enough revenue to be economically capable of deploying a DS3 facility or lease a DS3 facility from an alternative provider. The efficient competitive LEC generally would not continue to attain beyond 10 DS1 transport facilities at TELRIC pricing, in lieu of, taking advantage of pricing efficiencies by deploying a DS3 facility, leasing a DS3 facility from an alternative provider or obtaining unbundled DS3 facilities from the ILEC (if there is impairment on that route). Therefore, the Commission agrees with SBC's argument that the DS1 cap is applicable when there is DS1 impairment on a route regardless of the DS3 impairment status on that route. Accordingly, we adopt SBC's proposed language of Section 3.1.4.1 into the Amendment.

Issue 14: Section 4.1.1.1 - How frequently may SBC update its list of non-impaired wire centers. (Entry issue (l))

(a) CLEC Position

It is the CLEC's position that in order to avoid unduly disrupting end users and allow CLECs to develop and utilize business plans in an appropriate manner, the frequency of updates to the non-impaired wire centers needs to occur no more than once every six months. While CLECs point out that the TRRO did not discuss a time frame for additional wire center updates, they argue that SBC's proposal to update as "changes occur" is implausible and highly disruptive. The CLECs contend that allowing groups of wire centers to be updated together at six-month intervals will create efficiency to the process and reduce the disruption of CLEC business plans to twice a year. The proposed six-month interval, CLECs contend, should create a minimal level of necessary structure, while allowing SBC the ability to update its listing in a timely manner. (Garvin Direct at 4-5)

CLECs contend that 47 C.F.R. §51.319(a)(4)(i), (a)(5)(i), (e)(2)(ii), (iii) and (iv) referenced by SBC do not mandate any particular time frame and this Commission has authority to manage the procedure for its own dockets, including managing the process pertaining to self-certifications. (Garvin Rebuttal Testimony at 5)

(b) SBC Position

SBC explains that the TRRO establishes non-impairment criteria for high-capacity loops and dedicated transport consisting of the number of business lines served by a wire center and the number of fiber-based collocators at the wire center. (Chapman Direct at 57) SBC further explains that because the number of business lines and the number of fiber-based collocators at a wire center change over time, the wire centers that meet the FCC's non-impairment criteria will also change. (Id at 59) SBC argues that putting an artificial limitation such as the one proposed by the CLECs serves no purpose except to prevent SBC Ohio from obtaining unbundling relief to which it is entitled. (Id at 60) SBC

further argues that while the FCC did recognize that additions were likely and that the transition process should be addressed in the parties ICAs there is nothing in the FCC's rules that permits or supports the type of delay that the CLECs propose. (Id at 59, 60)

SBC argues that CLECs' proposal "to delay SBC Ohio's wire designations by up to another six full months is commercially unreasonable. SBC further argues that CLECs' proposal could create an opportunity for gaming the system. As an example, SBC contends that CLECs could time the turn-up of any new fiber-based collocation, by delaying it until after the updates had been made so that the CLECs could enjoy unbundled access (for which they should not have been entitled) for the remainder of the six-month period. (*Id.*)

SBC further contends that announcing changes as they occur will help ensure that end users are not negatively impacted. In support of this, SBC claims that it is obviously easier to manage the transition of one wire center than it would be to manage the simultaneous transition of two or more. SBC submits that its approach would automatically help to stagger the work necessary to complete the transmission and allow for more efficient us of the parties' resources. SBC argues its proposal tracks the FCC's findings in the TRRO because it recognizes wire centers can meet the FCC's non-impairment criteria at any time, while the CLECs' language imposes an artificial limitation on the implementation of the FCC's new unbundling rules, and it should be rejected. (Chapman Direct at 61-62)

SBC contends that CLEC witness Garvin did not provide any basis for suggesting that updating the wire centers as changes occur would have a negative impact on end users as the agreed process for implementing changes already provides time for CLEC opposition and for a smooth transition. (Chapman Rebuttal Testimony at 16) Under its plan, SBC argues, the parties would transition individual wire centers as circumstances for wire centers changed which would automatically help to stagger the work necessary to complete the transition and allow for more efficient use of the parties resources. (*Id.* at 16) SBC contends that staggering the wire center updates by providing notifications as changes occur will help the parties complete the transition quickly and that the CLEC's proposal limiting updates only serves to make a quick transition more difficult. (*Id.* at 17)

(c) Commission Conclusion

The Commission agrees with SBC that setting artificial six-month intervals would allow CLECs to unduly obtain UNEs in wire centers that meet the non-impairment criteria between intervals. The Commission further agrees with SBC that updating the non-impaired wire centers as changes occur would help to stagger the work necessary to complete the transition and allow for a more efficient transition process. Given that the CLECs will actually receive more timely information, the Commission finds it doubtful

that their business plans would be less disrupted using their proposed intervals. The Commission, therefore, agrees with SBC that additional wire centers can be listed as non-impaired as changes occur and rejects the CLECs' proposed language in 4.1.1.1.

Issue 16: **Sections 4.1.1.4, 4.1.1.6, 4.10 - Where a CLEC does not self-certify within 60 days of SBC issuing an Accessible Letter designating that the threshold has been met in additional wire center(s), the CLEC must transition off of applicable UNEs which were already provisioned at the time the Accessible Letter was issued. The issue here is can the CLEC, with respect to seeking new UNEs from these newly designated wire center(s), provide a self-certification more than 60 days after SBC issues the Accessible Letter? (Entry issue (m))**

Issue 30: **Section 4.1 – Where a CLEC has not self-certified for the initial list of wire centers designated as having met the threshold criteria for non-impairment for loops and /or transport, the CLEC must transition off of applicable UNEs within a defined transition period as governed by this Attachment. The issue here is can the CLEC, with respect to seeking new UNEs from such wire center(s), provide a self-certification after the defined transition periods have expired? (Entry issue (z))**

(a) CLEC Position

It is the CLEC's position that the FCC did not limit when self-certification should be provided by the CLEC. The CLECs maintain that they may have valid business reasons to only self-certify at some time after 60 days from issuance of the Accessible Letter and SBC will not be prejudiced by allowing self-certifications more than 60 days from the issuance of an Accessible Letter. (Garvin Direct at 6-7) CLECs argue that, according to the proposed Amendment, if there is no self-certification within 60 days, then the present circuits will be transitioned off of UNEs regardless of whether there is a subsequent self-certification and SBC, therefore, suffers no prejudice by allowing self-certifications to take place more than 60 days after the issuance of an Accessible Letter. (*Id.* at 7)

CLECs contend that the most basic reason they should not be forced to self-certify is to not undertake the time and expense of litigating SBC's challenge to the self-certification unless the CLEC has a business case to incur this type of expense. By doing this, CLECs argue, SBC is seeking to circumvent the dispute resolution process by permanently barring new UNE orders accompanied by a self-certification where no prior self-certification has been adjudicated. (*Id.* at 8) CLECs contend that SBC's proposed language would

encourage unnecessary litigation, by forcing CLECs to litigate matters where their present business needs do not economically justify this type of litigation. (*Id.* at 9) Given the broad scope of any ruling on self-certifications, it is important that this Commission not force self-certifications until at least one CLEC has a business case to justify the time and expense of litigating SBC's challenge to a self-certification. (*Id.* at 9) The CLECs maintain that their proposed language should be adopted as it supports strong public policy of not encouraging unnecessary litigation. (*Id.* at 9)

CLECs contend that SBC's argument that it would be wasteful to wait more than 60 days to self-certify because any previously installed high capacity loops or transport would have to be transitioned to alternative arrangements misses the mark. This is due to the fact that, CLECs argue, any SBC time or cost would be recovered by SBC through appropriate charges that would be assessed on the CLEC. In short, CLECs aver, this issue only concerns CLECs and SBC will not suffer any uncompensated loss. (Garvin Rebuttal at 6, 7)

The CLECs argue that SBC's claim that the FCC's non-impairment criteria is a time-sensitive determination which requires prompt dispute resolution because of the age of the data which SBC must rely, is wrong for several reasons. First, CLECs contend, the FCC's order never put a time-line on CLECs issuing self-certification, nor on state commissions ruling on any such self-certifications. Also, in ¶234 of the TRRO, the FCC made it clear that it was the CLEC self-certification which would be the trigger for an ILEC to challenge that self-certification, and which in turn would trigger dispute resolution before the state commission. Additionally, CLECs argue, SBC is operating under the wrong premise in arguing that the Commission must rely on old data as opposed to the most currently available data, when it rules on a dispute about a CLEC self-certification. It is the CLECs' position that SBC and the CLECs, should be encouraged to look at the most recently available data at the time of any dispute resolution before this Commission. (*Id* at 7, 8) The CLECs claim Issue 30 is similar to Issue 16 and has incorporated by reference for Issue 30 all of their testimony in Issue 16.

(b) SBC Position

SBC argues that its proposed language allow CLECs to be given a reasonable period of time in which to make self-certifications, but that after the expiration of that period the industry (including SBC, other CLECs and the Commission) have the certainty of knowing that the impairment status of that wire center has been established. SBC has proposed that once the transition period for UNEs that were declassified by a particular wire center designation has passed, no future wire center self-certifications should be accepted for that wire center. (Chapman Direct at 68-69)

For Issue 16, which only applies to wire centers that SBC designates as non-impaired at some point in the future, SBC proposes that the reasonable period for self-certification is 60 days after the date that SBC issues an Accessible Letter stating that the wire center satisfies the FCC's non-impairment criteria. (*Id.* at 69)

According to SBC, the self-certification process described in ¶234 of the TRRO enables a CLEC to obtain unbundled DS1/DS3 loop or DS1/DS3/dark fiber dedicated transport by certifying that it has performed a reasonably diligent inquiry and that, to the best of its knowledge, it is entitled to the affected UNEs. The self-certification requirement applies to any order a CLEC submits for any of these UNEs. Already, SBC claims, the parties have agreed that CLECs will only be required to self-certify if they wish to obtain (or continue to obtain) an unbundled high-capacity loop or dedicated transport at a wire center or on a route that SBC has identified as meeting the FCC's criteria for establishing non-impairment. If a CLEC submits a self-certification request in accordance with ¶234 of the TRRO, SBC must (and will) honor that CLEC's request pending the resolution of the dispute. (Chapman Direct at 71-72)

SBC claims that its proposal does not limit self-certification for unbundled high-capacity loops and unbundled dedicated transport to instances where the CLEC plans to submit an order. SBC offers two examples where a CLEC might self-certify without placing an order: (a) When a CLEC must transition all of its circuits that are no longer available as UNEs; and (b) If the CLEC planned to begin offering service from the wire center in the future. (*Id.*)

SBC opines that the FCC's non-impairment is a time-sensitive determination and if the Commission is going to make a determination of whether SBC's designation meets the criteria in the FCC's rules, that determination must be made in close proximity to the time of SBC's designation. Otherwise, it will be difficult for the Commission to review the conditions as they existed at the time of designation. (Chapman Direct at 72) SBC further avers that the FCC's rules specifically state that once a wire center has been designated as non-impaired for DS1 or DS3 loops or as meeting the Tier 1 or Tier 2 criteria for dedicated transport, the classification may not be reversed. CLECs should not be able to thwart these rules by not self-certifying in the first place. (*Id.* at 72-73) SBC argues that allowing this could lead to transitioning circuits to and from UNEs which would impose costs on both parties. SBC further argues that if, after all this activity, a CLEC issues a self-certification to challenge SBC's non-impairment designation, all of this effort and expense is potentially wasted. Clearly, SBC avers, such unnecessary waste can be avoided if any self-certification is made promptly. SBC further argues that it is contrary to Section 4.1.3 which requires SBC to notify CLECs in a timely manner of its intent to challenge a self-certification and to file a complaint within 60 days. It is unreasonable, SBC opines, to

allow CLECs unlimited response time while imposing a limit on SBC's response. (*Id.* at 73-74)

SBC avers that the CLEC argument that the current wire center in question may not have an impact of the CLECs' current business plans, but may become important in the future ignores the fact that in order to be placed on the wire center list in the first place, a wire center must have significant number of fiber-based collocators and/or a large number of business lines. As a result, the wire centers in question are the wire centers with significant revenue potential where CLECs tend to focus their business plans. Moreover, SBC argues, the CLEC proposal would permit them to transition off of UNEs in a given wire center or route, but retain the right to self-certify at a later date. SBC explains that this makes no sense because if the entire CLEC community is able to transition off of the affected UNEs then clearly CLECs are not impaired without access to those UNEs. It is illogical to suggest that a CLEC should be able to self-certify after the entire CLEC community has demonstrated that it is able to operate without access to the UNEs in question. (Chapman Direct at 74)

As a practical matter, SBC is concerned that the CLECs' proposal would allow CLECs to wait until enough time had passed to make it difficult for SBC to pull all of the evidence necessary to make a filing supporting its case at the Commission due to the fact that identification of unimpaired wire centers are based on the facts that existed at the time the identification was made. (*Id.* at 74-75)

SBC argues that the Commission should determine that CLECs cannot have unlimited time to self-certify a wire center SBC has placed on the non-impaired list. The appropriate time period for filing the CLEC self-certifications is 60 days for wire centers added in the future and, should never be later than the end of the transition period for the delisted UNE for any wire center. (*Id.* at 77)

(c) Commission Conclusion

The Commission agrees with the CLEC's argument that SBC will not be prejudiced with respect to the embedded base by allowing self-certification more than 60 days after the issuance of an Accessible Letter as the agreed upon language calls for the transitioning of the embedded circuits regardless of whether there is a subsequent self-certification. The Commission also agrees with the CLECs that any "wasted" effort on SBC's part will be fully compensated by appropriate charges assessed to the CLEC for the transition of the embedded circuits. However, the Commission also agrees with SBC's logic that the deadline to be able to self-certify and continue to receive UNEs should not exceed the transition period. We find that the conditions at the time the wire center was designated by SBC as non-impaired would be the deciding factor in any dispute arising from the self-certification process. Using the most recent conditions at a wire center rather than the

conditions that existed at the time SBC issues an accessible letter could frustrate the FCC's intentions. Therefore, the CLECs shall limit the self-certification time lines to 12 months (for DS1 and DS3 loops and transport) and 18 months (for dark fiber loops and transport), after the issuance of an Accessible Letter, due to the aging of the data SBC relied upon to make it initial determination that a wire center is no longer impaired. Therefore, the Commission finds that CLECs must self-certify within the 12-month transition period for DS1and DS3 loop and dedicated transport or 18 months for dark fiber transport in order to receive these services as UNEs.

Issue 17: Sec. 4.1.1.5 - Where a CLEC does not self-certify within 60 days of SBC issuing an Accessible Letter designating that the threshold has been met in additional wire center(s), the CLEC must transition off applicable UNEs which were already provisioned at the time the Accessible Letter was issued. The issue here is how long is this transition period for CLECs and during this transition period can the CLEC order applicable UNEs from the newly designated wire center(s)? (Entry issue (n))

(a) CLEC Position

The CLECs believe that the analysis and conclusions reached by the FCC in the TRRO, in setting 12-month and 18-month timeframes should apply to any subsequent wire center designation. The CLECs explain that for high capacity Loop and Transport, the FCC found at ¶143 that "the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase, or lease facilities." The CLECs also point to ¶133 of the TRRO where the FCC set an 18-month transition for dark fiber because it may take time for CLECs to negotiate Indefeasible Right of Use (IRU) or other arrangements with incumbent or competitive carriers, and that a more lengthy transition plan is warranted for transitioning carriers from the use of unbundled dark fiber to alternative facilities. (Garvin direct at 11)

The CLECs argue that the work that a CLEC must perform to self-provide or lease facilities is the same as for previous wire centers which were the subject of the FCC TRRO order. CLECs aver that SBC's proposal is contrary to the timelines previously established by the FCC and that SBC has not presented any reason to justify its proposed 30/90 day time frame. (*Id.* at 11-12)

The CLECs do not dispute that the FCC did not set the timelines for future designations; rather, they argue the issue is that the ICA should use the FCC timelines as a compromise to the different positions of the parties. Contrary to SBC's representation of

¶143 of the TRRO, CLECs argue that the FCC adopted the 12 to 18 month time intervals to allow both the ILECs and CLECs time to perform necessary tasks, including decisions concerning where to deploy, purchase or lease facilities. (Garvin Rebuttal Testimony at 9-10)

The CLECs argue that if they do not issue a self-certification within 60 days of the issuance of an Accessible Letter, the work that a CLEC must perform to self-provide or lease facilities is the same as for previous wire centers which were the subject of the FCC TRRO order. CLECs contend that given weather conditions and unforeseen delays in available facilities, it is hard to believe that conversions for multiple CLECs in a given office can take place 30 days from the end of a 60-day notice period as proposed by SBC. (*Id.* at 11)

(b) SBC Position

SBC argues that once CLECs have completed the initial transition of declassified high-capacity loop and dedicated transport, future transitions should be completed more quickly. (Chapman direct at 63) SBC contends that the 12 to 18 months for transition for DS1 loops, DS3 loops and dark fiber transport were designed to allow sufficient time for all of the activities associated with this initial transition. SBC argues that the CLECs' proposal is based on the erroneous premise that future, incremental transitions will take as much time and effort as the initial transition. (*Id.* at 64) SBC contends that the extended time period for the initial transition must have, at least in part, been intended to provide additional time to allow CLECs to deal with all of the transition issues that immediately followed the March 11, 2005 effective date of the TRRO, including transition of the embedded base of UNE-P lines and transition of existing DS1/DS3 loop and transport at all of the wire centers impacted by the initial designations. (Id at 64-65) SBC avers that its proposal recognizes that subsequent transitions will be different and requires CLECs to transition from unbundled high capacity loops and dedicated transport within 90 days after SBC designates an office as impaired...or until the end of the initial TRRO transition period, whichever is longer. (*Id.* at 65)

While SBC has agreed that the CLEC may continue to submit new orders for circuits impacted by the wire center addition for 30 days after SBC's notification, SBC proposes that once that period has passed, absent a CLEC self-certification, SBC should not be required to provide new high-capacity loops and dedicated transport at wire centers or routes declassified by the wire center designation. SBC argues that the CLECs' proposed provision is inconsistent with the FCC's treatment of high-capacity loops and dedicated transport that were declassified by the TRRO on March 11, 2005, which prohibits CLECs from obtaining new high-capacity loops and transport once there has been a finding of non-impairment. (Chapman direct at 66)

SBC points out what they believe are two key provisions of the FCC's rule regarding the transition of these UNEs. The first is that the transition only applies to individual circuits that were in place when the non-impairment determination became effective. The second is that CLECs may not obtain any new circuits where there is no impairment. SBC contends that the most obvious reason to not add circuits after a finding of non-impairment is that each circuit that is added increases the embedded base that must be transitioned to an alternative service by the end of the transition period and deprives SBC of the access revenues that it is entitled to receive. (*Id.* at 68)

SBC argues that the CLECs do not provide any evidence to support a claim that the transition of circuits that are delisted in the future could not be transition within the 90-day period proposed by SBC. SBC avers that the volumes of the type of circuits that will be transitioned due to delisting are relatively small and given the available due date intervals, there is no reason why CLECs could not convert their delisted DS1 and DS3 loop and transport circuits to SBC Ohio access offerings within the 90-day period offered by SBC. (Chapman Rebuttal Testimony at 18)

(c) Commission Conclusion

The FCC stated as follows in ¶143 of the TRRO:

> We believe it is appropriate to adopt a longer transition period for DS1 and dedicated transport than was proposed in the Interim Order and NPRM, because we find that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, including decision concerning where to deploy, purchase or lease facilities. Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. At the end of the twelve-month period, requesting carriers must transition the affected DS1 or DS3 dedicated transport UNEs to alternative facilities or arrangements.

