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June 2, 2005

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Via UPS Overnight Delivery
Pam Bonrud, Executive Director
South Dakota Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

Re: In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration of an Interconnection Agreement with Qwest Corporation; Case No. TC05-056

Dear Ms. Bonrud:

Enclosed for filing in the above-referenced matter, please find the original and ten copies of Covad Communications Company's Initial Reply Brief. A Certificate of Service is attached to the brief.

Please feel free to contact me if you have any questions.

Very truly yours,

Lynn Hankins

Lynn Hankins

Enclosures

cc: Service list *(with enclosures)*

RECEIVED
JUN 0 3 2005
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

BEFORE THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	**Case No. TC05-056** **COVAD'S INITIAL BRIEF**

DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"), through its undersigned counsel, presents this initial brief in support of its petition for arbitration:

INTRODUCTION

This proceeding presents for the South Dakota Public Utilities Commission (the "Commission") resolution of two issues of law: (1) whether the Commission has authority pursuant to section 271 of the Telecommunications Act of 1996 (the "Act") to order Qwest Corporation ("Qwest") to unbundle certain network elements as part of the arbitration of an interconnection agreement; and (2) whether pursuant to South Dakota law the Commission can order Qwest to unbundle certain network elements in this arbitration. The answer to both of these questions is unequivocally yes.

The Commission has jurisdiction pursuant to Qwest's ongoing obligations under section 271 of the Act to order the unbundling of section 271 checklist items. Specifically and of particular interest to Covad, the Commission has authority to order unbundling of checklist items #4 and #5 of the section 271 checklist:

> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.
>
> (v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

47 U.S.C. sec. 271(c)(2)(B)(iv) & (v)

In addition, the Commission has the unfettered right in this proceeding to follow existing state law requirements to order Qwest to provide Covad with access to unbundled loops (including high capacity loops and subloop elements) and dedicated transport. Moreover, despite what this Commission may hear from Qwest, the Commission has no authority to conclude whether state law is preempted by the Act or any other federal law. Even if the Commission concludes it has such authority, as a matter of substantive law, the Act does not pre-empt South Dakota unbundling requirements applicable to Qwest.

For these reasons, the reasons set forth in its petition (which is incorporated herein by reference) and the reasons set forth below, Covad respectfully requests the Commission adopt its proposed interconnection agreement language regarding access to and the pricing of unbundled network elements.

ARGUMENT

A. THE COMMISSION HAS JURISDICTION IN THIS PROCEEDING TO ORDER QWEST TO PROVIDE UNBUNDLE ACCESS TO NETWORK ELEMENTS PURSUANT TO SECTION 271 OF THE ACT

1. Section 271 Unbundling.

This Commission may properly, and should, use its authority to enforce the unbundling requirements of section 271 of the Act. The Federal Communications Commission ("FCC") held in its seminal *Triennial Review Order*[1] that Section 271 creates independent access obligations for the Regional Bell Operating Companies ("RBOC" or "RBOCs"). Qwest is an RBOC. The FCC concluded:

> [W]e 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 <u>regardless of any unbundling analysis under section 251.</u>

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[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking *("TRO")*, FCC 03-36 (Aug. 21, 2003).

TRO, ¶ 653 (emphasis added).

> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under Section 271 are not necessarily relieved based on any determination we make under the Section 251 unbundling analysis.

TRO, ¶ 655 (emphasis added).

These holdings were explicitly upheld on appellate review:

> The FCC reasonably concluded that checklist items four, five, six, and ten posed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52. In other words, even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching and call-related databases in order to enter the interLATA market.

United States Telecom Association v. FCC, 359 F.3d 554, 588 (DC Cir. 2004)

Thus, there is no question that, regardless of the FCC's analysis of competitor impairment and corresponding unbundling obligations under Section 251 for incumbent local exchange carriers ("ILECs"), as an RBOC Qwest retains an independent statutory obligation under Section 271 of the Act to provide competitors with unbundled access to the network elements listed in the Section 271 checklist.[2] Moreover, there is no question that these obligations include the provision of unbundled access to loops and dedicated transport under checklist item #4:

> Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251.

TRO, ¶ 654 (emphasis added).

Qwest does not attack this premise directly, but instead argues that this Commission does not have the authority to order the adoption of terms in an interconnection agreement that address compliance with Section 271. This position ignores the requirements of Section 271, as

[2] *See* 47 U.S.C. § 271(c)(2)(B).

well as common sense. Recently, the Maine Public Utilities Commission rejected this argument and found that:

> …[S]tate commissions have the authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct. Section 271(c)(2)(A)(ii) requires that ILECs provide access and interconnection which meet the requirements of the 271 competitive checklist, i.e. includes the ILEC's 271 unbundling obligations. <u>Thus, state commissions have the authority to arbitrate section 271 pricing in the context of section 252 arbitrations.</u>

Maine PUC Docket No. 2002-682, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection* (PUC 20) *and Resold Services* (PUC 21), Order – Part II, p. 19 (September 3, 2004) ("*Maine Unbundling Order*") (emphasis added). A copy of this order is attached hereto as Attachment 1.

Very recently, the Public Utilities Commission of New Hampshire forcefully echoed the FCC's determination that section 251 of the Act is not the limit or "real upper bound" of Qwest's unbundling obligation. Rather, section 271 continues to require Qwest to unbundle listed network elements:

> We address first Verizon's general argument that the FCC's determination of an element as a section 251 obligation allows Verizon to remove that element from its wholesale tariff altogether. The FCC made clear in the TRO [*Triennial Review Order*] that the removal of a UNE from the list of section 251 obligations because of lack of impairment did not automatically resolve the question of whether an RBOC must still make that UNE available under section 271. S*ee TRO* at ¶¶652-655. The FCC's *TRO* has in fact rejected Verizon's argument that once the FCC determined that a UNE is not necessary under section 251, the corresponding 271 checklist item should be construed as being satisfied. In rejecting this position, the FCC made it clear in the TRO that "the BOCs have an independent obligation under section 271 (c)(2)(B) to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at reasonable rates." The FCC further concludes that RBOC obligations pursuant to section 271 are "not necessarily relieved based on any determination [by the FCC] under the section 251 unbundling analysis." *Id.* at ¶ 655.

Proposed Revisions to Tariff NHPUC No. 84, pp. 38-39, Dckt. DT 03-201, 04-176, Order No. 24,442 (March 11, 2005) A copy of this order is attached hereto as Attachment 3.

Moreover, as recently as May 9, 2005, an administrative law judge for the Illinois Commerce Commission reaffirmed that commission's previous holding that "Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis." *In Re: Cbeyond Communications, LLP et.al v. Illinois Bell Telephone Company*, Illinois Commerce Commission, Dockets 05-154, 050156 & 05-174, Administrative Law Judge Decision, p. 23 (May 9, 2005) citing *XO Illinois, Inc. Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone*, Docket 04-0371, Order, Sept. 9, 2004, at p. 47. Copies of these two Illinois decisions are attached hereto as Attachments 4 and 5, respectively.

Furthermore, there can be no argument that the Commission's enforcement of Qwest's Section 271 checklist obligations would substantially prevent the implementation of any provision of the Act. Indeed, where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly authorized. *Florida Avocado Growers v. Paul,* 373 U.S. 132, 142, 83 S. Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). As described in greater detail in section D. of this brief, courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *De Canas v. Bica,* 424 U.S. 351, 356, 96 S. Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Avocado Growers,* 373 U.S. at 142, 83 S. Ct. at 1217). The Act, however, hardly evinces an unmistakable indication of Congressional intent to preclude state enforcement of federal 271 obligations. Far from doing so, the Act expressly preserves a state role in the review of a RBOC's compliance with its

Section 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a RBOC's Section 271 compliance.[3]

The FCC has confirmed state commissions' enforcement role with respect to Section 271:

> We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into the long distance market in Arizona.

In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in Arizona, WC Docket No. 03-194, Memorandum Opinion and Order, FCC 03-309 (Rel. Dec. 3, 2003), ¶61.

A hearing examiner for the Maine Public Utilities Commission agreed:

> Indeed, it makes both procedural and substantive sense to allow state commissions, which are much more familiar with the individual parties, the wholesale offerings, and the issues of dispute between the parties, to monitor ILEC compliance with section 271 by applying the standards prescribed by the FCC, i.e. ensuring that Verizon meets its Checklist Items No. 4, 5, 6, and 9 obligations.

Maine PUC Docket No. 2002-682, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection* (PUC 20) *and Resold Services* (PUC 21), Examiner's Report (July 23, 2004),. *affirmed by the Maine Public Utilities Commission in the Maine 271 Unbundling Order*. A copy of this order is attached hereto as Attachment 2.

2. Section 271 pricing.

Thus, the Commission clearly has the authority to enforce Qwest's obligations to provide unbundled access to loops (including high capacity loops and subloop elements) and dedicated transport under Section 271 checklist item #4, including the right to set prices. Specifically, this Commission has clearly been granted the authority to arbitrate provisions of interconnection

[3] *See* 47 U.S.C. § 271(d)(2)(B) (requiring the FCC to consult with state commissions in reviewing RBOC compliance with the 271 checklist).

agreements addressing Section 271 obligations, as well as set prices that comply with federal pricing standards. On this point, the United States Supreme Court directly held:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions ... the FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in [section] 252(d) [of the Act]. It is the states that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.

AT&T v. South Dakota Utils. Bd., 525 U.S. 366, 384, 142 L.Ed.2d 834, 876 (1999).

The FCC made it clear in the *TRO* that a different pricing standard should be applied to network elements required to be unbundled under Section 271 as opposed to network elements unbundled under Section 251 of the Act. Specifically, the FCC stated that "the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202." *TRO*, ¶ 656. In other words, according to the FCC, the *legal standard* under which pricing for Section 271 checklist items should be determined is a different *legal standard* than that applied to price Section 251 UNEs. Thus, "Section 271 requires RBOCs to provide unbundled access to elements not required to be unbundled under Section 251, but does not *require* TELRIC pricing." *TRO,* ¶ 659 (emphasis added).

Notably, in the *TRO,* the FCC nowhere forbids the application of such pricing of network elements required to be unbundled under Section 271. Rather, the FCC merely states that unbundled access to Section 271 checklist items is not *required* to be priced pursuant to the particular forward-looking cost methodology specified in the FCC's rules implementing Section 252(d)(1) of the Act – namely, TELRIC. The FCC states that the appropriate legal standard to determine the correct price of Section 271 checklist items is found in Sections 201 and 202. However, nowhere does the FCC state these two different legal standards may not result in the same rate-setting methodology.

Furthermore, the FCC does not preclude the use of forward-looking, long-run incremental cost methodologies *other than TELRIC* to establish the prices for access to Section

271 checklist items. As the FCC made clear when it adopted the TELRIC pricing methodology in its *Local Competition Order*,[4] there are various methodologies for the determination of forward-looking, long-run incremental cost. *Local Competition Order,* ¶ 631. TELRIC describes only one variant, established by the FCC for setting UNE prices under Section 252(d)(1), derived from a family of cost methodologies consistent with forward-looking, long-run incremental cost principles. *See Local Competition Order,* ¶¶ 683-685 (defining "three general approaches" to setting forward-looking costs). Thus, the FCC's *TRO* does not preclude the use of a forward-looking, long-run incremental cost standard *other than TELRIC* in establishing prices consistent with Sections 201 and 202 of the Act.[5]

Given the intense scrutiny that has been applied by this Commission in establishing rates for elements that may eventually be subject only to Section 271 unbundling obligations, adopting those rates, at least for an interim period, makes far more sense than any other result. In resolving this issue the Maine Public Utilities Commission stated:

> Until such time as we approve new rates for section 271 UNEs, adopt FCC-approved rates, or CLECs agree to section 271 UNE rates, Verizon must continue to provide all section 271 UNEs at existing TELRIC rates. We find this requirement necessary to ensure a timely transition to the new unbundling scheme. We have no record basis to conclude that TELRIC rates do not qualify as "just and reasonable" rates; while we might ultimately approve higher rates, we cannot do so without the benefit of a record or the agreement of the parties. We note that the decision we reach today is consistent with the approach embodied in the FCC's Interim Rules, which require a six-month moratorium on raising wholesale rates.

Maine Unbundling Order, pp. 20-21.

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[4] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (rel. August 8, 1996) ("*Local Competition Order*").

[5] For example, where the 271 checklist item for which rates are being established is not legacy loop plant but next-generation loop plant, incumbents might argue for the use of a forward-looking, long-run incremental cost methodology based on their *current network technologies* – in other words, a non-TELRIC but nonetheless forward-looking, long-run incremental cost methodology. *See, e.g., Local Competition Order,* ¶ 684.

B. UNDER SOUTH DAKOTA LAW THE COMMISSION HAS AUTHORITY TO COMPEL QWEST TO INTERCONNECT AND UNBUNDLE NETWORK ELEMENTS, INCLUDING LOOPS AND TRANSPORT.

On the question of unbundling under state law, the South Dakota Code is clear, specific and unequivocal:

The commission may compel access to any telecommunications facilities in this state. Any telecommunications company desiring access to any other company's facilities shall, if access is refused, make an application to the commission. Upon receipt of the application, the commission shall ascertain the facts in the case. If in its judgment the public service demands the access and the facilities of the applicant are in proper condition, the commission may order the access upon such terms and conditions that are found to be in the public interest and apportion the expense of the access. (emphasis added).

South Dakota Codified Laws §49-31-15.

Under the foregoing state law, Qwest must make loops and transport in South Dakota available to Covad on an unbundled basis.

C. THE COMMISSION SHOULD ADOPT THE INTERCONNECTION AGREEMENT LANGUAGE COVAD HAS PROPOSED

The language Covad has proposed for inclusion in the interconnection agreement is set forth, in part, below. As the Commission can see, this language preserves Covad's right to continue to obtain unbundled network elements under section 271 of the Act and South Dakota state law. This language applies on its face even if the FCC concludes now or at a later time that Qwest is not required to unbundle select elements under section 251 of the Act.

