECs

The CLECs' position is discussed above in Issue 9.

2. Commission Discussion and Findings

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

ISSUE 29

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

- **Disputed Agreement Language: Section 11.1.3**

1. Positions of the Parties

A. SBC

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

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

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

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

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

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

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

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

B. CLECs

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

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

[163] TRO, ¶ 284.

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

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

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

2. Commission Discussion and Findings

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

[164] *Id.* at ¶ 281.

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

ISSUE 30

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

- **Disputed Agreement Language: Section 11.2.5**

1. Positions of the Parties

A. SBC

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

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

Second, SBC Indiana contends that the CLECs' proposal is contrary to the FCC's order that incumbent LECs have discretion to manage their networks and decide how best to provision loops. In paragraph 297 of the TRO, the FCC clearly stated that "incumbent LECs must present requesting carriers a technically feasible method of unbundled access," not that requesting carriers are empowered to demand any particular method. SBC Indiana notes that in the arbitration between Verizon Virginia and Cavalier, the FCC's Wireline Competition Bureau rejected a CLEC proposal that would have required the incumbent "to conduct trials of the specific hairpin/nail-up and multiple switch hosting unbundling processes" advocated by the CLEC (even though the hairpin option

was among those mentioned in footnote 855 of the TRO).[165] As the Bureau explained, the TRO "gives incumbent LECs the choice whether to unbundle Integrated DLC loops when spare facilities are available, and the choice of technically feasible methods of Integrated DLC loop unbundling."[166] According to SBC Indiana, because "the [TRO] does not require Verizon to use the particular methods proposed by Cavalier," the CLECs' proposal "is at odds with the [TRO]."[167] SBC Indiana asserts that the FCC leaves the choice of method to SBC Indiana's discretion, and the CLEC is not entitled to second-guess the incumbent's engineering judgment.

B. CLECs

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

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

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

[166] *Id.*

[167] *Id.* at ¶¶ 131, 133.

[168] TRO, ¶ 297.

[169] *Id.*

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

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

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

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

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[171] TRO, ¶ 297.

[172] *Id.*

[173] TRO, n. 854.

2. Commission Discussion and Findings

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

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

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

ISSUE 31

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

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

1. Positions of the Parties

A. SBC

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

typically used to serve mass market customers."

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

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

B. CLECs

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

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

[174] TRO, n. 956.

[175] *Id.*

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

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

2. Commission Discussion and Findings

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

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

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

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

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[176] *Id.*

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

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

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

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

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

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

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

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

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

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

HARDY, HADLEY, SERVER AND ZIEGNER CONCUR; LANDIS ABSENT:
APPROVED: JAN 11 2006

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

Paula L. Barnett

Paula L. Barnett
Acting Secretary to the Commission