The Commission recognizes that ¶¶143 and 196 of the TRRO lists many activities that need to occur before transitioning the initial base of DS1 and DS3 dedicated transport and DS1 and DS3 loops from the initial list of non-impaired wire centers and that some of these activities would not be necessary for subsequent wire centers. While SBC has argued that the extended time period for the initial transition, must have, at least in part, been intended to provide additional time to allow CLECs to deal with all of the transition issues that immediately followed the March 11, 2005 effective date of the TRRO, we are not

convinced that the amount of time necessary for CLECs to perform the tasks necessary to an orderly transition, including decisions to deploy, purchase, or lease facilities in newly delisted wire centers would be shorter for subsequent transitions. We, therefore, agree with the CLECs that a 12-month period for the transition of DS1 and DS3 loops and dedicated transport at newly delisted wire centers is reasonable and should be adopted. For similar reasons, we adopt the CLEC's proposed 18-month period for the subsequent transition of dark fiber loops and transport.

With respect to whether CLECs may obtain new UNEs during the transition period, the Commission agrees with SBC that the TRRO is clear that requesting carriers may not obtain new DS1 and DS3 loops and dedicated transport UNEs pursuant to 47 U.S.C. §251(c)(3) where the Commission determines that no §251(c) unbundling requirement exists. In the absence of a self-certification, the Commission believes that SBC's 30-day period in which CLECs may order new dedicated transport UNEs from newly designated non-impaired wire centers is more than adequate.

Issue 18: Section 4.3 – How should transitions from high capacity loops and transport be handled and what charges apply? (Entry Issue (0))

(a) CLEC Position

The CLECs recite the proposed contract language (with agreed-to language in regular font and CLEC proposed language in bold underline) as follows:

> 4.3 The provisions of Section 3.2.2 shall apply to the transition of DS1/DS3 High-Capacity Loops, DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport arrangements impacted by wire center designation(s). As outlined in Section 3.2.2, requested transitions of DS1/DS3 High Capacity loops, DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport arrangements shall be performed in a manner that reasonably minimizes the disruption or degradation to CLEC's customer's service, and all applicable charges shall apply. **As of the date of conversion of such DS1/DS3 High Capacity Loops, DS1/DS3 Dedicated Transport, or Dark Fiber Transport,** Cross-connects provided by SBC in conjunction with such Loops and/or Transport shall be billed at applicable wholesale rates (i.e. if conversion is to an access product, they will be charged at applicable access rates). Cross-connects that are not associated with such transitioned

> DS1/DS3 High-Capacity Loops, DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport arrangements shall not be re-priced. (CLECs Initial Br. at 67)

The CLECs argue that it is difficult to understand SBC's reluctance to agree with the proposed language and why SBC does not agree to minimize any customer disruption to existing CLEC-provided end user service upon transition. The CLECs maintain that ¶586 of the TRO made clear that conversions should be implemented with no impact to the customer. (*Id.*)

In their reply brief, the CLECs state that it appears as though SBC and the CLECs are in agreement as to what should happen, but are at odds over the wording to make this happen. The CLECs recite the following statement from SBC's Initial Brief at page 72:

> The rates that are "applicable" for the cross connect should apply at all times – both before and after the transition. ... For example, the applicable cross connect rate prior to the transition may be a TELRIC-based rate, plus the additional 15% provided for in the FCC's transition pricing rule, while the applicable cross connect rated after the transition may be an access rate. The CLECs' proposed language would suggest that the rates that are applicable to the cross connect will not be "applicable" until after the transition. SBC Ohio is lawfully entitled to the rates that are "applicable" for the cross connect before the transition as well as after. (CLECs Reply Br. at 60)

The CLECs assert that if the SBC reading of the agreed to language in Section 4.3 (without the CLEC proposed additions) is consistent with this SBC statement as set forth in their brief, then the CLECs would not insist on their proposed wording of this section, and this issue could be readily resolved. If however SBC has an understanding other than what SBC set forth in its brief, the CLECs argue, then the Commission should adopt the CLEC proposed language on this issue. (*Id.*)

(b) SBC Position

SBC points out that the agreed language for Section 4.3 states that the "applicable wholesale rates" will apply to cross connects that are attached to loops or dedicated transport facilities. SBC questions the purpose of the CLECs' proposal to insert the qualifier "[a]s of the date of conversion of such DS1/DS3 High Capacity Loops, DS1/DS3 Dedicated Transport, or Dark Fiber Transport." It is SBC's position that the rates that are "applicable" for the cross connect should apply at all times – both before and after the transition. SBC maintains that the applicable cross connect rate prior to the transition may

be a TELRIC-based rate plus the additional 15 percent provided for in the FCC's transition pricing rule, while the applicable cross connect rate after the transition may be an access rate. SBC argues that while it is lawfully entitled to the rates that are "applicable" for the cross connect before the transition as well as after, the CLECs' proposed language would suggest that the applicable rates will not be "applicable" until after the transition which should be rejected by the Commission. (SBC Initial Br. at 72)

In its reply brief, SBC argues that the CLECs have not attempted to explain or support their proposal. SBC maintains that the only support that the CLECs provided is to an entirely different proposal that appears in an entirely different contract provision, namely, the "seamless" migration language addressed under issue 8. SBC further points out that CLEC witness Garvin's testimony in support of issue 18 does not relate to the disputed contract language. (*Id.*)

(c) Commission Conclusion

We find that it is obvious that SBC and CLECs are in agreement as to the purpose of the agreed to language in Section 4.3 of the Amendment. (CLECs Reply Br. at 60; SBC Initial Br. at 72) We also note that, based on the agreed upon language and the CLECs' understanding of SBC's position statement in its initial brief, the CLECs do not insist on their proposed wording of this section. We find that the CLECs' proposed language (disputed language) is unnecessary and does not relate to the issue of applicable pricing of cross connect before or after the transition. Accordingly, we reject the CLECs' proposed language.

Issue 20: Section 4.8 - Should SBC be required, on a quarterly basis, to post on its website information advising when it believes a wire center has reached 90% of the number of business lines needed for the wire center to be classified as a Tier 1 or a Tier 2 wire center, and to specify which wire centers it considers to have 2 or 3 fiber collocators? (Entry Issue (p))

(a) CLEC Position

The CLECs explain that they are proposing that SBC provide notice to the CLECs when a wire center is approaching the point where it is going to be classified as either a Tier 1 or Tier 2 non-impaired wire center. (Shulman Direct at 19-20) CLECs argue that SBC is the entity that holds all of the information regarding the number of business lines and the number of fiber-based collocators that is used in determining Tier 1 and Tier 2 status and that, without this knowledge, CLECs are unable to perform accurate advanced planning. (*Id.* at 20) Thus, CLECs contend, absent this notice, they may perform financial calculations, and facility planning that incorrectly assumes the ability to obtain UNEs in a

wire center. The CLECs argue that their proposed language simply allows the CLECs the same planning information that is available to SBC.

(b) SBC Position

SBC opposes CLECs' proposal arguing that it imposes significant burdens on SBC and contains requirements that SBC does not have the ability to meet. It would also require SBC to divulge highly confidential, competitively sensitive information. (Chapman Direct at 81)

SBC contends that it cannot provide business line information on a quarterly basis for the simple reason that the ARMIS data for the business lines is only available annually. SBC further argues that such information is highly sensitive on a wire center basis because it would indicate quarterly line growth or loss trends at a local level. SBC explains that, currently, ARMIS 43-08 data is reported to the FCC on a state-wide basis and that wire center level data is not filed as part of the ARMIS 43-08 filing or disclosed publicly or to their competitors. SBC contends that the reports requested by CLECs would not only give them a snapshot of SBC's competitive position at a point in time, it would also paint a detailed picture of access line trends at a particular wire center on a quarterly basis. (*Id.*)

SBC contends that it did not physically inspect all of its wire centers but only those in which SBC believed there was a substantial likelihood that the non-impairment criteria would be met. In order to meet the CLECs' request, SBC argues, it would have to first determine the wire centers that had two fiber-based collocators, a work effort for which the CLECs have not offered to provide any compensation and would not result in the elimination of any unbundling obligation. In summary, SBC argues that the CLECs proposal, is extremely burdensome, unreasonable and in the case of the business line count, not feasible, and should be rejected. (*Id.* at 82)

SBC argues that CLECs' claim that they are asking for the same planning information that is available to SBC is inaccurate in that SBC's wholesale operations cannot share competitively sensitive wholesale data with SBC retail operations. (Chapman Rebuttal Testimony)

(c) Commission Conclusion

The Commission agrees with SBC that adopting CLECs' proposal would place a substantial burden on SBC for which they would not be compensated. Given the fact that SBC would not be granted any additional unbundling relief by collecting and reporting the CLEC proposed data, along with the fact that the wire center may never reach the next Tier and that SBC would not be compensated, the Commission rejects CLECs' proposed language on this issue and adopts SBC's proposed language.

Issue 21: Section 5.1 – Should SBC be required to provide a Commingled Arrangement if it or an SBC RBOC affiliate provides it "anywhere in the nation"? (Entry Issue (q))

(a) CLEC Position

The relevant contract language regarding the dispute in Section 5.1, with agreed to language in regular font, and SBC proposed language in bold is as follows:

> 5.1 SBC shall permit CLEC to Commingle a UNE or a combination of UNEs with facilities or services obtained at wholesale from SBC. For the Commingled Arrangements listed in this Section 5.1, and any Commingled Arrangements voluntarily made available by SBC in the future for any of the 13 SBC ILEC states (i.e., the availability and subsequent posting to CLEC On-line was not as a result of a State Commission Order), SBC will make such Commingled Arrangements available in Ohio except where the Commingled Arrangement includes a special access service that is not being provided to any customer in Ohio. Where SBC in any of its 13 ILEC States **voluntarily** provides a particular Commingled Arrangement to any CLEC in response to a BFR request **(i.e., not as a result of a dispute resolution involving the BFR requesting such Commingled Arrangement)**, SBC will make such Commingled Arrangement available in Ohio under this Agreement, except where the Commingled Arrangement includes a special access service that is not being provided to any customer in Ohio. The types of Commingled Arrangements that SBC is required to provide as of the date on which this Agreement is effective will be posted on CLEC Online, and updated from when new commingling arrangements are made available. The following SBC Commingled Arrangements have been posted to CLEC-Online as available and fully tested on an end-to-end basis, i.e., from ordering through provisioning and billing. (CLECs Initial Br. at 69)

It is the CLECs' position that the dispute centers on SBC's reluctance to agree that once it provides a Commingled Arrangement elsewhere in the nation, this Commingled Arrangement should be available to CLECs in Ohio. The CLECs argue that if SBC provides it elsewhere, this shows that it is technically feasible and that SBC can put systems in place to allow this combination here in Ohio. In support of their position, the

CLECs argue that since SBC has been providing a list of available Commingled Arrangements in several other State proceedings that are similar if not identical, there is no valid reason for SBC to object to providing a Commingled Arrangement upon request within its footprint. The CLECs explain that if SBC does not have electronic OSS capability in place in Ohio, the CLECs see no reason why manual processes to accommodate the installation of the service cannot be used to support an arrangement that is already in use elsewhere within the SBC footprint, and the development of pending electronic OSS access can and should be finalized through the agreed upon change management process. The CLECs maintain that if their language is not accepted by this Commission, then they will be forced to use the expensive and time-consuming BFR process which will unnecessarily drive up their costs and impose time barriers to prevent CLECs from competing. (*Id.* at 70)

The CLECs assert that SBC's argument in its brief is based on speculation that SBC systems and processes in Ohio might be different for some type of commingling than what is available in other states. (CLECs Reply Br. at 62)

(b) SBC Position

SBC explains that the dispute is about commingling, the connection of a UNE or combination of UNEs to an SBC wholesale service. SBC proposes that only commingled arrangements that are voluntarily provided in other states need to be provided in Ohio, while commingled arrangements provided under compulsion should be left open. SBC disputes the CLECs' assertion that SBC should make a commingled arrangement available if SBC in any of its 13 ILEC states provides that arrangement to any CLEC in response to a BFR request, unless the arrangement includes an access service that is not provided to any Ohio customer. SBC explains that it has a specific concern regarding the CLECs' proposal that stems from the various different internal ordering, billing and implementation systems as well as different network infrastructure that makes up not only SBC's network in Ohio, but also the entire SBC network. (SBC Initial Br. at 75; Niziolek Direct at 24)

SBC argues that the problem with the CLECs' overbroad proposal is they are essentially saying that if an SBC incumbent loses some commingling dispute in any state, it automatically loses that dispute in Ohio – even if Ohio and/or the other 11 SBC states have taken SBC's side. Clearly, SBC opines, such a result does not meet the requirements of the 1996 Act, or of any law for that matter. SBC maintains that this Commission resolves Ohio disputes, and in so doing, it may consider precedents from other states, but it is not bound by them. SBC argues that, in this proceeding, the Commission is bound to meet the requirements of Section 251 and the FCC's rules and, therefore, should reject the CLECs' proposal. (*Id.* at 75)

Next, SBC addresses the CLECs' argument that SBC has been providing a list of available Commingled Arrangements in several other State proceedings that are similar if not identical, and that there is no valid reason for SBC's position. Although SBC agrees that uniformity is generally desirable, and it is willing to provide commingled arrangements that SBC voluntarily provides elsewhere, SBC disputes the CLECs' request that SBC provide the commingled arrangements that it provides somewhere solely under compulsion of another state commission's order. (SBC reply Br. at 52)

(c) Commission Conclusion

Although we agree with the parties that uniformity is generally desirable, we find that other factors need to be considered before adopting other state commissions' decisions in an Ohio interconnection agreement. Other state commissions reach their decisions based on data and facts presented to them and, similarly, this Commission needs to evaluate whether these facts and data support reaching the same conclusion in Ohio. For example, the Commission needs to evaluate whether the commingling arrangement ordered in another state would still be technically feasible to provide in Ohio based on SBC's network infrastructure and technology deployed in Ohio. Accordingly, we adopt SBC's proposed language for Section 5.1 of the Amendment.

Issue 22: Sections 4.9 and 5.8- Should the interconnection agreement amendment address the relationship between the interconnection agreement and SBC's special access tariffs? (Entry issue (t))

(a) CLEC Position

CLECs believe that the following proposed contract language is appropriate for inclusion in the applicable interconnection amendment:

4.9 If a wire center is determined to be nonimpaired for DS1/DS3 high capacity loops, the CLEC may disconnect SBC transport or collocation facilities, not governed, by the underlying Agreement, but purchased under tariff. The CLEC will pay termination liabilities or penalties only to the extent of the price differential between the tariff term and the actual term of the service or facility. For example, if the tariff term is 48 months (sic) was billed at $300 per month and the circuit was working for 24 months and the 24 month rate is $200 per month, the CLEC pays $2,400 in termination fees (24 months times ($300-$200). Any partial months will be paid at the lower tier rate. For example, if a service or facility was working for 28 months, the residual 4 months would be subject to

the 24 month rates for the calculation of termination, liability, or penalty. Tariff collocation or transport facilities involving special construction are not subject to this Section and termination liabilities or penalties for the special construction collocation and transport are payable (the CLECs proposed language in bold and underlined).