General provisions include:

Section 9.1.1

Qwest will provide to CLEC any and all UNEs required by the Telecommunications Act of 1996 (including, but not limited to Sections 251(b), (c), 252(a) and 271), FCC Rules, FCC Orders, and/or applicable state rules or orders, or which are ordered by the FCC, any state commission or any court of competent jurisdiction. Qwest is required to connect or combine 251(c)(3) UNEs with any and all of its service offerings, as required by the Telecommunications Act of 1996, FCC Rules, FCC Orders and/or state law or orders. Qwest must provide all technically feasible 251(c)(3) UNE combinations, including 251(c)(3) UNEs ordinarily combined and new 251(c)(3) UNE combinations.

Section 9.1.1.6

On the Effective Date of this Agreement, Qwest is no longer obligated to provide to CLEC certain Network Elements pursuant to Section 251 of the Act. Qwest will continue providing access to certain network elements as required by Section 271 or state law, regardless of whether access to such UNEs is required by Section 251 of the Act. This Agreement sets forth the terms and conditions by which network elements not subject to Section 251 unbundling obligations are offered to CLEC

Section 9.1.1.7 (imposes prices for elements at the TELRIC rate)

If, on the Effective Date of this Agreement, Qwest is providing to CLEC, pursuant to orders placed in accordance with a Interconnection Agreement, any of the Network above for which an independent unbundling obligation exists under Section 271 of the Act, or applicable state law, then Qwest shall bill for such UNEs and services using the Commission-approved TELRIC rates for such UNEs until such time as new, just, reasonable and non-discriminatory rates (as required by Sections 201 and 202 of the Act or applicable state law) are approved for the Section 271 or state law required UNEs .

The remaining provisions Covad proposes for inclusion in the interconnection agreement are of a similar nature as the sections quoted above but require Qwest to provide access to specific unbundled network elements – See, e.g., 9.1.5, 9.2.1.3 [access to loops], 9.2.1.4 [access to loops], 9.3.1.1 [feeder subloops], 9.3.1.2 [feeder loop], 9.3.2.2 [DS-1 feeder loops], 9.3.2.2.1 [feeder subloops], 9.6 [dedicated interoffice transport], 9.6.1.5.1 [DS-3 transport] [and related 9.6.1.5], 9.6.1.6.1 [DS-1 dedicated interoffice transport] and [and related Section 9.6.1.6].

D. FEDERAL LAW DOES NOT PREEMPT SOUTH DAKOTA'S UNDBUNDLING LEGISLATION

As a very significant preliminary matter, this Commission, as a matter of law, has no authority under state law to declare that any portion of state law is preempted by the Act or any other federal law. This was the very recent conclusion of the Illinois Commerce Commission ("ICC") when confronted with the identical issue here: whether state network element unbundling obligations were pre-empted by federal law. The ICC concluded:

> Moreover, the Illinois Supreme Court has long instructed that an administrative agency can neither limit nor extend the scope of its enabling legislation. "An

> administrative agency lacks the authority to invalidate a statute on constitutional grounds or to question its validity." *Carpetland U.S.A. v. Ill. Dept. Employment Security*, 201 Ill. 2d 351, 397, 776 N.E.2d 166, 192 (Ill. 2002). The Commission must follow and implement the statute's plain language irrespective of its opinion regarding the desirability of the results surrounding the operation of the statute. *Citizens Util. Bd. v. Ill. Commerce Comm'n* , 275 Ill. App. 3d 329, 341-42, 655 N.E.2d 961, 969-70 (1st Dist., 1995). In other words, the Commission is not empowered to declare portions of Section 13-801 [unbundling statutue] preempted or unconstitutional.

In Re: Illinois Bell Telephone Company Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, Order on Remand (Phase I), docket 01-0614, p. 61 (April 20, 2005) (emphasis added)[6]

This Commission, like the ICC, has no authority to declare portions of South Dakota law pre-empted. Nonetheless, as detailed below, even if the Commission had such authority, the outcome is the same: no preemption.

Federal administrative agencies such as the FCC have the power to preempt inconsistent state regulations, so long as the federal agency is acting within the scope of its delegated authority. *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988). "However, courts do not lightly attribute . . . to a federal agency the intent to preempt state or local laws." *Opthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062, 1066 (7th Cir. 1998). Rather, there must be a "clear and manifest" expression of the federal agency's preemptive intent, because "agencies normally address problems in a detailed manner and can speak through a variety of means [and] we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 715-16, 18 (1985). As detailed below, neither the Act nor FCC orders that addressed the issue of unbundling have the effect of pre-empting South Dakota legislation.

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[6] The ICC decision cited above is 140 pages long and therefore it is not attached to this brief. However, a complete copy of the decision will be provided to the Commission, Staff or Qwest upon request. Alternatively, a copy can be obtained at the ICC website by performing a search with the docket number at http://eweb.icc.state.il.us/e-docket/

1. The 1996 Act.

Well after South Dakota began taking steps to open local telephone markets, Congress passed the Act to "end[] the longstanding regime" under which local telephone service was provided by "state sanctioned monopolies." *AT&T Corp. v. South Dakota Utils. Bd.*, 525 U.S. 366, 371 (1999). Under the Act, Congress required incumbents like Qwest to provide competitors with access to network elements on an "unbundled" (*i.e.*, separately priced) basis. *Id.* § 251(c)(3). Incumbents have the federal duty under section 251 to provide unbundled access to network elements if "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* § 251(d)(2). Several of the key unbundled network elements at issue here are loops and transport.

Under the Act, state utility commissions like the Commission play a primary role in the effort to create competition in local telephone markets. State commissions fulfill two distinct functions under the Act. First, Congress has delegated certain federal authority to the states, and the state commissions thus act as "deputized federal regulators" in implementing the Act and the FCC's regulations. *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000) (internal quotation omitted). Specifically, in section 252 of the Act, Congress prescribed a process for implementing the incumbents' federal duties. The principal mechanism for implementing these duties are interconnection agreements between incumbents and competing carriers, and section 252 "specifically provides state commissions with an important role to play" in the formation of those agreements. *Illinois Bell*, 179 F.3d at 574.

Congress was explicit, however, that federally delegated authority is not the only source of state authority to regulate local competition. As the Seventh Circuit has explained, "the roles -- and the authority -- of the state commission and the FCC are distinct under the Act." *Indiana*

Bell Tel. Co. v. McCarty, 362 F.3d 378, 393 (7th Cir. 2004). In passing the Act, Congress noted with approval ongoing state efforts to "open the local networks of telephone companies," S. Rep. No. 104-23 at 5 (1995), and it endeavored to build on them, not undermine them. This intent is clearly evinced by four explicit savings clauses that safeguard state authority. *See* 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(c); 1996 Act § 601(c)(1).

Congress first stated that "nothing in [section 252] shall prohibit a State commission from establishing or enforcing *other requirements of State law* in its review of an agreement." *Id.* § 252(e)(3). Similarly, section 251(d)(3), entitled "Preservation of State Regulations," bars the FCC from "prescribing" or "enforcing" regulations that "preclude the enforcement of any regulation, order, or policy of a State," so long as those state measures are "consistent with the requirements of [section 251]," and do "not substantially prevent implementation of the requirements of this section and the purposes of this part [of the Act]." 47 U.S.C. § 251(d)(3)(B) & (C). Section 261(c) further provides that "[n]othing in this part [of the Act] precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition . . . as long as the State's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part." 47 U.S.C. § 261(c).

Finally, Congress directed courts to interpret the Act to preserve state authority. In section 601(c)(1), Congress specified that the "Act shall not be construed to modify, impair, or supersede . . . State[] or local law unless *expressly so provided*." Act § 601(c)(1), 110 Stat. 56, 143 (1996) (uncodified note to 47 U.S.C. § 152). Congress included this clause to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws." Conf. Rep. at 201, *reprinted in* 1996 U.S.C.C.A.N. 124, 215. As the Seventh Circuit has noted, section 601(c) "precludes a reading that ousts the state legislature by implication." *AT&T Communications v. Illinois Bell Tel. Co.*, 349 F.3d 402, 410 (7th Cir. 2003).

2. The *Triennial Review Order* and the D.C. Circuit's Decision in *USTA II*.

Beginning in 1996, the FCC issued a series of orders in which it attempted to implement the Act's federal unbundling requirements in light of the federal "impairment" standard. The Supreme Court, and later the D.C. Circuit, rejected the FCC's initial interpretations of the federal impairment standard. Specifically, the D.C. Circuit rejected the FCC's attempts to "adopt a uniform national rule, mandating the [network] element's unbundling in every geographic market and customer class, without regard to the state of competitive impairment in any particular market." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA I*"); *see also AT&T Corp.*, 525 U.S. at 387-92 (rejecting FCC's initial definition of impairment). The D.C. Circuit held that the Act "require[s] a more nuanced concept of impairment than is reflected in findings such as the [FCC's] . . . ." *USTA I*, 290 F.3d at 426.

In August 2003, the FCC issued the *TRO*. ILECs asked the FCC to declare in the *TRO* that the states are preempted from requiring unbundling beyond the Act's minimum requirements. The FCC rejected their arguments, holding that "[w]e do not agree with incumbent [carriers] that the states are preempted from regulating in this area [of unbundled network elements] as a matter of law." *TRO* ¶ 192 (emphasis added). The FCC observed that "[i]f Congress intended to preempt the field, Congress would not have included section 251(d)(3) [one of the savings clauses] in the 1996 Act." *Id.* The FCC noted that "[m]any states have exercised their authority under state law to add network elements to the national list." *Id.* ¶ 191. It noted that "'merely an inconsistency' between a state regulation and [an FCC] regulation was not sufficient for [FCC] preemption under section 251(d)(3)." *Id.* ¶ 192 n.611 (quoting *South Dakota Utils. Bd. v. FCC*, 120 F.3d 753, 806 (8th Cir. 1997)).

To be sure, the FCC expressed its "belie[f]" that "in some instances" state unbundling requirements likely would not be "consistent with our new framework and may frustrate its

implementation." *TRO* ¶ 195. However, the FCC refused the incumbents' request that it issue a preemption ruling in the *TRO*. Instead, the FCC held that "[p]arties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling" on preemption from the FCC. *Id.* ¶¶ 192, 195.

In subsequent briefs before the D.C. Circuit, the FCC reiterated that the *TRO* "did *not* preempt states from adding to the unbundling requirements that the FCC adopted." (FCC *TRO* Br. at 91 (emphasis in original).) Rather, the FCC again stated "that parties could petition the FCC for a declaratory ruling that a particular state unbundling obligation exceeds the statutory limits on state authority." *Id.* Only such "future," "fact-intensive" proceedings, if any are initiated, would result in "actual preemption." *Id.*

On appeal from the *TRO*, the D.C. Circuit held that the FCC's scheme of delegating the FCC's *federal* impairment determinations under section 251(d)(2) of the Act to state commissions was unlawful. *United States Telecom Ass'n v FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). The court "vacated, as an unlawful subdelegation of the [FCC's] § 251(d)(2) responsibilities, those portions of the [*TRO*] that delegate to state commissions the authority to determine whether [competing carriers] are impaired without access to network elements . . . ." *Id.* at 568. The D.C. Circuit specifically noted that the FCC could not "subdelegat[e]" its federal impairment analysis with respect to "mass market switching determinations." *Id.*

However, consistent with the FCC's position, the D.C. Circuit rejected the claim, raised by concerned state commissions, that the FCC had decided whether any particular state law unbundling requirements were preempted by the *TRO*. The D.C. Circuit found that the FCC "has not taken any view on any attempted state unbundling order," and that judicial consideration would be premature "until the FCC actually issues a ruling that a specific state unbundling requirement is preempted." *Id.* at 594.

3. The *Triennial Review Remand Order*.

On February 4, 2005, the FCC issued the *Triennial Review Remand Order* ("*TRO Remand Order*"), on remand from *USTA II*. *TRO Remand Order*, 2005 WL 289015 (rel. Feb. 4, 2005). In the *TRO Remand Order*, the FCC yet again refused incumbents' requests that it declare that states have been preempted from requiring any unbundling of network elements beyond what is provided under section 251 of the Act. For example, one RBOC (SBC) argued in its *TRO Remand Order* comments that "the [FCC] should now establish a rule that *all* . . . state attempts to impose unbundling requirements that the [FCC] has rejected are unlawful." (emphasis in original). But the FCC did not grant this request, leaving intact its prior directive from the *TRO* that parties believing that a state commission order is preempted should petition the FCC for such a ruling. *TRO* ¶ 195.

Applying the foregoing laws, neither the Act, the *TRO*, the *TRO Remand Order* nor any other law preempts South Dakota's unbundling regime. Put simply, the FCC did not preempt states from imposing unbundling obligations under state law and nothing in the *TRO* or *TRO Remand Order* could be read to apply to the unbundling obligations under South Dakota law. On the contrary, the FCC has refused time and again to do so, despite repeated requests from incumbent carriers during the *TRO* or *TRO Remand Order* proceedings. The FCC itself made it clear in the *TRO* and the *TRO Remand Order* that its unbundling rulings did not preempt state unbundling laws. In both the *TRO* and the *TRO Remand Order*, the FCC rejected requests from incumbent carriers that the FCC declare that states are preempted from requiring unbundling beyond the Act's minimum requirements. In a portion of the *TRO* that was not disturbed on appeal, the FCC stated that "[w]e do not agree with incumbent [carriers] that the states are preempted from regulating in this area [of unbundled network elements] as a matter of law." *TRO* ¶ 192. The FCC noted that "[m]any states have exercised their authority under state law to add network elements to the national list." *Id.* ¶ 191.

As noted above, the only lawful mechanism available to determine whether a state law is preempted is to seek a declaratory ruling from the FCC. Qwest has, to the best of Covad's knowledge, never filed a petition for declaratory ruling contending that South Dakota's unbundling requirements are preempted. Accordingly, a finding of preemption in this proceeding would be both unlawful and premature.

CONCLUSION

For the foregoing reasons, Covad requests that the Commission adopt its proposed interconnection agreement language requiring unbundling pursuant to section 271 of the Act and the state law requirements detailed above.

Respectfully submitted, this 3rd day of June 2005.

