BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand.	)	Case No. 05-887-TP-UNC

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ARBITRATION AWARD

The Commission, considering the joint filing submitted by SBC Ohio and certain competitive local exchange carriers, the evidence of record, the post hearing briefs and otherwise being fully advised, hereby issues its arbitration award.

ARBITRATION AWARD:

I. Background and History of the Proceeding

On February 4, 2005, the Federal Communications Commission (FCC) released its Order on Remand (TRRO) in CC Docket No. 01-338 in response to certain issues that had been vacated and remanded in part back to the FCC by the D.C. Circuit Court in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004). Among other things, the FCC in the TRRO put into place new rules applicable to incumbent local exchange carriers' (ILECs') unbundling obligations with regard to mass market local circuit switching, high-capacity loops and dedicated interoffice transport.

Recognizing that it had removed significant unbundling obligations, the FCC directed that, for the embedded customer base, a transition period and transition pricing would apply during which the impacted competitive local exchange carriers (CLECs) would be able to continue using the involved unbundled network elements (UNEs). During the transition period, the ILECs and the CLECs were directed to modify their interconnection agreements, including completing any change of law processes to perform the tasks necessary for an orderly transition to alternative facilities or arrangements. The FCC determined the effective date of these new rules to be March 11, 2005.

On March 4, 2005, MCImetro Access Transmission Services, LLC, LDMI Telecommunications, Inc. and CoreComm Newco, Inc. filed a petition and a motion for emergency relief in Case No. 05-298-TP-UNC (05-298) seeking a declaratory ruling prohibiting SBC Ohio (SBC) from breaching its existing interconnection agreements and preserving the status quo with respect to unbundled network element orders. Similarly, on that same day, XO Communications Services, Inc. filed its own petition in Case No. 05-299-TP-UNC (05-299) seeking an emergency order preserving the status quo and prohibiting discontinuance of certain UNE services.

By entry issued March 9, 2005, the Commission granted in part and denied in part the petitions filed in 05-298 and 05-299. Citing to ¶233 of the TRRO, the Commission noted that the centerpiece of the FCC's TRRO is the negotiation process envisioned to take place during the transition period to move the CLECs embedded customer base onto

alternative facilities or arrangements. Noting that to date there had been few negotiations between SBC and the petitioners in 05-298 and 05-299, the Commission instructed SBC and any interested CLEC to negotiate in good faith interconnection agreement amendments to implement the FCC-ordered rule changes. Further, the Commission empowered Commission Staff to work with the parties to ensure that meaningful negotiations take place consistent with the FCC's directive to monitor the negotiation process to ensure that the parties do not engage in unnecessary delay.

Following the motions filed in 05-298 and 05-299, a joint filing was submitted on July 15, 2005, by SBC and certain CLECs[1] participating in a collaborative endeavor to develop an interconnection amendment for the purpose of implementing the FCC's TRRO. The joint filing consists of a joint disputed issues list, as well as a redline amendment reflecting both the agreed upon amendment language, as well the disputed amendment language proposed by both SBC and the CLECs.

By attorney examiner entry issued July 21, 2005, SBC and the involved CLECs were directed to file concurrently verified written testimony (written testimony sworn to as being true in the presence of and verified by a notary public) and initial briefs on August 4, 2005, and reply briefs and supporting verified written reply testimony concurrently on August 18, 2005. In support of its position, SBC presented the testimony of Carol A. Chapman, Deborah Fuentes Niziolek and David J. Barch. The CLECs presented the testimony of Frances McComb, Kristen Shulman, Sherry Lichtenberg, Michael Starkley, Dayna Garvin, Edward J. Cadieus and Eric Strickland in support of their position.

II. Issues for Arbitration

Issue 1: Section 0.1.1 – Which parties' definition of "building" should be used in the Amendment (Entry Issue (a))

(a) CLEC Position

Citing to 47 C.F.R. §51.319(4)(ii) and (5)(ii), the CLECs submit that this issue is important because the TRRO has placed limitations or "caps" on the number of high

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[1] The list of CLECs include: Access One, Inc.; ACN Communications Services, Inc.; American Fiber Systems Inc.; BullsEye Telecom Inc.; CityNet Ohio, LLC; DSLnet Communications, LLC; Lightyear Network Solutions, LLC; McLeodUSA Telecommunications Services, Inc.; Neutral Tandem-Michigan, LLC; PNG Telecommunications, Inc.; XO Communications Services, Inc.; AT&T Communications of Ohio, Inc.; TCG Ohio; NuVox Communications; Talk America Inc.; LDMI Telecommunications Inc.; LCG Telecom Group, Inc.; KMC Telecom V, Inc.; First Communications, Inc.; Broadview Networks, Inc.; Easton Telecom Services LLC; Impact Network Solutions, Inc.; First Call Communications, Inc.; MCI WorldCom Communications, Inc.; and Trinsic Communications.

capacity loops that can be ordered by a CLEC to any "single building." Thus, the definition of a "single building" will have a significant impact on the availability of high capacity loops to serve specific customers (i.e., small and medium sized business customers) even where the wire center is otherwise considered to be impaired. According to CLEC witness Kristin Shulman, the CLECs' definition should be adopted because it is reasonable and reflects what is ordinarily thought of as being a single building. Moreover, unlike SBC's proposal, the CLEC definition balances the complexities that arise in applying the term "building" to various types of "multi-tenant property." The CLECs also propose a definition for "campus type" locations (i.e., governmental, educational, medical and research) whereby such locations would be deemed to be a "single building" for purposes of DS1 and DS3 loop caps provided that all of the structures are located on the same continuous property and telecommunications services enter the premises or campus through a single telecommunications room in one structure or through a Minimum Point of Entry (MPOE).

SBC's overly expansive building definition, the CLECs claim, appears designed to restrict to the greatest extent possible the ability of CLECs to serve certain customers. Additionally, unlike the SBC definition, the CLECs claim that their definition is wholly consistent with the FCC's analysis of when it is and is not economic for CLECs to build their own DS1 loops to serve customers. Thus, the CLECs assert, their definition of a "single building" is consistent with the very purpose of the caps created by the FCC. While exaggerating the complexities of the CLECs' definition, the CLECs claim that SBC completely ignores the ambiguities of its own definition, especially in the multi-tenant scenario, as being a "structure under one roof." SBC's definition would create far greater problems and uncertainties than applying the readily attainable factors identified in their definition the CLECs claim.

(b) <u>SBC Position</u>

SBC avers that the CLECs have proposed a convoluted definition with several exceptions, under which single structure might be treated as if it was numerous buildings. Unlike the CLECs' convoluted proposal, SBC claims that its proposed definition of "building" uses the plain and ordinary meaning of the word. (Chapman Direct at 13) SBC submits that its proposal is also in accord with Webster's Dictionary, which defines a "building" as "a usually roofed and walled structure built for permanent use" Id. (citing <u>www.webster.com</u>). Further, SBC argues that its proposed definition is consistent with the FCC's analysis and reasoning. To support this position, SBC cites to ¶150 of the TRRO which states that "the most significant portion of the costs incurred in building a fiber loop results from deploying the physical fiber infrastructure into underground conduit to a particular location." (Chapman Direct at 14) Moreover, SBC claims that the FCC acknowledged that CLECs target buildings that house multiple customers, so they can accumulate enough revenue to support the cost of deployment. As a result, according to

SBC, the CLECs' proposal has only one possible purpose – to nullify the FCC's DS1 and DS3 loop volume caps. SBC further avers that its proposal is much easier to administer than the CLECs. Under the CLECs' proposal, SBC submits that it would have to investigate and determine the ownership and layout of each structure within the wire center while under SBC's definition, one could look at a building from the street and know how many loops a CLEC could obtain under the FCC's rules. Citing to ¶161 of the TRRO, SBC claims that the FCC has specifically rejected such a building-by-building analysis.

Regarding a campus-type environment, SBC acknowledges that both parties have proposed language to reflect that if the actual loop facilities deployed by SBC only terminate at a single building, as in a campus environment, logic dictates that the loop volume caps must be based on the volume of loops provisioned to that building, no matter how many buildings the end user serves from that point. SBC claims that all the CLECs have done with their proposed language is to add an irrelevant exception that the loops must terminate at a single room within the building. This exception appears nowhere in the FCC's rules and only serves to make the rule unenforceable according to SBC. (Chapman Direct at 18)

(c) Commission Conclusion

In its TRRO decision, the FCC determined that, even in those wire centers where unbundled DS1 and DS3 loops are made available, CLECs are only entitled to a limited number of unbundled loops to any particular building. Specifically, the FCC determined that a CLEC may obtain no more than ten DS1 loop circuits and one DS3 loop circuit per building. 47 C.F.R. §§51.319(a)(4)(ii), (a)(5)(ii). The FCC based its ten DS1 loop circuit threshold on evidence showing a competitor serving a building with ten or more DS1 loop circuits would find it economic to purchase a single DS3 loop rather than purchasing individual loops. ¶181 TRRO. Similarly, regarding high capacity DS3 loop circuits, the FCC found that it is generally feasible for a carrier to self-deploy its own high capacity loops when demand nears two DS3s to a particular location. Therefore, the FCC limited the number of unbundled DS3s that a CLEC can obtain at each building to a single DS3 to encourage facilities-based deployment when such competitive deployment is economic.

Even though the FCC did not provide any special definition for the term "building", the FCC did intend to limit the availability of unbundled DS1 and DS3 loop circuits even in those wire centers that are impaired. Contrary to the FCC's intent, the CLECs' language could, in many circumstances, vastly expand the availability of unbundled DS1 and DS3 loop circuits that SBC would have to provide. As a result, we determine that SBC's language more closely comports with 47 C.F.R. §§51.319(a)(4)(ii), (a)(5)(ii). Accordingly, we reject the CLECs' proposed language and direct the parties to utilize SBC's proposed language in Section 0.1.1 of the final agreement.

Issue 2: **Sections 0.1.2, 0.1.4, 0.1.5, 0.1.6 – Is SBC required to provide FTTH, 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 the "mass market customers" and "predominantly residential" MDUs? (Entry Issue (b))**

(a) <u>CLEC Position</u>

The CLECs ask the Commission to adopt their proposed language regarding the following three sub-issues under issue 2: (a) whether the FCC rules for fiber-to-the home (FTTH), fiber-to-the curb (FTTC) and hybrid loops apply only to the mass market; (b) the definition of "mass market customer"; and (c) the definition of "predominantly residential."

As to issue 2(a), the CLECs maintain that the FCC's unbundling relief for FTTH, FTTC and hybrid loops is limited to the mass market, as stated repeatedly by the FCC in its orders. Although the CLECs admit that SBC's proposal to extend that relief to the enterprise market is supported by the unexplained ambiguity in the FCC's rules, they argue that the FCC's orders and their stated purpose clearly support the adoption of the CLECs' position. The CLECs argue that the FCC's entire discussion of FTTH and hybrid loops appears in the section of the Triennial Review Order (TRO)[2] entitled "Mass Market Loops," where the FCC stated that the purpose of these rules was to direct the ILECs to construct new fiber loops in markets where it feared that unbundling obligations would discourage such deployment. The FCC found, according to the CLECs, that removing ILEC unbundling obligations on FTTH loops will promote their deployment of network infrastructure necessary to provide broadband services to the mass market (TRO at 278). The CLECs also argue that, in contrast, the FCC, in the *MDU Order*[3], found that "the record shows that additional investment incentives are not needed" to give ILECs the incentive to deploy broadband-capable loops to larger customers, so the broadband unbundling limitations were not applied to the enterprise market (*MDU Order* at 8). Further, the CLECs point out that the FCC explained in the TRO that "that the line drawing in which we engage does not eliminate the existing rights competitive LECs have

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2 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, para. 278 (2003), corrected by Errata,. 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) cert. denied, 125 S.Ct. 313, 345 (2004).

3 *Review of the Section 251 Obligations of Local Exchange carriers*, CC Docket 01-338, Order on Reconsideration, FCC 04-191, ¶ 5 (rel. August 9, 2004) ("*MDU Order*").

to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service" generally to customers who are enterprise customers rather than mass market customers (TRO at 294). (CLECS Initial Br. at 6-7)

The CLECs argue that SBC should not be allowed to use the Hybrid Loop rules to eliminate DS1 and DS3 unbundling, simply because the FCC's rules attached to the TRO do not spell out all of the detail that is clearly set forth in the orders themselves. The CLECs cite SBC's statement, in its brief, that the FCC based its FTTH and hybrid loop unbundling exemptions in significant part on evidence of "competition in the broadband market as a whole, particularly from cable providers." The CLECs argue that since the TRO only found such intermodal competition in the mass market, SBC's statement supports the CLECs argument that the rules were designed only for the mass market. (CLECs Reply Br. at 5-7)

The CLECs maintain that subsequent actions by the FCC reaffirm that the FTTH rules apply only to mass market customers. The CLECs assert that in October 2003, the FCC opposed a motion to stay the TRO filed by Allegiance Telecom basically because CLECs would receive continued access to ILEC fiber as necessary to serve their enterprise customers with DS1 and DS3 loops. The CLECs also assert that in response to a BellSouth petition to clarify that FTTH apply to mixed-use MDUs, the FCC held that the FTTH rules apply only to MDUs that are "predominantly residential" (*MDU Order* at 4). The CLECs point out that SBC's proposed amendment here clearly recognizes that FTTH and FTTC loops to MDUs are only eligible for broadband relief if the MDU is "predominantly residential." The CLECs argue that this limitation would make no sense and would have been unnecessary if, as SBC contends, all enterprise fiber-to-the-premises loops were included in the FTTH and FTTC rules. Finally, the CLECs assert that in its *FTTC Order*[4], the FCC adopted rules that applied similar limitations on the unbundling of the FTTC mass market loops, where the FCC stated again that "in the Triennial Review Order, the Commission limited the unbundling obligations imposed on mass market FTTH deployments to remove disincentives to the deployment of the advanced telecommunications facilities in the mass market." The CLECs further cite paragraph 49 of the TRRO, where the FCC stated "we have substantially limited unbundled access to fiber-to-the-home, fiber-to-the-curb, and hybrid loops used to serve the mass market" to support their position. Citing the FCC's statement that its UNE rules must be read in conjunction with the rest of the Order,[5] the CLECs maintain that, despite the unexplained absence to this clarification (i.e. the mass market limitation) in the rules attached to the

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4 *Review of the Section 251 Obligations of Local Exchange carriers*, CC Docket 01-338, Order on Reconsideration, FCC 04-248, ¶ 2 (rel. October 18, 2004) ("*FTTC Order*").