5.8 **In the event that SBC changes its Access tariffs, or adds new Access tariff(s), that would restrict or impact the availability of provisioning of commingled arrangements under this Attachment or the Agreement, SBC will provide 60 days notice to CLEC** *if the tariff change eliminates the availability of a product pursuant to the notification process associated with such access tariffs as provided for under Section 214,* **prior to such changes or additions. Additionally, for additions or changes that do more than impact rates, SBC will grandfather in place commingled arrangements that have been ordered prior to the access tariffs effective date. SBC shall cooperate fully with CLEC to ensure that operational policies and procedures implemented that effect commingled arrangements shall be handled in such a manner as to not operationally or practically impair or impede CLECs' ability to implement new commingled arrangements** (the CLECs' proposed language in bold and underlined and SBC Ohio's proposed language in italicized).

With respect to their proposed language in Section 4.9, CLECs state that they are interested in establishing a reasonable maximum level of termination penalties that can be imposed on CLECs for early disconnection of transport and collocation facilities that might result in situations where wire centers are determined to be nonimpaired for the purposes of high capacity loops. CLECs submit that DS1/DS3 high capacity loops and special access termination charges for transport and collocation are tightly tied together. Based on this connection, CLECs state that their proposed language would permit a CLEC, when a wire center is determined to be nonimpaired for high capacity loops, to disconnect SBC's transport or collocation facilities purchased under tariff and limit, to a reasonable maximum, the amount of termination penalties that SBC could impose upon the disconnecting CLEC. In particular, CLECs believe that the amount of the termination payments should be based on what the payments would have been for a term comparable to the length of time that the special access arrangements are actually in place due to the fact that SBC is the cost causer of the termination penalties. (CLEC Initial Brief at 72; CLEC Reply Brief at 63, 64)

CLECs believe that such a provision is appropriate inasmuch as when high capacity loops are no longer available as unbundled network elements in a wire center, the CLECs'

need for collocation facilities could be significantly affected. CLECs explain that such a result is due to the fact that a CLEC may not be able to obtain another use for the high capacity loops that it was previously utilizing, thus, causing the CLECs' investment in transport and collocation facilities to be stranded. CLECs contend that they should not be penalized with stranded investments related to transport and collocation facilities as result of SBC's decision to no longer offer high capacity loops as unbundled network elements.

CLECs point out that they are not proposing that SBC be restricted from charging a termination penalty but, rather, that the termination penalty be limited to a reasonable maximum. Pursuant to their proposed language, CLECs aver that a CLEC should pay termination liabilities or penalties only to the extent of the price differential between the tariff term and the actual term of the service or facility. CLECs point out that tariff collocation or transport facilities involving special construction would not be subject to the proposed language in Section 4.9 and termination liabilities or penalties for special construction collocation and transport would be payable.

While SBC Ohio contends that the Commission has no jurisdiction over special access charges, CLECs posit that the FCC has vested the Commission with the authority to implement its TRO and TRRO with interconnection agreement amendments. (CLEC Rely Brief at 64)

In regard to the proposed language in Section 5.8, CLECs identify the disputed issue as being the extent to which notice must be given to CLECs regarding amendments to SBC's access tariffs. CLECs state that while SBC is willing to only provide notice to CLECs if an access tariff change would eliminate the availability of a commingled arrangement, it has not agreed to provide notice if its access tariff change would restrict or impact the availability or provisioning of any commingled arrangements. CLECs explain that receiving notification of access tariff changes is a major concern for CLECs inasmuch as commingled arrangements are the product of UNEs and access services. Therefore, CLECs submit that if SBC changes the terms or conditions for the access services, commingled arrangements may be subject to interruption based on SBC's unilateral action.

In support of its position, CLECs point out that in order to timely file comments or objections with the FCC, they must have advanced notice of pertinent tariff changes. CLECs submit that the FCC's 15-day notice does not take into account commingled arrangements. Further, CLECs believe that the Commission should adopt their proposed language in order to prevent SBC from attempting to escape its obligation to provide commingling by placing improper restrictions in its tariffs. Finally, CLECs state that their proposed language will assist in ensuring that there is consistency between tariff terms and the terms of interconnection agreements due to the fact that commingled arrangements are covered by the amendment at issue and, therefore, the amendment is the

appropriate place to address notices which impact the availability of commingled arrangements.

With respect to their proposed language regarding the grandfathering of commingled arrangements that have been ordered prior to an access tariff change, CLECs state that it is not the intent of the CLECs to prevent SBC from going through change management to eliminate certain commingled arrangements.

(b) SBC Position

With respect to CLECs' proposals regarding early termination charges and advanced notice of tariff changes, SBC concludes that such proposals should be rejected. First, SBC points out that charges for special access services and the notice period for special access services are governed by SBC's special access tariffs and contracts. SBC posits that while this proceeding is centered on resolving Section 251/252 interconnection agreement disputes arising out of the TRO and TRRO and the resulting SBC interconnection agreement amendments in Ohio, it is not intended to investigate or modify SBC's access tariffs or contracts. Therefore, SBC asserts that it is inappropriate for CLECs to interject these issues into this proceeding. Further, SBC asserts that to the extent that CLECs are proposing that the Commission modify contractual termination charges or notice provisions arising out of term contracts for interstate access services, or arising out of SBC's interstate tariffs, only the FCC has such authority. SBC asserts that the FCC has repeatedly rejected CLEC attempts to evade early-termination charges. (SBC Initial Br. at 76, 77)

Specific to commingling, SBC points out that while the TRO allows a CLEC to engage in commingling by connecting or attaching a UNE or UNE combination with an interstate service, it does not allow a CLEC to modify the terms and conditions of the access service. Further, SBC asserts that CLECs entered into long-term commitments for access services knowing full well that the FCC might eliminate unbundling for the high-capacity loops to which those services were connected. (SBC Reply Brief at 54)

SBC calls attention to the fact that 47 C.F.R. §61.58(a)(2)(i) already provides CLECs with a 15-day notice period relative to amendments to FCC tariff filings. (Niziolek, Direct Testimony at 27) SBC opines that CLECs' proposed interconnection agreement amendment language in Section 5.8 will result in SBC having two notice requirements for its access tariffs--the 15-day notice required by the FCC and the 60-day notice required by the individual interconnection agreements of those CLECs that entered into the proposed amendment. (Niziolek Direct Testimony at 33) SBC asserts that such an outcome would be violation of the filed-rate doctrine inasmuch as it will allow a customer to receive terms that are better than all other similarly situated customers.

In regard to CLECs' request that SBC grandfather, in advance, all existing commingled arrangements that have been ordered prior to the access tariffs effective amendment date, SBC asserts that the proposal should be rejected. SBC avers that there are many reasons for the company to withdraw an access service including the fact that a service could have insufficient demand, it could rely on out-dated technology, or it could be superseded by new services. SBC submits that decisions regarding the appropriateness of grandfathering a service are fact-specific and should be addressed at the time that the company proposes to withdraw a service. (*Id.* at 27, 28)

Specific to the CLECs' proposal that SBC be prohibited from changing its operations and procedures if it would operationally or practically impair or impede the ability of CLECs to implement new commingled arrangements, SBC asserts that the proposed language should be rejected because it is vague and overly restrictive. SBC believes that the vagueness of the language will result in future disagreements in need of Commission resolution. (*Id.* at 29) Additionally, SBC points out that the proposed language is overly restrictive inasmuch as it will cause SBC's internal practices to be dictated by a single CLEC. SBC notes that its operational policies are already addressed in industry forums such as the Change Management Process. Therefore, SBC submits that it would be improper to give CLECs a contractual right to unilaterally block changes that have gone through the Commission-endorsed and FCC-approved processes. (*Id.* at 29-31, SBC Initial Br. at 80)

(c) Commission Conclusion

The Commission concludes that SBC's position should be adopted with respect to Issue 22. Specifically, the Commission finds that, although tangential to issues related to high capacity loops arising out of the TRO and TRRO, concerns related to early termination charges are more specifically tailored to access tariffs which are not encompassed within the subject matter currently before the Commission in this proceeding. Further, the Commission agrees with SBC that CLECs were aware that the FCC was in the process of revisiting the issue of high capacity loops as UNEs and, therefore, the potential existed for the determination that they would be deemed to no longer be UNEs. Therefore, those CLECs that entered into special access agreements with a longer term did so aware of the potential consequences of that decision and should not now benefit from the FCC's revisiting of the issue of high capacity loops. These CLECs should not now benefit from the lower transport rates of a long term agreement with the early termination fee of a shorter agreement.

Further, as noted in our determination specific to Issue 8 supra, the FCC has consistently refused to grant CLECs a "fresh look" with respect to termination charges applicable to the early termination of multi-year agreements relative to the purchase of special access services pursuant to tariff. (¶¶587, 692, 694, 695 and 699 of the TRO) The

Commission fails to see any factors that would distinguish the current request from the prior determinations. Therefore, SBC should be allowed to continue collecting the applicable termination charges for the early termination of a multi-year special access offering.

Similarly, with respect to CLECs' concerns specific to the expanded notice of access tariff amendments, the grandfathering of all existing commingled arrangements and the changing of operations and procedures that would impair or impede the ability of CLECs to implement new commingled arrangements, the Commission finds that such issues exceed the scope of this proceeding. Notwithstanding this determination, the Commission notes that CLECs will have the opportunity to file objections to any tariff amendment in the applicable Commission or FCC docket. Further, regardless of any potential tariff amendment, CLECs will continue to be able to use the applicable access/transport services for the term of the agreement entered into with SBC pursuant to such tariffs.

Issue 23: Section 6.3.8.4 - What process should be used if a CLEC disagrees with the conclusions of the auditor's report? Also, should CLECs be required to remit payment or permitted to withhold payments pending a dispute? (Entry Issue (s))

(a) CLEC Position

The CLECs allege that SBC's proposed language does not contemplate any process for disputing an auditor's report regarding a wire center's classification. CLECs claim that if the auditor makes any factual mistakes or makes any false legal conclusions, the CLEC would be stuck with the auditor's result with no opportunity to appropriately challenge the auditor's result before this Commission. CLECs believe that the dispute resolution provisions contained in underlying interconnection agreements should be used to bring appropriate resolution to this potential dispute, in the same way that the dispute resolution provisions are available to resolve all other disputes under an interconnection agreement. (Garvin Direct Testimony at 23)

The CLECs contend that, to alleviate any SBC concern of an extended dispute process, the CLECs are willing to bring the dispute immediately to this Commission and waive the 30-day executive negotiation period which would otherwise be a condition precedent to bringing such a dispute before this Commission per the dispute resolution language in the current CLEC interconnection agreements. (*Id.* at 24)

The CLECs further believe that no true-up bill should be issued until either the CLEC agrees with the auditor's report or the Commission approves the auditor's report, and even then there should not be a universal true-up provision because there are circumstances under which SBC would be overcompensated if a true-up were awarded up

to the date of the installation of the circuit. (*Id.* at 24) CLECs note that under SBC's proposed language, a true-up would be required to the date that the circuit was established, even if everything with the circuit was appropriate for a year after establishing the circuit. (*Id.* at 26)

The CLECs aver that they are already directed to only dispute the audit result if they believe strongly that the circuit was properly configured and contend that due process requires that each CLEC has an opportunity to have the audit report reviewed by this Commission. (*Id.* at 26) While the dispute is pending, CLECs contend, there is no reason to require that SBC be made whole ahead of time and possibly be made whole even where the Commission may ultimately rule that the auditor report was either factually or legally incorrect. (*Id.* at 26) Finally, the CLECs argue that they would not be encouraged to file meritless disputes as the cost far outstrips any potential savings on interest. (Garvin Rebuttal Testimony at 19, 20)

(b) SBC Position

SBC explains that, under its proposed language, the CLEC would be required to pay the difference between what the CLEC should have been paying for the EEL circuits that do not satisfy eligibility criteria and what the CLEC had been billed by SBC into an escrow account. (Niziolek Direct at 35) SBC asserts that the eligibility requirements established in the TRO to purchase EELs are to ensure that the CLEC is actually providing local voice service over every circuit.

While the parties have agreed to the eligibility criteria, SBC does not believe it should bear the risk that the CLEC will not be able to pay the true-up that the FCC required it to pay, simply because the CLEC has raised some dispute which would just encourage CLECs to file meritless disputes. As it is, SBC contends, the FCC's provision-first-verify-later system already requires SBC to bear that risk from the time the EELs are provisioned until compliance is tested. Where an audit makes an initial finding of noncompliance, SBC argues, that risk should shift to the CLEC – because, after all, there has already been an independent, objective and professional finding that the CLEC is in non-compliance – while any further dispute is being resolved. (*Id.* at 36-37)

According to SBC, the FCC made it very clear in ¶627 of the TRO that the CLEC is responsible for paying the difference between what it did pay and what it should have paid where an independent auditor finds that the CLEC has failed to satisfy the eligibility criteria. Under the rules, SBC contends, CLECs should pay that difference when the audit is complete. SBC is, in effect, giving the CLECs the option of paying the difference into escrow. (*Id.* at 37)

SBC suggests a practical reason for doing this is that the prevailing party should be entitled to whatever interest is earned on the disputed funds while in escrow once the dispute is resolved. (*Id.* at 37) SBC argues that under the CLECs' approach, the CLEC would still earn interest on the funds to which the independent auditor has found it is not entitled, while it disputes the auditor's findings – even if the dispute is resolved against the CLEC. Placing the disputed funds in an escrow account, SBC contends, removes any incentive to dispute the findings of an independent auditor to either earn undeserved interest or string out the day of payment. (*Id.* at 38)

SBC claims that the CLEC's argument that they would be stuck with the auditor's result with no opportunity to appropriately challenge the auditor's result before the Commission is inaccurate. SBC argues that its proposed language in Section 6.3.8.4 provides that a CLEC may "dispute the auditors finding and initiate a proceeding at the Ohio Commission for resolution of the dispute" and that "no changes shall be made until the Commission rules on the dispute." (Niziolek Rebuttal Testimony at 27)

(c) Commission Conclusion

We find that SBC's proposed language allows the CLECs a chance to dispute the independent auditor's findings to this Commission. Due to the fact that the auditor by rule must be independent and the fact that SBC is required to bear the risk from the time the EELs are provisioned until compliance is tested, the Commission finds that SBC's proposal to have CLECs pay any disputed amounts into escrow until this Commission makes a determination on the disputed audit findings is reasonable. The Commission further agrees that since it was the CLEC's misrepresentation that allowed the non-compliant circuit to be established, the underpayment true-up should go back to when the non-compliant circuit was established unless there is clear evidence that the non-compliance occurred after the date the circuit was established. In this situation, the true-up should only go back as far as the beginning of the non-compliance period. With this clarification, the Commission adopts the language proposed by SBC for this issue.

Issue 24: Section 6.3.8.5 - To what extent should CLECs reimburse SBC for the cost of the auditor in the event of an auditor finding of noncompliance? (Entry Issue (t))

(a) CLEC Position

The CLECs argue that they would only be required to pay for the costs of the auditor based on the pro-rata portion of the number of circuits found by the auditor to be non-compliant compared to the total number of special access circuits which were the subject of the audit. (Garvin Direct at 27)

The CLECs argue that their proposal will reimburse SBC for the cost of the independent auditor to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria as directed by ¶627 of the TRO. (Garvin Rebuttal Testimony at 21) SBC's language, however, seeks to have the CLEC reimburse SBC well beyond the extent to which an auditor may find the CLEC to be out of compliance. SBC's language, the CLECs contend, would force the CLEC to reimburse SBC for 100 percent of an audit if only 11 percent of the circuits examined were out of compliance.

(b) SBC Position

SBC contends that, consistent with the FCC's holding, if the auditor makes a finding of non-compliance with the EEL eligibility criteria, the CLEC should be responsible for all the independent audit costs incurred by SBC. SBC further contends that CLECs' proposal, to only be responsible for a pro-rated amount of the audit costs, based on the percentage of the audited circuits found to be in non-compliance as compared to the total number of circuits audited will, in essence, require SBC to be responsible for the costs it must incur to determine that the CLEC is non-compliant. SBC avers that its proposal provides that if SBC is wrong, and the CLEC is compliant, SBC must bear the cost of the audit. SBC contends that CLECs' proposal, which that would have the CLEC pay only 50 percent of an audit's cost if 50 out of 100 circuits are found to be non-compliant, ignores the fact that an audit was necessary to bring the CLEC into compliance with their agreement. The CLECs' non-compliance, SBC argues, is the cost causer and the CLEC must bear the full cost of the audit. (Niziolek Direct at 39-40)

SBC contends that the FCC is clear in the TRO that the CLEC must reimburse SBC for the cost of the audit, not a portion of the cost, and that the requirement for full reimbursement is driven in part by the FCC's desire to create an incentive for the CLEC to abide by the eligibility criteria in the first place. (Id at 40) SBC contends that its proposed language simply tracks the language in ¶627 of the TRO in describing the parties' obligations with respect to the costs associated with an audit where a finding of non-compliance is made. (*Id.* at 41)

In essence, SBC argues, the CLECs are proposing that SBC be responsible for much of the costs it must incur to determine that the CLEC is non-compliant. SBC contends that it is less likely to incur the expense of an audit unless it already believes that the CLEC may be out of compliance. SBC claims its proposal provides that if SBC is wrong, and the CLEC is compliant, SBC must bear the cost of the audit. Furthermore, SBC contends that its proposal in section 6.3.8.5 does not require the CLEC to bear the cost of the audit, even if the CLEC is out of compliance, if less than 10 percent of the circuits investigated were non-compliant. (Niziolek Rebuttal Testimony at 29)

(c) Commission Conclusion

In ¶627 of the TRO the FCC states:

> To the extent the independent auditor's report concludes that the competitive LEC failed to comply with the service eligibility criteria, that carrier must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, and make the correct payments on a going-forward basis. In addition, we retain the requirement adopted in the *Supplemental Order Clarification* concerning payment of the audit costs in the event the independent auditor concludes the competitive LEC failed to comply with the service eligibility criteria. Thus, to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor. We expect that this requirement should provide an incentive for competitive LECs to request EELs only to the extent permitted by the rules we adopt herein.