DIECA COMMUNICATIONS, INC., D/B/A
COVAD COMMUNICATIONS COMPANY

By:

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CERTIFICATE OF SERVICE

Case No. TC05-056

I HEREBY CERTIFY that on the 3rd day of June, 2005 a true and correct copy of the foregoing Covad's Initial Brief was sent via e-mail and United States mail, first class, postage prepaid, to the following:

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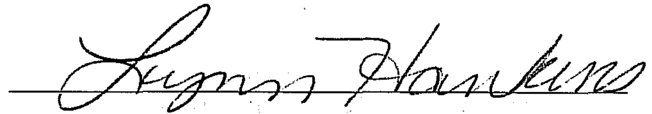

ATTACHMENT 1

Attachment 1

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms,
Conditions and Rates for Unbundled
Network Elements and Interconnection
(PUC 20) and Resold Services (PUC 21)

September 3, 2004

ORDER – PART II

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we find that Verizon must include all of its wholesale offerings in its state wholesale tariff, including unbundled network elements (UNEs) provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct). In addition, Verizon must file prices for all offerings contained in the wholesale tariff for our review for compliance with federal pricing standards, i.e. "Total Element Long Run Incremental Cost (TELRIC)" for section 251 UNEs and "just and reasonable" rates pursuant to sections 201 and 202 of the Communications Act of 1934 for section 271 UNEs. We also find that we are not preempted from considering in this proceeding whether Verizon must continue to offer line sharing pursuant 35-A M.R.S.A. §§ 1306 and 7101.

II. BACKGROUND

In our Comments to the Federal Communications Commission (FCC) regarding Verizon's section 271 application for authority to enter the interLATA toll market (Verizon's 271 Application), we stated that the availability of a wholesale tariff or Statement of Generally Available Terms (SGAT) would greatly reduce the time required to effect a valid interconnection agreement and would also eliminate the perception shared by some CLECs that they were being "forced" to accept contract terms in their interconnection agreements that were unrelated to the terms that they were interested in negotiating.[1] Thus, in a March 1, 2002 letter from the Commission to Verizon (Commission's 271 Letter), we explicitly conditioned our support of Verizon's 271 Application on Verizon's agreement to fulfill a number of additional requirements, including the filing of a wholesale tariff. Verizon committed to meeting the Commission's conditions in a March 4, 2002 letter to the Commission (Dinan Letter),

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[1] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine*, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) at 7.

and on November 1, 2002, Verizon submitted a schedule of terms, conditions and rates for Resold Services (P.U.C. No. 21) and the provision of Unbundled Network Elements and Interconnection Services (P.U.C. No. 20) along with cost studies for certain non-recurring charges and OSS-related issues.

In order to allow enough time to thoroughly examine the tariff, we suspended it on November 11, 2002. On November 13, 2002, the Hearing Examiner issued a Procedural Order requesting intervention and scheduling an initial case conference for December 10th. On December 4, 2002, prior to the case conference, the Hearing Examiner issued a second Procedural Order granting intervention to all parties that requested it[2] and proposing a schedule for processing this case. Between December 2002 and August 2003, the parties conducted some discovery and attempted to identify all the issues that need to be litigated.[3]

On August 11, 2003, the Hearing Examiner issued a Procedural Order setting a hearing date of October 2, 2003, and attaching a list of issues that the Advisors intended to explore at the hearing. Before a hearing could take place, however, on August 21, 2003, the FCC issued its *Triennial Review Order (TRO)*.[4] A case

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[2] The parties at that time included: the Office of the Public Advocate (OPA), Association of Communications Enterprises (ASCENT), MCI/WorldCom (MCI), Mid-Maine Telecommunications (Mid-Maine), and Oxford Networks (Oxford). Mid-Maine and Oxford filed joint briefs as the CLEC Coalition.

[3]At the Case Conference on December 10th, the proposed schedule was discussed and on December 17th the Hearing Examiner issued a Procedural Order to grant three additional interventions (Biddeford Internet Corporations d/b/a Great Works Internet (GWI), Conversent Communications (Conversent), and Cornerstone Communications (Cornerstone) and to set a preliminary schedule. On January 15, 17, and 23, and February 3, 2003, the Hearing Examiner issued Procedural Orders adjusting the case schedule and outlining further instructions and an initial list of issues to be litigated in the proceeding. On January 22nd, the CLEC Coalition and Cornerstone Communications also filed a list of initial issues. On February 3, 7, and 14, 2003, Verizon submitted responses to Staff's and other parties' issues and questions. On February 18, 2003, both Staff and the CLEC Coalition filed a list of issues that Verizon should attempt to address in its testimony. On February 24, 2003, the Hearing Examiner issued a Procedural Order establishing a schedule for testimony and discovery. On March 3, 2003, the Commission suspended the Verizon tariff for a second time to allow additional time to review it. On March 24, 2003, Verizon witnesses filed panel testimony. Staff issued its first set of data requests on the Verizon testimony on April 1, 2003, to which Verizon responded on April 22nd and 23rd. On May 20, 2003, Verizon issued discovery requests to GWI, to which GWI responded on May 27th.

[4]Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 96-98 *et al.*, FCC03-36, 18 FCC Rcd 16978 (rel. August 21, 2003)(*Triennial Review Order or TRO).*

conference was held on September 16, 2003, to discuss with the parties the potential impact of the *TRO* on the wholesale tariff. On September 18, 2003, the Examiner issued a Procedural Order summarizing the September 16th case conference and setting deadlines for Verizon to file new red-lined tariff schedules based on the changes required by the *TRO*.

On October 16, 2003, the CLEC Coalition filed a Motion for Issuance of Temporary Order. In its Motion, the CLEC Coalition objected to a letter sent by Verizon on October 2nd which stated that Verizon would be discontinuing the provisioning of certain UNEs in compliance with the *TRO*. On October 21, 2003, the Hearing Examiner issued a Procedural Order stating that Verizon had correctly identified those UNEs that the FCC eliminated from the TelAct's section 251 unbundling requirements and that while changes in terms and conditions caused by the *TRO* would be litigated in this proceeding, the Commission would not re-litigate the decision by the FCC to eliminate specific UNEs from section 251's requirements. Finally, the Examiner stated that the Commission had not anticipated the need to address Verizon's continuing obligations under section 271 in this proceeding and that the Advisors would further consider the issues and determine the next steps.

On December 16, 2003, a case conference was held. After discussion, the Hearing Examiner determined that before hearings on the substance of the Wholesale Tariff could be held, legal briefing was necessary on two issues: (1) whether the Commission had authority, under either state or federal law, to require Verizon to tariff its obligations to continue providing UNEs under section 271 of the TelAct and whether it could set the rates for those obligations; and (2) whether the Commission has the authority, under either state or federal law, to order Verizon to continue providing line-sharing at Commission-set TELRIC rates.

On January 16, 2004, Initial Briefs were filed by Verizon, the CLEC Coalition, and the Consolidated Intervenors (GWI, OPA and Cornerstone). The same parties filed Reply Briefs on January 30, 2004.

Before a decision could be reached by the Commission on the legal issues, the D.C. Circuit Court of Appeals issued its decision in *USTA II*, [5] the appeal of the *TRO*. Because *USTA II* was directly relevant to many of the legal issues raised in this Docket, the Hearing Examiner issued a Procedural Order on March 4, 2004, allowing all parties to supplement previously filed briefs to address the impact of the D.C. Circuit Court decision on their positions in this case. On March 26, the Consolidated Intervenors filed a supplemental brief, as did Verizon.

On July 23, 2004, the Hearing Examiner issued her Report recommending that we find that that Verizon must include all of its wholesale offerings, including UNEs

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[5] *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II*).

provided pursuant to section 271, in its state wholesale tariff. The Examiner also recommended that we find that Verizon must continue to offer line sharing pursuant to Checklist Item No. 4 of section 271. Finally, the Examiner recommended that we decline the opportunity to exercise any authority we might have to set rates for section 271 UNEs. In addition to serving her Report on the parties to this proceeding, the Examiner also served the Report on the parties to Docket No. 2004-135, Verizon's Request for Arbitration, pursuant to our June 11, 2004 decision in that case to consolidate the Arbitration proceeding with this Wholesale Tariff proceeding. All parties to both cases were given an opportunity to file exceptions.

On August 6, 2004, Verizon, Conversent, Cornerstone, the Association for Local Telecommunications Services (ALTS), Covad Communications (Covad), the CLEC Coalition, United Systems Access Telecom, Inc. (USA Telephone), AT&T Communications of New England, Inc. (AT&T), and GWI filed Exceptions to the Examiner's Report. The arguments from all parties in the three rounds of briefs and exceptions are summarized below along with our analysis and decision.

III. COMMISSION AUTHORITY TO REQUIRE TARIFFING OF SECTION 271 OFFERINGS

A. Introduction

As will be explained in detail below, at the time we conditioned our support of Verizon's 271 Application on Verizon filing a wholesale tariff, Verizon's unbundling obligations under sections 251/252 of the TelAct were synonymous with its section 271 unbundling obligations. Thus, we made no distinction between the two potentially differing obligations; we simply required a wholesale tariff. Since that time, the *USTA I*[6] decision was released, the FCC issued its *TRO*, and, most recently, the *USTA II* decision was issued. The impact of these three decisions on the issue at hand can be summed up as follows: today an ILEC's 251/252 obligations are narrower (in most respects[7]) than its 271 obligations. The CLECs contend that Verizon must now amend its proposed wholesale tariff to include its section 271 unbundling obligations. Verizon argues that the FCC has exclusive jurisdiction over matters relating to its 271 obligations and that this Commission has no authority to require Verizon to amend its wholesale tariff to include its 271 obligations.

B. Applicable Law

[6] *United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) *(USTA I).*

[7] In a recent order in the *Skowhegan Online Proceeding,* we found that subloops were a requirement under Section 251 but not a requirement under Section 271. *Investigation of Showhegan Online's Proposal for UNE Loops,* Docket No. 2002-704, Order (April 20, 2004), and Order Denying Reconsideration (June 16, 2004).

1. Difference Between Section 251 and 271 UNEs

Section 271 of the TelAct sets forth the requirements an ILEC must meet before it will be allowed to enter the interLATA toll market. The so-called "competitive checklist" contains 14 measures which were intended to ensure that the ILEC had opened the local exchange market to competition. Checklist Item No. 2 requires "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)." Section 251(c)(3) requires ILECs to provide access to their network, i.e. UNEs, while Section 252(d)(1) sets the pricing standard for those UNEs, i.e., TELRIC pricing. Section 251(c)(3) also requires compliance with section 251(d)(2) which limits access to UNEs at TELRIC pricing to only those which meet the "necessary and impair" standard.[8] Thus, Checklist Item No. 2 requires an ILEC to meet all of the 251 and 252 unbundling and pricing standards, which the FCC limited in the *TRO* to specific types of loops, subloops, and transport.[9]

Checklist Items Nos. 4, 5, 6, and 10 require ILECs to provide unbundled access to loops, transport, switching and signaling. The FCC has explicitly found that, despite elimination of a number of UNEs under section 251, ILECs must continue to provide access to those UNEs under section 271.[10] However, none of these other checklist items, unlike Checklist Item No. 2, cross reference sections 251(c)(3) and 252(d)(1). Thus, according to the FCC in the *TRO*, UNEs unbundled under Checklist Items Nos. 4, 5, 6 and 9 must only meet the "just and reasonable" standard of 47 U.S.C. §§ 201-202 and not the TELRIC standard required under section 251.[11]

2. State Commission Authority in 271 Enforcement Matters

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[8]In the *TRO*, the FCC retained its earlier definition of "necessary" ("...a proprietary network element is 'necessary' within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.") and adopted a new definition of "impairment" ("A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.") *TRO* at ¶¶ 170, 84.

[9]*USTA II* vacated the *TRO*'s findings regarding mass market switching, thereby effectively eliminating switching as a 251 UNE.

[10]*TRO* at ¶ 653.

[11]*TRO* at ¶ 656.

In the FCC's Order granting Verizon 271 authority in Maine,[12] the FCC stated:

> Working in concert with the Maine Commission, we intend to monitor closely Verizon's post-approval compliance for Maine to ensure that Verizon does not "cease [] to meet any of the conditions required for [section 271] approval.[13]

The FCC referred readers of the *Maine 271 Order* to its *Kansas/Oklahoma 271 Order*, for a more complete description of the 271 enforcement process. The *Kansas/Oklahoma 271 Order* states:

> Furthermore, we are confident that *cooperative state and federal oversight and enforcement* can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets.[14]

(emphasis added). Thus, the FCC recognized the important role that state commissions would play in enforcing the requirements of section 271. Of more importance, however, is the *Kansas/Oklahoma 271 Order*'s citation to the *New York 271 Order*,[15] which made several relevant findings. First, while noting that Congress had authorized the FCC to enforce section 271 to ensure continued compliance, the *New York 271 Order* specifically endorsed state commission authority to enforce commitments made by Verizon (then Bell Atlantic) to the New York Public Service Commission. The FCC stated that:

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[12] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization to Provide In-Region, InterLATA Services in the State of Maine*, CC Docket No. 02-61, Order, 17 FCC Rcd 11676 (June 19, 2002) (*Maine 271 Order*).

[13] *Maine 271 Order* at ¶ 65.

[14] *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (*Oklahoma/Kansas 271 Order*).

[15] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953 (*New York 271 Order*).

> Complaints involving a BOC's [Bell Operating Company] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, *should be directed to that state commission rather than the FCC.*[16]

(emphasis added). Thus, the FCC explicitly recognized the authority of state commissions to enforce 271-related commitments including, but not limited to, performance assurance plans (PAPs). Indeed, the FCC noted "with approval" the fact that the New York PAP "will be enforceable as a New York Commission order."[17]

3. Verizon's 271 Commitments to the Commission

Turning to Verizon's commitments here in Maine, as stated above, Verizon committed to the following relevant conditions, contained in the March 1, 2002, letter from the Commission:

> 1. Verizon will file a wholesale tariff for Maine no later than October 1, 2002. In the interim, CLECs shall be allowed to amend their interconnection agreements with Verizon in such a manner that enables them to negotiate the inclusion of a single UNE (and any terms and conditions related to the single UNE) rather than be required to sign a multi-part or omnibus amendment which contains provisions unrelated to the single UNE.[18]

In our April 10, 2002 Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of the Telecommunications Act of 1996, we explicitly conditioned our support of Verizon's 271 application upon Verizon's compliance with the list of conditions contained in our March 1, 2002 letter to Verizon, including its commitment to file a wholesale tariff. Specifically, we stated:

> The MPUC finds, based upon the record before us, including the commitments made by Verizon in its March 4, 2002 letter

[16] *New York 271 Order* at ¶ 452.