5 *TSR Wireless , LCC v. US West Communications, Inc.*, 15 FCC Rcd 11166, 11177-78, ¶¶ 20-21 (20000) (referring to the *Local Competition Order*).

orders, the FCC orders clearly support the adoption of the CLECs' position. (CLECs Initial Br. at 8-9)

As to the *Errata* that the FCC issued shortly after its release of the TRO, the CLECs argue that errata notices are issued without explanation and are merely used to correct discrepancies between the new rules and the underlying order. According to the CLECs, the TRO had spelled out that the FTTH and Hybrid Loop rules were to apply both to residences and "very small businesses," so the *Errata* was necessary to eliminate the conflict between the rules and the order with respect to such businesses. The CLECs opine that while it would have been helpful for the *Errata* to instead have clarified that the rule would be limited to mass market customers, the FCC's silence on that point in the rules does not outweigh its statements in the order itself. (CLECs Reply Brief at 7-8)

As to issue 2(b), the CLECs assert that the FCC did not precisely define the cutoff between "mass market" and "enterprise" customers, and left that determination to be made through negotiations and the arbitration process under 47 USC §252. The CLECs further assert that the FCC provided extensive guidance to the parties and the state commissions when it stated "mass market customers consist of residential customers and very small business customers." (TRO at 127) The CLECs contend that the parties agreed to include residential customers in the mass market customer definition, but disagree on the identification of "very small business customers." It is the CLECs' position that it should include all business locations served by telecommunications capacity of less than 4 DS0s. The CLECs argue that their proposal is more consistent with the FCC's instructions and its precedent. In support of their position, the CLECs cite the FCC's statement that "very small business customers are distinct from small business customers generally, and typically purchase the same kind of services as do residential customers, and are marketed to, and provided service as customer care, in a similar manner." (TRO at footnote 432) The CLECs argue that business customers purchasing telecommunications capacity of 23 DS0s, as SBC's proposes, hardly meet the FCC's description. The CLECs allege that very small business customers typically order 1 or 2 telephone lines, and in some cases a DSL service, that are provisioned over 1 or 2 DS0 loops (Strickland Testimony at 4). Accordingly, the CLECs argue that there is no reasonable support for SBC's position here that a business customer purchasing 23 DS0s would be ordering "the same kind of services purchased by residential customers." (CLECs Initial Br. at 10-11)

The CLECs assert that SBC's brief and testimony have utterly 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. The CLECs argue that Ms. Chapman's testimony completely ignores the FCC's definition of "very small business customer." The CLECs

criticize SBC's reference to the TRRO discussion of transition rates for local switching as resulting in a finding by the FCC that customers that purchase 23 telephone lines are part of the mass market. The CLECs argue that the FCC's switching rules are completely irrelevant to the definition of "mass market" for purposes of this issue. (CLECs Reply brief at 9-10)

As to issue 2(c), the CLECs assert that the FCC adopted additional clarification to the unbundling requirement for MDUs that houses both mass market and enterprise customers where it granted ILECs broadband unbundling relief for "predominantly residential" MDUs and left unbundling obligations in place for other MDUs. The CLECs claim that the purpose of the definition of "predominantly residential" in the Amendment is to provide the parties with determinable certainty as to whether or not an MDU would be subject to unbundling before the CLEC determines whether it should solicit business or accept orders from such MDU. The CLECs maintain that their proposal is an easily determined and verifiable test: all MDUs with more than 75 percent of their rentable square footage allocated to residence are "predominantly residential," while all others are not. The CLECs argue that while their proposal may not be a perfect test, it grants SBC more unbundling relief than it has under the existing Agreement, and it provides sufficient certainty to avoid later disputes. The CLECs disagree with SBC's proposal to use 50 percent, instead of the CLECs' proposal of 75 percent, arguing that the FCC's use of the word "predominantly" suggests a greater proportion than a simple majority. (CLECs Initial Br. at 12-13)

In response to SBC's argument on this issue, the CLECs maintain that they do not pretend that their 75 percent figure is the only correct estimation of predominance, but the 50.01 percent proposed by SBC is not it. The CLECs cite SBC's statement that the "definition" is only offered as an example," suggesting that parties could later argue that additional buildings are predominantly residential, without any standard to guide them. The CLECs argue that if there is a close call, the CLEC would be able on its own to determine with certainty whether the building will qualify, whereas under SBC's proposal no CLEC could ever be sure, since SBC's proposal suggests that even buildings with less than 50 percent of their space dedicated to residences could also be classified as predominantly residential. As to SBC's argument that the CLEC proposal would leave in "limbo" buildings in which the percentage of residences is between 25 percent and 75 percent, the CLECs maintain that nothing is in "limbo" in the CLEC proposal, under which every building in the SBC region could readily be determined either to be predominantly residential or not. The CLECs further argue that it is completely irrelevant here that the category of non-predominantly residential buildings includes a spectrum of MDUs, from those that are entirely commercial, to 50-50 MDUs, to buildings that have a majority but not a predominance of residences. In other words, a building that is 60 percent residential may have more residences than businesses, but it still has a substantial

enough commercial presence to direct SBC to deploy broadband, without the need for the additional incentive of an unbundling exemption. Thus, a building that is 60 percent residential is not the type of building that the FCC intended to place in the special category of "predominantly residential" MDUs. (CLECs Reply Brief at 12-14)

(b) SBC Position

According to SBC, the FCC defines FTTH loop as 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 a predominately residential MDU, a fiber optic cable, whether dark or lit, that extends to the multi-unit premises' minimum point of entry (MPOE)." 47 C.F.R. §51.319(a)(3)(i)(A). An 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." 47 C.F.R. § 51.319(a)(3)(i)(B). 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." 47 C.F.R. §51.319(a)(2). (SBC Initial Br. at 20)

SBC asserts that, pursuant to the FCC's TRO and its Order on Reconsideration, 19 FCC Rcd. 20,293, ¶¶ 1, 20 (rel. Oct. 18, 2004) ("*FTTC Reconsideration Order*"), SBC is required to provide unbundled access to a FTTH or FTTC Loop if and only if SBC has deployed a FTTH/FTTC loop; the FTTH/FTTC loop is deployed in an overbuild that is parallel to, or in replacement of, an existing copper loop facility; and SBC has retired the existing copper loop facility. 47 C.F.R. § 51.319(a)(3). SBC also asserts that incumbents are required to provide unbundled access to hybrid loops only for the provision of voice grade (or narrowband) service. If a carrier seeks access to a Hybrid Loop for the provision of broadband services, the incumbent need only provide the requesting carrier "with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of the hybrid loop, including DS1 or DS3 capacity (where impairment has been found to exist), on an unbundled basis." (*Id.* at 20-21)

As to issue 2(a) (Scope of the FCC rules for FTTH, FTTC and hybrid loops), SBC argues that the CLECs attempt to erroneously restrict the FCC's rules regarding the unbundling of FTTC, FTTH and Hybrid Loops, based on the type and size of customers served, by limiting the definition of such loops to local loops serving mass market customers. SBC disagrees with the CLEC's proposed language in Sections 0.1.2, 0.1.3, and 0.1.4 of the Amendment, claiming that it is contrary to the FCC rules and designed to nullify such rules. SBC maintains that the FCC did not limit the scope of its rules on FTTH, FTTC and Hybrid Loops to those loops serving "mass market customers." SBC argues that the FCC defined FTTH, FTTC and Hybrid Loops based on their physical characteristics (i.e. what they are), not based on the customer size. SBC further argues that the only end user-driven aspect of these rules is the portion of the FTTH and FTTC rules

that apply to predominantly residential MDUs. SBC further maintains that the FCC expressly rejected the limitations suggested by the CLECs' proposed language. SBC argues that while the TRO initially defined a FTTH loop as a fiber loop "serving a residential end user's customer premises" (TRO, Attach. B, 47 C.F.R. §51.319(a)(3,) the FCC then issued an *Errata*[6] that expressly deleted the words "residential" and "residential unit" from the definition of a FTTH Loop. In SBC's opinion, the CLECs' proposed addition of a "mass market customers" limitation in the FTTH, FTTC and hybrid loops definition simply ignores the *Errata*, and should be rejected by the Commission. (*Id.* at 21-22; Chapman's Initial Testimony at 23)

It is SBC's opinion that the CLECs' analysis in their brief begins and ends with the CLECs' candid admission that the FCC's rules support SBC's position. SBC argues that the CLECs try to dismiss the FCC's rules as an "unexplained ambiguity" as if the FCC simply forgot to say "mass market." SBC maintains that the FCC's rules reflect a conscious and deliberate choice to delete the reference to "mass market" end users, not an "unexplained ambiguity." In support of its position, SBC asserts that, following the *Errata*, 47 C.F.R. §51.319(a)(3) currently states that a "fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, and serving an end-user's customer premises" without any mention whatsoever of the type of end user. Similarly, SBC argues, the FCC's hybrid loop rule expressly includes loops like DS1 and DS3 loops that exceed the CLECs' proposed 4 DS0 threshold for defining "mass market customers." (SBC Reply Brief at 7-8)

As to issue 2(b)(the definition of mass market customer), SBC maintains that since the FCC's definition of FTTH, FTTC and hybrid loops does not include the limitation of "mass market customer" as suggested by the CLECs, there is no need to define "mass market customer" at all. (SBC Initial Br. at 22) SBC argues that the term "mass market" is no longer relevant to the current unbundling rules, as it was only relevant to SBC's unbundled switching obligation that has been eliminated. SBC maintains that if the definition of "mass market" is included, that definition should reflect the FCC's latest determinations. SBC argues that the "mass market customer" definition, if included, should be defined as "an end user who is either (a) residential customer or (b) a very small business customer at a premise with a transmission capacity of 23 or fewer DS0s." (Chapman's Initial Testimony at 27-28) SBC explains that the CLECs' proposed definition of "mass market customer," based on a four DS0 "cutoff" is obsolete and inconsistent with the FCC's TRRO. Further, SBC argues that in the TRO, the FCC held there was no impairment for switching used to serve "enterprise" customers but there was impairment for switching used to serve "mass market" customers, delegated to the states the authority to decide the cutoff between "mass market" and "enterprise" customers, and said that four

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6 *Errata*, In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C. Rcd. 19020, ¶¶ 37-38 (September 17, 2003).

DS0s (the CLECs' proposal) would serve as the default cutoff point until the states had made their determinations. SBC maintains that in the TRRO, the FCC eliminated unbundled access to local circuit switching for mass market customers and 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." TRRO ¶226, n.625. Thus, SBC argues that its position, that the FCC's current cutoff for "mass market" switching is a single DS1, which is equivalent to 24 DS0s, should be adopted, and the CLECs' proposal, as a reflection of the FCC's now-vacated TRO finding, should be rejected. (SBC Initial Br. at 22-23)

Finally, on this sub-issue, SBC argues that the CLECs are attempting to speculate as to the meaning of the FCC's reference to "very small business customers." SBC claims that the TRRO already explains precisely how a "mass market customer" should be defined, and thus there is no need to reinvent the definition. (SBC Reply Br. at 9)

As to issue 2(c) (the definition of "predominantly residential"), SBC disagrees with the CLECs' proposal and asks the Commission to reject it. SBC states that the FCC's definition of FTTH and FTTC loops contain a special test for defining "predominantly residential" MDUs. SBC asserts that its proposed language in Section 0.1.2 of the Attachment: "an apartment building, condominium, cooperative, planned unit development, or like structure that allocates more then fifty percent of its rentable square footage to residences," is flexible and reflects a common-sense understanding of the term. SBC observes that the CLECs' proposal to raise the bar from 50 percent to 75 percent is contrary to the FCC's orders. (SBC Initial Br. at 23)

According to SBC, the FCC first established the "predominantly residential MDU" rules in the *MDU Reconsideration Order*, 19 F.C.C. Rcd. 15,856, ¶4 (rel. Aug. 9, 2004), where 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.'" *Id. at* ¶6. SBC maintains that "predominant" is commonly understood to mean more than 50 percent. SBC argues that the CLECs' proposed 75 percent test is entirely arbitrary, has no basis in the *MDU Reconsideration Order* and many buildings would fall into limbo (i.e. neither residential nor commercial) under the CLECs' proposal. In support of its position, SBC argues that under the CLECs' proposed 75 percent rule, an apartment complex that allocates 60 percent of its rentable square footage to residences would not be "residential" (because it still falls below the CLECs' 75 percent threshold); and obviously, it would not be "commercial" either. Any building in which residential percentage of rentable square footage falls between 25 and 75 percent, in SBC's opinion would fall in that limbo (i.e. no category). SBC opines that the FCC did not create a classification test that would fail to classify such a large number of buildings. (SBC Initial Br. at 23-24)

SBC further argues that under the CLECs' 75 percent threshold, a building that has 74 percent of the rentable square footage as residential would not qualify as "predominantly residential." As to the CLECs argument that their proposal "grants SBC more unbundling relief than it has under the existing Agreements," SBC argues that the purpose of the TRO/TRRO Attachment is to implement the FCC's TRRO and give SBC the relief it is due, not just some of the relief it is due. (SBC Reply Br. at 9-10)

(c) Commission Conclusion

We first address issue 2 (a), whether the FCC rules for FTTH, FTTC and hybrid loops apply only to mass market customers. We note that the FCC first established unbundling rules for FTTH, FTTC and hybrid loops in the TRO, where it conducted the impairment analysis based on loop types and capacity levels, and identified "mass market loops" and "enterprise loops" considering the relevant customer classes. Later, the FCC issued its *Errata*, where it deleted the words "residential" and "residential unit" from the definition of a FTTH Loop. In effect, the FCC only removed the limitation of "residence-use" from the applicability of UNE relief granted to ILECs' unbundling obligation for those loops provided over FTTH or FTTC (see §§51.319(a)(3)). We note that the FCC did not remove the distinction between "mass market loops" and "enterprise loops" in any of the orders issued subsequent to the TRO. We agree with the CLECs that all the FCC orders intended to remove investment disincentives to deploy network infrastructure necessary to provide broadband service to the mass market. We find that the FCC's rule providing that FTTH and FTTC loops to MDUs are only eligible for broadband relief if the MDU is "predominantly residential," would make no sense and would have been unnecessary if enterprise loops were included in the FTTH and FTTC rules. Accordingly, we adopt the CLECs' proposed language "serving mass market customers" in Sections 0.1.2 and 0.1.4 of the Amendment.

However, we find that the FCC's unbundling rules for hybrid loops clearly do not limit the unbundling relief to "mass market loops" but intentionally makes that relief available to DS1 and DS3 loops provided over hybrid loops as well (see §51.319(a)(2)(ii)). If the FCC did not intentionally mean to relieve DS1 and DS3 loops provided by ILECs over hybrid loops from the unbundling obligations, the FCC could have made such correction in the same *Errata* where it deleted the words "residential" and "residential unit" from the definition of a FTTH Loop. Accordingly, we reject CLECs' proposed language "that serves a mass market customer," in Section 0.1.5 of the Amendment.

Next, we address the "mass market customer" definition dispute (issue 2(b)). We agree with SBC that the mass market definition should reflect the FCC's latest determinations. We find that the FCC's default cutoff of 4 DS0s for "mass market customer," which was established in the TRO, is not relevant to our analysis as it was established for the purpose of conducting impairment analysis for the unbundled local

switching, not impairment analysis of unbundled loops. We note that the FCC's unbundling rules, established in the TRRO, address ILECs' unbundling obligations for DS1 and DS3 loops regardless of whether it is provided over FTTH, FTTC or hybrid loops. Unbundling requirements for all other types of loops (i.e. 23 or fewer DS0s) are addressed in the TRO under "mass market loops," as noted by the CLECs themselves. However, if we accept the CLECs' proposal to define "mass market loops" as four or fewer DS0s, this will leave 5-23 DS0 loops provided over FTTH and FTTC facilities with no specific unbundling rules. Therefore, we adopt SBC's proposal of 23 or fewer DS0s as reasonable for the purpose of determining the cutoff between "mass market loops" and "enterprise loops" for the purpose of loop unbundling. Accordingly, we adopt SBC's proposed language in Section 0.1.6 of the Amendment.

As to the definition of "predominantly residential" (issue 2(c)), we find that the exact percentage of the rentable square footage of the MDU that would be allocated to residential tenants that achieves the goal behind that FCC rule can be different for different MDUs. However, we find SBC's proposed definition to be more consistent with the common understanding of the word "predominant," and easier to administer by both SBC and the CLECs. Therefore, we find that SBC's definition of "predominantly residential" provides the CLECs with the needed certainty as to whether or not an MDU would be subject to unbundling before the CLEC determines whether it should solicit business or accept orders from tenants in such a MDU. Accordingly, we adopt SBC's proposed definition of "predominantly residential" in Section 0.1.2 of the Amendment.