The FCC is clear that the CLEC must reimburse the ILEC for the cost of an independent auditor when the CLEC is found to be in non-compliance. The Commission agrees with SBC that if 10 percent or more of the circuits are found to be in non-compliance, the CLEC should bear the entire cost of the audit. The Commission believes a non-compliance rate of 10 percent or more would be indicative of a clear problem with a CLEC's EELs ordering/verification process. In these situations, the Commission agrees with SBC that the CLEC is the cost causer of the audit and that auditing circuits that turn out to be in compliance is necessary to get to the root of the CLEC's failure to properly order these circuits. The Commission notes that if the CLEC's non-compliance rate is below 10 percent they will only have to pay a pro-rated share of the audit costs which is similar to their own proposal. The Commission further believes SBC's language will help achieve the FCC's goal to direct CLECs to request EELs only to the extent permitted by the FCC's rules. SBC's language should, therefore, be adopted.

Issue 27: Section 8.1.6 -- To what extent are the costs of routine network modifications recoverable other than through existing Commission-approved TELRIC rates? (Entry Issue (w))

(a) CLEC Position

The language in dispute (with the CLECs' language shown in bold/underlined text, while SBC's language shown in bold text) is as follows:

> 8.1.6 **Where expenses resulting from routine network modifications are not already recovered by either monthly recurring or non-recurring rates paid by the CLEC to access a UNE,** SBC shall provide routine network modifications at the rates, terms and conditions set out in this Appendix, and in the state specific Appendix Pricing. SBC **will be required to substantiate any imposed** charges for Routine Network Modifications **that it believes in instances where such charges** are not included in **any** costs already recovered through existing, applicable recurring and non-recurring charges. **Until such time as the parties agree or the state commission determines that SBC is allowed to assess additional charges for any specific routine network modification, beyond its already established monthly recurring and non-recurring charges for accessing a UNE, SBC will assess no such charge. While the parties negotiate any such additional charge or during the period wherein a state commission is reaching a decision related to such charges, SBC will nonetheless undertake the routine network modification at the CLEC's request without delay. If agreement is reached or a commission decision is entered allowing SBC to recover additional expenses associated with the specific routine network modification at issue, the CLEC agrees to be responsible for such charges if it has requested SBC to perform the work. The Parties agree that the routine network modifications for which SBC is not recovering costs in existing recurring and non-recurring charges, and for which costs will be imposed on CLEC on an ICB basis for all ICBs include, but are not limited to: (i) adding an equipment case, (ii) adding a doubler or repeater including associated line card(s),and (iii) installing a repeater shelf, and any other necessary work and parts associated with a repeater shelf, to the extent such equipment is not present on the loop or**

> **transport facility when ordered. The resulting ICB rates shall continue to apply to such routine network modifications unless and until the Parties negotiate specific rates based upon actual time and materials costs for such routine network modifications or specific rates are otherwise established for such routine network modifications through applicable state commission proceedings.**

The CLECs argue that SBC's proposed language generally assumes that costs SBC would incur in undertaking routine network modifications (RNMs) on behalf of a CLEC are not recovered in the monthly recurring (or non-recurring) charges approved by the Commission relative to SBC's UNEs and, therefore, SBC should be allowed to charge for RNMs on an individual case basis (ICB). The CLECs maintain that, in most circumstances, because these network modifications are, by definition, "routine," the network maintenance and re-arrangement expenses already recovered by SBC in the monthly recurring rates it assesses for UNEs allow SBC to recover these costs without the need for further charges. (CLECs Initial Br. at 84-85)

The CLECs opine that it is difficult to envision all potential RNMs and it is possible that some rare modification will require activities or materials other than those already accounted for in SBC's TELRIC-based rates. Accordingly, the CLECs maintain that they include the option in their proposed Section 8.1.6 to further negotiate, or arbitrate, rates for circumstances wherein SBC believes its costs will go unrecovered. The CLECs also maintain that their language is intended to ensure that SBC is able to recover its costs associated with RNMs, and to ensure that SBC is in compliance with the TRO which prohibits SBC from recovering those expenses more than once. (*Id.* at 86)

The CLECs argue that in ¶634 of the TRO, the FCC provides the most concise description of SBC's obligation regarding routine network modifications, where it states:

> Rather, our operating principle is that incumbent LECs must perform all loop modification activities that it performs for its own customers. By way of illustration, we find that loop modification functions that the incumbent LECs routinely perform for their own customers, and therefore must perform for competitors, include, but are not limited to, rearrangement or splicing of cable, adding a doubler or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer. (*Id.*)

As to the issue of whether costs associated with RNMs are already recovered by TELRIC-based nonrecurring charges, the CLECs cite ¶640 of the TRO, where the FCC states:

> We note that the costs associated with these modifications often are reflected in the recurring rates that competitive LECs pay for loops. Specifically, equipment costs associated with modifications may be reflected in the carrier's investment in the network element, and labor costs associated with modifications may be recovered as part of the expense associated with that investment (*e.g.*, through application of annual charge factors ("ACFs"). The Commission's rules make clear that there may not be any double recovery of these costs (*i.e.*, if costs are recovered through recurring charges, the incumbent LEC may not also recover these costs through a NRC). (*Id.*)

The CLECs assert that, despite the fact that the FCC insists many such costs will already be recovered in existing rates, they have attempted to understand SBC's position that its existing TELRIC rates do not recover many RNM functions, especially those it specifically lists in its proposed contract language, but SBC has not provided any evidence to support its position that costs will go unrecovered absent additional RNM charges. It is the CLECs' position that SBC bears the sole and specific burden of justifying any rate it imposes for accessing a UNE. (CLECs Initial Br. at 87-88)

In their reply brief, the CLECs maintain that SBC provides absolutely no information regarding RNM cost recovery and does not identify any flaws in the analysis provided in the direct testimony of Mr. Starkey showing that UNE rates do include RNM costs. The CLECs argue that given that SBC has seen Mr. Starkey's testimony on this exact same issue in other states, most recently in Michigan, it was hoped that in this docket SBC would provide some meaningful analysis or rationale supporting its position. However, CLECs' argue, SBC has yet again failed to provide information showing that additional rates beyond its existing UNE rates would be required to recover RNM costs. Rather, SBC simply states that the FCC suggests that SBC, and SBC alone, will be the judge of when and/or if its rates sufficiently avoid double-recovery. (CLECs Reply Br. at 68, 70)

As to SBC witness Niziolek's complaint that it is the CLECs who have failed to justify their conclusion that RNMs are already recovered in existing UNE rates, the CLECs argue that such statement is clearly inaccurate in light of the direct testimony of Mr. Starkey. The CLECs maintain that it is SBC, not the CLECs, who bears the specific burden of proving that its rates do, or do not, allow for proper cost recovery including the avoidance of double recovery. In this proceeding, the CLECs argue, SBC has neither proven that additional charges for RNMs will not exceed the forward-looking cost, nor

submitted a cost study (or any information) showing uncompensated forward-looking costs for RNMs. (CLECs Reply Br. at 71-72)

Next, the CLECs address SBC's argument that it has provided no such information because "the question of whether SBC does recover the costs for specific routine network modification through the existing rates is a question that need not, and should not, be addressed in this proceeding." The CLECs claim that since the question that frames this issue is to what extent are the costs of routine network modifications recoverable other than through existing Commission-approved TELRIC rates, it is impossible for the Commission to answer that question if it adopts SBC's recommendation. (*Id.*)

In support of their position, CLEC witness Starkey contends that he formed his opinion based on his direct knowledge of the cost studies supporting SBC's current unbundled local loop rates in Ohio and his direct experience with SBC's Annual Charge Factor (ACF) and shared and common cost models that aggregate SBC's expenses for routine network modifications and other maintenance and engineering related activities to provide for its recovery in the overall monthly recurring UNE loop rate. Mr. Starkey explains that in SBC's ongoing TELRIC proceeding, Case No. 02-1280-TP-UNC (02-1280 proceeding), he provided expert testimony critiquing SBC's ACF and shared and common cost models. Likewise, he has been involved in numerous past proceedings related to SBC's special construction charge policies and its facilities modifications policies (FMOD). (CLECs Initial Br. at 85) Mr. Starkey asserts that he is certain that routine network modifications undertaken by SBC are already recovered in its monthly recurring TELRIC rates, via either the maintenance or other expense component of its ACF factors or in its EF&I investment figures. He also asserts that he can state with specificity that the individual routine network modifications listed by SBC in its proposed contract language are already recovered in SBC's approved monthly recurring charges for transmission facilities – both loops and transport – through its ACFs. (CLECs Initial Br. at 90; Starkey Direct Testimony at 5, 8 and 11)

Mr. Starkey notes that when SBC's technicians undertake an activity aimed at repairing or rearranging an existing facility in the normal course of business, they book their time and any incidental materials (such as equipment cases and repeaters or doublers) to the specific plant accounts that serve as the basis for SBC's ACFs. According to Mr. Starkey, SBC recovers the entirety of those expenses from its ACF model, with a single exception, the service order activity adjustment, where SBC separately identified, through internal tracking, the expenses for operations associated with customer-initiated service orders. Accordingly, the CLECs argue, absent SBC's specific exclusion for expenses that would be recovered from specific nonrecurring charges (i.e., service order activity), all other repair and rearrangement expenses remain in the ACF for recovery. The CLECs also argue that because routine network modifications by their nature have not had

specific non-recurring charges associated with them, expenses associated with those network rearrangements remain in SBC's recently approved ACFs and provide SBC the requisite cost-recovery vehicle for routine modifications. (CLECs Initial Br. at 89-91; Starkey Direct Testimony at12-13)

As additional support for their position, the CLECs point to the 02-1280 proceeding where SBC acknowledged that its loop conditioning charges were already recovered within its ACFs and, as a result, filed a document with the Commission after the hearing in the case, proposing to rectify this "error" by removing these costs from its recurring rates. Similarly, the CLECs points to Wisconsin Docket No. 6720-TI-187, where SBC Wisconsin ultimately stipulated that its loop conditioning costs were already recovered within its ACFs and, as a result, accepted an agreement precluding it from assessing stand-alone charges for loop conditioning.[9] (CLECs Initial Br. at 92-93)

The CLECs note that, in SBC's proposed language, SBC identifies three specific RNMs that it believes will require additional charges: (a) adding an equipment case, (b) adding a doubler or repeater including associated line cards, and (c) installing a repeater shelf. The CLECs argue that each of these three activities is either:

(1) routinely undertaken in the construction of a loop (or transport circuit) and expenses associated with the requisite materials and their installation are already recovered in the capital cost component of SBC's TELRIC-based monthly recurring rates; or

(2) this equipment is routinely added to existing network infrastructure and expenses associated with this equipment are recovered in SBC's maintenance and/or "other expense" factor via the application of ACFs.

(CLECs Initial Br. at 93-94; Starkey Direct Testimony at 17)

As to Ms. Niziolek's statement that: "SBC Ohio proposes in its language that it is required to certify that it does not otherwise recover its cost for these routing network modifications . . . ," the CLECs argue that neither the disputed language for Section 8.1.6 shown in Ms. Niziolek's direct testimony, nor the language in SBC's July 15, 2005 filing, contains the certification proposal discussed in Ms. Niziolek's direct testimony. (CLECs Reply Br. at 73)

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9 *Petition of Wisconsin Bell, Inc. d/b/a SBC Wisconsin to Establish Rates and Costs for Unbundled Network Elements*, Case No. 6720-TI-187, *Final Decision* (PSC Ref#: 22890), October 13, 2004 at 71-72.

The CLECs also maintain that SBC is choosing to ignore the FCC's rules and orders in stating that its proposal is "commercially reasonable" as CLECs are not required to obtain Commission approval before asking for modifications, and SBC should not have to ask for Commission approval before receiving compensation. The CLECs maintain that while CLECs are not required to obtain Commission approval before asking for modifications, because it is SBC's obligation under 47 C.F.R. §51.319(a)(7), SBC should be required to seek Commission approval for additional RNM charges because that is what the FCC requires. (*Id.* at 77)

As to Ms. Niziolek's contention that "[T]he CLECs have proposed language for Section 8.1.6 of the Amendment that prohibits SBC from assessing charges for the following routine network modifications in any event ...," the CLECs assert that their proposed language does not include the language to which Ms. Niziolek objects. The CLECs argue that it appears that Ms. Niziolek is confusing Ohio with Illinois, wherein CLECs have proposed language in that regard. (*Id.* at 80)

As to SBC's argument that RNMs are unique, the CLECs argue that SBC pretends as if the parties are unaware of the activities that are eligible as RNMs, and ignores the fact that the parties have already agreed on contract language that spells out a number of activities that are, and are not, RNMs (Section 8.1.2 of the Amendment). The CLECs also argue that, pursuant to 47 C.F.R. §51.319(a)(7)(ii), RNMs are, by definition, activities that the incumbent LEC regularly undertakes for its own customers. The CLECs recognize that the list of RNMs in the TRO and the Amendment is not an all-inclusive list and that additional RNMs may be required in the future, and that is why they have offered language that allows SBC to prove to the Commission or the CLECs that a particular RNM activity is not already recovered. (CLECs Reply Br. at 68-69)

As to SBC's argument that its proposed language for Section 8.1.6 tracks the FCC rule, the CLECs contend that SBC's proposed ICB-based charges are directly inconsistent with the FCC's TELRIC pricing rules. The CLECs maintain that while the FCC's TELRIC pricing rules require SBC to prove to the state commission that its TELRIC rates are reasonable and the FCC's TRO requires SBC to prove that its proposal will not result in double recovery, SBC has done neither of these things. (CLECs Reply Br. at 69)

The CLECs object to SBC's insinuation that ¶635 of the TRO specifically allows it to assess additional charges for RNMs beyond its existing UNE rates, and argue that there is nothing in ¶635 that speaks to additional charges for RNM activities. The CLECs further argue that SBC incorrectly claims that the CLECs' proposal is likely to cause more disputes and lead to more work for the Commission than SBC's proposal, when it is SBC that is recommending that the Commission not issue a decision in this docket regarding RNM

cost recovery, but instead, push these determinations out into future dockets as disputes arise. (*Id.* at 80-81)

(b) SBC Position

According to SBC, issue 27 concerns "routine network modifications," which ¶634 of the TRO defined as those activities that incumbent LECs regularly undertake for their own customers and include rearrangement or splicing of cable; adding a doubler or repeater; adding an equipment case; adding a smart jack; installing a repeater shelf; adding a line card; and deploying a new multiplexer or reconfiguring an existing multiplexer. SBC notes that in ¶640 of the TRO, the FCC held that incumbents may recover the cost of these routine network modifications, so long as there is no double recovery of those costs. It is SBC's opinion that the CLECs' proposal represents an attempt to graft artificial hurdles and exceptions onto the FCC's rule and nullify SBC's right to compensation. (SBC Initial Br. at 88)

SBC maintains that its proposed language for Section 8.1.6 of the Amendment tracks the FCC rule which reflects that the ILEC may assess charges for routine network modifications, but only in instances where such charges are not included in any costs already recovered through existing, applicable recurring and nonrecurring charges. SBC objects to the CLECs' contention that SBC must obtain advance approval for each charge from the CLEC (who has an obvious incentive not to agree) or the Commission before even sending a bill and argues that if every extra charge, however small, had to be the subject of litigation, the FCC's cost recovery rule would be unworkable and ineffective. As a result, SBC argues, it would be forced to forego many legitimate, albeit small, charges entirely, simply to avoid the CLEC-imposed process while the FCC's rules do not impose such a hurdle to foreclose the ILECs' right to compensation. (SBC Initial Br. at 88-89; Niziolek Direct Testimony at 43) SBC maintains that the CLECs, through their proposed language, try to litigate in advance the issue of whether double recovery would occur, contending that additional charges for some modifications would be inappropriate. (SBC Reply Br. at 63)

Ms. Niziolek alleges that the CLECs want to add an outright substantive bar on some charges by proposing that SBC would not be permitted to seek compensation in any event for certain modifications, namely: adding an equipment case, adding a doubler or repeater, installing a repeater shelf, or splicing dark fiber. She argues that the "in any event" language means that SBC would be barred from seeking compensation no matter what -- even if the associated costs are not already included in its normal prices. She argues that this "in any event" language is inconsistent with the ¶640 of the TRO, where the FCC expressly gave incumbents the opportunity to recover the cost of the routine network modifications we require here. According to SBC, some of the modifications

challenged by the CLECs here are expressly included in the FCC's general discussion, in ¶635 of the TRO. (SBC Initial Br. at 89; Niziolek Direct Testimony at 46)

It is SBC's position that this is not a cost docket but a contract proceeding, and the Commission does not have specific, charges before it, but it should wait for parties to bring a dispute, where each party can present concrete facts as to the propriety of compensation. (SBC Initial Br. at 90; Niziolek Direct Testimony at 47)