[17] *New York 271 Order* at n. 1353.

[18] Commission's 271 Letter.

to the MPUC, that Verizon meets the Section 271 Competitive Checklist.[19]

Verizon's commitment to file a wholesale tariff for Maine alleviated certain concerns we had regarding the ability of individual CLECs to negotiate interconnection agreements. Specifically, during the course of our 271 proceeding, we heard from a number of CLECs regarding the difficulties and delays they encountered with Verizon when trying to re-negotiate or amend their interconnection agreements. We found that requiring Verizon to submit a wholesale tariff would simplify the interconnection process for CLECs and provide a single forum for litigating disputes and thus we explained in our 271 Report to the FCC that:

> Unlike some other states, Verizon does not have a Statement of Generally Available Terms (SGAT) or wholesale tariff for the State of Maine. Availability of a wholesale tariff would greatly reduce the time required to effect a valid contract and would also eliminate the possibility of "tying" unrelated sections of an interconnection agreement together when trying to add new terms to an existing agreement. Thus, at our request, Verizon has agreed to file a wholesale tariff for our review by October 1, 2002. This will provide us an opportunity to review all of the terms and conditions that Verizon imposes on CLECs purchasing wholesale services.[20]

Thus, we found the filing of a wholesale tariff encompassing all of Verizon's wholesale obligations would benefit the CLECs, Verizon, and the Commission by consolidating our review of Verizon's wholesale terms and conditions.

C. Positions of the Parties

1. Verizon

Verizon's initial brief did not directly respond to the Hearing Examiner's question concerning Commission authority to require Verizon to tariff its 271 obligations. In its arguments concerning the availability of specific elements, Verizon

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[19]Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) (271 Report to FCC) at p. 1.

[20]271 Report to FCC at p. 7.

admitted that in paragraph 653 of the *TRO*, the FCC recognized that former Bell Operating Companies (BOCs) have ongoing access obligations under section 271 of the TelAct but argued that nothing in the TelAct gives a state commission any power to interpret or enforce section 271 requirements. According to Verizon, only the FCC may issue regulations relating to 271 UNEs and only the FCC may set rates for these UNEs. Verizon maintained that the pricing standard set by the FCC for 271 network elements, "just and reasonable," is not the same as the TELRIC standard used for section 251 UNEs.

In its reply brief, Verizon acknowledged that the Commission may play a role in enforcing 271 obligations – for example, by administering the PAP and Carrier to Carrier Guidelines – but argued that this in no way suggests that the FCC has delegated, or could delegate, to state commissions the authority to determine, in the first instance, whether section 271 requires the unbundling of a particular network element, independent of section 251 requirements. Finally, although Verizon did not specifically address state authority under section 271 in its Supplemental Brief, Verizon stated that the "Commission plainly has no authority to order additional unbundling of network elements under the TelAct."

In its Exceptions, Verizon argued that, even if the FCC orders cited by the Examiner contained a delegation of section 271 enforcement authority to state commissions, after *USTA II* any such delegation would be illegal. Verizon claimed that Congress had expressly limited the states' role in section 271 matters to consultation with the FCC during its review of a 271 application and that any "cooperative enforcement" envisioned by the FCC was limited to a monitoring role.

Verizon also argued that requiring it to file a wholesale tariff at the Commission violated federal law. Specifically, Verizon argued that two federal appellate decisions, *Wisconsin Bell, Inc. v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003) and *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002), had found that state commissions could not require an ILEC to tariff its TelAct unbundling and interconnection obligations with the state commissions. Verizon contended that the rationale motivating our desire for a state wholesale tariff, namely concerns with difficulties and delays associated with individual negotiations, had been struck down by both courts. Thus, according to Verizon, the two federal decisions "are cause for serious reservation" regarding whether the Commission should "continue to expend resources on state wholesale tariffing inquiries."

2. Consolidated Intervenors

In their initial brief, the Consolidated Intervenors stated that the FCC "took pains" to confirm that section 271 creates independent access obligations for BOCs and cited paragraphs 653 and 655 of the *TRO*. They also pointed to the fact that this Commission conditioned its support of Verizon's 271 Application to the FCC on Verizon's willingness to adhere to a number of requirements that it would not otherwise be required to meet under section 251.

In their reply brief, the Consolidated Intervenors urged the Commission to reject Verizon's argument that we do not have authority to enforce 271 obligations. They pointed to the history of this case, and the fact that Verizon filed the wholesale tariff in compliance with a condition set by the Commission during its 271 review, as evidence of the Commission's authority. They asserted that Verizon's argument that the Commission has no power to regulate its wholesale tariff "constitutes an outright repudiation of a fundamental premise of the agreement" in the 271 case.

In their Supplemental Brief, the Consolidated Intervenors stated that *USTA II* confirms that Verizon has section 271 obligations that are independent of its obligations under section 251. They also interpreted the *USTA II* decision to confirm that the *TRO* does not impact a state commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs.

The Consolidated Intervenors filed separate Exceptions, however, all three parties (GWI, OPA, and Cornerstone) concurred with the Examiner's analysis of the differing section 251 and section 271 unbundling obligations and her recommendation that Verizon be required to include its section 271 unbundling obligations in the wholesale tariff.

3. CLEC Coalition

In its brief, the CLEC Coalition stated that the authority for the Commission to require Verizon to tariff its UNE obligations under section 271 comes from the Congressional framework of section 271, Verizon's explicit agreement to the UNE tariffing obligations in Verizon's March 4, 2002 letter, and the plain and unambiguous declarations of the FCC in paragraphs 653-655 of the *TRO*. The CLEC Coalition also concluded that the FCC expressly found that it was the responsibility of both the FCC and state commissions to ensure compliance with section 271, including setting prices for UNEs established pursuant to section 271. Finally, the CLEC Coalition argued that the Commission must exercise its 271 authority over Verizon, because if the state does not, no one will; the FCC is simply without the resources. The absence of state action would have a drastic effect on the competitive landscape in Maine.

In their reply brief, the CLEC Coalition concurred with the Consolidated Intervenors and urged the Commission not to let Verizon break its agreement to meet the obligations it agreed to during the 271 approval process. The CLEC Coalition's exceptions generally supported the Examiner's Report and included specific comments on issues addressed in other sections of this order.

4. Other CLECs

ALTS, Covad, USA Telephone, AT&T, and Conversent, though they did not participate in the briefing phase of this proceeding, filed exceptions to the Report. ALTS and Covad filed joint exceptions which concurred with the Examiner's

conclusion that we have authority to "ensure Verizon's ongoing compliance with the competitive checklist of section 271" and that we can, and should, require Verizon to file a wholesale tariff including all of its unbundling obligations. ALTS and Covad dismissed Verizon's arguments regarding exclusive FCC jurisdiction as contrary to the existing and continued authority of state commissions to enforce PAPs. USA Telephone's exceptions focused on pricing issues, though they did appear to support the recommendations regarding Commission authority to require a wholesale tariff.

Conversent's exceptions supported the Examiner's conclusion that Verizon should include all of its wholesale offerings, including section 271 UNEs, in its Maine wholesale tariff. Conversent claimed that such a requirement will reduce the risk that Verizon will unilaterally cease providing high-capacity DS1 and DS3 loops and dark fiber. Conversent countered Verizon's arguments concerning the voluntary nature of its PAP commitments and pointed out that if those commitments were entirely voluntary, Verizon could stop making payments at any time – a result not contemplated by the FCC, state commissions or CLECs. Conversent urged us to enforce the 271 conditions and commitments made by Verizon and to specifically require Verizon to include DS1 and DS3 high-capacity loops in its wholesale tariff. Conversent argued that neither the *USTA II* decision nor the Court's mandate eliminated the 251 unbundling requirement for high capacity DS1 and DS3 loops – the decisions only vacated the sub-delegation to the states and not the national finding of impairment. Conversent argued that we are not preempted from requiring Verizon to include those UNEs in the state wholesale tariff because such a requirement does not substantially prevent the implementation of section 251 or the purposes of the Act.

AT&T concurred with the Examiner's recommendations concerning our jurisdiction over 271 unbundling requirements and the need for Verizon to include all of its unbundling obligations in its wholesale tariff.

D. Analysis

As stated above, at the time of Verizon's 271 proceeding, Verizon's unbundling obligations under 251/252 of the TelAct were the same as its 271 unbundling obligations and thus there was no need to distinguish between the two types of requirements. Now that they are different, we must determine both the scope of Verizon's commitment to file a wholesale tariff and, if that commitment includes Verizon's 271 unbundling obligations under Checklist Items 4, 5, 6, and 10, our authority to enforce such a commitment.

1. Scope of Verizon's commitment

Interpretation of Verizon's commitment to file a wholesale tariff requires an examination of the language of the letters exchanged with Verizon during our 271 proceeding and as well as a review of the underlying purposes of the condition. Neither the Commission's 271 Letter nor the Dinan Letter contain any language that would limit Verizon's commitment to file a wholesale tariff to its 251 obligations. Thus

we must turn to the underlying purposes of the condition for guidance. During our 271 proceeding, we heard numerous complaints from CLECs regarding the difficulties and delays associated with negotiating amendments to interconnection agreements with Verizon. Today, we continue to hear complaints from CLECs regarding difficulties with interconnection agreements. In the Verizon Arbitration proceeding,[21] CLECs complained that Verizon had not responded to requests from CLECs to negotiate amendments to their interconnection agreements.

We find that a reasonable interpretation of the condition we placed upon Verizon during our 271 proceeding, and the condition it committed to fulfill, requires Verizon to include both its section 251 and 271 unbundling obligations in its wholesale tariff filed in Maine. Indeed, the reasons underlying the condition apply even more today when the legal and regulatory landscape has become increasingly confusing and complex, making it difficult to completely address and negotiate all of the issues that may arise in an interconnection agreement negotiation.

2. Our authority to enforce Verizon's commitment

While Verizon is correct that section 271(d)(6) allows for continued enforcement of an ILEC's 271 obligations by the FCC, Verizon ignores the FCC's directives regarding enforcement of ILEC commitments to state commissions and fails to explain adequately why states have authority over some section 271 issues, such as PAPs, and not others. Verizon also does not address the requirement, pursuant to section 271(c)(2)(A)(ii), that its interconnection agreements, subject to state arbitration pursuant to section 252(b), include access and interconnection that meets the requirements of section 271(c)(2)(B) – the competitive checklist. We find, upon consideration of each of these factors, that we do have authority to enforce Verizon's commitment to file a wholesale tariff with us that includes both its section 251 and 271 obligations.

Under section 271, state commissions do not have authority to approve an ILEC's 271 application but are allowed to consult with the FCC concerning an ILEC's 271 application. In fulfilling that role, the FCC encouraged state commissions to conduct extensive fact-finding proceedings to ascertain whether the terms, conditions, and prices of an ILEC's wholesale operations met section 271's standards. While the FCC made the ultimate finding of compliance, it relied heavily upon the work of state commissions. Indeed, the FCC noted in its *Maine 271 Order*:

> 3. We wish to recognize the effort and dedication of the Maine Public Utilities Commission (Maine Commission). In smaller, more rural states, the section 271 process taxes the resources of the state commissions, even more heavily than

[21] *Investigation Regarding Verizon Maine's Request for Consolidated Arbitration*, Docket No. 2004-135, Order (June 4, 2002).

> in other states. Yet, by diligently and actively conducting proceedings beginning in 1997 to set TELRIC prices, to implement performance measures, to develop a Performance Assurance Plan (PAP), and to evaluate Verizon's compliance with section 271 of the Act, the Maine Commission laid the necessary foundation for our review and approval. We are confident that the Maine Commission's efforts, culminating in the grant of this application, will reward Maine consumers by making increased competition in all markets for telecommunications services possible in the state.
>
> . . .
>
> 5. We rely heavily in our examination of this application on the work completed by the Maine Commission. . . .

Thus, the FCC explicitly acknowledged the prominent role the Commission played in evaluation of Verizon's 271 Application and the depth of the Commission's understanding of the particular circumstances of the competitive market in Maine.

As indicated above, the FCC has clearly stated that states may enforce commitments made to them by ILECs during the 271 process. The FCC's statement regarding enforcement of state 271 commitments and our significant experience with the issues associated with the wholesale tariff, provide us with legal authority and substantive expertise to enforce Verizon's wholesale tariff commitment. We will exercise this authority by requiring Verizon to honor the commitment it made to us in the 271 process to file a wholesale tariff which includes all of its unbundling requirements and then evaluating that tariff for compliance with state and federal standards. If a party believes the Commission has not applied the correct standard, the party may file an action with the FCC pursuant to 47 U.S.C. §271(d)(6) and the FCC will have the benefit of the detailed factual record developed by us. Nothing about our review of Verizon's wholesale tariff preempts or invalidates the FCC's authority under section 271(d)(6). If the FCC disagrees with the position we take here, it can explain itself in any order issued on appeal. In the meantime, our decision will provide a single litigation proceeding to resolve the myriad of issues resulting from the *TRO* and *USTA II*.[22]

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[22]We do not find Verizon's reliance upon the Sixth Circuit's *Verizon North v. Strand* decision and the Seventh Circuit's *Bie v. Worldcom* decision persuasive. In both the *Strand* and *Bie* cases, the issue before the court was whether a state commission could order a complete by-pass of the TelAct interconnection requirements – a matter not at issue in this case. Specifically, we never envisioned that our wholesale tariff would replace the need for an interconnection agreement, only that it would simplify the process by providing a "floor" of standard terms and conditions, which is consistent with Verizon's own practice of offering an interconnection agreement template with standard offerings. Further, we note that section 252 of the TelAct specifically provides that a state commission may consolidate the litigation associated with multiple arbitration

Verizon's express agreement to file a wholesale tariff, in its letter confirming that it would abide by the Commission's conditions for recommending Section 271 approval, provide us with an independent basis for requiring Verizon to file such a tariff now. We assume Verizon did not lightly make its commitment, and that Verizon understood that the Commission, in accepting that commitment, would not condone or allow conduct inconsistent with the obligations thus undertaken. It follows, then, that Verizon by its acceptance of the condition (for which Verizon obtained Commission support for its Section 271 application) granted to the Commission the authority to ensure that Verizon fully complied with the wholesale tariff obligation defined by Section 271. This is not to suggest that the Commission has the independent authority to define the scope of those obligations where the FCC has clearly spoken; merely that, in light of Verizon's commitment, the Commission has an independent role in determining whether those obligations have been met.