Issue 3: **Section 01.1.12 -- 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? (Entry Issue (c))**

(a) CLEC Position

In the TRRO, the FCC determined that certain wire centers are non-impaired based on the number of business lines and/or fiber collocators within an office. Therefore, the CLECs contend that the number of business lines in a given wire center is critical to the determination of whether the wire center is impaired or non-impaired. According to the CLECs, their language proposal would limit the definition of business lines to lines purchased by business customers, which, as the CLECs assert, the first sentence of the FCC's definition of business lines specifically requires. The CLECs opine that in

determining the number of business lines within a wire center, SBC seeks to include the "sum of all UNE loops connected to that wire center," including UNE loops that serve residences. (CLEC Initial Br. at 14)

The CLECs claim that SBC has misconstrued the FCC's definition of a "business line" in a manner which would include all UNE-L lines serving residential customers in the count of business lines. The CLECs allege that SBC has taken the phrase "plus the sum of all UNE loops" and interpreted it to mean both business and residential loops, switched and non-switched. The CLECs aver that clearly the FCC was referring to switched UNE-L business lines in this phrase given its chosen language in the first sentence of the rule that states "switched access line used to serve a business customer." (CLEC Reply Br. at 15, 16)

Moreover, the CLECs declare that SBC's proposal directly conflicts with the definition of "business line" adopted by the FCC. (CLEC Initial Br at 15.) Additionally, the CLECs state that the FCC found that its impairment calculation for these high-capacity UNEs was not informed by the number of residential lines used by CLECs and that it is contrary to the FCC's rules to count residential loops to determine whether CLECs are denied access to UNEs used to serve business customers. The CLECs maintain this to be the reason why the TRRO plainly defines a business line as a "switched access line used to serve a business customer" and that this wording in the FCC rule is and should be determinative of the issue. The CLECs argue that, clearly, the FCC was referring to switched UNE-L business lines given its chosen language and that this Commission should look back to the purpose of the rule and find that the existence of residential UNE loops are not indicative of non-impairment for high-capacity business loops and transport UNEs. (CLEC Reply Br. at 15, 16) Moreover, the CLECs declare that the FCC intentionally limited its count to business lines, because it found the "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 continue the argument by stating 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. (CLEC Initial Br. at 15)

The CLECs also dispute SBC's claims that the CLECs' approach would be difficult to administer because SBC does not know whether a CLEC is using a loop to serve business or residential customers. (*Id.* at 16) According to the CLECs, SBC and CLECs frequently exchange data and information on the CLEC's use of the UNEs provided by SBC, and this information can easily be provided by CLECs to SBC. (*Id.*)

(b) <u>SBC Position</u>

SBC states that the parties dispute how to calculate the number of business lines in a given wire center, which is the basis of the FCC's rules for impairment of DS1 and DS3 loops and dedicated transport. SBC opines that the number should be calculated exactly in the straightforward manner described by the FCC in the TRRO, using the same Automated Reporting Management Information System (ARMIS) data that the FCC said to use. (SBC Initial Br. at 25) Specifically, SBC asserts that the FCC gave precise instructions for calculating the number in 47 C.F.R. §51.5 which states, "[T]he number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements." (SBC Reply Br. at 11) Moreover, SBC claims that the FCC made the matter clearer by performing a "dry run" of the rule in the proceedings that led to the TRRO by directing incumbents to provide business line counts and told them to use business lines from the ARMIS 43-08 report, add UNE-Ps and add all UNE loops. (*Id.*) SBC avers that the FCC explained that incumbent LECs already possessed and used such data to satisfy other regulatory and reporting requirements and the whole idea was to use data that is readily available to incumbents and simple to apply. (SBC Initial Br. at 25, 26) SBC declares that the FCC deemed the data sufficient to assess non-impairment. (SBC Reply Br. at 11)

SBC contends that its proposal follows the FCC's instructions and the CLECs' proposal does not. (*Id.*) SBC argues that the CLECs want to exclude (i) UNE loops used to serve residential customers, and (ii) UNE loops used to provide non-switched services to businesses. (*Id.*) Further, SBC claims that the CLECs are looking at the first ingredient of the FCC's business line definition (business switched access lines) to support their proposed exclusions and ignoring the rest of the FCC's definition that business lines equal "incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements". (*Id.* at 12) According to SBC, the FCC plainly said to add "all UNE loops," not just those used to serve business customers or to provide switched service. (*Id.*)

SBC declares that the FCC has instructed parties to use the basket of all "UNE loops," knowing that a few residential loops might be mixed in with the business loops because the FCC's goal was, (i) to have a test that would be easy to apply, using data that incumbent LECs already possess and use, and (ii) the FCC used the exact same basket in its "dry run" to set the threshold numbers of business lines that would establish non-impairment (*Id.*). SBC's claim is that the CLECs' proposal nullifies these purposes because it requires data that incumbents do not already have such as the number of lines used to provide "non-switched" service (information that would come from the CLECs) and the number of residential loops (information many incumbents do not have), thus precluding uniform application nationwide. (*Id.*) SBC maintains that it does not know which stand-

alone loops in the business line count are being used to provide switched service nor does the company have the information to determine how a CLEC is using its loops because when SBC provides a UNE loop to a CLEC, the loop is terminated at a collocation arrangement. Therefore, SBC claims it cannot know the service that the CLEC is providing to the end user over the unbundled loop. (SBC Initial Br. at 27, 28) In addition, SBC argues that not all of SBC's incumbents possess the information necessary to determine which UNE loops the CLECs are using to provide business service as opposed to residential service to an end user. (*Id.*) SBC affirms that SBC, in Ohio, and other SBC incumbents in the Midwest region do maintain this information, but SBC incumbents in other states do not and that it makes no sense to have a national rule that is implemented differently in various states based on the diverse information capabilities of the incumbents (*Id.*)

(c) Commission Conclusion

The Commission concludes that SBC's proposed language should be adopted in the interconnection agreement for Section 0.1.12. SBC's proposed language mirrors 47 C.F.R. §51.5 of the TRRO which clearly states that, "[T]he number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements." In the TRRO, as the basis for the business line definition, the FCC used data that the incumbents already provide for other regulatory purposes and the Bell Operating Company (BOC) wire center data that the FCC analyzed is based on the ARMIS 43-08 report (TRRO ¶105). Moreover, the FCC explicitly required adding the sum of all UNE loops connected to that wire center knowing that some of those loops would include residential customers. Incumbents are unable to determine if the end user of the UNE-loop is a business or residential customer since incumbents terminate UNE loops to a collocation arrangement and thus do not know the class of customer beyond that point. (SBC Chapman Direct at 49) With even more clarification, the FCC says, "...by basing our definition on an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information (TRRO ¶105). The FCC has clearly stated that all UNE loops connected to the wire center should be counted as part of the business line density in determining wire center non-impairment for high capacity loops and transport. Accordingly, we adopt the proposed language of SBC for Section 0.1.12 of the Amendment.

Issue 4: **Section 0.1.15 – 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? (Entry Issue (d))

(a) CLEC Position

The CLECs claim that the classification of a wire center as non-impaired is a serious matter insofar as, under the FCC's rules, once a wire center is classified as non-impaired, that classification generally cannot be reversed. (Shulman Direct at 17) Therefore, the CLECs explain, reasonable safeguards to assure that wire centers are not deemed non-impaired based on incorrect, illusory, or temporary facts or circumstances must be included in the interconnection amendment. According to the CLECs, in ¶102 of the TRRO, the FCC explicitly recognized that the number of fiber-based collocators should not be artificially inflated by counting multiple collocations provided by the same company through separate affiliates. (*Id.* at 18) The CLECs maintain that their proposed language is narrowly and reasonably tailored to accomplish its purpose. Moreover, the CLECs assert that their proposal would apply only when a legally binding agreement existed and only for so long as the agreement remained binding. Thus, if a planned merger were abandoned, then the entity would immediately once again count as a fiber-based collocator and SBC would only suffer a temporary time period in which the collocator did not count toward non-impairment.

Addressing SBC's position, the CLECs claim that the interconnection agreement need not parrot the FCC rules. Otherwise, there would be no need for the extraordinary procedure of state arbitration of interconnection agreements. Additionally, the CLECs assert that this Commission, unlike the FCC at the time the TRRO was adopted, has the benefit of knowing the details of the planned SBC/AT&T acquisition.

(b) SBC Position

Unlike the CLECs' proposal, SBC claims that its proposal, in Section 0.1.15 of the interconnection agreement, tracks precisely the FCC's rule. SBC claims that the language propounded by the CLECs has no support in the FCC definition of fiber-based collocators and in fact is proposed by the CLECs with the obvious intent of excluding AT&T as a fiber-based collocator for purposes of the non-impairment test. (Chapman Direct at 51) SBC claims that it would be premature and imprudent for this Commission to adopt the CLECs' language and treat the merger as if it had already happened. In fact, SBC points out the SBC/AT&T merger was announced before the FCC issued the TRRO and, thus, if the FCC wanted to exclude potential merger partners from the definition of fiber-based collocators, it would have addressed the issue in the rule and in the accompanying order. (*Id.*) As a final matter on this issue, SBC asserts that the number of fiber-based collocators is not intended to measure the number of existing or future competitors in any wire center but rather is a proxy designed to capture both actual and potential competition based on

indicia of revenue opportunities at wire centers. Therefore, it is not important whether AT&T continues as a non-affiliated competitor at some point in time but rather that AT&T was able to become a fiber-based collocator as an independent non-affiliated CLEC. According to SBC, under the FCC's rules, that decision demonstrates that CLECs are able to deploy alternative facilities and that the revenue opportunities are sufficient to support such facilities. (*Id.*)

(c) Commission Conclusion

The Commission finds that the agreed to language in Section 0.1.15 of the Amendment, without the additional language proposed by the CLECs, is consistent with the definition of fiber-based collocator in §51.5 of the FCC's rules. We are aware of an SBC commitment, docketed in Case No. 05-269-TP-ACO, to file revised data reflecting the exclusion of fiber-based collocation arrangements established by AT&T or its affiliates in identifying wire centers in which SBC had previously claimed no impairment pursuant to §51.319(a) and (e) of the FCC rules. In adopting general contract language for the Amendment, we are attempting to ensure that the Amendment is consistent with the FCC rules from the TRO and the TRRO proceedings. Accordingly, we adopt the agreed to language, without the language proposed by the CLECs, for the purpose of the Amendment. This conclusion shall not be construed as to have any impact on the implementation of SBC's commitment in Case No. 05-269-TP-ACO or any SBC obligation under the FCC rules to update its data to meet the non-impairment test set in the TRRO.

Issue 5: Sections 14.2, 14.3, and 14.4 – Is SBC required to provide entrance facilities to CLECs for use in interconnection pursuant to Section 251(c)(2)? If so, what rates should apply? (Entry Issue (e))

(a) CLEC Position

It is the CLECs' position that this issue involves SBC's obligation to provide CLECs with interconnection facilities in the wake of the TRRO. The language in dispute is as follows (with the CLECs' proposed language in bold and underlined):

> 14.2 Notwithstanding Section 14.1, SBC is required to provide access to facilities**, including Entrance Facilities,** that CLEC requests to interconnect with SBC's network for the transmission and routing of telephone exchange service and exchange access service, in accordance with the requirements of Section 251(c)(2) of the Act ("Interconnection Facilities").

> **<u>14.3 The rate for an Entrance Facility, when obtained as an Interconnection Facility, shall be calculated in accordance with the rates for Unbundled Dedicated Transport as set forth in the Agreement. The rates for other Interconnection Facilities, if not established by the Agreement, shall be in conformance with Section 251(c)(2)(D) of the Act.</u>**
>
> **<u>14.4 For avoidance of doubt, CLEC may request that an Entrance Facility UNE be reclassified as an Interconnection Facility pursuant to Section 14.1 if CLEC will use the facility for interconnection in accordance with Section 14.2. SBC will perform such reclassification at no charge, since no physical work is required.</u>**

It is the CLECs' position that entrance facilities can be used either for interconnection or non-interconnection purposes. Additionally, depending on its use, entrance facilities are treated under separate provisions of the Telecommunications Act of 1996 (1996 Act), and are treated differently under the TRO and TRRO. (CLECs Initial Br. at 18)

The CLECs maintain that although SBC's obligation to offer entrance facilities as a UNE has been eliminated, SBC has a continuing obligation to provide entrance facilities at total element long run incremental cost (TELRIC) rates for interconnection purposes. It is the CLECs' opinion that entrance facilities used for interconnection purposes are used to connect CLEC and ILEC switches for the purposes of exchanging traffic between networks. The CLECs acknowledge that the FCC made a nationwide finding of non-impairment regarding entrance facilities used for non-interconnection (i.e. as a UNE). The CLECs argue that SBC refuses to recognize that the 1996 Act establishes a continuing and independent basis requiring ILECs to provide interconnection facilities at TELRIC rates. The CLECs maintain that both the TRO and TRRO affirmed that the CLECs have the right to interconnect at TELRIC rates with the ILEC's network for "the transmission and routing of telephone exchange service and exchange access, pursuant to Section 251(c)(2)." In support of their position, the CLECs cite ¶140 of the TRRO stating:

> We 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. (footnote omitted) (CLECs Initial Br. at 21)

The CLECs assert that the FCC recognized the distinction between uses of entrance facilities and SBC's continuing obligation to provide interconnection entrance facilities which is not affected by its determination with respect to non-interconnection entrance facilities. In support of their argument, the CLECs also cite ¶365 of the TRO stating:

> ... 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 explicitly must 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 to competitive LEC networks for the purpose of backhauling traffic. (footnote omitted)

Accordingly, the CLECs opine that SBC's argument that "the linking of two networks" is somehow exclusive of "the transport or termination of traffic" renders the FCC's statements in ¶140 of the TRRO and ¶365 of the TRO essentially meaningless. (CLECs Reply Brief at 21-22)

Next, the CLECs respond to SBC's argument that the CLECs' proposed contract language is out of place as this proceeding "involves unbundled access, not the terms and conditions for interconnection." The CLECs maintain that the purpose of this amendment is to incorporate into the various SBC interconnection agreements the changes caused by the TRO and the TRRO, and the survival of the interconnection entrance facilities is a topic of these orders. (*Id.* at 20)

(b) SBC Position

SBC disputes the CLECs' proposed language in Sections 14.2, 14.3 and 14.4 of the Amendment that requires SBC to provide entrance facilities at a TELRIC price. It is SBC's position that an "entrance facility" is defined as a transport facility that runs from SBC's network (typically a central or tandem office) to that of another carrier, as it provides a point of "entry" for the carrier's traffic into SBC's network. (TRO ¶¶365-366; footnote 1116). SBC maintains that, pursuant to §51.319(e) of the FCC rules and ¶366 of the TRO, the FCC's definition of dedicated transport network element "includes only those transmission facilities *within* an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches." SBC argues that, in the TRO, the FCC eliminated entrance facilities as a UNE and reaffirmed that result in the TRRO, where it made a national finding of non-impairment for entrance facilities. (SBC Initial Br. at 33)

Ms. Niziolek maintains that the FCC's determination that CLECs are not impaired without access to entrance facilities is based on its determination that such facilities are available from several other providers (including self-deployment). She argues that it makes no economic sense to conclude that CLECs have ample alternatives to entrance facilities when these facilities are used to access ILEC UNE loops (*i.e.*, non-interconnection) but that they don't have sufficient alternatives if these same facilities are used to deliver traffic to the ILEC's switch. (Niziolek Rebuttal Testimony at 3)

SBC argues that the CLECs seek to nullify the FCC's holding, suggesting that they can obtain the exact same facilities, at the exact same UNE prices, simply by calling them "interconnection facilities" instead of "entrance facilities." It is SBC's opinion that the CLECs attempt here simply misconstrues the nature of interconnection. In support of its position, SBC cites 47 C.F.R. §51.5 that refers to "interconnection" as "the linking of two networks for the mutual exchange of traffic. The term does not include the transport and termination of traffic." SBC argues that the term "interconnection" under Section 251(c)(2) refers only to the physical linking of two networks. Accordingly, SBC argues, while interconnection allows a CLEC to "access" the ILEC's network, this access comes via an interconnection point between the two networks, not by leasing the ILEC's facilities. (*Id.* at 33-34; Niziolek Initial Testimony at 5-6)

As to the CLECs' reference to ¶140 of the TRRO, SBC argues that the CLECs' citation is misplaced, as the FCC simply stated 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). SBC further argues that the next sentence in this paragraph makes clear that 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. (*Id.*) SBC witness Niziolek asserts that the language in Section

251(c)(2) of the Act provides that interconnection is "[T]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." Ms. Niziolek argues that the facilities in question are those provided by the "requesting telecommunications carrier," or in other words, the CLEC. Section 251(c)(2) and ¶140 of the TRRO merely requires SBC to interconnect its network with those CLEC-provided facilities. (Niziolek Initial Testimony at 6) Ms. Niziolek asserts that nothing in Section 251(c)(2) of the Act requires SBC to "provide interconnection facilities," as this is the responsibility of the requesting telecommunications carrier. She maintains that SBC's obligation is limited to interconnection with the facilities provided by the CLECs. (Niziolek Rebuttal Testimony at 3)

Ms. Niziolek argues that a CLEC may purchase services that connect its network with SBC's network from SBC's Special Access tariff if it chooses to do so, self-provision entrance facilities themselves or secure them from a third party. Ms. Niziolek maintains that if SBC provides entrance facilities under its access tariff, it must do so at the tariffed rates, not at TELRIC rates as suggested by the CLEC's proposed language. Further, if a CLEC chooses to purchase entrance facilities from SBC's access tariff, the rates specified in that tariff would apply including the effective rates for initiating service and those rates cannot be revoked or ignored. (Niziolek Initial Testimony at 7-8)

Finally, SBC argues that the CLECs' language is out-of-place since this proceeding involves access to unbundled network elements, not terms and conditions for interconnection. (SBC Initial Br. at 33)

(c) Commission Conclusion

The CLECs' proposed language is based on their opinion that SBC has a continuing obligation to provide entrance facilities at TELRIC rates for interconnection purposes pursuant to Section 251(c)(2) of the 1996 Act. (CLECs Initial Brief at 21) We note that Section 251(c)(2) of the 1996 Act defines an ILECs' obligation for interconnection as the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access. The FCC defined "interconnection" in 47 C.F.R. §51.5 as "the linking of two networks for the mutual exchange of traffic. The term does not include the transport and termination of traffic."