SBC maintains that the CLECs are off base in contending that SBC's proposed language generally assumes that the costs of modifications are not already recovered because SBC's proposed language states that charges will not be assessed if double recovery would occur, which would prevent SBC from assessing charges for most modifications. SBC points out that it has identified certain limited activities that are not already recovered in its existing prices, and it proposes to memorialize those few activities in the Amendment. (SBC reply Br. at 63-64; Niziolek Rebuttal Testimony at 31-32)

Next, SBC addresses Mr. Starkey's argument that such RNM costs are already recovered somewhere, either in capital costs, maintenance or other expense, and that additional charges for such costs would allow SBC the double recovery the FCC prohibits. SBC witness Barch argues that, although Mr. Starkey is correct that the costs for some RNMs are included in the TELRIC development, the fact remains that the costs for other RNMs are not included. Witness Barch asserts that the RNMs that would be recovered in SBC's existing UNE rates via SBC's operating/maintenance expense ACFs are more likely to be certain activities for splicing, cable rearrangements, accessing manholes and deploying bucket trucks to reach existing aerial cable. However, he continues, other RNMs, particularly those that may involve installation of capital (which are not recovered in SBC's operating/maintenance expense ACFs) may not be recovered in SBC's existing UNE rates. One reason for this, according to Mr. Barch, is that the specific capital at issue in a particular RNM may not be forward-looking and thereby may not be included in SBC's recurring cost studies. (SBC reply Br. at 64; Barch Rebuttal Testimony at 3)

Mr. Barch argues that an example of the costs that are unrecovered in SBC's existing TELRIC prices are costs of repeaters and associated equipment that are required for all-copper DS1 unbundled loops as they were not included in the development of SBC's TELRIC-based prices. He maintains that those costs were expressly excluded because the associated equipment is not considered appropriate for a forward-looking network. He cites SBC's testimony in the 02-1280 proceeding that expressly states that the forward-looking costs for DS1 copper loops are based on the use of High-bit-rate Digital Subscriber Line - Two Wire (HDSL-2) technology that allows a DS1 level signal to be transmitted up to 12,000 feet without the use of repeaters. He argues that a CLEC may want to have

repeaters anyway, and it can have them, but the FCC's rules permit SBC to seek compensation for the extra cost. (SBC reply Br. at 64; Barch Rebuttal Testimony at 4-5)

SBC points out that Mr. Starkey acknowledges that it is difficult to envision all potential modifications and agrees that it is possible that some modifications will not be already accounted for in SBC's TELRIC-based rates. SBC asserts that its proposed language lists three specific RNMs for which SBC is not recovering costs in existing UNE rates, but SBC is not currently aware of other known RNMs for which it is not recovering costs. (Barch Rebuttal Testimony at 5) SBC agrees that most of the routine network modification charges are recovered through the existing rates, and acknowledges that it is not entitled to apply a separate charge for the routine network modifications that are included in the existing rates. SBC argues that the issue is not about the numerous activities for which SBC is receiving compensation, but rather, it is about the very limited number of activities for which SBC is not receiving compensation. (Niziolek Rebuttal Testimony at 32)

(c) Commission Conclusion

While the Commission agrees that SBC has the burden to demonstrate that it does not already recover the costs associated with a certain RNM through any of its existing UNE TELRIC-based rates, we find that such obligation does not mean that SBC has to provide the RNM function and facilities without compensation until such a time that either the CLEC agrees to that rate or the Commission decides on its appropriateness. We note that the FCC, in ¶637 of the TRO, states that:

> We therefore conclude that the local loop definition includes routine modifications and we require incumbent LECs to add types of electronics that incumbent LECs ordinarily attach to a loop for a customer requiring a DS1 loop, even if such electronics are not attached to a particular loop. (Footnote Omitted)

We find that, as SBC is expected to perform all functions and take all steps necessary to provide access to an unbundled network element, including RNM, in a timely manner and according to the agreed upon provisioning intervals, SBC should be compensated for such service. As with the provision of any UNE, until SBC and the CLEC agree to a rate for such UNE or this Commission decides on the appropriate TELRIC-based price for such UNE, SBC should be able to charge an interim rate for such UNE to be incorporated in the ICA. However, we reject SBC's ICB-based proposal for setting the price of any RNM. We find the ICB approach to be appropriate only to accommodate unique activity, which is not the case in any RNM, as such activities by nature are routine work that SBC performs for its own end users. Absent prior knowledge of such activities,

we will not set a price for any RNM. We also find that the evaluation of the appropriateness of a charge assessed by SBC for any RNM, or whether the costs associated with that charge are already included in the existing Commission-approved UNE prices, should be performed in the continuing SBC TELRIC proceeding and not in the instant proceeding. The first time an RNM function is performed by SBC on behalf of a CLEC, SBC should perform all functions and take all steps necessary to provide access to the requested UNE, including RNM, in a timely manner, and should charge that CLEC and all subsequent CLECs requesting that function an interim price for such service, only if SBC does not already include the costs associated with performing that function in its existing UNE prices. Parties should bring any disputed RNM interim price(s) to the Commission, after it is provisioned, for evaluation of SBC's proposed interim price.

Accordingly, we reject both SBC and the CLECs' proposed language as both are inconsistent with our conclusion. The CLECs' language requires SBC to prove that it is not double recovering its costs before SBC can charge for any RNM, while SBC's language includes a list of RNM activities that it alleges are not recovered through its existing UNE rates without any demonstration that this allegation is true. The parties are instructed to include language in Section 8.1.6 of the Amendment that allows SBC to charge the same interim rate for a given RNM to all requesting CLECs subject to true-up process, and excluding any pre-qualified functions.

Issue 28: Section 9 - Should batch hot cut terms and conditions be included in the ICA amendment? (Entry issue (x))

(a) CLEC Position

The CLECs argue that batch hot cut (BHC) terms and conditions should be included in the ICA Amendment and that SBC arguing otherwise is in direct contradiction to the entry issued by this Commission in its order of July 19, 2005 in 02-1280. (CLEC Reply Brief at 81, 82)

The CLECs cite the following excerpt from the July 19, 2005 order in 02-1280:

> In considering the appropriateness of joint movants' request to include certain cost studies for specific batch hot cut processes in this docket, the Commission notes that the issue of the rates, terms and conditions related to SBC Ohio's batch hot cut processes is currently a disputed issue in SBC Ohio's proposed TRO/TRRO interconnection amendment which is being considered in Case No. 05-887-TP-UNC (05-887), *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 Order on Remand.* The Commission believes that it is more appropriate to first resolve the current disputes regarding the terms and conditions for batch hot cut processes which are properly before the Commission in 05-877, prior to attempting to engage in analysis of the actual costs related to such processes. Depending on the Commission's determination in 05-887, a TELRIC analysis of SBC Ohio's batch hot cut processes could occur at a later date. In reaching this decision, the Commission notes that the current proceeding, which is dedicated to performing a TELRIC analysis for nonrecurring cost, would have to be delayed if the Commission were to grant joint movants' motion and consider the batch hot cut disputes in this case. (at pages 4-5)

Accordingly, the CLECs aver, there has already been a determination by this Commission that the batch hot cut terms and conditions are properly before the Commission in the present docket. (CLEC Initial Brief at 82) CLECs further aver that addressing batch hot cuts within the context of a 251/252 ICA was specifically envisioned by the FCC in the TRRO where it states at ¶211 that "any inadequacies in carriers' hot cut performance can be addressed through enforcement of interconnection agreements and, in the case of BOCs, complaints pursuant to Section 271(d)(6)." CLECs aver that since the FCC concluded that the 251/252 ICA was the appropriate place to address hot cut issues, the 251/252 pricing standard or TELRIC, should also apply to the hot cuts. (*Id.* at 82-83)

The CLECs cite footnote 569 of the TRRO which CLECs contend acknowledged the existence of various state proceedings addressing batch hot cuts, but in no way ordered these state proceedings to stop as evidence that the FCC has not preempted the states from addressing appropriate terms and conditions for batch hot cuts. (*Id.* at 83)

The CLECs also contend that the FCC was quite clear in the TRRO that batch hot cuts are not voluntary as argued by SBC. CLECs again cite footnote 569 of the TRRO which states "[w]e emphasize, however, that...each of the RBOCs has adopted batch hot cut processes throughout its territory and has based it advocacy with regard to unbundled mass market local switching on the continued availability of these processes." (TRRO, note 569) Accordingly, CLECs argue, with the FCC taking mass market local switching away, batch hot cuts are a quid pro quo and must continue to be made available so long as mass market switching under §251 of the 1996 Act is not available at TELRIC rates. (*Id.* at 84)

The CLECs argue that the NRCs for BHCs serve the same purpose as SBC's non-recurring loop connection charges. Just as the UNE loops and associated loop connection charges are TELRIC-based, so should the batch hot cut non-recurring charges. CLECs

argue that the FCC has not found SBC NRCs for batch hot cut to be appropriate and in footnote 576 of the TRRO refused to opine on these rates. (*Id.* at 85)

The CLECs claim their proposed language for a batch hot section (Section 9) uses as a baseline a batch hot cut settlement agreement between Talk America and SBC and between LDMI and SBC Michigan approved by the Michigan Public Service Commission. (Lichtenberg Direct at 2) CLECs argue that appropriate batch hot cut terms and conditions are needed to provide an appropriate rate for batch hot cuts and to provide resolution on current disputes about the SBC batch hot cut process. (*Id.* at 3) For CLECs with a large number of mass market customers who are currently using SBC-provided switching they will use the process to move customers to UNE-L throughout the life of the ICA and will ensure that competitive switching becomes and remains available as an alternative to the SBC network. (Id at 3)

The CLECs purport that the rates set forth in the CLEC proposed Section 9 are at an amount which Talk America and SBC Michigan agreed to in MPSC Case No. U-14463, as well as the rates that the MPSC ordered between LDMI and SBC Michigan. Given that this Commission has not yet established TELRIC rates for batch hot cuts, CLECs argue these batch hot cut rates from Michigan should be adopted as the best available proxy. (Id at 3) CLECs further argue that since SBC would not have agreed to these rates with Talk America were they not satisfactory, the rate in the proposed Section 9 above must be fully compensatory to SBC. TELRIC rates would be just and reasonable, so the CLEC-proposed rates offer compensation to SBC well above this amount. (*Id.* at 4)

Besides price, CLECs argue that certain changes are needed to SBC's prior offers to make the batch hot cut process acceptable. Primarily, CLECs contend, SBC must allow CLECs to use the batch hot cut process to move its customers to another CLEC that will be providing the retail CLEC with wholesale switching for its customers in such a way that the CLEC wholesaler can use its own OCN (operating company number) and Access Customer Name Abbreviation (ACNA) when it sends its orders to SBC or the other CLEC's OCN. The end user would remain an end user of the retail CLEC, since the customer would continue to be billed by the retail CLEC for local service. The customer's record in SBC's system (i.e., the lessor of the UNE-L) would simply reflect the name of the retail CLEC's wholesale partner. (*Id.* at 4)

Another change CLECs argue is needed to make the BHC process acceptable is to allow for customers to be moved from one wholesale provider to another in batches, so that the long term process improvements and savings from the SBC developed batch hot cut processes can be utilized. (Id at 4)

The CLECs believe that SBC has the capability to implement these changes and use, as an example, a situation in Wisconsin in which SBC Wisconsin performed a limited number of hot cuts for MCI to local switching wholesaler McLeoudUSA even though the orders were submitted by McLeodUSA. (*Id.* at 5)

The CLECs claim that, contrary to SBC's description of a significantly changed process, the CLECs have requested only minor changes to the current batch hot cut processes. (Lichtenberg Rebuttal Testimony at 1) These changes include the ability to migrate CLEC customers using SBC-provided switching (UNE-P, Local Wholesale Complete or resale) to UNE-L (whether provided by the CLEC serving the end-user or provided by a third party wholesaler of switching) using the batch hot cut process, and a billing process that will bill hot cut charges to the new switching supplier. (*Id.*)

The CLECs claim that the all day cut process actually helps SBC since this process provides SBC with a binding forecast of cutovers to the time and procedures to be used. (Id at 2) The CLECs explain that the proposed process simply allows a CLEC to issue orders in one of two ways to migrate customers to a third party switching provider. First, the CLEC may place an order for the conversion using its OCN/ACNA/Trading Partner ID and the OCN/ACNA/Carrier Facilities Assignment (CFA) information for the third party supplier to migrate customers to that third party switch. Second, the third party supplier may use its own OCN/ACNA and CFA information to migrate customers to its switch, identifying that transaction as a batch hot cut. (*Id.* at 2) The CLECs claim that both proposals follow methodology currently used for line splitting where the data CLEC and the voice CLEC are two different companies. (*Id.* at 2)

The CLECs aver that Local Wholesale Complete (LWC) should be included in the BHC amendment because LWC is a finished service using SBC's switching and local switch port and, therefore, is technically the same product as UNE-P. Thus, the CLECs claim the process to migrate these lines should be the same as the process used to migrate embedded UNE-P lines. The CLECs aver that SBC's contention that the BHC process is only for the transition; renders all the work that SBC has done to create these processes worthless. The CLECs may continue to use resale and LWC for some time until they have switches ready or have the number of customers necessary to make a UNE-L offering worthwhile. (*Id.* at 3)

The CLECs aver that during TRO/TRRO collaboratives in Ohio and Michigan, SBC did not discuss the BHC language for its batch hot cut proposal, SBC did not express any concerns about the clarity of the CLEC proposed language, nor whether SBC's systems could accomplish what the CLEC proposed amendment language was requesting. (*Id.* at 4)

(b) SBC Position

SBC explains that a batch hot cut is a hot cut that is done on a bulk basis where the timing and volume of the cut over is managed. (Chapman Direct at 93) SBC further explains that they have three batch hot cut processes that were developed in industry collaboratives. According to SBC, these three processes, which are offered through SBC's current batch hot cut offering in Ohio, are the Enhanced Daily Process, the Defined Batch Hot Cut Process and the Bulk Offering. As described by SBC, the Enhanced Daily Process is designed to support CLECs' acquisition of new mass market customers currently obtaining voice grade service as an SBC retail customer or as another CLEC's resale or UNE-P customer. (Id at 94) The Defined Batch Process is available for transitioning a CLEC's embedded base of resold and UNE-P mass market customers (and enterprise customers with up to 24 lines) to the same CLEC's own switch and for new customer acquisitions currently obtaining voice grade service as SBC retail customers or as another CLEC's resale or UNE-P customers. (Id at 94) The Bulk Project provides CLECs with an additional option for scheduling large volumes of hot cuts and may be used for both new acquisitions and embedded base customers. The Bulk Project offering is designed to provide additional flexibility to CLECs desiring special handling for a group of hot cuts. (Id at 95) SBC avers that the rates in Ohio for these processes are less expensive than traditional hot cuts, because they reflect the efficiencies gained through the batching of orders. (*Id.* at 101)

SBC contends that its position on this issue is three-fold. First, SBC does not believe that its batch hot cut offering is required under section 251 and, therefore, the offering should not be the subject of 251/252 negotiations and arbitrations. SBC contends it is negotiating batch hot cut provisions on a business-to-business basis. (*Id.* at 95) Second, SBC argues, even if batch hot cuts were subject to 251/252 negotiations and arbitrations, batch hot cuts would not be an appropriate topic for this proceeding which is addressed in the development of an amendment to implement change of law for TRO and TRRO. SBC argues that the batch hot cut rule established in the TRO was vacated by *USTA II* and was not replaced by the FCC in the TRRO. As a result, SBC contends, the only change of law relating to batch hot cuts is the change that eliminated the rule that had required them in the first place (*Id.* at 95, 96) Lastly, SBC claims that the provisions proposed by CLECs are overreaching, unreasonable and confusing (*Id.* at 96)

SBC avers that its batch cut offerings were originally developed pursuant to the vacated TRO requirements designed to facilitate the transition of the embedded base of UNE-P to UNE-L and tied the need for the process directly to unbundled local circuit switching impairment. The CLECs, SBC argues, have proposed wide-ranging hot cut provisions for scenarios that are completely unrelated to the transition of a CLEC's UNE-P embedded base. (*Id.* at 96)

SBC contends that the FCC found no impairment arising from the hot cut process for the majority of mass market lines and mentioned that SBC has implemented a variety of enhancements to its hot cut processes that will result in lower hot cut NRCs. Therefore, SBC avers, the FCC has determined that SBC's batch hot cut processes are sufficient to support the timely migration of the embedded base of UNE-P lines by the end of the 12-month transition period. (Id at 97)

SBC also notes that its batch hot cut performance was evaluated by the FCC in the context of SBC's 271 application and ultimately found that SBC's performance was sufficient to demonstrate checklist compliance for each BOC in each relevant state. (*Id.* at 97) SBC avers that the hot cut processes that the FCC evaluated are the hot cut processes that are available to all CLECs under existing ICAs. SBC contends that even though *USTA II* vacated the rules obligating SBC to develop and offer batch hot cuts, SBC still chose to make its batch hot cut offerings available to CLECs and any CLEC interested in this process may amend their ICA to include SBC-offered Batch Hot Cut terms. (*Id.* at 98)

SBC claims that the CLECs are essentially asking for the same process modifications they proposed be imposed by the FCC. However, SBC contends, rather than impose the process modifications requested by CLECs, the FCC concluded that "the procedures sufficiently respond to our (FCC's) concerns about the potential for scalability of hot cuts."(Id at 98)