IV. COMMISSION AUTHORITY TO SET PRICES FOR § 271 OFFERINGS

A. Introduction

Having determined that Verizon must tariff its 271 obligations, we consider the extent of our authority to set rates for those 271 offerings. Under state law, our authority is clear: 35-A M.R.S.A. § 301 requires that rates be just and reasonable and gives the Commission the authority to determine whether a utility's rates meet this standard. The Commission's authority under federal law is not as clear and requires a review of sections 251 and 252 of the TelAct, the *TRO*, and *USTA II*.

B. Applicable Law

Section 252 of the TelAct requires state commissions to apply the pricing standards found in section 252(d) to set the rate for interconnection pursuant to section 251(c)(2) and for UNEs unbundled pursuant to section 251(c)(3). Section 252(d) requires that the rate be based upon cost, and be nondiscriminatory, and further provides that it may include a reasonable profit. This standard has been interpreted by the FCC (and upheld by the Supreme Court[23]) to require forward-looking TELRIC pricing for all UNEs unbundled pursuant to section 251 of the TelAct.

Section 271 does not contain its own pricing standard. Section 271(c)(2)(B)(ii) (Checklist Item No. 2) requires that ILECs make UNEs available "in

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requests. Given that Verizon's pending *Arbitration* proceeding involves over 100 carriers and the same issues associated with the wholesale tariff, we believe that our approach of consolidating the two proceedings and developing a baseline wholesale tariff as a first step in the interconnection agreement process achieves the underlying goal of the TelAct, i.e., encouragement of interconnection between competitors and ILECs.

[23] *See AT&T v. Iowa Utilities Bd.*, 525 U.S. 355 (1999)(*Iowa II*).

accordance with the requirements of section 251(c)(3) and 252(d)(1)" while sections 271(c)(2)(B)(iv, v, vi, and x) (Checklist Items Nos. 4, 5, 6 and 10), which provide for access to loops, switching, trunk side transport, and databases, make no reference to a pricing standard.

In the *TRO*, the FCC interpreted the pricing provisions of the TelAct as requiring TELRIC pricing for section 251(c)(3) elements only and "just and reasonable" rates for 271(c)(2)(B)(iv, v, vi, and x) elements. The FCC found that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."[24] Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Communications Act empowered the Commission to adopt rules that implement the TelAct, the FCC found that it had authority to impose the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Communications Act. The FCC went even further and found that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or a 271 enforcement action, whether the price for a particular 271 element met the section 201/202 standard.[25] The FCC noted that prices similar to those currently charged in ILEC access tariffs would likely meet the standard, as would any prices negotiated through arms-length agreements.[26]

In its March 2004 decision in *UTSA II*, the D.C. Circuit affirmed the FCC's finding that the pricing standard for UNEs unbundled pursuant to § 271 is found in sections 201-202 of the TelAct and not section 251. Specifically, the court upheld the FCC's determination that TELRIC pricing was not required under section 271; all that was required was that the prices not be "unjust, unreasonable or discriminatory."[27] The Court did not address the FCC's assertion that it, rather than state commissions, should determine whether the price for a 271 element meets the just and reasonable standard. The Court did find, in the context of state unbundling authority, that claims relating to the preemptive scope of the *TRO* were not ripe, because no party had challenged a specific state decision.

Since the *USTA II* decision was released, several state commissions have directly addressed the issue of state authority to review pricing for 271 elements. The Massachusetts Department of Telecommunications and Electricity recently found that it could approve or deny, on the basis of market-based pricing, the prices included in Verizon's wholesale tariff for its §271 obligations because those services are

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[24] *TRO* at ¶ 656.

[25] *TRO* at ¶ 664.

[26] *Id.*

[27] *USTA II* at 53.

jurisdictionally intrastate.[28] On June 21, 2004, the Tennessee Regulatory Authority (TRA) issued an order which sets a 271 switching rate in the context of a section 252 arbitration proceeding.[29] Bellsouth has appealed that decision to the FCC and asked for an emergency declaratory ruling by the FCC that the action taken by the TRA violates the TelAct, FCC Orders, and federal precedent. The FCC has asked for comment on Bellsouth's petition.

C. Position of the Parties

1. Verizon

In its briefs, Verizon argued that the *TRO* makes clear that the FCC has exclusive jurisdiction over the pricing of 271 UNEs and that the "just and reasonable" standard, rather than TELRIC, should be applied to the rates for those elements. Verizon contended that even if TELRIC prices meet the "just and reasonable" standard, there is nothing that precludes Verizon from charging higher rates that also meet the "just and reasonable" standard. According to Verizon, the Commission would have no grounds for insisting on the lower TELRIC rate. Verizon also pointed out that while state commissions have authority to set rates for section 251 UNEs, there is no similar grant of authority for section 271 UNEs.

In its exceptions, Verizon urged us to clarify that all matters involving prices for section 271 elements are "deferred" to the FCC. Verizon argued that, because of its belief that we have no authority to define UNEs under section 271, we also would have no authority to set prices of any such UNEs. Verizon contested the grounds underlying the Examiner's finding that we have authority to set prices for section 271 UNEs, contending that the Examiner places too much significance on the Massachusetts DTE order cited above and that Verizon's petition for reconsideration of that order is still pending. Verizon also argued that Congress's silence on the issue of state enforcement of 271 obligations does not imply that states do, in fact, have any authority. Finally, Verizon alleged that *USTA II* "flatly rejected" any sub-delegation of FCC powers to state commissions.

Verizon also challenged the Examiner's recommendation that the Commission require Verizon to offer section 271 UNEs at TELRIC prices until Verizon obtained approval from the FCC of its 271 UNE rates. Verizon alleged that the FCC "ruled unequivocally" that TELRIC should not apply to section 271 UNEs and that the Examiner's recommendation was "based on a misunderstanding" of the process the

[28] *Proceeding by the DTE on its own Motion to Implement the Requirements of the FCC's TRO Regarding Switching for Large Business Customers Serviced by High-Capacity Loops*, DTE 03-59-A (Jan. 23, 2004), fn. 9.

[29] *In the Matter of Bellsouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-__ (July 1, 2004) at 1.

FCC intends to use for section 271 UNEs. Finally, Verizon urged the Commission to adopt the FCC's "safe harbor" pricing standards for section 271 UNEs, i.e. special access rates or commercially agreed upon prices.

2. CLECs

In its briefs, the CLEC Coalition argued that by agreeing to submit a wholesale tariff, Verizon agreed to file rate schedules for 271 UNEs which the Commission could review, accept, and/or reject. The Consolidated Intervenors did not directly address the Commission's authority to set prices for 271 UNEs because they believed, despite the specific questions posed in the Hearing Examiner's Procedural Order, that pricing issues would be addressed later.[30]

In their exceptions, a number of CLECs challenged the Examiner's analysis and recommendation that we refrain from exercising any section 271 pricing authority that we might have. The CLEC Coalition argued that the FCC's statements in paragraph 664 of the *TRO* should be viewed as a "limited statement" regarding the FCC's assertion of jurisdiction over section 271 pricing and that we should, in fact, exercise our 271 pricing authority. Specifically, the CLEC Coalition argued that paragraph 664's emphasis on pre-entry review by the FCC indicates a desire by the FCC not to "reach down to affect pricing in existing 271 approvals." The CLEC Coalition asserted that the FCC did not establish itself as the initial rate setting body in "a circumstance such as the one in Maine" but rather simply asserted its authority to review rates in the event of a disagreement between Verizon and the state commission. The CLEC Coalition urged us to exercise our authority to ensure that prices are conducive to competition and to provide reasonable transition for any rate changes. Finally, the CLEC Coalition endorsed the Examiner's recommendation that current TELRIC-based rates remain in place until we approve new 271 rates. The Coalition, however, urged us not to determine at this time that FCC-approved prices automatically be allowed to go into effect.

ALTS and Covad argued that the Supreme Court, in *Iowa II*, clearly held that while the FCC could establish the pricing methodology to be used for setting rates under section 252, it was the states that actually applied the methodology and set the rates. ALTS and Covad contended that we have an ongoing role in ensuring that the rates charged by Verizon under section 271 meet the appropriate standards. ALTS and Covad dispute the Examiner's "preemptive preemption" approach of finding preemption before finding an actual conflict with an FCC determination on the merits of an issue. They argued that the question is not whether a state pricing decision thwarts the policies of the *TRO* but, instead, whether it thwarts the requirements of section 251 and

[30]It is true that pricing issues were scheduled to be addressed later in the proceeding. However, parties should have reasonably expected that if a specific question relating to the legal underpinnings of the Commission's authority was posed for briefing, the question needed to be addressed.

271 of the TelAct. Finally, they argued that, contrary to Verizon's assertions, the FCC did not forbid the application of forward-looking pricing to section 271 UNES but rather only stated that TELRIC pricing was not required. Thus, a state commission could find that TELRIC pricing met the "just and reasonable" standard or that another forward-looking pricing methodology could be used.

USA Telephone also contended that we should exercise our authority to set prices for section 271 UNEs in order to protect the competitive environment in Maine and to meet the needs of Maine consumers. USA Telephone argued that we must be prepared to exercise our authority to encourage stability in the market. The current instability makes it very difficult for CLECs to secure the necessary capital to implement planned facility build-outs. While not suggesting a permanent status *quo*, USA Telephone did urge consideration of the competitive impacts during any transitions.

AT&T argued that the Examiner's recommendation that we refrain from exercising our pricing authority over section 271 UNEs was unwarranted because it was based upon the mistaken belief that the FCC had asserted exclusive jurisdiction in the *TRO*. AT&T pointed out that the Examiner's Report itself admitted that the FCC did not specifically preclude state commissions from evaluating compliance with the federal "just and reasonable" standard. AT&T urged us to preclude Verizon from raising its 271 UNE rates above TELRIC until it obtained specific approval for its new rates from the FCC.

D. Analysis

Determining the scope of the Commission's 271 pricing authority involves both interpretation of the *TRO* and a determination under both state and federal law of the Commission's authority to set rates for intrastate services and products. First, Verizon is correct that the FCC stated in the *TRO* that it would review rates for 271 UNEs in the context of 271 applications and enforcement proceedings. However, as described above, and as acknowledged by Verizon, the FCC has already delegated significant authority to state commissions to enforce 271-related requirements. While the FCC stated it would conduct the review, the FCC did not specifically preclude state commissions from also conducting such an evaluation. Thus, we find, for the reasons discussed below, that we have the authority to require Verizon to file prices for its section 271 UNEs in its wholesale tariff and that we may review those prices for compliance with the FCC's "just and reasonable" standard.[31]

There are a number of factors which generally support a state commission's authority to set prices for section 271 UNEs. First, the standard the FCC has announced for section 271 UNEs, "just and reasonable," is the same standard the Commission applies under 35-A M.R.S.A. § 301. Thus, the Commission has

[31]It is also possible that we may order Verizon to unbundle certain elements pursuant to state law, in which case we will use state law pricing standards to evaluate Verizon's proposed rates.

considerable experience in applying this standard to the rates of Verizon and many other public utilities. Further, state commissions, and not the FCC, are most familiar with the detailed company-specific data that will be used to support an ILEC's claim that particular rates are just and reasonable. In addition, as both CLECs and the National Association of Regulatory Utility Commissioners (NARUC) have argued in filings related to the appeal of the *TRO*, the Supreme Court's decision in *Iowa II* and the Eighth Circuit's decision in *Iowa III*[32] clearly establish that states, not the FCC, set rates for UNEs. Indeed, the Supreme Court stated that:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions .... The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[33]

Finally, state commissions have authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct. Section 271(c)(2)(A)(ii) requires that ILECs provide access and interconnection which meet the requirements of the 271 competitive checklist, i.e. includes the ILEC's 271 unbundling obligations. Thus, state commissions have the authority to arbitrate section 271 pricing in the context of section 252 arbitrations.

In addition to all of the supporting factors, we find that Verizon's commitment to file a wholesale tariff included a commitment to file prices for the elements included in the tariff. Indeed, if we do not require Verizon to file prices, its commitment to file a wholesale tariff becomes a hollow promise, given the complexities of the wholesale marketplace at this time. In addition, practical concerns, such as timely access to section 271 UNEs, require that we enforce Verizon's commitment by requiring it to file proposed rates for each of the section 271 UNEs. We do not foreclose the possibility that Verizon may also seek approval of such rates from the FCC. If it does obtain such approval, it may file those same rates with us and we will give the FCC's determination substantial weight during our review.

Until such time as we approve new rates for section 271 UNEs, adopt FCC-approved rates, or CLECs agree to section 271 UNE rates, Verizon must continue to provide all section 271 UNEs at existing TELRIC rates. We find this requirement necessary to ensure a timely transition to the new unbundling scheme. We have no record basis to conclude that TELRIC rates do not qualify as "just and reasonable" rates; while we might ultimately approve higher rates, we cannot do so without the benefit of a record or the agreement of the parties. We note that the decision we reach

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[32] *Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir. 2000).