We find that Section 251(c)(2) of the 1996 Act and §51.5 of the FCC rules as well as ¶365 of the TRO and ¶140 of the TRRO, clearly require the ILEC (SBC in this case) to interconnect its network with the requesting carrier's (i.e. the CLECs) facilities and equipment. Such CLEC facilities and equipment are provided by the CLEC, not leased from the ILEC, and are a part of the CLEC's network that starts from the point of

interconnection (POI) between the two networks. Therefore, any facilities on the CLEC's side of the POI, including entrance facilities, are part of the CLEC's network regardless of whether they are used for transport and termination of traffic exchanged between that CLEC and the ILEC, used to access UNEs or used to backhaul traffic. We find that the CLEC may build its network by either purchasing facilities, including entrance facilities, from SBC's Special Access tariff if it chooses to do so, by self-provisioning entrance facilities themselves or by securing them from a third party. If a CLEC chooses to purchase entrance facilities from SBC's Special Access tariff, the rates specified in that tariff would apply, not TELRIC rates as proposed by the CLECs.

If the entrance facilities are on SBC's side of the POI, they are not interconnection facilities as described by the CLECs and not leased by the CLECs. They are part of SBC's network that is used by SBC, like the rest of its network, to carry traffic exchanged between SBC and that CLEC. In this situation, SBC should be compensated for the use of its network, including entrance facilities, according to 47 C.F.R. §51.709(b) (i.e. at cost-based rates).

Accordingly, we reject the CLECs' proposed language in Sections 14.2, 14.3 and 14.4 of the Amendment.

Issue 6: Sections 5.9 and 13 - Should the Amendment include rates and terms for SBC's Section 271 obligations? If so, what should those rates be? (Entry issue (f))

(a) CLEC Position

The CLECs assert that Section 271 of the 1996 Act applies to all BOCs including SBC as a result of the FCC's granting SBC authority to provide in-region long distance services. CLECs state that the FCC has determined that the BOCs obligation pursuant to Section 271(c)(2)(B) is to provide access to certain network elements including local switching independent of any Section 251 obligation to unbundle and provide those elements. (CLEC Initial Brief at 22, citing TRO at ¶652) As further support for its position, the CLECs indicate that the FCC, in 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 ...." (CLEC Initial Brief at 25, citing TRO at 652, 653 and 656) The CLECs aver that the FCC has indicated that all of the BOCs' unbundling obligations pursuant to Section 271 would remain in effect even after a Section 251 UNE was eliminated. (CLEC Reply Brief citing TRO at ¶¶653-655) The CLECs highlight the fact that, in response to SBC Communications' specific request to the FCC to forebear from applying the independent obligations of Section 271 to all network elements, the FCC granted the petition only with respect to mass market broadband network elements and declined to act on the remaining portions of the application. (CLEC Reply

Brief at 26) Therefore, CLECs conclude that the FCC has consciously decided to require SBC to provide, pursuant to Section 271, the elements that it is no longer required to provide pursuant to Section 251 (CLEC Reply Brief at 26).

The CLECs allege that the Commission has, in the past, established Section 271 rates in the context of Section 252 arbitrations. CLECs believe that, consistent with Section 271(c)(1) and (2), competitive checklist requirements, including loops, transport and switching which are independent of Section 251 determinations, must be implemented through interconnection agreements or Statements of Generally Available Terms (SGATs) approved by state commissions pursuant to Section 252. Therefore, the CLECs represent that they can request negotiations to incorporate Section 271 rights into their interconnection agreements and state commissions are to establish the corresponding rates consistent with their delegated authority consistent with Section 252. [7] The CLECs opine that the Commission has equal authority to establish "just and reasonable" rates for Section 271 elements in Section 252 arbitration proceedings as it does to establish TELRIC rates for Section 251 proceedings.

The CLECs submit that since the 1996 Act requires the inclusion of Section 271 rates and terms in interconnection agreements and since only the CLECs have proposed such terms, the CLECs proposed terms must be adopted. While the CLECs recognize that the TRO did not require state commissions to apply TELRIC to Section 271 elements, the CLECs propose the continued utilization of TELRIC-based rates on a temporary basis, until SBC proposes new rates that are approved by the Commission. The CLECs believe that this is the appropriate treatment inasmuch as the TELRIC rates incorporated within their existing agreements remain the supportable pricing scheme available for the Commission to adopt in this proceeding. In support of their position, CLECs allege that SBC has refused to propose any terms by which a CLEC could request to reclassify a delisted Section 251 UNE to a Section 271 element.

The CLECs assert that, inasmuch as interconnection agreements must include terms and conditions for Section 271 elements, the Commission should adopt their proposed language in Section 13.3. CLECs believe that their proposed language will assure: (1) that they will be able to effectively use network elements, (2) nondiscriminatory performance of routine network modifications, commingling and conversions, (3) nondiscriminatory maintenance and repair and (4) standard provisioning intervals.

The CLECs also submit that their proposed language in Section 13.5 clarifies that they should not be subject to special charges as a result of converting a Section 251 unbundled network element to a Section 271 network element.

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7 CLECs acknowledge that no court or FCC decision has specifically addressed whether a state commission can arbitrate Section 271 rates and terms (CLEC Reply Brief at 30).

(b) SBC Position

SBC asserts that, pursuant to their advocated position, the CLECs are trying to override the regulations prescribed by the FCC in the TRO and TRRO, including those which prohibit CLECs from obtaining new local switching as an UNE or obtaining unbundled loops or dedicated transport in those situations in which the FCC has determined that there is nonimpairment (SBC Initial Br. at 36).

With respect to the CLECs' reliance on Section 271, SBC asserts that the Commission has no authority to interpret or enforce Section 271 and that such authority belongs exclusively to the FCC. Further, SBC contends that the Commission's jurisdiction in this proceeding is limited to carrying out the requirements of Sections 251 and Section 252, and does not extend to Section 271. Specific to the terms of Section 271, SBC posits that the FCC alone has authority to address or enforce this section, including addressing any claims that a Bell Operating Company has failed to satisfy any statutorily imposed conditions to its continued provision of long distance (*Id.* at 38, 39). SBC asserts that a number of state commissions have concluded that the 1996 Act provides no specific authorization for state commissions to arbitrate Section 271 issues, including provision related to Section 271 for inclusion in Section 251/252 agreements. (*Id.* at 40)[8]

SBC opines that the express purpose of a Section 251/252 interconnection agreement is to implement a request for network elements pursuant to Section 251 (*Id.* at 37). SBC states that in resolving open issues, the Commission must abide by the provisions of Section 251. (*Id.* at 38 citing to Section 252(c)(1) SBC distinguishes the access obligations under Section 251 from those pursuant to Section 271. SBC believes that the FCC has held that access under Section 271 differs markedly from that under Section 251. For example, SBC notes that Section 271 does not address combinations of network elements but, rather, only addresses stand alone items. Further, SBC argues that Section 271 does not support a requirement for any combinations. (*Id.* at 44 citing TRO ¶665 footnote 1990; SBC Reply Brief at 26)

SBC surmises that the CLECs' primary objective is not to obtain access to standalone network elements, but to obtain combinations of network elements. (SBC Initial Brief at 42) In support of its position, SBC focuses on CLECs' proposed language in Section 13.5, which permit CLECs to "request any Section 251 unbundled network element or combination of network elements" to be reclassified as a corresponding 271 element. SBC points out that, based on the CLECs' proposed language, this request to combine network elements could occur even if the unbundled access to the unbundled element or combination has been prohibited by the TRO or TRRO. (*Id.* at 43) SBC is also of the

8 These state commissions include Texas, Kansas, and Utah.

opinion that the CLECs' proposed Sections 1.5, 2.3 and 3.3, would require SBC to continue providing UNEs or combinations pursuant to Section 271, notwithstanding the fact that the UNE(s) may no longer be required. (*Id.* at 43) SBC submits that CLECs' position would result in the illogical situation of the FCC not requiring UNE-P pursuant to Section 251, but reinstating the requirement of the UNE combinations pursuant to Section 271. SBC argues that such a result would be contrary to TRO ¶659. (*Id.* at 44)

Similarly, SBC rejects the CLECs' recommendation that the Commission continue to require the offering of unbundled network elements pursuant to Section 271 at TELRIC rates until such time that the Commission established new rates. SBC argues that, inasmuch as the FCC has already rejected the implementation of TELRIC rates with respect to Section 271 obligations, it would be unlawful to require such rates, even on a temporary basis. Further, SBC asserts that the Commission has no authority to regulate rates pursuant to Section 271 in light of the fact that Section 252(d)(1) is the only rate making authority for state commissions and it does not apply to network elements that are required under Section 271. (*Id.* at 45 citing TRO ¶657)

In support of its position, SBC states that rates for elements required by Section 271, but not by Section 251, are reviewed pursuant to the "just, reasonable, and nondiscriminatory" rate standards of Sections 201 and 202 of the 1934 Communications Act. (*Id.* at 46 citing TRO ¶663) Further, SBC states that Sections 201 and 202 do not provide any jurisdiction to state commissions and, instead, are administered solely by the FCC. (*Id.* citing TRO ¶659, 664) SBC notes that the "just and reasonable" prices were not included as part of SBC's Section 271 application due to the fact that the FCC did not establish the standard for Section 271 checklist items until the TRO which was issued subsequent to the filing of SBC's Section 271 application.

According to SBC, the FCC has determined that a state imposed rate for network elements pursuant to Section 271 would be improper due to the fact that Section 271 requires nothing more than a market rate, rather than a regulated rate imposed by a state commission. SBC believes that these market rates are established simply by demonstrating 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. " (*Id.*)

(c) <u>Commission Decision</u>

First, the Commission calls attention to the fact that the TRO and TRRO did not affect SBC's §271 obligations in Ohio and, therefore, this issue is beyond the scope of this specific proceeding. Notwithstanding this determination, the Commission finds that neither SBC's nor the CLECs' proposed language should be adopted. While CLECs assert

that they are entitled to purchase §271 checklist items pursuant to §252 agreements notwithstanding the FCC's TRO and TRRO determinations, the Commission focuses on the fact, as discussed in more detail in Issue 32 of this order, that the FCC has determined that §§251 and 271 of the 1996 Act operate independently of each other.

Although SBC's obligations under §271 are not necessarily relieved based on the FCC's §251 unbundling analysis, these obligations should be addressed in the context of carrier-to-carrier agreements, and not § 252 interconnection agreements, inasmuch as the components will not be purchased as network elements. These carrier-to-carrier agreements should be filed with the Commission consistent with Section 4905.16, Revised Code.

Issue 7: **Section 4.4 – Under what circumstances may SBC process disconnect or conversion orders for high capacity loops, transport, or dark fiber and for loop and/or transport arrangements that are to be transitioned during the FCC transition periods that the CLEC transitions to an alternative arrangement prior to the end of the applicable FCC transition period, what rate should apply from the date the arrangement is transitioned through the end of the FCC transition period? (Entry Issue (g))**

Issue 10: **Section 2.1.4 – Where a CLEC migrated embedded ULS/UNE-P customers to another functionally equivalent SBC service platform (e.g., resale) should the transition rate specified by the FCC in the TRO Remand Order apply to those migrated lines until the end of the transition period – i.e., until March 11, 2006 – if the transition occurs sooner than March 11, 2006? (Entry j))**

(a) CLEC Position

Issue 7 deals with the transition of unbundled loops, transport and dark fiber. The CLECs argue that SBC has not correctly identified what is at issue on this dispute. The CLECs declare that consistent with the FCC's determination of applicable conversion timeframes of 12 and 18 months as set forth in the TRRO, orders for the disconnection/conversion of identified facilities can be made within the these timelines. (CLEC Reply Br. at 34) The CLECs contend that the basic issue here is that CLECs should be entitled to keep their UNE arrangements to the extent allowed by the agreement and in the event that a CLEC desires to discontinue that UNE arrangement any earlier, then CLECs can issue an appropriate disconnect order to SBC. The CLECs deny SBC witness Niziolek's claim that, "CLECs may wait until the very last moment to submit its orders"

and affirm that just the opposite is true. The CLECs aver that with the CLEC-proposed language, CLECs would be directed to issue applicable conversion or disconnection orders well ahead of time, knowing that the actual date to implement the order would be at the end of the availability of the UNE unless the parties agreed otherwise. The CLECs maintain that without their proposed language, CLECs would be directed to submit orders at the last possible moment in order to assure maximizing the usage of the UNE while it was still available. The CLECs maintain that either way (with or without the CLEC language), the CLEC would get to keep the UNE at issue up until the end of the transition period and the only difference is that, with the CLEC proposed language, all parties are given an incentive to issue the applicable conversion or disconnection orders well ahead of time, and this will result in a better exchange of information, better coordination between the companies and a better customer experience. (*Id.* at 35)

Additionally, the CLECs assert that the timeframes established in the TRRO should help both SBC and the CLECs determine a more orderly conversion for the affected circuits in a given wire center. The CLECs explain, however, that because SBC has systems limitations that prevent it from processing many of the conversion orders within a narrow time frame, SBC would like to have the CLECs forego their contract rights to the lower UNE pricing. Moreover, the CLECs contend that if SBC has a problem with its own ability to process orders, then it should work to solve that problem and not force CLECs to bear an increase in its own costs to solve SBC's problem. (CLEC Initial Br. at 32)

Issue 10 deals with the transition of ULS/UNE-P arrangements. The CLECs opine that their proposed language provides that, unless the CLEC specifically requests or contractually agrees otherwise, the FCC-established transition rate for UNE-P should apply to the CLECs' entire embedded base of UNE-P customers until the end of the transition period, which is March 11, 2006, even if those customers are migrated to a functionally equivalent SBC service arrangement, such as resale, prior to the end of the transition period. (CLEC Initial Br. at 44)

The CLECs declare that both the CLECs and SBC agree that it is not possible to process all UNE-P conversion service orders on a single day (March 11, 2006) but that this activity will need to take place over some period of time if the conversion is to occur in a timely and orderly fashion. The CLECs assert that it is this need to perform the work over a period of time that has resulted in SBC requesting that the CLECs begin migration of their embedded base of UNE-P customers prior to March 11, 2006, and that SBC insists that the price paid by the CLECs be immediately changed coincident with the processing of the service order for the new service. However, the CLECs believe that, consistent with the FCC's TRRO goals and directives that the transition be an orderly one, such a price change becomes effective only at the end of the transition period. (CLEC McComb Direct at 7)