For several reasons, SBC claims that it is important to note that the FCC acknowledged that the batch hot cut offering developed by the BOCs has lower non-recurring costs than those previously reviewed as well as the fact that various rates are comparable to the Batch Hot Cut rates offered by SBC. First, SBC contends that the CLECs are seeking to use a change of law proceeding to force modified batch hot cut provisions on SBC in spite of the fact that the FCC has already determined that SBC's existing offerings satisfy the 271 checklist requirements and are sufficient to support a finding of non-impairment for mass market circuit switching. SBC argues that the CLECs are proposing rates that are not based on any cost study and which are far below the cost of the requested activity. SBC avers that it is difficult to understand how such arbitrary rates could be justified when the proposed rates are far below rates the FCC found to "demonstrate it would be inappropriate to reach a nationwide finding of impairment on the basis of hot cut NRCs." (*Id.* at 99)

SBC contends that the All Day Cut, Frame Due Time, and Coordinated Hot Cut provisions of the CLECs proposal are taken directly from a negotiated settlement in Michigan that is completely inappropriate for Ohio. The Michigan settlements in question, SBC avers, were a compromise that were not intended to be made available on a long-term basis to any party or outside of the state of Michigan. (*Id.* at 100) SBC further observes

that the processes agreed to in the Michigan settlement are not hot cut processes and introduce a number of inefficiencies including weekly reviews of forecasts and volume commitments, the manual tracking of orders to determine if commitments have been met and manual billing of orders to apply various discounted rates. (*Id.* at 100, 101)

SBC further contends that unlike Ohio, Michigan's normal hot cut rate is so low, and does not allow SBC Michigan to recover its costs, that the batch hot cut rates are actually higher than the normal hot cut rate. In order to resolve this anomaly and direct CLECs to complete the transition, the parties agreed to a temporary and arbitrary discount off the standard rates in exchange for volume and planning commitments. (*Id.* at 101) SBC contends that the rates negotiated in Michigan are not TELRIC-based or supported by any cost study. (*Id.* at 102) SBC further contends that the Defined Batch Cut offering already provides a significant discount over the rates that apply to the standard hot cut processes and, as result, there is no need to create a special process in order to make a discounted offer available. (*Id.* at 102)

SBC avers that the main reason a special, temporary offering was developed in Michigan simply does not exist in Ohio and that the CLECs' proposal does not reflect the fact that the planning requirements, binding commitments and liquidated damages provisions apply to all three of the options that were negotiated in Michigan. (*Id.* at 102) SBC contends that the CLEC proposal also does not reflect the fact that the offering was only temporary and would not be available on an ongoing basis. In essence, SBC argues, the CLECs are attempting to use a change of law proceeding to create permanent new rates that are not based on a cost study in Ohio. (*Id.* at 102) SBC argues that CLECs are attempting to use the Michigan-specific settlement terms as the floor for future agreements in Michigan and elsewhere. SBC explains that this type of behavior severely hinders SBC's ability to negotiate on a business-to-business basis with any carrier. SBC argues that if it is punished when it compromises on an issue by having other CLECs use SBC's compromise as a starting point for the imposition of additional obligations, SBC will not be able to negotiate freely. (*Id.* at 103) Further, SBC observes that it would not have agreed to the Michigan-specific settlement if it thought those settlement provisions would become available outside of Michigan or on a permanent basis. (*Id.* at 103)

SBC also argues that the CLEC's request regarding third party switching is unclear and extremely confusing. (*Id.* at 103, 104) SBC notes that its current Batch Hot Cut Offering is available to CLECs acting as wholesale switching providers and that no additional language is required to accomplish the CLECs' goal. (*Id.* at 104) SBC contends that the language does not make sense and further sets provisions that would govern the terms under which SBC would provide batch hot cuts to CLECs that are not a party to the agreement. SBC further explains that the CLEC language establishes billing requirements

between SBC and CLECs that are not a party to the interconnection agreement which are obviously inappropriate. (*Id.* at 104, 105)

SBC also avers that there are many practical, operational issues associated with the significant, proposed modifications the CLECs requested, many of which are not consistent with the manner in which the batch hot cut process has been designed. As an example, SBC points to provisions that are applicable to SBC's LWC commercial offering. SBC argues that issues associated with a commercially negotiated offering should be addressed in commercial negotiations, not in a 251/252 negotiation/arbitration. Further, SBC argues that the batch hot cut offering was developed to facilitate the transition from UNE-P to an alternative arrangement after elimination of unbundled switching obligations and CLECs with LWC commercial agreements already have an alternative arrangement to UNE-P. (*Id.* at 105)

SBC further contends that the batch hot cut processes are not designed to support the CLEC–to-CLEC, UNE-L-to-UNE-L migrations included in the CLEC's proposed language. SBC notes that CLEC-to-CLEC migration issues are currently being addressed in industry forums. (*Id.* at 106)

SBC next claims that the CLECs have expanded the maximum number of lines that SBC must accept in a Defined Batch to an unacceptable number. SBC argues that the 25 percent increase is unjustified and could potentially jeopardize service quality for all by setting unsupportable volume requirements. (*Id.* at 106) SBC also points out that CLECs have not proposed any rates for the batch hot cut offerings in 9.1.1-9.1.3, and avers that they cannot bill for various offerings if no rates are included. (*Id.* at 106)

Contrary to CLEC claims, SBC argues that the settlement agreement between Talk America and SBC Michigan does not concern hot cuts and in fact was carefully written to exclude batch hot cuts. SBC also disagrees with the CLEC's claim that the rates in the Talk America settlement are satisfactory. (Chapman Rebuttal Testimony at 30, 31) SBC argues that it does not believe that the rates it agreed to with Talk America were satisfactory; however, due to Talk America-specific concerns in Michigan, SBC Michigan agreed to a temporary rate in exchange for commitments from Talk America that would minimize SBC Michigan's future financial losses in the event Talk America's volume commitments were not met. (*Id.* at 32) SBC avers that the temporary rates that the MPSC approved are not batch hot cut rates, are Michigan-specific, are not TELRIC-based and are not cost based. (*Id.* at 32)

Contrary to CLEC claims, SBC avers that the CLEC plan does not use the Michigan settlement as a baseline for their proposal as there are many significant differences

between the CLECs' proposal and the language contained in the Michigan settlement amendments.

To support its position, SBC notes the following differences between the two: First, the purpose of the Talk America amendment is to facilitate the transition of Talk America's embedded base of UNE-P to UNE-L while the CLECs' proposal is not limited to UNE-P to UNE-L. (*Id.* at 32) Second, the Talk America amendment requires Talk America to provide specific planning information while the CLECs' proposal leaves out key provisions from these requirements. (*Id.* at 33) Third, the Talk America amendment is clearly not intended to replace the existing hot cut processes while the CLECs' proposal appears to be a permanent replacement of the existing processes. (*Id.* at 33) Fourth, the Talk America amendment limits the maximum number of orders for all-day cuts to 100 per day per central office unless Talk America sustains a volume of 90-100 cuts per day for a month while the CLECs' proposal does not include any limits on all-day hot cut volumes. (*Id.* at 33) Fifth, the Talk America amendment provides that premium pricing would apply for all-day cuts in excess of 100 lines per day per central office while the CLECs' proposal does not include any premiums for excess volumes. (*Id.* at 33) Furthermore, the Talk America amendment is only available for all-day cuts ordered on or before December 15, 2005, while the CLECs' proposal does not have an end date except for UNE-P migrations. (*Id.* at 33) Lastly, the Talk America amendment requires the use of a special project code which SBC Michigan needs in order to track and bill the requests correctly while the CLECs' proposed language does not contain any such requirement. (*Id.* at 33)

(c) Commission Conclusion

As the Commission stated in its 02-1280 order, SBC's BHC terms and conditions are properly before this Commission for consideration in this docket. The Commission finds that the BHC processes that have been developed pursuant to the TRO and the TRRO are the quid pro quo for relieving ILECs of the responsibility to continue making mass market switching under Section 251 (c)(3) of the 1996 Act available. In fact, SBC admits that the BHC offerings developed by the BOCs is sufficient to support a non-impairment finding for mass market circuit switching. (Chapman Direct at 99) Thus, BHC terms and conditions are rightfully before this Commission in this proceeding to set necessary terms and conditions for a Section 251/251 ICA amendment due to a change of law provision. This conclusion is also supported by the FCC's statement, in ¶211 of the TRRO, that, "[r]ather, any inadequacies in carrier's hot cut performance can be addressed through enforcement of interconnection agreements...."

As far as operational impairment, we note that the FCC, in ¶211 of the TRRO after reviewing SBC's new BHC procedures, determined that "we cannot conclude that the hot cut processes will be insufficiently scalable to handle those lines that are transitioned from UNE-P to UNE-arrangements." Further, at ¶212, the FCC found that these same BHC

processes also address concerns about service disruption. In light of these FCC pronouncements, we find that SBC's existing BHC processes are sufficient to not create operational impairment with respect to the migration and should continue to be offered as they exist today, to the extent modified below. With respect to CLECs' proposed changes and additions recommended by the CLECs to SBC's existing BHC processes in Ohio, we reject the CLECs' requests.

Regarding the LWC offering and resale customers, the Commission agrees with the CLECs that these arrangements are very similar to UNE-P, and the BHC process should be available to migrate these customers to UNE-L. We find that a BHC is a non-recurring activity needed to provision a UNE-L. Allowing CLECs to migrate LWC and resale customers using the BHC process does nothing to change this. For these reasons, SBC is required to allow requesting CLECs to utilize the BHC processes for the migration of LWC and resale customers to UNE-L arrangements.

As to CLEC-to-CLEC, UNE-L-to-UNE-L migrations, we will not require SBC to incorporate the CLECs' proposal at this point of time. Such processes should be finalized in the existing industry forum where it is being addressed.

As stated above, the Commission views the BHC process as an activity necessary to provision UNE-L. Accordingly, we find that the NRCs for BHCs serve the same purpose as SBC's non-recurring loop connection charges which are TELRIC-based. Therefore, we conclude, as the CLECs argue, that BHC NRCs charges should be set at TELRIC.

Accordingly, we adopt SBC's BHC processes, as modified above, at interim rates equal to SBC's proposed rates, subject to true-up based on the Commission approved TELRIC-based NRCs for the different hot cut processes.

Issue 31: Section 4.1.2 – A CLEC may provide a self-certification and SBC Ohio disputes such self-certification through a proceeding via the Commission. In an event where such a dispute is before the Commission where the CLEC withdraws its self-certification prior to a decision being rendered by the Commission, is the wire center subject to future self-certifications? (Entry issue (aa))

(a) CLEC Position

The CLECs claim that this issue is similar to the disputes under issues 16 and 30 and the discussion for these issues is incorporated herein for issue 31 by reference. Similar to these prior issues, the CLECs assert that SBC seeks to bar all CLECs from obtaining high capacity loops or transport from a wire center where there has been no Commission ruling

of non-impairment. The CLECs claim that it would be patently unfair to force a CLEC, having no customers at the present time in that wire center, to participate in a self-certification case between SBC and another CLEC just to avoid being forever foreclosed in the wire center should the self-certifying CLEC withdraw before the Commission rules on the challenge. That is, according to the CLECs, the impact that SBC's proposed language would have however. In other words, the CLECs argue that they should not be forever foreclosed from self-certifying a particular wire center just because a previous CLEC abandoned an earlier self-certification challenge. (Garvin Direct at 31)

Addressing SBC's concern regarding frivolous self-certifications, the CLECs submit that there are adequate remedies available to the Commission today should the Commission determine that a CLEC is engaging in frivolous self-certification filings. (Garvin Rebuttal at 23)

(b) SBC Position

SBC explains that its proposal is intended to prevent CLECs from submitting frivolous, perhaps repeated, self-certifications and, by doing so, preventing the Commission form ever ruling on SBC's designation. In so doing, SBC claims that a CLEC could also escape the established transition periods. SBC submits that the CLECs are once again attempting to throw another roadblock in the way of the implementation of federal law and policy. (Chapman Direct at 79-80)

(c) Commission Conclusion

The Commission determines that the SBC proposal should be adopted in Section 4.1.2 of the Amendment. In making this determination, we note that the FCC at ¶234 of the TRRO acknowledged that the rules governing access to dedicated transport and high-capacity loops evaluate impairment based on objective and readily obtainable facts, such as the number of business lines or the number of fiber-based collocators in a particular wire center. Therefore, before SBC could even designate a wire center as unimpaired, the wire center at issue would have to be subject to sufficient competition to satisfy the objective test. Thus, the likelihood is that should a CLEC seek to self-certify and SBC challenge that designation, there will be other CLECs in that wire center to carry through to conclusion the self-certification challenge. Moreover, as SBC suggests, we are concerned with the possibility that a CLEC could file and withdraw a self-certification multiple times and, in effect, frustrate the transition of a wire center. We believe SBC's proposal strikes the appropriate balance.

Issue 32: Sections 0.1.20 and 13.3[10]– Is SBC Ohio required to commingle Section 271 elements with other SBC Ohio wholesale services, including but not limited to UNEs? (Entry Issue (bb))

(a) CLEC Position

It is the CLECs' position that SBC's proposed terms would not permit or enable CLECs to commingle §271 checklist items with other facilities or services, such as §251 UNEs or special access obtained from SBC, or CLEC or third-party facilities. The CLECs assert that the FCC, in ¶581 of the TRO, explicitly found that "a restriction on commingling would constitute an unjust and unreasonable practice under §201 of the Act, as well as an undue and unreasonable prejudice or advantage under §202 of the Act." The CLECs maintain that 47 C.F.R. §51.309 provides that: "[U]pon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or combination of unbundled network elements with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC." The CLECs opine that §271 network elements are clearly facilities that are obtained at wholesale from SBC. Further, the CLECs continue, the TRO (¶581) explained that a commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them to operate two functionally equivalent networks and, in this instance, a network made up of §251 UNEs and other services, and another network consisting of §271 elements that SBC denied the CLEC the ability to commingle. (CLECs Initial Br. at 101-103)

The CLECs aver that the Massachusetts DTE recently ruled in favor of the CLEC position on this issue. The CLECs also argue that SBC offers no compelling technical or operational justifications for its proposal. Instead, SBC's proposed commingling restrictions are simply a attempt to leverage SBC's market power to frustrate competition. (*Id.* at 102, 104)

The CLECs argue that as SBC attempts to narrowly mischaracterize this issue as one merely about a replacement for UNE-P, many of the CLEC parties have no interest in obtaining unbundled access to SBC's switching under §271, but they need the ability to commingle, for example, §251 UNE loops with §271 transport, and §271 loops and transport with §271 transport or their own transport facilities. As to SBC's reference to the FCC's *Errata* which struck the reference in ¶584 of the TRO that BOCs were required under §251 to commingle §271 elements, the CLECs acknowledge this FCC action. The CLECs further point out that SBC fails to mention that the *Errata* also struck the reference

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[10] Although Section 13.3 was not listed in the initial issues list filed with the Commission, the parties subsequently agreed by e-mail that it should be referenced in this Issue 32 (bb), in addition to the overlapping Issue 6 (f).

in footnote 1990 of the TRO that had stated the opposite, that its commingling rules would not apply to §271 elements. The CLECs argue that the *Errata* can only be read to have struck the conflicting references to eliminate the conflict and defer the issue to another proceeding – which the CLECs submit is the §252 process. If the FCC had intended to "make clear" one conclusion or the other, it would have kept one of them, rather than deleting both. (CLECs Reply Br. at 90-91)

The CLECs maintain that SBC did not explain how the proposed ban on §271 commingling is reasonable and nondiscriminatory under Sections 201 and 202. The CLECs argue that the TRO held that the RBOCs' §271 provisioning is subject to the reasonableness and nondiscrimination requirements of §§ 201 and 202, which *USTA II* confirmed, and this commission must apply these standards when acting as a federal arbitrator under the 1996 Act. The CLECs express surprise that SBC has claimed support for its position from an October 2004 decision of the Illinois Commerce Commission (ICC) because a more recent November 2004 decision by the ICC, in the *MCI-SBC Arbitration*, ruled in favor of the CLEC position once the ICC had the opportunity to more fully consider the substantive arguments. As to the Kansas decision cited by SBC, the CLECs argue that it is only a proposed decision by an arbitrator that was never challenged or considered by the Commission because the parties reached a full settlement and the case was dismissed. (*Id.* at 91-92)

As to SBC's argument that in ¶579 of the TRO, the FCC precludes commingling valid §251 network elements with §271 facilities and services, the CLECs contend that the actual language from the TRO shows there is no basis for SBC's claim and that SBC is required to commingle §251 UNEs with any other wholesale arrangement, including §271 services and facilities. (*Id.* at 93)

(b) SBC Position

It is SBC's position that since the FCC has established a "nationwide bar" on unbundled local switching and the UNE-P (a combination whose critical component is local switching), the CLECs cannot evade that bar under §271 because the FCC rejected their theory and held that the combination duty does not extend to §271 offerings. SBC maintains that the CLECs, through their proposed language in Sections 0.1.20 and 13.3, contend that they can commingle §271 items (like switching) with §251 UNE loops and covertly reassemble the very same UNE-P that the FCC barred as contrary to law and harmful to national policy. SBC argues that initially in ¶584 of the TRO, the FCC defined an incumbent's commingling duty to include any network elements unbundled pursuant to section 271 then later , in its September 17, 2003 *Errata* to the TRO, the FCC removed that language from ¶584, clearly indicating that §271 checklist items are not subject to commingling. (SBC Initial Br. at 105)