[33] *Iowa II,* 525 U.S. at 384.

today is consistent with the approach embodied in the FCC's Interim Rules, which require a six-month moratorium on raising wholesale rates.[34]

V. COMMISSION AUTHORITY TO ORDER LINE SHARING PURSUANT TO STATE LAW

A. Legal Authority

1. Line Sharing

In the *TRO*, the FCC overturned its earlier decision in the *UNE Remand Order*[35] and found that CLECs are not impaired without access to the high frequency portion of the loop (HFPL), i.e. access to line sharing. Specifically, the FCC shifted its focus from the revenues derived from a single service deployed using the HFPL to the potential revenues derived from all services that could be provided over the full functionality of the loop. Thus, the FCC concluded that the increased operational and economic costs of acquiring a stand-alone loop are offset by the increased revenue opportunities afforded by use of the whole loop for services such as voice, voice over xDSL, data and video services.[36] While the FCC declined to explicitly find that any decision by a state commission to require line sharing under state law was automatically preempted, in paragraph 264 it invited any party aggrieved by such a decision to seek a declaratory ruling from the FCC.

In *USTA II*, the D.C. Circuit upheld the FCC's line sharing decision, finding that:

> [E]ven if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment.[37]

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[34] Order and Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 01-338, FCC 03-313, (rel. August 20, 2004)(Interim Rules Order).

[35] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, rel. November 5, 1999 (*UNE Remand Order*).

[36] *TRO at* ¶ 258.

[37] *USTA II at 45.*

Thus, under federal law, section 251 line sharing will only be available on a grandfathered basis for the next three years, with the price increasing each year until it reaches the full price of the loop, at which time unbundling will no longer be required.[38]

2. State authority to order unbundling

Recently, in the *Skowhegan OnLine* proceeding[39], we found that we have authority, pursuant to 35-A M.R.S.A. §§ 1306 and 7101, to order the unbundling of network elements not required by federal law when doing so meets a demonstrated need by CLECs and is consistent with both state and federal policies concerning broadband deployment. We predicated our decision in *Skowhegan Online* on an earlier decision in the *Mid-Maine Arbitration Case,*[40] in which we found that we had authority to order access to additional UNEs under section 252(d)(3) of the TelAct[41] and that 35-A M.R.S.A. § 1306[42] provided us with authority to designate additional UNEs so long as our actions did not conflict with federal law. We found in *Skowhegan Online* that section 1306 continued to provide us with independent authority under state law and that 35-A M.R.S.A. § 7101 provided additional authority to order unbundling where doing so will allow for further deployment of broadband, especially in rural areas. Thus, we found that unbundling pursuant to state law requires a showing that the lack of unbundling constitutes an unreasonable act or is insufficient when consideration is given to state law, public policy, and the potential impact of the unbundling on the availability of

[38]Neither the *TRO* or *USTA II* directly addressed whether an ILEC's continuing unbundling obligations under section 271 include continued access to line sharing with the ILECs and we will not reach that issue in this Order.

[39]*Investigation of Skowhegan Online, Inc.'s Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004) and Order on Reconsideration (June 15, 2004).

[40]*Mid-Maine Telplus, Re: Request for Arbitration of an Interconnection Agreement with Bell Atlantic*, Order Addressing Subloop and Extended Link Issues (E3 and E7) – Part 2, Docket No. 98-593 (April 9, 1999) (*Mid-Maine*).

[41]Our holding was based upon the fact that there was nothing in the TelAct that provided the FCC with exclusive authority to designate UNEs. *Mid-Maine* at 3. Indeed, the FCC's *Local Competition Order* specifically provided that states had authority to order additional UNEs pursuant to state law and the FCC's Rules at that time specifically provided for state commission designation of additional UNEs during arbitration proceedings. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996). The *TRO* has since vacated both of those rules/findings.

[42]Section 1306 provides that, if the Commission determines that a term, condition, practice or act is unjust, unreasonable, insufficient, or unjustly discriminatory, the Commission may "establish or change terms, conditions, measurement, practice, service or acts, as it finds just and reasonable."

telecommunications services to Maine consumers. In addition, any decision to unbundle pursuant to state law must not conflict with federal law.

In our Order on Reconsideration in *Skowhegan Online*, we re-affirmed our earlier findings and pointed to other provisions of state law that supported our unbundling authority. Specifically, we found that the standards in 35-A M.R.S.A. § 301, requiring all utilities to provide "safe, reasonable and adequate facilities and service," as well as those set forth in 35-A M.R.S.A. § 711, granting us authority to order the joint use of wires and prescribe reasonable compensation and reasonable terms and conditions, supported unbundling. We emphasized section 7101's clear expression of the Legislature's policy objective of supporting broadband deployment throughout the state. Finally, we pointed out that the Law Court had already found that the Commission has all the implied and inherent powers necessary to implement the objective set forth in section 7101. *New England Telephone v. PUC*, 1997 ME 222. Thus, we found that the clear policy objectives contained in section 7101, when combined with our broad mandate to ensure that utility practices and rates are reasonable pursuant to section 1306, provided us with the necessary authority to require Verizon to unbundle its legacy copper network.

3. Federal Preemption

a. Definition of Preemption

The Supreme Court has held that "preemption will not lie unless it is 'the clear and manifest purpose of Congress.'"[43] If a federal statute contains an express preemption clause, the court will first focus on the plain wording of the clause, "which necessarily contains the best evidence of Congress' preemptive intent."[44] Similarly, savings clauses, which specifically reserve state authority, are "the best evidence of Congress' preemptive intent."[45] Generally speaking, preemption will be found when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[46] What constitutes a sufficient obstacle, however, is a matter of judgment, informed by examining the statute as a whole and identifying its purpose and intended effects.[47]

[43] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[44] *Id.*

[45] *Id.*

[46] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).

[47] *Id.*

b. Language of the TelAct

Section 251(d)(3) of the TelAct states that the FCC may not preclude enforcement of any state commission decision establishing local exchange interconnection and access requirements which is consistent with section 251 and which "does not substantially prevent implementation of the requirements of this section." In the *TRO*, the FCC asserted that its interpretation of the requirements of section 251, i.e., its Rules, was intended by Congress to be included under the "requirements of this section" language of section 251(d)(3).[48] Thus, according to the FCC, any state decision that is inconsistent with the FCC's Orders or Rules (the so-called "federal regime") violates section 251(d)(3) and is preempted.

However, the FCC's assertion that its Rules are included in "the requirements of this section" language of section 251 was specifically rejected by the Eighth Circuit Court of Appeals in a decision concerning the FCC's *Local Competition Order*, which implemented the TelAct.[49] The Eighth Circuit held that section 251(d)(3) does not require state commission orders to be consistent with all of the FCC's regulations promulgated under section 251.[50] It stated that "[t]he FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical."[51] While portions of the Eighth Circuit's decision were ultimately reversed by the Supreme Court, the FCC did not challenge, nor did the Supreme Court reverse, the Eight Circuit's holding on section 251(d)(3).[52] Indeed, the FCC admits in footnote 611 of the *TRO* that the Eighth Circuit's interpretation of section 251(d)(3) is the law of the land and that mere inconsistency with the FCC's rules is not enough to trigger federal preemption. Thus, contrary to the assertions of both the FCC and Verizon, the mere fact that a state requires an additional unbundled element does not mean it automatically will be preempted. Instead, consideration must be given to whether the requirement is consistent with section 251 and whether it prevents its implementation.

In analyzing the legislative intent behind a statutory requirement that two mandates be consistent, courts have defined the word by its common usage, as found in the dictionary. *See* e.g. *Cross v. Warden, N.H. State Prison*, 644 A.2d 542, 543 (N.H. 1994)(the meaning of "consistent" is synonymous with "consonant" or "compatible."); *Ryan v. Roach Drug Co.*, 239 P. 912, 914 (Okla.1925)

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[48] *TRO* at 191.

[49] *See Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd sub nom. on other grounds, AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999)(*Iowa I*).

[50] *Id.* at 806.

[51] *Id.*

[52] *See TRO* at ¶ 192, fn. 611.

("'Consistent' means not contradictory, compliable, accordant."). Courts have also concluded that two designs may be consistent even if one contains additional elements. *Lake City Corp. v. City of Mequon*, 558 N.W.2d 100, 104 (Wis.1997) ("so long as any issues addressed in both a master plan and an official map are not contradictory, the master plan is consistent with the official map").

The Supreme Court of Vermont addressed the meaning of section 251's "consistency" requirement in a challenge to an order of the Vermont Public Service Board requiring Verizon to make certain facilities or services available to CLECs pursuant to state law.[53] Verizon argued that the Board's order was inconsistent with federal law and not supported by independent state authority.[54] In holding that there was ample state authority to support the order and that the order did not contradict federal law, the Vermont court described how Congress intended the Act to work in conjunction with state regulatory commissions:

> The Telecommunications Act of 1996 fundamentally amends the Communications Act of 1934, the principal legislation that regulates telecommunications and established the FCC. . . . The use of a federal statute by a state board is consistent with the federal government's approach to telecommunications regulation, in which states are considered partners in regulation. In both the 1934 Act and the 1996 Act, Congress has taken pains to preserve the overlapping jurisdiction of the states and the federal government over the telecommunications industry. . . . Congress did not intend to occupy the field of telecommunications regulation, it took explicit steps to maintain the authority of state regulatory bodies to enforce and work within the Act.[55]

The court further explained that the "federal scheme does not outline any limitations on state authority to regulate above and beyond the minimum requirements of the Act . . . federal law sets only a floor, the requirements of which may be exceeded by state law."[56] Furthermore, the Vermont court emphasized that when

[53] *In re Petition of Verizon New England Inc. d/b/a Verizon Vermont*, 795 A.2d 1196 (Vt. 2002).

[54] *Id.* at 1198.

[55] *Id.* at 1201.

[56] *Id.* at 1204.

compliance with a state commission's order does not interfere with a carrier's ability to comply with federal law, there is no conflict between the state and federal regulations.[57]

B. Positions of the Parties

1. Verizon

Verizon argued that the FCC has determined that CLECs are not impaired without unbundled access to line sharing. According to Verizon, where federal law sets forth the legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, "the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns." Citing section 251(d)(3) and "long-standing federal preemption principles," Verizon asserted that state commissions have no authority to override the FCC's determination that the unbundling of certain network elements is not required under the TelAct.

Verizon contended that the Commission has no independent authority under state law to impose additional unbundling requirements on Verizon, especially where the FCC has explicitly declared that the UNE is not required. Verizon further argued that the Commission does not have authority to order unbundling under section 271, but even if it did, Checklist Item No. 4 - the local loop - does not include separate access to the HFPL. Additionally, it argued that the pricing would not be TELRIC but would be "just and reasonable" which would require a "fact specific inquiry" conducted by the FCC.

In its Reply Brief, Verizon reiterated its position that "[t]he Commission is legally preempted from re-imposing unbundling obligations eliminated by the FCC's rulings in its *TRO*." In particular, Verizon disputed the CLECs' claim that the Commission has separate state authority to order line sharing and stated that, "where the FCC determines that an element should not be unbundled, a state may not lawfully override that determination." Verizon also refuted the CLECs' claim that the Commission can unbundle HFPL based on Maine specific facts.

In its Supplemental Brief, Verizon asserted that *USTA II* affirms the FCC's findings in the *TRO* on line sharing and unambiguously struck down the FCC's delegation of any unbundling authority to states.[58] Verizon also repeated its belief that the "Commission may not lawfully rely on state law to impose an unbundling obligation for line sharing, feeder subloops, OCN transport, entrance facilities or other UNEs expressly eliminated or curtailed by the FCC in the *TRO*." Referring to its previous statements concerning the absence of state law authorizing unbundling, Verizon argued that even if the state is authorized to order unbundling (which they insist, it is not), it

[57] *Id.* at 1205.

[58] *USTA II* at 12.

may not do so in the case of line sharing because *USTA II* affirmed the FCC's decision in the *TRO* not to order line sharing because it discourages investment.

In its exceptions, Verizon objected to the Examiner's recommendation that we find that line sharing is a continuing 271 obligation under Checklist Item No. 4 but did not directly address state unbundling authority.

2. CLECs[59]

In their Brief, the Consolidated Intervenors pointed to the Commission's reliance upon Verizon's performance in Maine on the number of line sharing arrangements when it found Verizon in compliance with Checklist Item No. 4 during Maine's 271 proceeding. They contended that allowing Verizon to discontinue line sharing now effectively repudiates one of the conditions for the Commission's support and is anti-competitive. The Consolidated Intervenors argued that the FCC took pains to make clear that 271 requirements remain unaffected by the *TRO* (citing to ¶¶ 653, 655). They also suggested that the Commission follow the Pennsylvania Public Utilities Commission's lead in insisting that Verizon honor its 271 obligations. Finally, they cited 35-A M.R.S. A. § 7101 and argued that Verizon's proposal contradicts state telecommunications policy of promoting broadband, especially in rural areas, and urged us to order line sharing because it has been instrumental in creating and fostering competition in rural Maine.

In their Reply Brief, the Consolidated Intervenors again described how Verizon and the Commission relied on the provisioning of line sharing to show that Verizon had opened up its network to competition during the 271 review. The Consolidated Intervenors also cited paragraph 650 of the *TRO* which states that "Section 271(c)(2)(B) establishes an independent obligation for BOCs to provide access to loops...." and implored the Commission to enforce Verizon's 271 obligations and require continued line sharing.

In their Supplemental Brief, the Consolidated Intervenors stated that *USTA II* confirmed the FCC's conclusion that section 271's unbundling requirements for BOCs are independent of a BOC's section 251 requirements. They also argued that "the Court essentially held that the *TRO* has no impact whatsoever, from a legal standpoint, on a state Commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs."

As stated earlier, the Consolidated Intervenors filed separate exceptions. GWI argued that the Commission is not preempted from ordering line sharing and that, absent a court finding of preemption, the Commission should rely upon state law and policy to require unbundled line sharing. GWI argued that that no

[59]The CLEC Coalition did not brief the line sharing issues but "supports the arguments and conclusions set forth in the briefs on Line Sharing issues submitted by GWI, Conversant and the Office of the Public Advocate."

court had supported the FCC's proposition that any unbundling not required by the FCC's rules promulgated under section 251 is preempted by the "requirements of this section" language. GWI also pointed to the FCC's own acknowledgement of the limitations of the preemptive effect of the TelAct.