The CLECs argue that to successfully accomplish the orderly transition the FCC emphasized, the transition plan must eliminate any incentives or motivations on behalf of both ILECs and CLECs to act in any way that would disrupt the orderly transition that the FCC made a top priority. The CLECs further argue that only by guaranteeing the UNE-P/ULS transition rate apply during the entire 12-month period, even if migration occurs sooner, can the transition from UNE-P to a functionally equivalent SBC alternative service arrangement occur in an orderly manner. According to the CLECs, the FCC mandated that unbundled access to local circuit switching during the 12-month transition period be priced at the specified UNE-P rate plus one dollar in order to ensure that the transition is an orderly one and free from the potential loss of service to customers that inevitably occurs when a transition is forced or rushed. (CLEC Initial Br. at 44, 45)

The CLECs argue that SBC's contention that the ULS/UNE-P transition rate should terminate when the customer is migrated to a functionally equivalent SBC service arrangement is at odds with the FCC's goals of ensuring an orderly transition and rate shock. According to the CLECs, if SBC's position were to prevail, the CLECs would have the incentive to wait until the latest possible moment to place orders to migrate their embedded UNE-P base and SBC would have the incentive to overstate and exaggerate implementation challenges in order to get as may UNE-P customers converted as early as possible making these types of perverse incentives entirely at odds with the FCC's desire for an orderly transition. The CLECs argue that their approach eliminates such incentives by applying the ULS/UNE-P transition rate to the CLECs' embedded base of UNE-P customers until the end of the 12-month transition period, even when those customers are migrated to an SBC functionally equivalent service arrangement prior to March 11, 2006. (*Id.* at 45) Moreover, the CLECs declare that by concluding that the UNE-P rate set in the TRRO will apply to all of the embedded base being transitioned to an SBC functionally equivalent service until a specific date (March 11, 2006), the FCC chose not to tie the imposition of higher rates for new service arrangements to the time of a CLEC's transition, but to a date certain and this decision effectively eliminates all CLEC incentives to wait until the last minute to submit its orders to migrate its UNE-P customers in order to take advantage of the lower rate for as long as possible. (CLEC Reply Br. at 51)

(b) SBC Position

SBC alleges that issue 7 arises out of a fundamental disagreement regarding the CLECs' obligations to transition unbundled loops, dedicated transport and dark fiber to alternative serving arrangements. (SBC Initial Br. at 49) SBC believes that the CLECs' proposed language assumes that the FCC merely established an "end date" for UNE availability instead of a transition period (12 months for switching, DS1 and DS3 loops and dedicated transport, 18 months for dark fiber). (*Id.*) SBC claims that the CLECs propose that they do nothing to convert their UNEs during the transition, and then require SBC to

perform all the work necessary to convert every single affected switching, loop and dedicated transport arrangement of every CLEC at the very last moment of the transition period. (*Id.*) SBC opposes this language as unreasonable and inconsistent with the FCC's reasoning in the TRRO. (SBC Reply Br. at 28)

According to SBC, the FCC established a period of transition, not just a single end date. (SBC Initial Br. at 50) SBC maintains that the FCC's switching rule [47 C.F.R. §51.319(d) (2) (ii)] plainly commands that each CLEC "shall migrate its embedded base . . . to an alternative arrangement within 12 months of the effective date of the TRRO" and ¶199 of the TRRO also states that the "transition plan . . . requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within 12 months of the effective date of this order" (emphasis in original). (*Id.*) SBC asserts that the CLECs themselves admit in issue 10 of their initial brief that the FCC clearly adopted a transition period of twelve months which is twice as long as the six-month transition period the FCC had originally contemplated in its *Interim Order*. (SBC Reply Br. at 28) SBC declares that the CLECs' proposal is also contrary to the purpose of the transition period which is to ensure an orderly transition and the FCC explained three times in ¶¶143, 196 and 227 of the TRRO that the 12-month transition period for DS1/DS3 loops, and interoffice transport provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition. (SBC Initial Br. at 50) SBC opines that the FCC clearly did not intend that every conversion occur at the end of the 12 months following the TRRO. (*Id.*)

According to SBC, the CLECs assert that if the limitations of resources such as electronics and people prevent SBC from processing huge volumes of orders at the very last instant, such limitations are merely "SBC's problem." (SBC Reply Br. at 28) SBC disagrees and states that the FCC solved the problem by establishing a transition period rather than a chaotic transition day or moment. (*Id.*) SBC asserts that it does not process orders consistent with the end of the applicable transition but rather processes orders consistent with their due date. (SBC Initial Br. at 50) Therefore, SBC affirms that its proposed language ensures that CLECs submit transition orders in a manner that allows them to be processed appropriately. (*Id.*)

According to SBC, issue 10 is about what rates should apply if a CLEC migration of its UNE-P arrangements to some alternative service occurs before the end of the FCC's 12-month transition period. (SBC Reply at 36) SBC proposes that the rates for the new service should apply once the migration has occurred and the new service has begun but the CLECs believe that they are entitled to the FCC's transition rates until March 11, 2006, even if the actual migration date occurs before then. (*Id.*) SBC avers that the transition rate established by the FCC should cease to apply to former mass market ULS/UNE-P end user services when the CLECs transition them to an alternative service arrangement and

SBC maintains that Section 2.1.4, as proposed by the CLECs, should be omitted from the amendment in its entirety. (Niziolek Direct at 21)

SBC argues that there is no reason to extend the transitional rates any further than is provided by the FCC's rules because the FCC has stated that the transition mechanism "is simply a default process" and that carriers may "negotiate alternative arrangements superseding this transition period. SBC states that 47 C.F.R. §51.319(d)(2)(iii) has a transition mechanism that only governs the transition plan not the price for alternative or commercial arrangements. Additionally, the FCC did not say that the transitional rate would supersede the standard rates associated with alternative commercial arrangements after the transition to those arrangements has occurred, but instead it is the commercial rate, not the transitional rate, that prevails. (Niziolek Direct at 21) SBC agrees that the FCC established a 12-month transition period to allow incumbents the time to implement conversions in an orderly fashion but it did not say that CLECs could keep transitional prices even after the conversion takes place. (SBC Reply Br. at 36) SBC maintains that the FCC stated very clearly in ¶199 of the TRRO that "competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar *until the incumbent LEC successfully migrates those UNE-P customers* to the competitive LEC's switches or to alternative access arrangements negotiated by the carriers" (emphasis in original) and that the CLECs' proposal that regulated transitional pricing be maintained after the transition has been accomplished is entirely inconsistent with the FCC's instructions and its goals. (*Id.*)

SBC claims that the CLECs' threat to delay their migration to the end if they do not get to keep transitional prices is specifically admonished by the FCC when it stated in ¶233 of the TRRO that, "the incumbent LECs and competitive LECs must negotiate in good faith" and "not unreasonably delay implementation." The FCC encouraged the "state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay" and remind carriers that "the failure...to negotiate in good faith...may subject that party to enforcement action." (*Id.*)

(c) Commission Conclusion

The disputed language in Section 4.4 (with SBC proposed language in bold, and CLEC proposed language in bold underline) states:

> **4.4 SBC will process CLEC orders for DS1/DS3 High Capacity Loops, DS1/DS3 Dedicated Transport, or Dark Fiber Transport conversion or disconnection <u>consistent with the end of the applicable transitional period identified in Section 4.1.1.5.</u> SBC will not convert or disconnect these services prior to the end of the applicable transitional period unless specifically requested by the CLEC;** however, CLEC is responsible for

ensuring that it submits timely orders in order to complete the transition by the end of applicable transitional period in an orderly manner.

Section 4.4 of the interconnection agreement considers high capacity loops, transport and dark fiber only. We note that ¶¶143 and 196 of the TRRO provides that at the end of the twelve-month period, requesting carriers must transition the affected DS1 or DS3 dedicated transport UNEs or high capacity loops to alternative facilities or arrangements. In regards to the dark fiber transport and loops, ¶144 f.n. 406 and ¶197 f.n. 523 provides that at the end of the 18-month period, requesting carriers must transition the affected dark fiber dedicated transport UNEs or loop UNEs to alternative facilities or arrangements. Therefore, we find the CLECs proposed language for Section 4.4 of the Amendment to be reasonable and shall be adopted.

Additionally, we note that in ¶¶143 and 196, the FCC directs both CLECs and ILECs to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase or lease facilities. Likewise, concerning dark fiber transport and loops, the FCC in ¶197 of the TRRO found that it may take time for CLECs to negotiate IRUs or other arrangements with incumbent or competitive carriers; and that a more lengthy transition plan is warranted. Also, to ensure that the orderly transition is achieved, we find SBC's proposed language for Section 4.4 of the Amendment to be reasonable and shall be adopted.

Concerning the embedded base ULS/UNE-P loops, the disputed language in Section 2.1.4 (with CLEC proposed language in bold underline) states:

> **Notwithstanding the forgoing provisions of Section 2.1 and unless the CLEC specifically request or has contractually agreed otherwise, to the extent an Embedded Base ULS/UNE-P customer is migrated to a functionally equivalent alternative service arrangement prior to March 11, 1006, the ULS/UNE-P Transition Rate continue to apply until March 11, 2006.**

We find that in ¶227 of the TRRO, the FCC directs both CLECs and ILECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements and performing loop cutover or other conversions. The FCC provisioned a transition plan in the TRRO that requires the LECs to execute the necessary steps to migrate UNEs to alternative facilities or arrangements within the time period specified. This transition plan requires preparation by both SBC and the CLECs and the preparation cannot begin unless the CLECs submit their orders in a timely manner. Since the migration will occur by the end of the transition period, the UNEs at issue will be available to the CLECs during that period of time. The Commission concludes that for Section 2.1.4, the CLECs proposed

language is reasonable and shall be adopted for the Amendment. Further, we conclude that the parties should add a sentence to avail CLECs to the UNE-based price for the facility after it is transitioned to the alternative arrangement through the end of the applicable FCC transition period only if the alternative arrangement involves purchasing the facilities from SBC.

Issue 8: **Section 1.3.3, 2.1.3.3, and 3.2.2.2 – To what extent may SBC Ohio impose charges on transitioning the Embedded Base of Declassified TRO, DS-0 Local Circuit Switching, UNE-P and High Capacity Loops and Transport elements? (Entry Issue (h))**

Issue 29: **Section 10.1.3.1 - What charges should apply to conversions that require manual handling? (Entry Issue (y))**

(a) CLEC Position

It is the CLECs' position that issue 8 relates to whether SBC may impose noncost-based nonrecurring charges (NRC) on CLECs to convert UNE-P, high capacity loops and transport being used to serve embedded base customers to another form of wholesale services. The CLECs note that in Section 1.3.3, the parties agree that when converting UNEs (UNE-P and/or high capacity loops and transport) to alternative service arrangements, a CLEC will pay the rates associated with physical work by SBC to implement the transition. The CLECs contend that their proposal, in Sections 2.1.3.3 and 3.2.2.2, involving the conversion of UNEs (UNE-P and/or high capacity loops and transport) to alternative service arrangements that require only a record change by SBC, would limit SBC to charge CLECs a record only charge. The CLECs maintain that in those circumstances where the configuration of the physical facilities both before and after the conversion remain the same, the record only charge would compensate SBC for its costs to recast the facilities in its billing systems as other wholesale services rather than UNEs. The CLECs argue that SBC's proposed language would require CLECs to pay service order charges even though physical work is not actually required to transition UNEs to an alternative service arrangement (CLECs Initial Brief at 32-33).

As to the ULS/UNE-P conversion to alternative arrangements, the disputed language in Section 2.1.3.3 (with SBC proposed language in bold, and CLEC proposed language in bold underline) states:

> 2.1.3.3 CLEC agrees to pay all non-recurring charges **applicable to the transition of its Embedded Base provided the order activities necessary to facilitate such transition involve physical work (physical work does not include the re-**

> **use of facilities in the same configuration) and involve other than a "record order" transaction. The rates, terms and conditions associated with such transactions are set forth in the Pricing Schedule applicable to the service being transitioned to. To the extent that physical work is not involved in the transition and the applicable service order charges and/or applicable non-recurring tariff order charges, if any, as governed by this Agreement and/or Tariff from which the service being transitioned to is ordered, will be the only applicable charge. SBC shall not impose any termination, reconnection, disconnection or other nonrecurring charges, except for an Electronic Service Order (Flow Through) Record Simple charge, associated with any conversion or any discontinuance of any TRO Remand Declassified Element. Any discontinuance of any TRO Remand Declassified Element and the conversion shall take place in a seamless manner that does not affect the customer's perception of service quality (*Id.*).**

The CLECs' argue that in Section 1.3.3, both SBC and the CLECs agree that transition of a UNE arrangement to a corresponding service (or vice versa) that re-uses the same facilities would not trigger any nonrecurring charges related to circuit design, installation, testing, etc. The CLECs argue that there should be little, if any, need for physical work since, in almost all cases, the existing configuration of the physical facilities will remain the same both before and after the conversion of an existing UNE-based service to a functionally equivalent service arrangement (CLECs Initial Brief at 33-34). The CLECs witness Ms. McComb argues that wherever a record charge exists it should be applied in the case of the conversion of the existing service. She maintains that there is a "Line Port Service Order charge" of $16.02 and a "Record Order" charge of $14.27. According to Ms. McComb, a record change charge relates to changing the information on an existing customer's billing records while the service order charge involves updating all of SBC's systems based on the assumption that service does not already exist in all instances. (McComb Initial Testimony at 19; CLECs Initial Brief at 34)

Ms. McComb asserts that SBC could not argue that the CLECs' proposal to apply the record charge is impractical because record charges do not exist for every possible situation. She argues that the draft Amendment submitted in this proceeding contains three separate paragraphs (Sections 5.6, 10.1.2.1 and 10.1.2.2) where parties agreed to apply record non-recurring charges. (McComb Initial Testimony at 19-20) The CLECs claim that their proposed language in Section 2.1.3.3 is intended to clarify that Service Order charges, which may include manual and physical labor costs associated with the

migration of a UNE, should not apply where the migration or transition from UNEs is a billing record change only. (CLECs Initial Brief at 35)

The CLECs maintain SBC's contention that it will be required to perform physical work without compensation with respect to CLEC's transition of the UNE-P embedded base is unsupported since such transition does not involve any physical change. Ms. McComb asserts that options the CLECs are looking at now are either to order Total Service Resale or to order Local Wholesale Complete. She argues that with these two options it is rare that an order submitted electronically would not flow through to completion. She further argues that there is a small likelihood that any physical work is required of SBC to make the transition from UNE-P to these two alternatives. The CLECs maintain that the transition away from reliance on SBC's facilities and to the use of CLECs' own switches will take longer than the time remaining between now and March 2006. Ms. McComb contends that she doubts any CLEC now relying on UNE-P is contemplating a total conversion for every customer it now serves to UNE loops by next March 2006. She argues that many of the existing UNE-P arrangements will physically remain in place but be called something else – like resale – and billed at a different rate. She further contends that when, in the future, a CLEC is ready to move off resold services or off Local Wholesale Complete to its own switch and SBC's UNE Loops, this Section of the Amendment regarding non-recurring charges will not apply as the limiting language it contains expires when the transition period expires.