SBC asserts that the CLECs' argument that the deletion of this language means nothing, for the remaining language generically refers to other wholesale facilities and services, which they say includes §271 offerings, makes no sense. SBC questions the FCC's need to delete language that expressly required commingling of §271 offerings if the FCC had meant to require such commingling. SBC further argues that ¶¶579 and 584 of the TRO, as amended by the *Errata*, makes clear throughout the discussion of commingling that the wholesale services with which UNEs may be commingled are switched and special access services offered pursuant to tariff, as well as §251(c)(4) resale services. SBC points out that the amended TRO refers to tariffed access services repeatedly throughout its discussion of commingling, but not once §271 checklist items. Since the FCC specifically removed the §271 commingling language, SBC argues, the TRO does not permit the commingling of §271 items with Section 251 UNEs. SBC asserts that other state commissions (Kansas, Illinois and Utah) have already rejected CLEC attempts to incorporate a requirement that SBC commingle UNEs with §271 checklist items. (*Id.* at 105-106)

SBC maintains that §271's checklist only deals with network elements that are unbundled or apart from other network elements and from other services – for example, the checklist says that switching is to be unbundled from transport, local loop transmission, or other services. 47 U.S.C. §271(c)(2)(B)(vi). Thus, SBC contends, just as the FCC rejected combinations of checklist items on the ground that section 271's competitive checklist contain[s] no mention of combining, TRO ¶655 n. 1990, a commingling duty would be equally contrary to the statute. (SBC Reply Br. at 75)

SBC next addresses the CLECs' arguments that the Commission should avoid a debate about the meaning of the FCC's §251 rules, that the Commission should instead look at §§201 and 202 of the Communications Act and that a restriction on commingling would run afoul of those sections. SBC asserts that the CLECs are overlooking the purpose and scope of this proceeding, which is to implement the FCC's §251 rules. The Commission's duty, SBC argues, is to resolve issues in accordance with section 251, including the regulations prescribed by the FCC pursuant to section 251 [47 U.S.C. §252(c)(1)] and that the Commission cannot ignore a debate about the meaning of those rules. Further, SBC argues that this proceeding is not a proceeding to enforce §§201 and 202 of the Communications Act of 1934, nor could it be, as that is the FCC's jurisdiction to interpret or enforce §§201 and 202. (*Id.* at 76)

As to the CLECs' reference to Massachusetts decision to support their proposal, SBC argues that this decision is unavailing, as several other states have agreed with SBC's position. SBC also argues that the CLECs' citation to an Illinois decision in a single arbitration ignores the same commission's decision in favor of SBC in a second arbitration. SBC maintains that it is the FCC's decision that binds this Commission. (*Id.*)

(c) Commission Conclusion

We note that the FCC found that §§251 and 271 of the 1996 Act operate independently as it stated in ¶653 of the TRO: "we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251." Also the FCC stated in ¶655 of the TRO:

> it is reasonable to interpret section 251 and 271 as operating independently. Section 251, by its own terms, applies to *all* incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs.... As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis. (Emphasis in original)

We also note that the FCC concluded, in footnote 1990 of the TRO, that §271 checklist items that are not UNEs under §251(c)(3) are not subject to the UNE combination requirements and, in fact, in §271 of the 1996 Act there is no mention of "combining" and it does not reference back to the combination requirement set forth in §251(c)(3).

Applying the same analysis as applied by the FCC to reach its conclusion not to require combinations of checklist items, we decline to require the commingling of §271 competitive checklist items with other wholesale services, including but not limited to UNEs. We find that the CLECs, in their arguments, failed to demonstrate how a combination, which is clearly not required per TRO footnote 1990, would be different from a commingled arrangement, as proposed by the CLECs. Accordingly, we reject the CLECs' proposed language in Sections 0.1.20 and 13.3 of the Amendment.

Issue 33: Section 11.1.3 - Should SBC Ohio be required to offer a reasonable alternative to a CLEC before it can retire a copper loop that a CLEC is currently using to provide service to a customer? If so, what terms should apply? (Entry issue (cc))

(a) CLEC Position

The CLECs state that in the TRO, the FCC recognized that the new broadband unbundling exemptions give ILECs additional incentives to retire copper loops in order to deny UNE access to CLECs but that, if an ILEC wishes to retire a copper loop, the ILEC must follow certain notice procedures that the FCC has placed in the TRO. (CLEC Initial Br. at 104) The CLECs maintain that in ¶284 of the TRO, the FCC recognized that states

may wish, and are allowed, to establish additional requirements with respect to copper retirement. (*Id.*) The CLECs allege that SBC's position is that only the FCC network disclosure rules should apply even though the FCC itself found that state oversight was an important complement to its rules in order to safeguard consumer and competitive interests. (*Id.*) The CLECs assert that copper loop retirement poses a unique problem for CLECs that are providing DSL-based services to existing customers because, due to technological limitations, CLECs would be unable to provide DSL service over the Hybrid Loops and Fiber-To-The-Home (FTTH) pursuant to the limitations set forth in the Amendment. (*Id.* at 105) The CLECs opine that if SBC proposed to retire a copper loop and only offered the Hybrid Loop or FTTH as alternatives to the CLEC, the CLEC would be forced to disconnect the customer's DSL service and the customer might not be able to replace that service with a comparable service from SBC, since CLECs offer different types and prices of DSL services. (*Id.*) According to the CLECs, the interests of the end user customer are deserving of consideration in the equation as to whether SBC should be permitted to retire the copper loop. (*Id.*)

As a compromise, the CLECs are proposing only modest and limited additional safeguards for copper loop retirement to address this particular type of scenario where SBC proposes to retire a copper loop that a CLEC is presently using to serve an end user customer. (*Id.*) The CLECs suggest that when SBC wants to retire a copper loop, SBC should send notice of the proposed retirement to the CLEC and if the CLEC is currently using one or more of those loops to serve an existing customer, the CLEC would work with SBC to migrate the service to an alternative UNE facility, such as through a line station transfer. (*Id.*) The CLECs opine that if SBC does not offer a UNE alternative that the CLEC could use to provide its same services to its end user customer, then the CLEC could object to the retirement and SBC would not be permitted to retire the loop unless SBC could demonstrate to the Commission that the CLECs' rejection of the proposed alternatives was unreasonable. (*Id.*) The CLECs maintain that this modest and limited proposal is clearly a reasonable application of ¶284 of the TRO and the FCC's intent for a "state review process, working in combination with the Commission's network disclosure rules to address concerns regarding the potential impact of the incumbent LEC retiring its loops." (*Id.*) Clearly, the CLECs argue, the public interest, particularly the interests of Ohio consumers who purchase DSL from CLECs, would be well served by the Commission's invocation of this "state review process" as suggested by the FCC in the modest, narrowly-tailored manner proposed here. (CLEC Reply Br. at 95)

Additionally, the CLECs claim that SBC erroneously suggests that the CLECs are seeking a "blanket rule" that would require SBC to obtain Commission approval before retiring any copper loop. (CLEC Reply Br. at 94) The CLECs deny this claim asserting that the CLECs are instead requesting a narrowly-tailored safeguard that would apply only where SBC seeks to retire a loop that the CLEC is presently using to serve an existing Ohio

customer, and only where SBC fails to offer any solution that would enable the CLEC to continue to provide its services to that customer over alternative UNE facilities. (*Id.*) Therefore, the CLECs declare that the CLEC proposal would permit SBC to retire a copper loop being used by a CLEC to provide DSL, so long as it could demonstrate some reasonable basis for needing to do so. (*Id.*) The CLECs aver that they simply seek assurance that SBC cannot retire otherwise viable copper loops primarily for the purpose of trying to eliminate CLEC DSL services and forcing Ohio consumers back to SBC for service. (*Id.*) Moreover, the CLECs claim they have advised SBC that they are willing to consider any alternative contract language that would enable CLECs to continue to provide DSL services, but, according to the CLECs, SBC has so far shut its ears to these concerns and continues to fall back on its line-station transfer proposal, which in some cases is useless where DSL services are involved. (*Id.*)

(b) SBC Position

According to SBC, this issue involves the procedures for retiring copper loops that have been replaced by FTTH and FTTC overbuild facilities. (CLEC Reply Br. at 78) SBC declares that in ¶281 of the TRO, the FCC's rules limit unbundled access to an incumbent's FTTH and FTTC loops where those facilities overbuild existing copper facilities and the FCC rules also give incumbents the right to retire copper loops that have been replaced by FTTH and FTTC overbuild facilities, subject to certain notice requirements. (SBC Initial Br. at 107) Specifically, SBC claims that 47 C.F.R. §51.319(a)(3)(iii) already requires that prior to retiring any copper loop or copper sub loop that has been replaced with a fiber-to-the-home loop or a fiber-to-the-curb loop, an ILEC must comply with: (A) The network disclosure requirements set forth in section 251(c)(5) of the Act and in §51.325 through §51.335; and (B) Any applicable state requirements. This language is reflected in the language to which the parties have already agreed in Section 11.1.3 of the Amendment. (*Id.*)

SBC asserts that it has proposed additional pro-CLEC language for Section 11.1.3, providing CLECs the option of requesting a line and station transfer (LST) to a non-fiber loop facility, when available, even when this option has never been required by the FCC or any of its rules. (*Id.*) According to SBC, the dispute arises because the CLECs propose that SBC may retire copper loops only where LST is available, unless SBC obtains an advance Commission determination that the CLEC's rejection of SBC's proposed alternative is unreasonable and contrary to the public interest. (SBC Reply Br. at 78) SBC opines that the CLECs provide absolutely no legal basis for this requirement nor could they because the FCC, in ¶281 of the TRO, specifically rejected CLEC proposals for advance approval of loop retirements stating that the FCC's existing rules, with minor modifications, serve as adequate safeguards. (*Id.*)

Moreover, SBC argues that the FCC rules only require notice of retirements, not CLEC or Commission approval and, in the event that SBC retires copper loops that have been replaced by FTTC or FTTH loops, SBC must provide access to a 64-kbps transmission path over the replacement loop. (CLEC Initial Br. at 108) Likewise, SBC avers that the CLECs' proposed procedure is contrary to the FCC's rule and the purpose of the CLECs' suggested pre-approval proceeding would be to decide whether the CLEC's rejection of SBC's proposed alternative to an LST is unreasonable and contrary to the public interest. (SBC Reply Br. at 79) SBC affirms that its proposed alternative would be a 64-kbps transmission path over the FTTH or FTTC replacement facility which SBC is required to offer by the FCC's rule and the FCC has already deemed this alternative to be sufficient. (*Id.*)

Further, SBC asserts that the retirement of copper loops is primarily an economic issue and that SBC generally retires loop facilities when the cost of maintaining them becomes so excessive that the loops cannot continue to be used effectively or efficiently. (SBC Initial Br. at 108, 109) Thus, SBC claims, the CLECs' proposal is a request to force SBC to maintain a network that is no longer efficient or cost effective and to have the CLECs and the Commission step in to micromanage SBC's network management decisions. (*Id.*) SBC contends that it is unwarranted to impose such an obligation under any circumstances, but it is particularly unreasonable when SBC's prices for unbundled loops are based on the cost of a forward-looking efficient network. (*Id.*)

(c) Commission Conclusion

The Commission concludes that SBC's proposed language for Section 11.1.3 will be adopted into the Amendment. We note that the FCC modified its rules in the TRO because of comments submitted regarding the FCC pre-approval process for retirement of copper loops. Specifically, in ¶¶282 and 283 of the TRO, the FCC allowed parties to file objections to the incumbent LECs' notice of copper loop retirement. However, the FCC also stated in ¶282 that, "[U]nless the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules," the FCC deemed such oppositions denied unless the FCC ruled otherwise within 90 days of the public notice of the intended retirement. Nonetheless, SBC has offered alternative loop facilities for those copper loops that will be retired. In Section 11.1.2(c), SBC offers to provide nondiscriminatory access to a 64-kbs transmission path capable of voice grade service over the FTTH/FTTC loop or, as stated in Section 11.1.3, SBC offers a line station transfer upon CLEC request.

In the TRO at ¶281, the FCC addressed those parties who proposed rules that would require affirmative regulatory approval prior to the retirement of any copper loop facilities. The FCC has explicitly held that affirmative prior regulatory approval was not needed for copper loop retirement because the FCC's existing rules with minor

modifications, including allowing parties to file objections and requiring the incumbent LECs to file their disclosures within 91 days of the retirement date, are satisfactory precautions. Similarly, we do not find that an Ohio Commission approval process is necessary in light of the FCC rules and SBC's proposed alternative arrangements. Accordingly, we adopt SBC's proposed language for Section 11.1.3 of the ICA.

Issue 34: Section 11.2.5 – Where a CLEC has requested access to a loop to a customer premises that SBC Ohio serves with an integrated digital loop carrier hybrid loop, under what conditions can SBC Ohio impose nonrecurring charges other than standard loop order charges and, if applicable, charges for routine network modifications? (Entry Issue (dd))

(a) CLEC Position

It is the CLECs' position that SBC is obligated to provide unbundled Hybrid Loops where it has deployed Integrated Digital Loop Carrier (IDLC) systems. The CLECs contend that the FCC in ¶297 of the TRO recognized that providing unbundled access to hybrid loops served by a particular type of DLC system, (*e.g.*, Integrated DLC systems) may require ILECs to implement policies, practices and procedures different from those used to provide access to loops served by Universal DLC systems. The CLECs opine that this rule does not necessarily require SBC to unbundle an IDLC loop, so long as it provides the CLEC with some other unbundled loop serving the same customer premises. (CLECs Initial Br. at 107)

The CLECs' proposed language is as follows:

> 11.2.5 **IDLC Hybrid Loops. Where CLEC requests a loop to a premises to which SBC has deployed an IDLC Hybrid Loop, SBC must provide CLEC a technically feasible method of unbundled access. SBC may not impose special construction or other non-standard charges (which does not include routine network modification charges permitted under Section 8.1.6 of this Attachment) to provision unbundled loops where it has deployed IDLC except when it would not be technically feasible to provision the requested loop under any of the following options: (1) the use of a spare copper loop (whether terminated or not), (2) by SBC changing or replacing line cards or multiplexing equipment; (3) by SBC performing a line station transfer; or (4) by SBC providing access to the IDLC Loop. Access to the IDLC loop shall be deemed technically feasible if such access can be**

accomplished via any of the methods described in footnote 855 of the TRO. (Mr. Strikland Direct Testimony at 7)

The CLECs maintain that their proposal is a straightforward implementation of the TRO, as it does not mandate any particular form of access where IDLC loops are present; instead, it affords SBC the discretion to choose which form of access to provide, limited only by a reasonable rule that, in effect, provides that SBC could not charge extra for special construction when it would be technically feasible for SBC to provide unbundled access to a loop without such construction. (CLECs Initial Br. at 107)

The CLECs question SBC's disagreement with the first sentence of their proposed 11.2.5, since it is a clear requirement of the TRO. The CLECs contend that the remainder of their proposed language is a simple safeguard to protect against SBC attempts to impose unjustified charges for special construction when in fact no special construction is necessary. The CLECs maintain that as they have agreed to grant flexibility to SBC, through their proposed four options, to decide which technically feasible method of access to offer to CLECs, so that SBC can maintain control over its network design, SBC should not be permitted to use this flexibility to effectively deny CLEC access by offering the slowest, most expensive alternative it can devise. (*Id.* at 108)

The CLECs question SBC's position in disputing the first three of the four options in the CLEC proposal, as they reflect SBC's actual engineering preferences in fulfilling CLEC UNE requests where IDLC loops are present. The CLECs cite ¶297 of the TRO where the FCC specifically explained that ILECs could provide unbundled access through a spare copper facility or through a UDLC system. The CLECs argue that any attempt by SBC to impose special construction when any of these three alternatives are available would, therefore, contradict SBC's own engineering practices and the TRO. The CLECs claim that in such circumstances, SBC should only be permitted to charge the non-recurring charges that would ordinarily apply when a CLEC orders a UNE loop. Moreover, the CLECs' proposal would still permit SBC to impose standard additional charges for line station transfers and the changing of line cards to the extent permitted by the Amendment. The CLECs allege that while SBC does not voluntarily perform the fourth option, unbundling of the IDLC, footnote 855 of the TRO explains that "[I]ncumbent LECs can provide unbundled access to hybrid loops served by integrated DLC systems by configuring existing equipment, adding new equipment, or both." (*Id.* at 109-110)

It is the CLECs' opinion that SBC, by its own admission, will almost never be forced to choose between loop construction and unbundled IDLC. The CLECs reference a letter, cited in footnote 854 of the TRO, from SBC in which "SBC explains that, for 99.88% of SBC's lines served over Integrated DLC, competitive LECs have access to Universal DLC or spare copper facilities as alternatives to the transmission path over SBC's Integrated DLC system." Accordingly, the CLECs argue, the primary objective of their proposal is to

assure that SBC does not try to subject CLECs to special construction charges in the (at least) 99.88 percent of the instances in which, in fact, no such charges are appropriate even under SBC's existing provisioning guidelines. (*Id.* at 111)

The CLECs assert that SBC's proposal to completely exclude this issue from the Amendment cannot be adopted. First, there is no justification for SBC's complete omission of a requirement that it provide unbundled access where IDLC is present without offering language to effectuate a clear requirement of the TRO. Second, SBC has made no attempt to even specify the additional charges SBC seeks to impose for IDLC access arguing that, if SBC believes additional charges are appropriate, SBC should have proposed rates and presented cost justification in support of its proposal. (*Id.*)