GWI's exceptions also addressed both the state policy supporting broadband deployment and the impact on that policy if line sharing is eliminated. GWI pointed out that the price for line sharing will rise in October and that if GWI has to raise its rates to cover increased costs, rural areas will be the hardest hit. GWI also argued that the FCC's line sharing decision was based upon a vision of the competitive landscape that does not match what is occurring in Maine and which has changed since the issuance of the *TRO* itself. Specifically, *USTA II* overturned the FCC's findings regarding the unbundling of mass market switching, which will limit the development of residential voice competition and the revenues associated with it.

GWI argued that the consequences of the FCC's actions seriously impact the future of competition in Maine, particularly for broadband services. According to GWI, while cable broadband service is available in urban and suburban areas, it is generally not available in rural areas. While Verizon broadband is available in many Verizon exchanges, over 40% of the customers are impacted by distance limitations. GWI asserted that there are ways to overcome those problems but they require CLEC access to Verizon line sharing and Verizon's cooperation in deploying the solutions. Thus, GWI urged us to exercise our authority to order line sharing and to set a fair rate for line sharing because failure to do so will result in constant litigation over interconnection agreement terms.

The OPA's exceptions urged us to order Verizon to continue to provide unbundled line sharing at affordable rates. The OPA argued that the FCC's decision regarding line sharing transition rates should not be interpreted as an FCC decision as to a just and reasonable rate under section 271 and that we should exercise our authority to make a determination regarding pricing. Absent Commission action, Maine consumers will be harmed by substantial increases in prices for xDSL and the potential destruction of the nascent broadband market in Maine.

Cornerstone's exceptions also recommended that we exercise our authority to order the continued availability of line sharing at reasonable rates. Cornerstone alleged that if the FCC's transition rates are allowed to go into effect, Cornerstone would not be able to serve many of the rural exchanges it intends to serve because it could not cover the exchange-specific costs. Cornerstone pointed out that if it and other Maine CLECs cannot economically serve these rural areas, it is unlikely that larger firms would be willing to invest in areas where the margins are so slim. For some of these exchanges, where neither Verizon nor the cable provider have deployed xDSL, this means that citizens and businesses in these areas will continue to lag behind more urban areas.

ALTS and Covad urged us to exercise our own authority to order line sharing under state law. They argued that sections 251 and 252 of the TelAct preserve the authority of state commissions to order unbundling and that the Supreme Court has refused to diminish the role of state commissions in overseeing local competition matters. Further, and contrary to the assertions of the FCC, the FCC cannot preempt state commissions by its orders or rules – the language of the TelAct preserving state authority controls. ALTS and Covad also pointed out that in the *TRO* the FCC did not preempt any existing state law unbundling requirements nor any future state law unbundling requirements – it acknowledged that such unbundling requirements may be consistent with the federal framework.

ALTS and Covad argued that facts supporting the FCC's decision not to unbundle line sharing on a national basis do not exist in Maine. Specifically, the FCC relied upon a carrier's ability to line-split with other carriers. However, in Maine, Verizon has not made line splitting operationally available in the same manner as its own retail voice and data bundles, thereby limiting CLECs' ability to line split. In addition, there are customer-impacting time constraints on line splitting, and different policies for submission of orders, and Verizon will not line split on resold voice service. Thus, ALTS and Covad urged the Commission to order the continued availability of line sharing at TELRIC rates.

AT&T supported the Hearing Examiner's determination that line sharing should be provided under section 271 but disagreed with the recommendation that we not exercise our authority to set prices for section 271 UNEs. Specifically, AT&T contended that the FCC had not asserted exclusive jurisdiction over section 271 pricing and that we need not refrain from exercising our section 271 authority in deference to a claim of exclusive jurisdiction that the FCC did not make.

C. **Decision**

We find that the FCC has not preempted our further consideration of whether to unbundle line sharing under state law. First, we agree with GWI that the Hearing Examiner essentially recommended preemptive preemption, i.e. that we not take action on the grounds that the FCC might attempt to preempt our action. We reject this approach because, as several parties pointed out, the FCC specifically declined to make a finding of preemption of both existing and future state unbundling decisions. While the FCC made clear that it might find preemption if the state decision met federal preemption standards, such a determination would need to be made based upon the specific circumstances of each case. The D.C. Circuit reached the same conclusion in *USTA II*, i.e., that claims relating to preemption were not ripe because no specific state decision had been challenged.

While we recognize the federal policies enunciated by the FCC in the *TRO*, we find that further exploration of the specific circumstances in Maine and state law policies and mandates are necessary in order to determine whether we should, in fact, exercise our authority under 35-A M.R. S.A. §§ 301, 711, 1306 and 7101 to order

line sharing. As we stated in our *Skowhegan Online* decision, we take very seriously the Legislature's directive that all Maine citizens should have access to broadband services. The issues raised by GWI, Cornerstone, and the OPA concerning the viability of rural broadband deployment warrant a closer examination. It would be premature to find at this time, both on a factual and legal basis, that we have already been preempted by the FCC. In addition, there are several pending legal challenges at the FCC and in the courts which may provide further direction concerning the scope of any federal preemption relating to line sharing. Waiting for resolution of those proceedings, however, would mean delaying for an uncertain period a decision that might prevent a significant declaration in rural broadband deployment. Given our obligation to implement legislative directives. We think the more appropriate course is to proceed as expeditiously as possible to resolve the question of whether to order the unbundling of line sharing under state law.

If we decide to order line sharing pursuant to state law, we would also set the price for such sharing using state law standards, i.e., just and reasonable rates. We invite the parties to develop a record in this proceeding that would allow us to set rates at the conclusion of the proceeding.

VI. CONCLUSION

For the reasons discussed above, we order Verizon to include 271 UNEs and prices for those UNEs in its state wholesale tariff. We also determine that we have authority under state law to order the unbundling of line sharing and that we should proceed to investigate whether to exercise that authority.

Dated at Augusta, Maine, this 3rd day of September, 2004.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

ATTACHMENT 2

Attachment 2

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

July 23, 2004

EXAMINER'S REPORT

NOTE: This Report contains the recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file responses or exceptions to this Report on or before **noon on August 6, 2004**. It is expected that the Commission will consider this report at a special deliberative session on **August 12, 2004.**

I. SUMMARY

In this Order, we find that Verizon must include all of its wholesale offerings, including unbundled network elements (UNEs) provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct), in its state wholesale tariff. We also find that Verizon must continue to offer line sharing pursuant to Checklist Item No. 4 of section 271. Finally, we decline the opportunity to exercise any authority we might have to set rates for section 271 UNEs.

II. BACKGROUND

In our Comments to the Federal Communications Commission (FCC) regarding Verizon's section 271 application for authority to enter the interLATA toll market (Verizon's 271 Application), we stated that the availability of a wholesale tariff or Statement of Generally Available Terms would greatly reduce the time required to effect a valid interconnection agreement and would also eliminate the perception shared by some CLECs that they were being "forced" to accept contract terms in their

interconnection agreements that were unrelated to the terms that they were interested in negotiating.[1] Thus, in a March 1, 2002 letter from the Commission to Verizon (Commission's 271 Letter), we explicitly conditioned our support of Verizon's 271 Application on Verizon's agreement to fulfill a number of additional requirements, including the filing of a wholesale tariff. Verizon committed to meeting the Commission's conditions in a March 4, 2002 letter to the Commission and on November 1, 2002, Verizon submitted a schedule of terms, conditions and rates for Resold Services (P.U.C. No. 21) and the provision of Unbundled Network Elements and Interconnection Services (P.U.C. No. 20) along with cost studies for certain non-recurring charges and OSS-related issues.

In order to allow enough time to thoroughly examine the tariff, we suspended it on November 11, 2002. On November 13, 2002, the Hearing Examiner issued a Procedural Order requesting intervention and scheduling an initial Case Conference for December 10th. On December 4, 2002, prior to the Case Conference, the Hearing Examiner issued a second Procedural Order granting intervention to all parties that requested it[2] and proposing a schedule for processing this case. Between December

[1] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine,* CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) at 7.

[2] The parties include: OPA, ASCENT, WorldCom, Mid-Maine Telecommunications, and Oxford Networks. Mid-Maine and Oxford filed joint briefs as the CLEC Coalition.

2002 and August 2003, the parties conducted some discovery and attempted to identify all the issues that need to be litigated.[3]

On August 11, 2003, the Hearing Examiner issued a Procedural Order setting a hearing date of October 2, 2003, and attaching a list of issues that the Advisors intended to explore at the hearing. Before a hearing could take place, however, on August 21, 2003, the FCC issued its *Triennial Review Order (TRO)*.[4] A case conference was held on September 16, 2003, to discuss with the parties the potential impact of the *TRO* on the wholesale tariff. On September 18, 2003, the Examiner issued a Procedural Order summarizing the September 16th case conference and setting deadlines for Verizon to file new red-lined tariff schedules based on the changes required by the *TRO*.

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[3]At the Case Conference on December 10th, the proposed schedule was discussed and on December 17th the Hearing Examiner issued a Procedural Order to grant three additional interventions (Great Works Internet, Conversent Communications, and Cornerstone Communications) and to set a preliminary schedule. On January 15, 17, and 23, and February 3, 2003, the Hearing Examiner issued Procedural Orders adjusting the case schedule and outlining further instructions and an initial list of issues to be litigated in the proceeding. On January 22nd, the CLEC Coalition and Cornerstone Communications also filed a list of initial issues. On February 3, 7, and 14, 2003, Verizon submitted responses to Staff's and other parties' issues and questions. On February 18, 2003, both Staff and the CLEC Coalition filed a list of issues that Verizon should attempt to address in its testimony. On February 24, 2003, the Hearing Examiner issued a Procedural Order establishing a schedule for testimony and discovery. On March 3, 2003, the Commission suspended the Verizon tariff for a second time to allow additional time to review it. On March 24, 2003, Verizon witnesses filed panel testimony. Staff issued its first set of data requests on the Verizon testimony on April 1, 2003, to which Verizon responded on April 22nd and 23rd. On May 20, 2003, Verizon issued discovery requests to GWI, to which GWI responded on May 27th.

[4]Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 96-98 *et al.*, FCC03-36, 18 FCC Rcd 16978 (rel. August 21, 2003)(*Triennial Review Order or TRO).*

On October 16, 2003, the CLEC Coalition filed a Motion for Issuance of Temporary Order. In its Motion, the CLEC Coalition objected to a letter sent by Verizon on October 2nd which stated that Verizon would be discontinuing the provisioning of certain UNEs in compliance with the *TRO*. On October 21, 2003, the Hearing Examiner issued a Procedural Order stating that Verizon had correctly identified those UNEs that the FCC eliminated from the TelAct's section 251 unbundling requirements and that while changes in terms and conditions caused by the *TRO* would be litigated in this proceeding, the Commission would not re-litigate the decision by the FCC to eliminate specific UNEs from section 251's requirements. Finally, the Examiner stated that the Commission had not anticipated the need to address Verizon's continuing obligations under section 271 in this proceeding and that the Advisors would further consider the issues and determine the next steps.

On December 16, 2003, a case conference was held. After discussion, the Hearing Examiner determined that before hearings on the substance of the Wholesale Tariff could be held, legal briefing was necessary on two issues: (1) whether the Commission had authority, under either state or federal law, to require Verizon to tariff its obligations to continue providing unbundled network elements (UNEs) under section 271 of the TelAct and whether it could set the rates for those obligations; and (2) whether the Commission has the authority, under either state or federal law, to order Verizon to continue providing line-sharing at Commission-set TELRIC rates.

On January 16, 2004, Initial briefs were filed by Verizon-Maine (Verizon), the CLEC Coalition, and the Consolidated Intervenors (Biddeford Internet Company d/b/a Great Works Internet (GWI), the Office of the Public Advocate (OPA) and Cornerstone

Communications (CC)). The same parties filed reply briefs on January 30, 2004.

Before a decision could be reached by the Commission on the legal issues, the D.C. Circuit Court of Appeals issued its decision in *USTA II*,[5] the appeal of the *TRO*. Because *USTA II* was directly relevant to many of the legal issues raised in this Docket, the Hearing Examiner issued a Procedural Order on March 4, 2004, allowing all parties to supplement previously filed briefs to address the impact of the D.C. Circuit Court decision on their positions in this case. On March 26, the Consolidated Intervenors filed a supplemental brief, as did Verizon. The arguments from all parties in the three rounds of briefs are summarized below along with our analysis and decision.

III. COMMISSION AUTHORITY TO REQUIRE TARIFFING OF SECTION 271 OFFERINGS

A. Introduction

As will be explained in detail below, at the time we conditioned our support of Verizon's 271 Application on Verizon filing a wholesale tariff, Verizon's unbundling obligations under sections 251/252 of the TelAct were synonymous with its section 271 unbundling obligations. Thus, we made no distinction between the two potentially differing obligations; we simply required a wholesale tariff. Since that time, the *USTA I* decision was released, the FCC issued its *TRO*, and, most recently, the *USTA II* decision was issued. The impact of these three decisions on the issue at hand can be summed up as follows: today an ILEC's 251/252 obligations are narrower (in most

[5] *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II*).

respects[6]) than its 271 obligations. The CLECs contend that Verizon must now amend its proposed wholesale tariff to include its section 271 unbundling obligations. Verizon argues that the FCC has exclusive jurisdiction over matters relating to its 271 obligations and that this Commission has no authority to require Verizon to amend its wholesale tariff to include its 271 obligations.

B. Applicable Law

Section 271 of the TelAct sets forth the requirements an ILEC must meet before it will be allowed to enter the interLATA toll market. The so-called "competitive checklist" contains 14 measures which were intended to ensure that the ILEC had opened the local exchange market to competition. Checklist Item No. 2 requires "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)." Section 251(c)(3) requires ILECs to provide access to their network, i.e. UNEs, while Section 252(d)(1) sets the pricing standard for those UNEs, i.e., TELRIC pricing. Section 251(c)(3) also requires compliance with section 251(d)(2) which limits access to UNEs at TELRIC pricing to only those which meet the "necessary and impair" standard.[7] Thus, Checklist Item No. 2 requires an ILEC to meet

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[6]In a recent order in the *Skowhegan Online Proceeding*, we found that subloops were a requirement under Section 251 but not a requirement under Section 271. *Investigation of Showhegan Online's Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004), and Order Denying Reconsideration (June 16, 2004).