As to the conversions that will take place from UNE-P to UNE Loops between now and March 2006, the CLECs argue that SBC will not go uncompensated for work performed. The CLECs assert that they will pay for hot cuts associated with these conversions of existing customers. Additionally, the CLECs argue that SBC has provided no cost information or provided evidence supporting its contention that its costs will not be recovered under the CLECs' proposal. (CLECs Reply Br. at 36-38; McComb Rebuttal Testimony at 11-13)

Regarding the high capacity loop and/or transport UNEs to an alternative arrangement, the disputed language in Section 3.2.2.2 (with SBC proposed language in bold, and CLEC proposed language in bold underline) states:

> **3.2.2.2 CLEC agrees to pay all non-recurring charges applicable to the transition of its Embedded Base provided the order activities necessary to facilitate such transition involve physical work and involve other than a "record order" transaction. The rates, terms and conditions associated with such transactions are set forth in the Pricing Schedule applicable to the service being transitioned to. To the extent that physical work is not involved in the transition**

> **the applicable service order charges and/or applicable non-recurring tariff order charges, if any, as governed by this Agreement and/or Tariff from which the service is being transitioned to is ordered, will be the only applicable charge. SBC shall not impose any termination, reconnection, disconnection or other nonrecurring charges, except for an Electronic Service Order (Flow Through) Record charge, associated with any conversion or any discontinuance of any TRO Remand Declassified Element. Any discontinuance of any TRO Remand Declassified Element and the conversion shall take place in a seamless manner that does not affect the customer's perception of service quality.** (*Id.*)

The CLECs' witness Michael Starkey argues that SBC's proposed language would allow it to assess non-recurring charges specific to manual work over and above a simple electronic record change when transitioning existing circuits either from wholesale or retail services to UNE, or vice versa. The CLECs assert that SBC has been unable to provide any examples of where such charges would apply or why any effort beyond a simple record change would be required. The CLECs assert that their proposed language only assumes that an electronic record change charge should apply for conversions. In support of their position, the CLECs cite ¶585 of the TRO, where the FCC discussed UNE conversions. Paragraph 585 of the TRO states:

> We decline the suggestions of several parties to adopt rules establishing specific procedures and processes that incumbent LECs and competitive LECs must follow to convert wholesale services (e.g., special access services offered pursuant to interstate tariff) to UNEs or UNE combinations, and the reverse, i.e., converting UNEs or UNE combinations to wholesale services (CLECs Initial Brief at 36-37; Starkey Initial testimony at 23-24).

The CLECs also argue that ¶587 of the TRO addressed the fact that an ILEC would never have to perform such a conversion to continue to serve its own customers, and thus would never incur these costs. As such, the FCC ruled that termination charges, re-connect and disconnect fees or non-recurring charges for establishing the original service were not allowed for conversions and are inconsistent with the 1996 Act. In support of their position, the CLECs further cite ¶588 of the TRO where the FCC states: "...converting between wholesale services and UNEs (or UNE combinations) is largely a billing function." The CLECs claim that the FCC's recognition 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 non-recurring charges appropriately

applied under the format within which the circuit was originally ordered. Accordingly, the CLECs contend that since the circuit was paid for and is up and running, there seems to be no rational reason why SBC would need to physically alter that circuit such that it would incur manual provisioning costs. The CLECs argue that SBC should simply revise its records so that it can bill the CLEC under a different set of rates consistent with the new status of the circuit. The CLECs argue that SBC should bear the burden of explaining why it requires language reserving its right to assess costly manual charges. In the absence of such explanation and supporting rationale, SBC's language should simply be rejected. (CLECs Initial Brief at 37-38; Starkey Initial testimony at 25-27)

The CLECs assert that their proposed language would not preclude SBC from assessing hot cut charges, including batch hot cut charges, when transitioning the CLECs' embedded base. The CLECs maintain that both Sections 3.2.2.2 and 10.1.3.1 of the Amendment relate to converting an existing UNE circuit to a non-UNE circuit or vice versa, and a hot cut would not be relevant in this circumstance. A hot cut is only required when the circuit in question is being physically dismantled with the switching element being removed from one carrier and re-attached to another. Such a hot cut, the CLECs argue, is not a "conversion" consistent with the CLECs' language at either Section 3.2.2.2 or 10.1.3.1. As such, there would be no "conversion" scenario wherein a hot cut would be applicable. The CLECs claim that there is a difference between "conversions" and "transitions." The CLECs provide an example of conversions as contemplated by the CLEC language, which would include "converting" a DS1 UNE loop to a DS1 special access local channel. (CLECs Initial Brief at 38-39)

In support of their position, the CLECs cite the June 9, 2004 Order of the Illinois Commerce Commission where it held that SBC was entitled to recover only its administrative costs to recast the facilities in its systems, and nothing more. The CLECs claim that the Illinois Commerce Commission rejected SBC-proposed "Service Order" rate elements that included change charges, including service order and design charges. Only a "Project Administrative Charge" to allow SBC to recoup costs for the administrative functions SBC incurs when a CLEC converts special access to UNEs would be allowed. The CLECs also cite the June 16, 2005 decision of the Texas Public Utilities Commission where it required SBC Texas to include the following language into its conforming agreement: "SBC Texas shall not impose any untariffed termination, reconnect, or other non-recurring charges, except for a record change charge, associated with any conversion or any discontinuance of any declassified network elements." (*Id.* at 40-41; Starkey Initial testimony at 28-29)

The CLECs maintain that their proposed language does not prevent SBC from recovering its costs related to physical work involved in conversions of unbundled high capacity loops and transport to alternative arrangements because no physical work is

involved in conversions and SBC has not provided one example of a conversion activity that would involve physical work in a special access to UNE conversion. Therefore, the CLECs argue that it is inappropriate for the contract language to grant SBC the authority to impose a number of unspecified charges for physical work associated with conversions. (CLECs Reply Br. at 38-39)

As to SBC's reference to the "Project Administrative Charge" approved in Illinois Docket No. 02-0864, the CLECs argue that it should not have any bearing on the Commission's decision in the case at hand. Mr. Starkey asserts that SBC's claims that this charge is in SBC's EEL tariff is inaccurate, as SBC Ohio does not have an EEL tariff, and SBC certainly does not point to any cite to support this claim. Mr. Starkey argues that a charge approved in Illinois, based on Illinois-specific cost study and record evidence, should have no bearing on the charges assessed in Ohio. Mr. Starkey contends that he participated in the Illinois proceeding and had the opportunity to review SBC Illinois' TELRIC cost studies for special access to UNE conversion. Based upon that experience, he opines that the SBC Illinois' Project Administrative Charge does not recover any costs related to physical work, and the activities that are included in that Project Administrative Charge are all related to administrative activities triggered by operations support system fallout, such as conference calls and verification activities. He further opines that the SBC Illinois' Project Administrative Charge involves activities related to creating disconnect orders, which are charges the FCC specifically precluded incumbents from assessing in 47 C.F.R. §51.316(c) of its rules. (CLECs Reply Br. at 39-40; Starkey Rebuttal Testimony at 21-23)

As to SBC's contention that the CLECs' proposed electronic service order charge is inappropriate because not all orders are submitted electronically and not all orders flow through, the CLECs argue that the electronic service order charge is still appropriate. They assert that SBC concedes that its non-recurring proposal would require CLECs to pay not only the record charge, but also charges for manually processing service orders and any charges that SBC contends applies under its special access tariff. However, SBC never indicates whether it will perform the work these non-recurring charges were designed to recover because, the CLECs assert, in a vast majority of circumstances SBC will not perform the work. (*Id.* at 42)

Next, the CLECs address SBC's contention that the CLECs' proposed language, prohibiting SBC from imposing termination charges for conversions, is "overbroad". According to the CLECs, it is SBC's opinion that termination charges should apply for the early termination of multi-year special access agreements. The CLECs assert that there is a difference between non-recurring charges for disconnection or "termination" of a circuit and early termination penalty payments. SBC has made it clear that when CLECs convert a special access circuit to a UNE combination, SBC will assess "termination" charges for

disconnecting the circuit. The CLECs' language is designed to prevent SBC from assessing these termination charges, as these charges are inconsistent with the FCC's rules and orders. The CLECs note that their language in this section is not designed to avoid tariffed early termination penalties associated with a multi-year special access offering. (*Id.* 42-43)

Finally, on this issue, the CLECs address SBC's argument that the CLECs' proposed language regarding "seamless" conversion is unreasonable because it requires perfection, is vague, and is based on "the customer's perception." The CLECs argue that while the FCC's rule does not specifically use the term seamless, it does make clear that conversions should be performed without adversely affecting the end-user's service quality. The CLECs maintain that their proposed language regarding conversion processes in Sections 10.1.3.1, 2.1.3.3 and 3.2.2.2 of the Amendment is consistent with the FCC's conversion rules (§51.316(b)) in all respects. (*Id.* at 43)

(b) SBC Position

SBC opines that there are two areas of dispute under issue 8: (a) charges applicable to the conversion of "embedded base" UNEs to alternative arrangements; and (b) the manner of performing these conversions. As to the charges applicable to the conversion of "embedded base" UNEs to alternative arrangements, SBC opines that 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. (SBC Initial Br. at 52)

As to the charges for the cost of physical work, SBC argues that its proposed language in both Sections 2.1.3.3 and 3.2.2.2, that the CLECs oppose here, is the exact same language, for the exact same charges, in the exact same situations that the CLECs have agreed to in Section 1.3.3. SBC explains that Section 2.1.3.3 refers to what non-recurring (NRC) charges apply when converting a UNE-P to an analogous service. Section 3.2.2.2 refers to what NRC charges apply when converting DS1, DS3 and/or dark fiber loops or dedicated transport from UNEs to analogous services. (Niziolek Initial Testimony at 11-13) SBC maintains that its proposed language 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 transaction. Thus, SBC argues that its proposed language in the disputed sections should be adopted for the sake of consistency; otherwise, the Amendment will contain two sets of conflicting provisions with one set authorizing charges and the other taking them away. SBC maintains that if it incurs the cost of physical work to serve a CLEC, as the proposed language reflects, it is entitled to compensation from the CLEC that caused that cost and benefits from it. (SBC Initial Brief at 52)

SBC points out the CLECs, in their Initial Brief 32-33, agreed that they should pay the associated rates for work that requires physical work by SBC to implement the transition. However, SBC argues, the CLECs did not provide any explanation as to why they oppose the same exact language in the first sentence of Section 2.1.3.3 and 3.2.2.2. (SBC Reply Br. at 30) In response to the CLECs' argument that SBC did not provide examples where charges for physical work would be required and why, Ms. Niziolek provided an example of conversions that require physical work. In Ms. Niziolek's example, a CLEC having an existing EEL arrangement involving an unbundled DS1 loop connected to an unbundled DS3 interoffice transport facility that is no longer available as a UNE may choose to use its own facilities. In that instance, SBC explains, the CLEC would probably request that the unbundled DS1 loop be provided to their collocation so that the CLEC could connect it to their own facilities. SBC argues that it could not fulfill such a request without performing physical work (i.e., disconnecting the unbundled DS1 loop from the interoffice transport facility and performing the necessary cabling to terminate the DS1 loop at the CLEC's collocation arrangement). As to CLECs' questioning whether there are instances in which effort beyond a simple record change would be required, Ms. Niziolek contends that all transitions will require an effort beyond a record change as that term is generally used in the industry. (Niziolek Rebuttal Testimony at 8-9)

As to the CLECs' claim that SBC is causing the CLECs to convert their network elements from UNEs to alternative serving arrangements, SBC argues that it is the law that is requiring such conversion. In support of its position, SBC cites ¶227 of the which specifies that the FCC requires CLECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within 12 months of the effective date of the TRRO. SBC also cites ¶143 which specifies that requesting carriers must transition the affected DS1 or DS3 dedicated transport UNEs to alternative facilities or arrangements. SBC maintains that it should be entitled to recover the costs for processing the orders, costs which are caused by the CLECs not by SBC, and which result from SBC's compliance with the FCC's rules. (Niziolek Rebuttal Testimony at 7-8)

As to the service order charges, SBC argues that its proposed language that the CLECs pay any applicable service order charges applies whether or not there is physical work. (Niziolek Initial Testimony at 13) SBC disputes the CLECs contention that they should only pay a "record order" charge. In SBC's opinion, a "record order" charge is a type of service order and applies only when a CLEC requests that the name or contact number on a particular circuit or account be changed (i.e., a change to non-service affecting record), but SBC's proposed language takes into account the possibility that the conversion requested by a CLEC may require something more. SBC argues that its "applicable service order charges" language 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 as the CLECs propose. (*Id.*

at 14-15) SBC maintains that this proceeding is not one to investigate or modify SBC's access tariff, this proceeding is about a Section 251/252 interconnection agreement amendment which applies to rates, terms and conditions applicable to UNEs, interconnection and resale. SBC also maintains that when a CLEC chooses to convert its UNEs to special access, the special access tariff governs the terms and conditions under which the CLEC obtains the special access facility or service, and SBC's proposed language simply refers to the applicable charges in the tariff. SBC argues that the CLECs' attempt to nullify SBC's access tariff should be rejected. SBC further argues that the CLECs' proposal states that SBC may only assess the record order charge for an electronic flow-through order (i.e., an order that is submitted and processed electronically) without any manual processing by SBC. But CLECs do not submit all orders electronically, SBC argues, and any additional costs that SBC 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. (*Id.* at 14) Moreover, SBC continues, not all electronically submitted orders can be processed electronically, some require manual work for translation and input. SBC asserts that its Commission-approved rates include a component for that manual work. (SBC Initial Brief at 53)

SBC maintains that the application of a records change charge, as proposed by the CLECs, is not consistent with activity that would occur. SBC contends that most of the orders to convert UNEs to alternative arrangements will be change orders or disconnect orders, not records orders. SBC argues that it is inappropriate to arbitrarily assign the charge for a records order to a change order when the Commission has established the appropriate rate for a change order. It is SBC's opinion that the application of transition-specific rates for the conversion of the embedded base would impose additional cost on SBC in order to bill in a manner that is inconsistent with the standard service order charge for the order type. (Niziolek Rebuttal Testimony at 9-10)

Next, SBC addresses Mr. Starkey's argument that the FCC in ¶587 of the TRO ruled that termination charges, re-connect and disconnect fees, or non-recurring charges for establishing a service for the first time were not allowed for conversions and inconsistent with the 1996 Act. The FCC describes the application of unnecessary and wasteful charges in instances where the customer's service is already in place and simply being reclassified. SBC maintains that it agrees that those types of charges are not appropriate, and has not proposed that they apply. SBC does not propose applying any of the charges associated with establishing a service for the first time, where the service is already established, and will remain in place. According to SBC, the only charges that it is requesting in such an instance are the charges for changing service to provide compensation for the processing of a CLEC's local service request (LSR). Ms. Niziolek also addresses Mr. Starkey's argument that, in instances where the circuit is already up and working and the CLEC has already paid to SBC the requisite nonrecurring charges, there is no reason for SBC to need

to physically alter that circuit such that it would incur manual provisioning costs. Ms. Niziolek contends that the conversion may require that the circuit be re-arranged to comply with FCC rules such as 47 C.F.R. §51.318(b), which establishes mandatory criteria applicable to a CLEC obtaining a high-cap EEL or commingled arrangement. If a CLEC has obtained an EEL under the previous FCC criteria, that EEL may not meet the new rule requirements, she argues, and will need to be re-configured to comply with that TRO-adopted criteria or, if the EEL cannot meet the criteria, it will be converted to an SBC wholesale service. Another situation Ms. Niziolek offers is where the CLEC requests a physical change to a facility at the time of conversion. SBC argues that in all these instances it should be entitled to obtain compensation for the physical work that is performed. (Niziolek Rebuttal Testimony at 10-11)

As to the manner of performing these conversions, SBC claims that parties have already agreed in Sections 2.1.3.2 (UNE-P) and 3.2.2.1 (loops and dedicated transport) that SBC will complete transition orders with any disruption to the end user's service reduced to a minimum. Further, where disruption is unavoidable due to technical considerations, SBC will act to minimize any disruption detectable to the end user. SBC opines that, in Sections 2.1.3.3 (UNE-P) and 3.2.2.2 (loops and dedicated transport), the CLECs are attempting to go farther and mandate that the conversion take place in a seamless manner that does not adversely affect the customer's perception of service quality. SBC argues that the CLECs' proposed language is unnecessary because the agreed upon language already provides the maximum feasible level of seamlessness. SBC further argues the CLECs' proposed language is unreasonable as: a) it mandates a standard for perfection that is not attainable; b) the CLEC proposal is vague and thus unworkable as it is based on the customer's perception of service quality and c) the agreed contract language in Sections 2.1.3.2 and 3.2.2.1 recognizes that some disruption is unavoidable and simply directs SBC to minimize any disruption that is detectable to the end user. (Niziolek Initial Testimony at 16) Moreover, SBC's Commission-approved performance standards do not require perfection in processing CLEC orders, SBC claims. (SBC Initial Brief at 54)

