ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE INDIANA UTILITY REGULATORY COMMISSION'S INVESTIGATION OF ISSUES RELATED TO THE IMPLEMENTATION OF THE FEDERAL COMMUNICATION COMMISSION'S TRIENNIAL REVIEW REMAND ORDER AND THE REMAINING PORTIONS OF THE TRIENNIAL REVIEW ORDER	)	CAUSE NO. 42857 APPROVED: JAN 11 2006

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

INDIANA UTILITY REGULATORY COMMISSION

ORDER

CAUSE NO. 42857

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INDIANA UTILITY REGULATORY COMMISSION

ORDER

CAUSE NO. 42857

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[4] 47 U.S.C. § 252(b)(4)(C).

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

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

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

5. <u>Resolution of Issues</u>.

<u>ISSUE 2</u>

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

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

1. Positions of the Parties

A. SBC

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

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

[5] 47 C.F.R. § 51.319(a)(3)(i)(A).

[6] 47 C.F.R. § 51.319(a)(3)(i)(B).

[7] 47 C.F.R. § 51.319(a)(2).

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

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

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

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

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

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

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

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

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

[10] 47 C.F.R. § 51.319(a)(2).

[11] TRO, ¶¶ 288-289.

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

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

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

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

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

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

[13] TRRO, n. 625

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

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

B. CLECs

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

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

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

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

[16] TRO, ¶ 278.

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

[18] *Id.* at ¶ 8.

[19] TRO, ¶ 294.

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

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

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

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

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

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

[21] TRO, ¶ 127.

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

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

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

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

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

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

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[23] *Id.*

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

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

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

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

2. Commission Discussion and Findings.

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

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

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

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

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

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[27] TRO, n. 956.

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

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

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

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

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

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

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[29] TRO, ¶ 127.

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

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

ISSUE 3

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

- **Disputed Agreement Language: Section 0.1.12**

1. Positions of the Parties

A. SBC

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

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

[31] 47 C.F.R. § 51.5.

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

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

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

B. CLECs

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

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

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[32] TRRO, ¶ 105.

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

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

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

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

2. Commission Discussion and Findings

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

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

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

[34] TRRO, ¶¶ 115, 179.

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

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

<u>ISSUE 4</u>

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

- **Disputed Agreement Language: Section 0.1.15**

1. Positions of the Parties

A. SBC

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

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

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

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

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

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

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

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

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

B. CLECs

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

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

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

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[36] TRRO, ¶ 102.

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

2. Commission Discussion and Findings

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

ISSUE 5

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

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

1. Positions of the Parties

A. SBC

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

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

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

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

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

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

- the purpose and scope of this proceeding is to implement the FCC's Section 251 rules, which SBC Indiana claims do not require commingling of Section 271 elements;

- the Commission has no jurisdiction to interpret or enforce Sections 201 and 202; and

- there can be no "restriction on commingling" unless there is an obligation to commingle in the first place, which SBC asserts does not exist.

B. CLECs

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

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

[38] TRO, ¶ 581.

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

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

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

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

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

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

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

2. Commission Discussion and Findings

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

[39] *Id.* at ¶ 579 (emphasis added).

[40] *Id.* at ¶ 581.

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

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

ISSUE 6

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

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

1. Positions of the Parties

A. SBC

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

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

[42] *Id.* at ¶ 366.

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

[44] TRRO, n. 384.

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

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

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

B. CLECs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[49] TRO, ¶ 368.

[50] TRRO, ¶140.

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

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

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

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

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

In the TRRO, the FCC stated that:

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

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

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

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[51] TRO, ¶ 365 (emphasis added).

[52] TRRO, ¶140 (emphasis added).

[53] *Id.*

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

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

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

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

2. Commission Discussion and Findings

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

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

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

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

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

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

[57] *See* TRO, ¶ 365.

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

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

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

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

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

ISSUE 7

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

- **Disputed Agreement Language: Section 13**

1. Positions of the Parties

A. SBC

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

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

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

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

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

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

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[58] 47 U.S.C. § 252(c)(1).0

[59] 47 C.F.R. § 51.319(d)(2)(iii).

further cites the following:

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

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

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

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

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

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

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

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

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[60] 47 U.S.C. § 251(c)(1).

[61] 47 U.S.C. § 252(c)(1).

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

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

[64] 47 U.S.C. § 271(d)(2)(B).

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

compliance with the conditions for approval.[66]

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

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

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

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

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

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[66] 47 U.S.C. § 271(d)(6).

[67] *Id.*

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

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

[70] TRRO, ¶ 218.

[71] TRO, n. 1990.

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

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

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

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[72] *Id.* at ¶ 663.

[73] *Id.* at ¶ 659.

[74] *Id.* at ¶ 664.

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

[76] *UNE Remand Order*, at ¶ 471.

[77] TRO, ¶ 664.

[78] 47 U.S.C. § 251(d)(2).

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

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

B. CLECs

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

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

[79] *Id.* at § 252(d)(1).

[80] TRO, ¶ 652.

[81] 47 U.S.C. § 271(c)(1), (2).

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

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

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

2. Commission Discussion and Findings

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

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

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

[85] TRO, ¶ 652.

[86] *Id.* at ¶¶ 701, 703-704.

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

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

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

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

ISSUE 9

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

- **Disputed Agreement Language: Sections 1.3.3, 2.1.3.3, 3.2.2.2**

1. Positions of the Parties

A. SBC

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

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

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

[89] TRO, ¶¶ 659-664.

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

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

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

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

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

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

B. CLECs

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

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

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

For the two existing options, ordering Total Service Resale or ordering Local Wholesale Complete, the CLECs state that it is rare that an order submitted electronically does not flow through to completion. The need for manual intervention should be even

less for a transition given that the ordering information the CLEC is providing to SBC is for an existing customer and the retention of that customer's service arrangement. Additionally, the CLECs note that since conversions from resale to UNE-P have historically only triggered a flow-through records charge, logic dictates that the same type of charge is appropriate for the same conversion in reverse.

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

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

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

[90] TRO, ¶ 588.

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

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

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

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

2. Commission Discussion and Findings.

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

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

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

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[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.

<u>ISSUE 10</u>

- **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."