The CLECs next address SBC's argument that the Commission should not consider the CLEC proposal because it might alter the existing contractual relationship between the parties regarding an issue on which there has been no change of law. The CLECs assert that while it is true that the *Local Competition Order* found that SBC is required to unbundle IDLC loops, the TRO expanded its consideration of such loops in light of the new hybrid loop rules. The CLEC argue that their proposal is, therefore, ripe for consideration as an "open issue" in this arbitration, which the Commission must resolve pursuant to Section 252(b)(4)(C) of the 1996 Act. (CLECs Reply Brief at 96)

As to SBC's argument that the CLECs' proposal would rarely permit SBC to charge for loop construction, the CLECs argue that it should rarely, if ever, be necessary for SBC to have to build a new copper loop to provide access. They further argue that in the event that SBC truly needs to construct a new loop to provide access, the CLEC proposal would allow it to do so and would allow SBC to recover its cost. (*Id.*)

As to SBC's argument that the CLECs' proposal would "dictate" how SBC chooses to provide access where IDLC loops are present, the CLECs contend that they repeatedly emphasized in negotiations that it was their intent to allow SBC to provision access in any manner it chooses, and that their proposal would only prohibit SBC from charging extra fees for special construction when no such construction is necessary. (*Id.*)

(b) SBC Position

SBC describes the IDLC technology as allowing several loops to share a single path for at least part of the trip between the customers' premises and the central office as an integrated facility that feeds directly into the central office switch instead of going through the main distribution frame. To provide CLECs with access to unbundled IDLC loops, SBC describes its procedure which is to take the requested loop or loops off the IDLC and connect it to a non-integrated facility that runs parallel to the IDLC, from the remote terminal to the central office. SBC maintains that in the vast majority of cases, there is

already a non-integrated facility in place that can be used or adapted to take the requested loop, but in some rare instances, which apply to only one percent of SBC IDLC loops in Ohio, a non-integrated facility is not available. In those instances, SBC asserts, it might give the requesting carrier a quote for the cost of designing and installing a new non-IDLC facility to receive the requested loop(s), and the requesting carrier may accept the quote and have SBC do the work. (SBC Initial Br. at 110-111; Niziolek Direct at 52-54)

SBC maintains that the FCC held, long before the TRO, that incumbent LECs had to provide unbundled access to loops served by IDLC systems (*First Report & Order*, ¶383) and that the ILECs would be entitled to recover compensation from the requesting carrier (*First Report and Order*, ¶384) when the FCC stated that the cost of "separating out individual loops from IDLC facilities . . . . will be recovered from requesting carriers." It is SBC's position that the FCC in ¶297 of the TRO simply reiterated its prior holding and recognized that, in most cases, this type of access will be either through a spare copper facility or through the availability of Universal DLC systems. (SBC Initial Br. at 111-112)

Accordingly, SBC argues that there are two disputes related to loops served by IDLC technology encompassed in the CLECs' proposal for Section 11.2.5 of the Attachment: the method of providing access and the compensation for cost of access. (*Id.* at 110) As to the dispute regarding the method of providing access to IDLC loops, SBC argues that in restating its prior holdings on IDLC loops in ¶297 of the TRO, the FCC attached footnote 855 that cites submissions from other incumbents and from CLECs, regarding methods such as a "hairpin" option offered by Qwest, that had been used or that might be used by some carriers in some situations. SBC argues that in their proposed language for Section 11.2.5, the CLECs seek to turn that tangential discussion into an absolute rule by stating that "[a]ccess to the IDLC loop shall be deemed technically feasible if such access can be accomplished via any of the methods described in footnote 855 of the TRO." SBC argues that the CLECs' proposed language is unreasonable because this proceeding is designed to implement changes in law, and the TRO did not change the law on IDLC. SBC also argues that the FCC did not hold that the methods described in footnote 855 are always technically feasible for every carrier and every IDLC loop, nor did it attempt to decide whether any particular methods are technically feasible. Further, SBC maintains that the CLECs' proposal is contrary to the FCC order that incumbent LECs have discretion to manage their networks and decide how best to provision loops. Specifically in ¶297 of the TRO, the FCC clearly stated, according to SBC, that incumbent LECs must present requesting carriers a technically feasible method of unbundled access, and not that requesting carriers are to demand any particular method. (*Id.* 113-114)

As to the dispute regarding the compensation for cost of access to unbundled IDLC loops, SBC maintains that it does not propose any contract language for this situation, thus leaving in place whatever compensation arrangements exist under its current

interconnection agreements. SBC asserts that as the TRO and the TRRO did not even purport to change the law on compensation, those orders should not result in any change to the agreements on this issue. SBC argues that, according to the CLECs' proposed language, option (4) appears to swallow the rule, covering any method by which SBC would provide access to the IDLC Loop. The CLECs' proposal, according to SBC, precludes charges in all instances except those where access is not feasible and in which case the ability to charge for such access would be a moot point. Additionally, SBC argues, its existing agreements already define its right to recover costs for IDLC unbundling. If the CLECs' proposed language mirrors any existing agreements, it is redundant and thus unnecessary. If the CLECs' proposed language modifies existing agreements, SBC argues that it is improper as those agreements are binding and there has been no change of law to warrant such a modification. (*Id.* 112-113)

As to the CLECs' position that SBC offers no language on IDLC, SBC argues that it offers no IDLC language for this Amendment because the requirement that SBC provide access to loops served by IDLC, where such access is technically feasible, has been around since the FCC's *First Report and Order* in 1996, and not a requirement of the TRO. Accordingly, SBC contends, if the CLECs' interconnection agreements already provide for IDLC access in accordance with federal law, that the language they propose here adds nothing; if not, that is because the CLECs agreed to access without regard to the federal requirements, in which case their agreement is binding and cannot be altered here. (SBC Reply Br. at 81)

Next, SBC disputes the CLECs' argument that their proposal would not require SBC to undertake the particular solutions identified by the TRO. In SBC's opinion, under the CLECs' proposed language, SBC must either implement the four options presented by the CLECs' proposed language or construct a new facility and forfeit its right to compensation for the cost. SBC argues that the CLECs' proposal is inconsistent with the FCC's rules and ¶384 of the *First Report and Order* where the FCC held that the cost of "separating out individual loops from IDLC facilities . . . will be recovered from requesting carriers" since the CLECs propose that this cost will not be recovered if one of four methods of providing access is possible. (*Id.* at 82)

(c) Commission Conclusion

First we address the dispute regarding the method of providing unbundled access to hybrid loops provided over an IDLC system. We find that the ILECs' obligation to unbundle loops provided over an IDLC system has been in place since the FCC's *First Report and Order* in 1996. We note that although the TRO (specifically ¶297 cited by the CLECs) did not add any new requirement for ILECs unbundling of loops provided over IDLC systems, the FCC made it clear that in situations where the hybrid loop that is requested by the CLEC as a UNE is served by an IDLC system, the ILEC is required to

present the requesting CLEC with a technically feasible method of unbundled access to such a loop. The FCC also stated that "[W]e recognize that in most cases this will be either through a spare copper facility or through the availability of Universal DLC systems."

However, in 47 C.F.R. §51.319(a)(2)(iii) the FCC stated:

> *Narrowband services.* When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of narrowband services, the incumbent LEC may either:
>
> (A) Provide nondiscriminatory access, on an unbundled basis, to an entire hybrid loop capable of voice-grade service (*i.e.*, equivalent to DS0 capacity), using time division multiplexing technology; or
>
> (B) Provide nondiscriminatory access to a spare home-run copper loop serving that customer on an unbundled basis.

We find that in this rule, the FCC recognized only one technically feasible alternative to providing unbundled access to an entire hybrid loop which is: to provide a spare home-run copper loop. Although the FCC in ¶297 recognized that the availability of Universal DLC systems is another alternative, it did not include it as a requirement, and left the ILECs with the flexibility to manage their network. We find that the CLECs' proposed language is much more restrictive on how SBC should provision unbundled hybrid loops to requesting carriers and, therefore, inconsistent with the FCC's approach. The CLECs recognize that, for 99.88 percent of SBC's lines served over Integrated DLC, CLECs have access to Universal DLC or spare copper facilities as alternatives to the transmission path over SBC's Integrated DLC system. (CLECs Initial Br. at 111) The record also reflects that, in the vast majority of cases, there is already a non-integrated facility in place that can be used to provision requested loops and in some rare instances a non-integrated facility is not available. In light of this fact, we find the CLECs' proposed language is unnecessary.

We generally agree with SBC's argument that: "if the CLECs' interconnection agreements already provide for IDLC access in accordance with federal law, then the language they propose here adds nothing; if not, that is because the CLECs agreed to access without regard to the federal requirements, in which case their agreement is binding and cannot be altered here." We find that CLECs' interconnection agreements that already provide for IDLC access in accordance with federal law should also reflect that TRO clarification. However, we note that the agreed upon language in Section 11.2.2 of the Amendment reflects the TRO clarification as outlined in §51.319(a)(2)(iii) of the FCC rules. Accordingly, we reject the CLECs' proposed language in Section 11.2.5 regarding

the method of providing unbundled access to hybrid loops provided over an IDLC system.

Next, we address the dispute regarding the compensation for cost of access to IDLC hybrid loops. The CLECs contend that the remainder of their proposed language is a simple safeguard to protect against SBC attempts to impose unjustified charges for special construction when in fact no special construction is necessary. However, we find that the CLECs failed to explain the difference between activities that they envision to be taking place under "special construction" versus activities they characterize as "routine network modifications" to explain what they are attempting to guard against. The CLECs also did not explain what the "non-standard charges" in their proposed language are. Based on this record which reflects that, for over 99 percent of SBC's lines served over Integrated DLC, CLECs have access to Universal DLC or spare copper facilities as alternatives to the transmission path over SBC's Integrated DLC system, we find CLECs' proposed language for alleged protection to be unnecessary. Accordingly, we reject the CLECs' proposed language for Section 11.2.5 of this Amendment in its entirety.

Issue 35: Should section 11.2, which relates to Hybrid Loops, include language derived from footnote 956 of the TRO? (Entry issue (ee))

(a) CLEC Position

It is the CLECs' position that while DS1 loops are often provided over mixed fiber-copper facilities (hybrid loops), the TRO established a different set of rules for DS1 loops than the hybrid loops. The CLECs maintain that their proposed language in Section 11.2 of the Amendment that "[T]he unbundling obligations associated with DS1 and DS3 loops are in no way limited by this section 11.2 or the Rules adopted in the TRO with respect to hybrid loops typically used to serve mass market customers" was taken almost directly from footnote 956 from the TRO which states:

> DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops, *e.g.*, two-wire and four-wire HDSL or SHDSL, fiber optics, or radio, used by the incumbent LEC to provision such loops and regardless of the customer for which the requesting carrier will serve unless otherwise specifically indicated. *See supra* Part VI.A.4.a.(v) (discussing FTTH). The unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass market customers. *See supra* Part VI.A.4.a.(v)(b)(i).

The CLECs argue that SBC's position regarding footnote 956 of the TRO should be ignored as incorrect and misleading. The CLECs maintain that the DS1 loop section of the TRO was not vacated and, even if it was, footnote 956 remains relevant to illustrating the FCC's intent of the scope of hybrid loops rules. The CLECs argue that nothing in *USTA II* questioned this limitation on the scope of hybrid loop rules. It is the CLECs' position that the FCC did not intend to allow SBC to use hybrid loop rules to eliminate DS1 and DS3 unbundling, and that the CLECs' proposed language makes clear their right to continue to obtain unbundled DS1 and DS3 loops provided over hybrid loops. (CLECs Initial Br. at 112-113)

As to SBC's argument that footnote 956 refers only to DS1 loops and not to DS3 loops, the CLECs maintain that while that is true, it is obvious that if this language from the TRO is applicable to DS1 loops, then it is also applicable to DS3 loops. The CLECs further argue that SBC has offered no explanation for why the FCC would carve DS1 loops out of the hybrid loop rules while leaving higher-capacity DS3 loops governed by the rules that would otherwise apply only to mass market DS0 loops. (CLECs Reply Br. at 97)

Next, the CLECs address SBC's claims that the CLECs removed much of the discussion and context from footnote 956 which expressly notes that DS1 loops are to be available "unless otherwise specifically indicated" as well as references to the section of the TRO that includes the discussion on FTTH loops." The CLECs argue that since their proposed language in Section 11.2 is specifically limited to hybrid loops, there is no reason to include the portion of footnote 956 that refers to FTTH loops. The CLECs also dispute SBC's argument that the CLECs' proposal is out of date, arguing that the hybrid loop rules have not changed at all since they were adopted by the FCC. The CLECs assert that neither the *Errata* clarification that removed the word "residential" from the FTTH rule, nor the FTTC Order, which applied the FTTH relief to FTTC loops, altered the scope of the hybrid loop rules. (CLECs Reply Br. at 98)

(b) SBC Position

SBC disputes the language proposed by the CLECs in Section 11.2 of the Amendment. SBC argues that although the CLECs claim that their proposal is derived from footnote 956, the footnote refers only to DS1 loops and the CLECs added on the reference to DS3 loops. SBC maintains that while footnote 956 expressly states that DS1 loops are to be available unless otherwise specifically indicated and references the section of the TRO that includes the discussion on FTTH loops, the CLECs' proposed language excluded such reference. SBC also maintains that the footnote that hybrid loops are typically used to serve mass market customers, is out of date and that the rule for hybrid loops that is in effect today applies to all customers. (SBC Initial Br. at 115) SBC witness Chapman argues that without the inclusion of additional language and associated references, it would be very easy to misinterpret the language, and that the omitted

references relate to the reason why the language is outdated. (Chapman Initial Testimony at 32)

SBC also asserts that it is improper to include a statement in the interconnection agreement that relates to rules established in the TRO (FTTH loops) that are no longer in effect. SBC argues that the FTTH Loop rules established in the TRO have changed significantly since the issuance of the TRO (i.e. since this language was written). First, the FCC changed the FTTH Loop rule so that it was no longer limited to residential end users, then the FTTH rule was modified to address predominantly residential MDUs, and then the FCC modified the rule once again to include both FTTH and FTTC loops. Therefore, SBC argues, the CLECs' proposed language in Section 11.2 should be rejected. (*Id.*)

(c) Commission conclusion

Based on our finding that the FCC's unbundling rules for hybrid loops clearly do not limit the unbundling relief to "mass market loops" but make that relief available to DS1 and DS3 loops provided over hybrid loops as well (see our conclusion on issue 2), we do not adopt the CLECs' proposed language in Section 11.2 of the Amendment. We note that, pursuant to 47 C.F.R. §51.319(a)(2)(ii), the CLECs continue to have the right to obtain unbundled access to DS1 and DS3 loops provided over hybrid loops, but limited to the time division multiplexing (TDM) based features, functions and capabilities of the hybrid loop.

CONCLUSION

Based upon the foregoing, the parties should incorporate the directives set forth in this arbitration award within the interconnection agreement amendment. In accordance with Mediation/Arbitration guideline X.J., the parties shall file, within 14 days of this arbitration award their entire interconnection agreement amendment for the Commission's review. If the parties are unable to agree upon an entire agreement amendment within this time frame, each party shall file for the Commission's review its version of the language that it believes should be incorporated into the interconnection agreement amendment to facilitate the Commission's determinations herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On July 15, 2005, SBC filed, with the assent of the CLEC parties, a redline interconnection agreement amendment and a current issues list which were the results of a collaborative intended to implement the Federal Communication Commission's Triennial Review Remand Order.

(2) By attorney examiner entry issued on July 21, 2005, SBC and the involved CLECs were directed to file concurrently verified written testimony, initial briefs and reply briefs and supporting verified reply testimony.

(3) The parties concurrently filed initial testimony and initial briefs on August 4, 2005, and reply testimony and reply briefs on August 18, 2005.

(4) This arbitration award rules on the outstanding disputed issues not heretofore resolved among the parties.

(5) Based upon this arbitration award, the parties should incorporate the directives set forth in this arbitration award within their interconnection agreement amendment and file such within 14 days for the Commission's review.

It is, therefore,

ORDERED, That the parties incorporate the directives set forth in this arbitration award within their interconnection agreement amendment. It is, further,

ORDERED, That, within 14 days of this arbitration award, the parties file in this docket their entire interconnection agreement amendment for review by the Commission, in accordance with Mediation/Arbitration guideline X.J. If the parties are unable to agree upon an entire interconnection agreement amendment within this time frame, each party shall file for Commission review its version of the language that should be used in a Commission-approved interconnection agreement amendment. It is, further,

ORDERED, That, within ten days of the filing of the interconnection agreement amendment, any party or other interested persons may file written comments supporting or opposing the proposed interconnection agreement amendment and that any party or other interested persons may file responses to comments within five days thereafter. It is, further,

ORDERED, That nothing in this arbitration award shall be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule or regulation. It is, further,

ORDERED, That this arbitration award does not constitute state action for the purpose of the antitrust laws. It is not our intent to insulate any party to a contract from the provisions of any state or federal law which prohibits the restraint of trade. It is, further,

ORDERED, That this docket shall remain open until further order of the Commission. It is, further,

ORDERED, That a copy of this arbitration award be served upon all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Bergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

JRJ/JSA/NS/MG/MT/vrm

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Reneé J. Jenkins
Secretary