As to issue 29, SBC maintains that its proposed language would require the CLECs to pay the non-recurring charges included in the Amendment's Pricing Schedule and/or Tariff for the UNEs or UNE combinations to which a particular wholesale service is being converted. Ms. Niziolek argues that SBC should be allowed to assess the charges applicable to conversions of wholesale services that have previously been approved by the Commission and/or agreed to by the parties. There is no basis for the CLECs' proposal to preclude SBC's ability to assess such charges and to limit the charge that SBC may assess to a record order charge. SBC cites the Illinois Commerce Commission approval of a Project Administration Charge applicable to conversions of special access services to EELs and private lines to EELs (in Docket 02-0864). SBC contends that the Illinois Commission recognized in approving the Project Administration Charge that the processing of orders

for conversions of wholesale services to UNEs involves additional activities and associated costs. (Ms. Niziolek Initial Testimony at 47-49)

Ms Niziolek maintains that the CLECs' proposal should be rejected as it would prohibit SBC from imposing any termination charges associated with any conversion. She argues that SBC's interstate and intrastate special access tariffs contain identical language providing for the application of termination charges to the early termination of multiyear agreements for the purchase of special access tariffs at discounted rates. She maintains that the FCC has consistently rejected proposals that local exchange carriers be prohibited from assessing early termination charges upon the conversion of special access services to EELs. She cites the UNE Remand Order, ¶481, fn. 985, where the FCC states: "[w]e note, however, that any substitution of unbundled network elements for special access would require the requesting carrier to pay any appropriate termination penalties under volume or term contracts." She also sites ¶695 of the TRO, where the FCC reaffirmed these rulings, stating that "we remain unconvinced by the general argument advanced by several commenters that converting a special access circuit to a UNE does not constitute a termination within the meaning of the termination provisions of incumbent LEC tariffs." Additionally, Mr. Niziolek argues that the FCC, in ¶¶692-699 of the TRO, expressly refused to grant CLECs a "fresh look" with respect to the applicability of termination charges to special access to UNE conversions, holding that doing so would neither be in the public interest nor represent a competitively neutral approach. (*Id*. at 49-50)

As to the CLECs' proposed language in Section 10.1.3.1 of the Amendment relative to the conversion process, SBC maintains that such language is unnecessary, and should be rejected, in light of the agreed upon language in Section 10.1.3. Ms. Niziolek explains that the agreed upon language in 10.1.3 addresses the manner in which conversions from wholesale services to UNEs take place, which states:

> 10.1.3. SBC will complete CLEC conversion orders in accordance with the OSS guidelines in place in support of the conversion that the CLEC is requesting with any disruption to the end user's service reduced to a minimum or, where technically feasible given current systems and processes, no disruption should occur. Where disruption is unavoidable due to technical considerations, SBC shall accomplish such conversions in a manner to minimize any disruption detectable to the end user. Where necessary or appropriate, SBC and CLEC shall coordinate such conversions. (*Id*. at 50-51)

(c) Commission Conclusion

Under issues 8 and 29, we will address the following sub-issues: a) whether physical work is required to fulfill a conversion request from an unbundled UNE-P/ULS to an alternative arrangement; b) whether physical work is required to fulfill a conversion request from an unbundled high capacity loop and transport to alternative arrangement; c) whether a "record charge" is reasonable to recover SBC's costs of converting unbundled UNE-P/ULS or unbundled high capacity loops and transport to alternative arrangement; d) the appropriate non-recurring charge for special access to a UNE arrangement; and e) the appropriate manner to perform these conversions.

The first issue in dispute is whether physical work is required to fulfill a conversion request from an unbundled UNE-P/ULS to an alternative arrangement. We note that nothing in either the FCC rules or the draft Amendment limits the CLECs' choice to convert an existing UNE-P/ULS arrangement to either total service resale or to order Local Wholesale Complete (LWC) arrangements only, as the CLECs suggest. We are not convinced with the CLECs' argument that, due to the CLECs' limited (two) options, there is an extremely small likelihood that any physical work would be involved in such a request. The CLECs have their own switches and it may be more economic for some CLECs to lease SBC's unbundled loops and connect the unbundled loops to their own switch as a third option. In those situations, physical activities, including a hot cut process, would be involved. The CLECs' proposed language in Section 2.1.3.3 fails to reflect such possibility.

In a situation where the CLEC opts into total service resale as the alternative to the UNE-P/ULS arrangement and the CLEC's ICA with SBC includes non-recurring charges for the total service resale, we find that such rates shall be the applicable rates. The CLECs failed to explain why such agreed upon rates are not reasonable for the purpose of the conversions at issue in these situations. We note that the LWC arrangements are purchased via separate agreements that contain the relevant rates, terms and conditions that are not part of the ICA or the Amendment at hand. Therefore, in a situation where the CLEC opts into a LWC arrangement as the alternative to the UNE-P/ULS arrangement, we find that the rates, terms and conditions in these LWC agreements shall control the appropriate non-recurring charges for such conversions.

We find that the CLECs' proposed language limits the non-recurring charges that SBC can charge under any of the three possible alternative arrangements to electronic service order record simple charge that parties refer to in other sections of the Amendment (see Sections 5.6, 10.1.2.1 and 10.1.2.2) as record order charge or record change charge. We note that there is no specific definition of electronic service order record simple charge, record order charge or record change charge in the draft Amendment. We also note that the only place where an explanation of these terms appear is in Ms. Niziolek's rebuttal

testimony (at 9) where she states that a record order charge is a type of service order and applies only when a CLEC requests that the name or contact number on a particular circuit or account be changed (i.e. a change to non-service affecting record). We find that the CLECs' proposed language in Section 2.1.3.3 would not allow SBC to recover its costs of processing the conversion requested by a CLEC in situations where the conversion request requires something more than the name or contact number on a particular circuit or account being changed as discussed above. Accordingly, we reject the CLECs' proposed language in Section 2.1.3.3.

Next, we address the issue of whether physical work is required to fulfill a transition request from an unbundled high-capacity loop and transport to an alternative arrangement. We note that although the CLECs address that issue (sub-issue 8) and the issue of special access to UNE conversion (issue 29) at the same time, we address them separately. Section 3.2.2.2 of the Amendment addresses the applicable non-recurring charges to the transition/conversion order placed by a CLEC for unbundled high-capacity loop and transport capacity (UNE loop and transport) to alternative arrangements. The CLECs admit that their proposed language only assumes that an electronic record change charge should apply for such conversions. (CLECs Initial Br. at 37) We find that the CLECs' position, as reflected in their proposed Section 3.2.2.2 language, is inconsistent with the CLECs' agreement, in Section 1.3.3 of the Amendment, to pay the applicable non-recurring rates for activities that require physical work by SBC to implement the transition. We also find that SBC demonstrated (Niziolek Rebuttal Testimony at 8-9) that the transition of the embedded UNE loop and transport request by a CLEC in compliance with the FCC rules, may involve physical work that is beyond the record charge, depending on the existing UNE arrangement and the CLEC-chosen alternative.

Paragraph 587 of the FCC's TRO and the 47 C.F.R. §51.316(c) discussion involving conversion of UNEs and services state:

> Except as agreed to by the parties, an incumbent LEC shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service for the first time, in connection with any conversion between a wholesale service or group of wholesale services and an unbundled network element or combination of unbundled network elements.

The record reflects that SBC does not propose to charge termination charges, re-connect and disconnect fees or non-recurring charges for establishing a service for the first time, where the service is already established and will remain in place. SBC proposes, in such an instance, to only apply a charge for changing service to provide compensation for work performed in the processing of a CLEC's LSR. (Niziolek Rebuttal Testimony at 10-

11) In fact, SBC provided an example of a situation where an already established UNE arrangement may require physical work (e.g. circuit re-configuration) in fulfilling a CLEC conversion/transition request in compliance with the FCC rules. We find that the Amendment language should allow SBC to recover such costs. Accordingly, we reject the CLECs' proposed language in Section 3.2.2.2. We find that, although SBC contends that it does not propose to charge termination charges, re-connect and disconnect fees, or non-recurring charges for establishing a service for the first time, where the service is already established and will remain in place, nothing in its proposed language prohibits such action. Accordingly, we adopt SBC's proposed language in Section 3.2.2.2 of the Amendment subject to adding the following language: "SBC will not impose any untariffed termination charges, or any disconnect fees, re-connect fees or charges associated with establishing a service for the first time, where the service is already established and will remain in place, in connection with any conversion of its Embedded Base."

Next, we address the dispute on Section 10.1.3.1 language regarding the appropriate non-recurring charge for converting wholesale services (special access arrangement) to UNE arrangements. We find that the FCC consistently (¶¶587, 692, 694, 695 and 699 of the TRO) refused to grant CLECs a "fresh look" with respect to the termination charges applicable to the early termination of multi-year agreements for the purchase of special access tariffs at discounted rates for the purpose of special access to UNE conversions. Although the CLECs claim that their proposed language in Section 10.1.3.1 is not designed to avoid the tariffed early termination penalties associated with a multi-year special access offering (CLECs Reply Br. at 42-43), we find that their proposed language clearly prohibits such charges and only allows for the electronic service order (flow through) record charge. Therefore, we reject the CLECs' proposed language in Section 10.1.3. as it is inconsistent with the federal requirement where it disallows SBC from collecting the applicable termination charges for early termination of a multiyear special access offering. Accordingly, we adopt SBC's proposed language in Section 10.1.3.1 of the Amendment subject to adding the following language: "SBC will not impose any untariffed termination charges, or any disconnect fees, re-connect fees or charges associated with establishing a service for the first time, where the service is already established and will remain in place."

As to the disputed language regarding the appropriate manner to perform these conversions in Sections 2.1.3.3, 3.2.2.2 and 10.1.3.1 of the Amendment, we reject the CLECs' proposed language in all of these sections of the Amendment. Based on the CLECs' arguments on the record, we find that the agreed upon language in Section 2.1.3.2 of the Amendment is reasonable, consistent with 47 C.F.R. §51.316(b) of the FCC rules, and provides the CLECs with the same result (i.e. achieving the conversion/transition process with minimal disruption to the CLECs' end user service) as the disputed language

proposed by the CLECs in Section 2.1.3.3 of the Amendment attempt to achieve. We also find that this proposed language can be contradictory to the agreed upon language in Section 2.1.3.2 that allows minimum disruption due to technical considerations. The same is true for the agreed to language in Section 3.2.2.1 and disputed language in Section 3.2.2.2; and for the agreed to language in Section 10.1.3 and disputed language in Section 10.1.3.1. Accordingly, we reject the CLECs' proposed conversion performance language in Sections 2.1.3.3, 3.2.2.2 and 10.1.3.1 of the Amendment as we find it unnecessary and inconsistent with the agreed upon language.

Issue 9: Section 2.1.3.4 – What rates should apply to ULS or UNE-P services if a CLEC fails to submit orders to disconnect or migrate its embedded base customers by the deadline to be specified in the amendment? (Entry Issue (i))

(a) CLEC Position

The CLECs propose that in the event the CLECs' embedded base of ULS/UNE-P arrangements has not been fully migrated to alternative arrangements or disconnected at the end of the twelve-month transition period for ULS/UNE-P, SBC should re-price those in-place arrangements at total service resale. It is the CLECs' opinion that issue 9 and issue 10 are linked to the matter of transitioning existing UNE-P customers to alternate serving arrangements and that the proper resolution of these issues should be based on the goals articulated by the FCC for this transition. According to the CLECs, the FCC, in ¶226 of the TRRO stated that "eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors." The CLECs assert that their proposed language is consistent with the FCC objective to provide a set of incentives that balances the interests of the CLECs and ILECs to achieve an orderly transition with no adverse impact on end user customers. It is the CLECs' position that SBC's proposal reflects an interpretation of the FCC's determination that would allow SBC under certain circumstances to unilaterally implement "market pricing." The CLECs argue that market pricing is an ambiguous term certain to engender business planning uncertainty and risk by dictating the rapidity with which ordering and implementation of alternate serving arrangements are executed. (CLECs Initial Br. at 41-42; McComb Initial testimony at 3-4)

The CLECs ask the Commission to adopt the CLECs' proposal and reject SBC's proposal because, they maintain, there simply is no market for UNE-P or mass market ULS and, in their opinion, the concept of a market-based rate is a complete fiction. They argue that while SBC has not proposed a rate for market-based pricing, the resale rate has been established by the Commission. The CLECs claim that requiring SBC to charge the CLEC, who still controls the relationship with the customer, the retail rate for the service

minus the wholesale avoided cost discount would still fully compensate SBC for the service it provides.

The CLECs argue that the components of the service the customer is receiving before and after March 11, 2006, are exactly the same if the customer were not migrated to an alternative service arrangement. The CLECs maintain that if SBC had completed the migration from ULS/UNE-P to resale on March 12, 2006, SBC would be entitled to the resale rate and no more. Accordingly, they argue, there is no legitimate reason to allow SBC to charge a higher, undefined market-based rate simply because the migration was not completed by the end of the transition period. (CLECs Initial Br. at 42-43; McComb Initial Testimony at 6)

The CLECs also argue that SBC has never explained the basis of its claim that there are real world market-based rates, and that a market exists for local switching, or that its rates for switching are reasonable or competitive with local switching offerings made by other entities in Ohio. The CLECs assert that rates for LWC are unilaterally set by SBC and the fact that some CLECs have signed LWC agreements with SBC when there is no competitive source available does not mean that SBC's rates are market rates. They argue that using these rates as the default alternative would not establish a predictable, just and reasonable price as the default, but would, instead, give SBC a windfall for every UNE-P arrangement that a CLEC omits from its orders or, for whatever reason, should SBC not complete the transition by March 11, 2006 . (CLECs Reply Br. at 45)

The CLECs respond to SBC's argument that, because CLECs will deliberately disregard the requirements of the TRRO and fail to submit orders to disconnect or migrate customers, it is inappropriate for such CLECs to dictate what default price they will pay. The CLECs argue that making the resale rate the default price will provide little incentive for those CLECs to submit orders on time. The CLECs' witness, Ms. McComb, asserts that CLECs actively work at managing their operations and costs. She claims that the CLECs' survival always has depended on providing quality service to their customers, ensuring that they know what their costs are and by developing pricing and marketing strategies that cover those costs. She opines that submitting no orders, making no plans for the transition away from reliance on UNE-P would, in effect, turn control of the CLEC's operations and its costs over to SBC. (CLECs Reply Br. at 44; McComb Rebuttal Testimony at 2)

The CLECs contend that the "default" price is prudent because there could be a number of reasons why some UNE-P arrangements were not converted on time, including error on the CLEC's part in submitting orders and error on SBC's part in performing a conversion. In support of their position, the CLECs claim that one option is to order total

service resale at Commission-approved rates that fully recover SBC's costs and fulfill the objective of establishing a predictable, fair and reasonable "default" alternative. (*Id.*)

The CLECs dispute SBC's claims that CLECs must submit orders for total service resale in order for SBC to bill resale rates and that CLECs' end users might lose some functionality, such as voicemail. The CLECs maintain that if this possibility exists, CLECs will be aware of it and will take care of those customers. The CLECs maintain that they are not asking SBC to convert those customers to resale, but they are asking SBC to re-price these arrangements at resale rates until they are disconnected or transitioned. (*Id.* at 45)

(b) SBC Position

SBC contends that the FCC in the TRRO established a "nationwide bar" on unbundled local switching and the UNE-P, and then the FCC established a transition period for the "embedded base" of UNE-Ps, which expires on March 11, 2006, to give carriers time to submit orders to convert their customers served through UNE-P arrangements to alternative arrangements. According to SBC, Section 2.1.3.4 of the Amendment involves the situation when a CLEC fails to convert its UNE-P customers to an alternative arrangement by the March 11, 2006, expiration date. SBC proposes that it will re-price such arrangements to market-based rates which are the prices established by arms' length agreements with other CLECs. (SBC Initial Br. at 55; Niziolek Initial Testimony at 17)

SBC maintains that the CLECs' proposal should be rejected for two reasons. First, SBC asserts, if any CLEC truly wants to convert its UNE-P arrangements to resale, the FCC's rules give it ample time to implement that choice, one year from the effective date of the TRRO until March 11, 2006. It is SBC's opinion that each CLEC should be making the decisions and taking affirmative action on how to serve those customers. The TRRO at ¶227 makes it clear that it is the responsibility of the CLECs to transition the affected mass market local circuit switching UNEs to alternative facilities or arrangements. SBC argues that the CLECs should not be allowed to dictate terms if they fail to act within the FCC's year-long transition. SBC further argues that if CLECs are permitted to dictate the default transitional arrangement they will have little incentive to submit conversion orders on time which will force SBC to do all the work at the very end of the transitional period. SBC also maintains that the CLECs' proposal cannot be implemented because SBC cannot convert all the features on a mass market ULS/UNE-P account to a resold account as a resold line can only contain telecommunication services that SBC makes available on a retail basis. As an example, SBC argues that a CLEC may currently be offering a feature to a ULS/UNE-P end user that is not available on a resold basis, such as voicemail. If SBC converts a UNE-P line to resale, the end user may lose that functionality. SBC maintains 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. SBC maintains that only the CLECs can be operationally accountable to make sure that they capture such features and services when issuing orders so that their end users are appropriately served after the transition. (SBC Initial Br. at 55-56; Niziolek Initial Testimony at 18-20)

SBC disputes the CLECs' claim that their proposed Commission-regulated resale rate is superior to the market-based rate proposed by SBC. SBC maintains that its proposed language is consistent with the overall goals of the 1996 Act and the TRRO. SBC argues that the 1996 Act does not prefer regulated prices to those determined by a private market. SBC also cites ¶¶145, 198 and 228 of the TRRO arguing that the FCC expressed a preference for private, commercial agreements over regulation as the FCC states that "the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period." (SBC Reply Br. at 34; Niziolek Rebuttal Testimony at 12)

As to the CLECs' argument that market-based prices for UNE-P are a "complete fiction" because "there simply is no market for UNE-P," SBC maintains that several real-world CLECs have already reached arm's-length binding agreements with SBC on its commercial LWC offering that contains market-based prices. (SBC Reply Br. at 35; Niziolek Rebuttal Testimony at 13-14)

Also, SBC disputes Ms. McComb's argument that the term "market-based price" is ambiguous and will endanger business planning with uncertainty and economic risk for the CLECs. SBC asserts that the only time its proposal would apply is if the CLEC has failed to provide the necessary notification to SBC as to what the CLEC wants to do with its "mass market" UNE-P arrangements prior to March 11, 2006. SBC argues that it is the CLEC's responsibility to determine how it will continue to serve its end-user(s) as the CLEC has full control over its business planning. Consequently, any economic risk is brought on by the CLEC itself, by failing to make its decision as to what to do with those arrangements in time to meet the FCC's deadline. (Niziolek Rebuttal Testimony at 13 and 15)

(c) Commission Conclusion

The Commission notes that the FCC articulated the goals of the transition plan for the migration of the embedded base unbundled local circuit switching used to serve mass market customers to an alternative service arrangement in ¶226 of the TRRO. In ¶226, the FCC stated that "eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors." In ¶227, the FCC discusses the transition plan itself. In the first sentence of ¶227, the FCC states that "**We require competitive LECs to submit the**

necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of this Order." (Emphasis added) The FCC ends that paragraph by stating that "By the end of the twelve month period, **requesting carriers must transition** the affected mass market local circuit switching UNEs to alternative facilities or arrangements." (Emphasis added) The Commission finds that the FCC made it clear that it is the CLEC's responsibility to take the first step to effectuate the agreed-upon transition process for a given end user that the CLEC serves using unbundled local circuit switching, either as a stand-alone UNE or in combination with other UNEs.

Again in paragraph ¶227, the FCC states that "[T]he transition we adopt is based on the **incumbent LECs' asserted ability to convert** the embedded base of UNE-P customers to UNE-L on a timely basis **while continuing to meet hot cut demand for new UNE-L customers.**" (Emphasis added) We note that the agreed to language in Section 2.1.3.4 of the Amendment states that:

> if CLEC has met all of its due dates as agreed to by the Parties, including dates renegotiated between the Parties, and SBC does not complete all of the tasks necessary to complete a requested conversion or migration, then until such time as such ULS or UNE-P remains in place it should be priced at the rates in the Pricing Schedule attached to the Agreement plus $1.00.

Therefore, we find, in situations where SBC fails to complete all of the tasks necessary to complete a requested conversion or migration, SBC accepts the responsibility of pricing such arrangements at the transitional rate. The dispute involves a situation where the CLEC embedded base of ULS/UNE-P arrangements is still in place at the conclusion of the 12-month transition period. As we stated earlier, we find it is the CLEC's responsibility to take the steps in submitting the necessary orders and to effectuate the agreed-upon transition process. We find that if the ULS/UNE-P arrangements are still in place at the conclusion of the 12-month transition period while SBC has completed all of the tasks necessary to complete a requested conversion or migration, the CLECs shall be responsible for the failure to take the appropriate steps to transition their embedded base customers to alternative arrangements. Accordingly, we find that these arrangements shall be re-priced at market-based rates until the CLECs take the appropriate action to transition or disconnect these arrangements. Therefore, we reject the CLECs' proposed language.

We also reject the CLECs' proposal to re-price such arrangement at total service resale. We find that the CLECs will have had an ample amount of time (12 months) to make business decisions and take the appropriate action to transition their embedded base ULS/UNE-P arrangements to total service resale if they desire to do so. We also find that

the CLECs failed to explain how SBC would determine the type of regulated retail services, features and arrangements the end user purchases from the CLEC before this proposed "re-pricing" takes place. It would seem that such information would be needed so that SBC can determine the appropriate total service resale price to charge the CLECs for each arrangement. We expect that this type of information would be exchanged in the transition order request.

Further, we find that SBC's proposal to "re-price" the remaining embedded base ULS/UNE-P arrangements left in place at the conclusion of the 12-month transition period to market-based price is reasonable and shall be adopted. The FCC's national finding of non-impairment to the CLECs with regard to ULS in its TRRO is based on the finding of competitive alternative to the ILEC's ULS, including self-provisioning of local switching. (TRO at ¶199) The record reflects that several CLECs have signed LWC agreements with SBC. (SBC Reply Br. at 35) Accordingly, we reject the CLECs' argument that there simply is no market for UNE-P and that "market-based price" is an ambiguous term that is certain to endanger business planning with uncertainty and economic risk for the CLECs.

Issue 12: Section 3.1.4.1 - Should a CLEC be prohibited from obtaining more than ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available as a UNE? (Entry issue (k))

(a) CLEC Position

The CLECs' position is that the 10 circuit limitation for DS1 transport applies only on those transport routes where CLECs are not impaired with respect to DS3 transport (CLEC Initial Br. at 52). The CLECs dispute SBC's position that the 10 circuit DS1 limitation applies to all transport routes. The CLECs argue that the purpose of the FCC's limitation on DS1 transport is to prevent CLECs from evading the elimination of DS3 transport UNEs by ordering multiple DS1 circuits instead, meaning, where a DS3 transport UNE is available, there would be no rule to evade, and any CLEC request for DS1 circuits instead of DS3s would be considered legitimate. (*Id.*) The CLECs opine that the FCC addresses the 10 DS1 circuit cap in 47 C.F.R. §51.319(e)(2)(ii)(B) and in ¶128 of the TRRO which states that the limitation of 10 DS1 UNE transport circuits only applies on those particular routes where the ILEC is no longer obligated to provide DS3 UNE transport but where impairment exists for DS1 transport. (*Id.* at 53) In other words, the CLECs argue that, under the FCC's new impairment test, there is a 10 DS1 UNE transport circuit cap on all routes where the end-points are either Tier 1 or Tier 2 wire centers, but the cap does not apply on routes where either end-point is a Tier 3 wire center, thus, SBC's position ignores ¶128. (*Id.*) The CLECs maintain that ¶128 cannot simply be ignored because the rule adopted in the FCC regulations does not include this clarification. The CLECs further maintain that ¶128 is clear – the limitation of 10 DS1 UNE circuits to a

particular CLEC applies only on those routes where the unbundling obligation for DS3 UNE transport has been removed due to a finding of non-impairment, not on all transport routes. (Id at 54.)

According to the CLECs, the FCC's analysis focused on when it would make economic sense for a CLEC to either construct a DS3 transport facility or be expected to be able to acquire a DS3 transport from a provider other than the incumbent LEC. The FCC concluded, as stated by the CLECs, that transport impairment is related to capacity and that it is economically feasible for the CLEC (or an alternative provider) to construct DS3 capacity only on routes between relatively more dense wire centers but that on routes connecting relatively less dense wire centers, construction of alternative DS3 capacity is generally not economically feasible. Moreover, the CLECs claim for this category of less dense routes, a CLEC remains impaired in the absence of DS3 UNE transport and can still obtain DS3s as UNEs under §251. (*Id.* at 54, 55) Concerning the analysis for DS1s, the CLECs opine that the FCC conducted a similar analysis and concluded that construction or alternative provider availability of DS1 transport is likely to be feasible only on the very densest routes - routes which have a sufficient level of demand such that it could theoretically be served either by a DS3 or multiple DS1s. (*Id.* at 55) According to the CLECs, the crossover point the FCC estimated when it is economically efficient for a CLEC to move to a DS3 transport circuit is after 10 DS1 transport circuits have been attained. The CLECs assert that a 10-circuit cap on DS1s was needed in order to protect the effect of impairment findings on DS3 transport and without this cap on routes where there is no longer impairment for DS3 transport, CLECs would be able to evade the non-impairment finding simply by substituting multiple DS1 circuits. (*Id.* at 56) In other words, the CLECs declare that, where the FCC had determined that CLECs should not have access to DS3 UNEs, it did not want CLECs to be able to effectively obtain DS3-level transport at TELRIC rates by ordering an equivalent number of DS1s. (CLEC Reply Br. at 52) Furthermore, the CLECs exclaim, if the FCC had intended for the cap to apply to all transport routes, there would have been no reason to tie the DS1 transport cap to DS3 impairment conclusions. (CLEC Initial Br. at 56)

The CLECs offer another argument by claiming that the reasoning behind the FCC's adoption of the DS1 cap makes no sense when applied to situations where DS3 transport remains available as a UNE because there would be no concern that a CLEC might prevent DS3 non-impairment via use of multiple DS1 UNE transport circuits and if the DS1 transport cap is applied over broadly, it will have a negative effect on the use of DS1 EELs and on competition in the small and medium-sized business market where EELs are most prevalent. (*Id.*) Likewise, the CLECs aver that if SBC's position is adopted, the availability of DS1 EELs will be curtailed to a substantially greater degree than is contemplated in the TRRO, such that a maximum of 10 DS1 EELs would be available on all transport routes, rather than just on those routes where both end-points are either Tier 1 or Tier 2 wire

centers. Moreover, the CLECs claim, the TRRO did not envision the DS1 transport cap to apply on those routes where either end-point is a Tier 3 wire center or constraining the number of DS1 EELs a CLEC can deploy. (*Id.* at 57) Finally, the CLECs allege that if SBC's position is adopted, CLECs would no longer be able to obtain facilities in a manner that SBC provides such facilities to itself because it may not be an economically feasible alternative for serving small business customers since SBC's DS1 special access services are priced substantially above TELRIC DS1 transport rates. (*Id.*)

(b) SBC Position

SBC declares that this issue concerns the FCC's "cap" on the number of unbundled DS1 dedicated transport UNEs that a CLEC can purchase on a single route where "impairment for DS1 transport" exists but the CLECs maintain that the 10-ciruit limitation applies only on those transport routes where DS3 transport is not available as a UNE. (SBC Reply Br. at 38) SBC states that its position repeats the FCC's rule, 47 C.F.R. §51.319(e)(2)(ii)(B), which provides that a "requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis." (SBC Initial Br. at 59) SBC claims that the CLECs try to modify the rule, so that it only applies where there is no Section 251 unbundling obligation for DS3 Dedicated Transport, but the CLECs' proposal does not appear anywhere in the FCC's rule and it is contrary to the FCC's reasoning. (*Id.*)

SBC maintains that in ¶128 of the TRRO, the FCC based the DS1 cap on evidence showing "that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s . . . such that it effectively could use a DS3 facility" and thus the volume cap of 10 DS1 circuits makes sense because at volumes greater than 10, the efficient CLEC will place those dedicated transport circuits on a single DS3 circuit. (SBC Reply Br. at 38) Additionally, SBC exclaims that if there is no impairment for DS3 dedicated transport facilities on a given route, the carrier can deploy its own facilities or obtain them from an alternative wholesale provider. However, SBC argues that the DS1 cap makes sense even if there is impairment and federal law does permit unbundled DS3 dedicated transport on that route because it would be similarly more efficient for the carrier to obtain unbundled dedicated transport at that DS3 level rather than racking up an inefficiently large number of DS1s. (SBC Initial Br. at 60) SBC continues that the availability of unbundled DS3 transport as an option makes unbundled DS1 transport even less appropriate than in the situation where DS3 transport is not available on an unbundled basis. (SBC Reply Br. at 39)

SBC also alleges that the CLECs' principal argument is based not on the rule or the FCC's analysis, but on a stray FCC statement in ¶128 of the TRRO, which states, "On routes for which we determine that there is no unbundling obligation for DS3 transport . . . we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits." SBC states that contrary to the CLECs' view that this sentence addresses the

issue, it does not address the situation presented here, which is where there *is* an unbundling obligation for DS3 transport, but the rule does apply wherever there is unbundling for DS1 transport, without regard to the availability of DS3 transport. (*Id.*). SBC asserts that the remainder of ¶128 cited by the CLECs goes on to explain the FCC's reasoning: "[W]hen a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply", thus, meaning, a carrier "effectively could use a DS3 facility" whether that facility is available on an unbundled basis or through alternative sources. Moreover, SBC claims that the phrase, "DS3 impairment conclusions should apply," means if there is impairment, the carrier may obtain unbundled DS3 transport from the incumbent; if there is no impairment, the carrier may obtain DS3 transport from an alternative source and that either way, it makes no sense for the carrier to choose an inefficient number of DS1 transport circuits. (*Id.*)

SBC also states that the CLECs' proposal that a CLEC may request 336 DS1 transport circuits rather than the allotted 10 on a given route, if there is impairment with respect to DS3 transport, is invalid. Such proposal would allow CLECs to circumvent the DS3 transport cap because where there is impairment for DS3 transport under the FCC's rules, the FCC held that a carrier could obtain no more than 12 DS3 transport circuits on a given route. SBC alleges that under the CLECs' proposal, a CLEC with 12 unbundled DS3 dedicated transport circuits on a route could still obtain 336 DS1 circuits (which is the equivalent of 12 more DS3s) or in other words, the carrier could use DS1 circuits to effectively "double up" the capacity it is allowed to obtain on an unbundled basis (SBC Reply Br. at 40). Additionally, SBC counters the CLECs' argument concerning DS1 EELs which is if CLECs can obtain a maximum of ten DS1 transport circuits on an unbundled basis on any given route, the number of EELs that may be obtained using DS1 transport over that route are limited to 10 as well. SBC asserts that the CLECs neglect to mention the fact that CLECs may obtain EELs that consist of unbundled DS1 loops combined with unbundled DS3 dedicated transport so that if a CLEC wishes to obtain EELs supporting more than 10 unbundled DS1 loops, the CLEC can aggregate the DS1 loops on a DS3 level transport circuit. (*Id.* at 40, 41)

(c) Commission Conclusion

The Commission concludes that SBC's proposed language for Section 3.1.4.1 will be adopted into the Amendment. The FCC is clear in 47 C.F.R. §51.319(e)(2)(ii)(B) and in its explanation found in ¶128 of the TRRO. We interpret the FCC's rule to be when impairment exists such that the incumbent LEC must provide DS1 transport circuits as an unbundled element, the FCC limits the competitive LECs' availability to DS1 transport circuits to ten circuits. We agree with the FCC's reasoning and the record that for an efficient carrier who aggregates sufficient traffic on DS1 facilities, which the FCC record reveals is approximately 10 DS1 transport facilities, that carrier should have generated