[7]In the *TRO*, the FCC retained its earlier definition of "necessary" ("...a proprietary network element is 'necessary' within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.") and adopted a new definition of "impairment" ("A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a

all of the 251 and 252 unbundling and pricing standards, which the FCC limited in the *TRO* to specific types of loops, subloops, and transport.[8]

Checklist Items Nos. 4, 5, 6, and 10 require ILECs to provide unbundled access to loops, transport, switching and signaling. The FCC has explicitly found that, despite elimination of a number of UNEs under section 251, ILECs must continue to provide access to those UNEs under section 271. However, none of these other checklist items, unlike Checklist Item No. 2, cross reference sections 251(c)(3) and 252(d)(1). Thus, according to the FCC in the *TRO*, UNEs unbundled under Checklist Items Nos. 4, 5, 6 and 9 must only meet the "just and reasonable" standard of 47 U.S.C. §§ 201-202 and not the TELRIC standard required under section 251.

In the FCC's Order granting Verizon 271 authority in Maine,[9] the FCC stated:

> *Working in concert with the Maine Commission*, we intend to monitor closely Verizon's post-approval compliance for Maine to ensure that Verizon does not "cease [] to meet any of the conditions required for [section 271] approval.[10]

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barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.") *TRO* at ¶¶ 170, 84.

[8]*USTA II* vacated the *TRO*'s findings regarding mass market switching, thereby effectively eliminating switching as a 251 UNE.

[9]*Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization to Provide In-Region, InterLATA Services in the State of Maine*, CC Docket No. 02-61, Order, 17 FCC Rcd 11676 (June 19, 2002) (Maine 271 Order).

[10]*Maine 271 Order* at ¶ 65.

(emphasis added). The FCC referred readers of the *Maine 271 Order* to its *Kansas/Oklahoma 271 Order*, for a more complete description of the 271 enforcement process. The *Kansas/Oklahoma 271 Order* states:

> Furthermore, we are confident that *cooperative state and federal oversight and enforcement* can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets.[11]

(emphasis added). Thus, the FCC recognized the important role that state commissions would play in enforcing the requirements of section 271. Of more importance, however, is the *Kansas/Oklahoma 271 Order*'s citation to the *New York 271 Order*, which made several relevant findings. First, while noting that Congress had authorized the FCC to enforce section 271 to ensure continued compliance, the New York 271 Order specifically endorsed state commission authority to enforce commitments made by Verizon [then Bell Atlantic] to the New York Public Service Commission. The FCC stated that:

> Complaints involving a BOC's [Bell Operating Company] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC.[12]

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[11] *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (*Oklahoma/Kansas 271 Order*).

[12] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953 (*New York 271 Order*) at ¶ 452.

Thus, the FCC explicitly recognized the authority of state commissions to enforce 271-related commitments including, but not limited to, performance assurance plans (PAPs). Indeed, the FCC noted "with approval" the fact that the New York PAP "will be enforceable as a New York Commission order."[13]

Turning to Verizon's commitments here in Maine, as stated above, Verizon committed to the following relevant conditions, contained in the March 1, 2002, letter from the Commission:

> 1. Verizon will file a wholesale tariff for Maine no later than October 1, 2002. In the interim, CLECs shall be allowed to amend their interconnection agreements with Verizon in such a manner that enables them to negotiate the inclusion of a single UNE (and any terms and conditions related to the single UNE) rather than be required to sign a multi-part or omnibus amendment which contains provisions unrelated to the single UNE.[14]

In our April 10, 2002 Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of the Telecommunications Act of 1996, we explicitly conditioned our support of Verizon's 271 application upon Verizon's compliance with the list of conditions contained in our March 1, 2002 letter to Verizon, including its commitment to file a wholesale tariff. Specifically, we stated:

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[13]*New York 271 Order* at n. 1353.

[14]March 1, 2004 Letter from Commission to Edward Dinan, President, Verizon Maine.

> The MPUC finds, based upon the record before us, Including the commitments made by Verizon in its March 4, 2002 letter to the MPUC, that Verizon meets the Section 271 Competitive Checklist.[15]

Verizon's commitment to file a wholesale tariff for Maine alleviated certain concerns we had regarding the ability of individual CLECs to negotiate interconnection agreements. Specifically, during the course of our 271 proceeding, we heard from a number of CLECs regarding the difficulties and delays they encountered with Verizon when trying to re-negotiate or amend their interconnection agreements. We found that requiring Verizon to submit a wholesale tariff would simplify the interconnection process for CLECs and provide a single forum for litigating disputes and thus we explained in our Report to the FCC that:

> Unlike some other states, Verizon does not have a Statement of Generally Available Terms (SGAT) or wholesale tariff for the State of Maine. Availability of a wholesale tariff would greatly reduce the time required to effect a valid contract and would also eliminate the possibility of "tying" unrelated sections of an interconnection agreement together when trying to add new terms to an existing agreement. Thus, at our request, Verizon has agreed to file a wholesale tariff for our review by October 1, 2002. This will provide us an opportunity to review all of the terms and conditions that Verizon imposes on CLECs purchasing wholesale services.[16]

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[15]Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) (271 Report to FCC) at p. 1.

[16]271 Report to FCC at p. 7.

Thus, we found the filing of a wholesale tariff encompassing all of Verizon's wholesale obligations would benefit the CLECs, Verizon, and the Commission by consolidating our review of Verizon's wholesale terms and conditions.

C. Positions of the Parties

1. Verizon.

Verizon's initial brief did not directly respond to the Hearing Examiner's question concerning Commission authority to require Verizon to tariff its 271 obligations. In its arguments concerning the availability of specific elements, Verizon admits that in paragraph 653 of the *TRO*, the FCC recognized that former Bell Operating Companies (BOCs) have ongoing access obligations under section 271 of the TelAct but argues that nothing in the TelAct gives a state commission any power to interpret or enforce section 271 requirements. According to Verizon, only the FCC may issue regulations relating to 271 UNEs and only the FCC can set rates for these UNEs. Verizon maintains that the pricing standard set by the FCC for 271 network elements, "just and reasonable," is not the same as a total element long run incremental cost methodology (TELRIC) used for section 251 UNEs.

In its reply brief Verizon acknowledged that the Commission may play a role in enforcing 271 obligations – for example, by administering the Performance Assurance Plan (PAP) and Carrier to Carrier Guidelines – but argued that this in no way suggests that the FCC has delegated, or could delegate, to state commissions the authority to determine, in the first instance, whether section 271 requires the unbundling of a particular network element, independent of section 251 requirements. Finally, although Verizon does not specifically address state authority under section 271 in its

Supplemental Brief, Verizon states that the "Commission plainly has no authority to order additional unbundling of network elements under the TelAct."

2. Consolidated Intervenors.

In their initial brief, the Consolidated Intervenors state that the FCC "took pains" to confirm that section 271 creates independent access obligations for BOCs and cites paragraphs 653 and 655 of the *TRO*. They also point to the fact that this Commission conditioned its support of Verizon's 271 Application to the FCC on Verizon's willingness to adhere to a number of requirements that it would not otherwise be required to meet under section 251.

In their reply brief, the Consolidated Intervenors urged the Commission to reject Verizon's argument that we do not have authority to enforce 271 obligations. They point to the history of this case, and the fact that Verizon filed the wholesale tariff in compliance with a condition set by the Commission during its 271 review as evidence of the Commission's authority. They assert that Verizon's argument that the Commission has no power to regulate its wholesale tariff "constitutes an outright repudiation of a fundamental premise of the agreement" in the 271 case.

In their Supplemental Brief, the Consolidated Intervenors state that *USTA II* confirms that Verizon has section 271 obligations that are independent of its obligations under section 251. They also interpret the *USTA II* decision to confirm that the *TRO* does not impact a state commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs.

3. CLEC Coalition.

In its brief, the CLEC Coalition states that the authority for the Commission to require Verizon to tariff its UNE obligations under section 271 comes from the Congressional framework of section 271, Verizon's explicit agreement to the UNE tariffing obligations in Verizon's March 4, 2002 letter, and the plain and unambiguous declarations of the FCC in paragraphs 653-655 of the *TRO*. The CLEC Coalition also concludes that the FCC expressly found that it was the responsibility of both the FCC and state commissions to ensure compliance with section 271. Here, the state should secure compliance by setting prices for UNEs established pursuant to section 271. Finally, the CLEC Coalition argues that the Commission must exercise its 271 authority over Verizon, because if the state does not, no one will; the FCC is simply without the resources. The absence of state action would have a drastic effect on the competitive landscape in Maine. In their reply brief, the CLEC Coalition concurred with the Consolidated Intervenors and urged the Commission not to let Verizon break its agreement to meet the obligations it agreed to during the 271 approval process.

D. Analysis

As stated above, at the time of Verizon's 271 proceeding, Verizon's unbundling obligations under 251/252 of the TelAct were the same as its 271 unbundling obligations and thus there was no need to distinguish between the two types of requirements. Now that they are different, we must determine both the scope of Verizon's commitment to file a wholesale tariff and whether this Commission has authority to require Verizon to file a tariff in Maine reflecting its 271 unbundling obligations, i.e. its obligations under Checklist Items 4, 5, 6, and 9.

First, with regard to the scope of Verizon's commitment to file a wholesale tariff in Maine, we examine the underlying purposes of the condition and find that the same reasons for requiring a wholesale tariff encompassing Verizon's 251 obligations apply equally to Verizon's 271 obligations. Indeed, they apply even more today when the legal and regulatory landscape has become increasingly confusing and complex, making it difficult to completely address and negotiate all of the issues that may come up in an interconnection agreement negotiation. In the Verizon Arbitration proceeding,[17] CLECs complained that Verizon has not responded to requests from CLECs to negotiate amendments to their interconnection agreements. These are the same types of complaints we heard during the 271 process which led us to adopt the wholesale tariff condition in this first place. Finally, Verizon has not argued to us that it did not commit to tariff all of its wholesale obligations. Instead, it focuses on the jurisdictional issues without examining the motivations and intentions behind its 271 commitment. We find that a reasonable interpretation of the condition we placed upon Verizon, and the condition it committed to fulfill, requires Verizon to include both its 251 and 271 unbundling obligations in its wholesale tariff filed in Maine.

We turn now to our authority to enforce that commitment. While Verizon is correct that section 271(d)(6) allows for continued enforcement of an ILEC's 271 obligations by the FCC, Verizon fails to explain adequately why states have authority over some 271 issues, such as performance assurance plans, and not others. Previously, state commissions did not have authority to approve an ILEC's 271

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[17] *Investigation Regarding Verizon Maine's Request for Consolidated Arbitration*, Docket No. 2004-135, Order (June 4, 2002).

application but were allowed, indeed encouraged, by the FCC to conduct extensive fact-finding proceedings to ascertain whether the terms, conditions, and prices of an ILEC's wholesale operations met 271 standards. While the FCC made the ultimate finding of compliance, it relied heavily upon the work of state commissions. Indeed, the FCC noted in its *Maine 271 Order*:

> 3. We wish to recognize the effort and dedication of the Maine Public Utilities Commission (Maine Commission). In smaller, more rural states, the section 271 process taxes the resources of the state commissions, even more heavily than in other states. Yet, by diligently and actively conducting proceedings beginning in 1997 to set TELRIC prices, to implement performance measures, to develop a Performance Assurance Plan (PAP), and to evaluate Verizon's compliance with section 271 of the Act, the Maine Commission laid the necessary foundation for our review and approval. We are confident that the Maine Commission's efforts, culminating in the grant of this application, will reward Maine consumers by making increased competition in all markets for telecommunications services possible in the state.
>
> . . .
>
> 5. We rely heavily in our examination of this application on the work completed by the Maine Commission. . . .

We find that states have a similar role with regard to enforcement of 271 obligations. Indeed, it makes both procedural and substantive sense to allow state commissions, which are much more familiar with the individual parties, the wholesale offerings, and the issues of dispute between the parties, to monitor ILEC compliance with section 271 by applying the standards prescribed by the FCC, i.e. ensuring that Verizon meets its Checklist Items No. 4, 5, 6, and 9 obligations.

As indicated above, the FCC has already clearly stated that states may enforce commitments made by ILECs during the 271 process. Here, where the commitment involves filing a wholesale tariff, we believe we also have authority to review that tariff for compliance with the applicable federal and state requirements. If a party believes the Commission has not applied the correct standard, the party may then file an action with the FCC pursuant to 47 U.S.C. §271(d)(6) and the FCC will have the benefit of the detailed factual record developed by us. Nothing about our review of Verizon's wholesale tariff preempts or invalidates the FCC's authority under section 271(d)(6). If the FCC disagrees with the position we take here, it can explain itself in any order issued on appeal. In the meantime, our decision will provide a single litigation proceeding to resolve the myriad of issues resulting from the *TRO* and *USTA II*.

In addition to the legal basis for our decision, our decision also addresses a significant practical consideration facing the Commission. Specifically, from a Commission resource perspective, it makes much more sense to litigate all of the issues associated with unbundling in one docket and develop a standard offer or Statement of Generally Available Terms (SGAT). A single litigated case ensures that we receive the benefit of briefing on an issue from all interested parties, rather than rely on individual litigants to brief issues that may, or may not, be important to them. Individual litigation diverts Commission resources from addressing matters that impact all carriers to issues that may only affect one or two carriers.

Finally, we note that 35-A M.R.S.A. § 304 requires that all utilities file schedules containing the rates, terms, and conditions for any service performed by it within the State. We have previously interpreted this provision to require filing of

wholesale rates with the Commission, i.e. services which are resold to other carriers or special contracts made with specific customers. For example, Verizon has on file with the Commission a state access tariff through which it offers many UNE-like services, such as high capacity transport. Thus, subject to the specific finding below, we require Verizon to file both its terms and conditions and rates for all of its 251 and 271 obligations in its Maine wholesale tariff.

IV. COMMISSION AUTHORITY TO SET PRICES FOR § 271 OFFERINGS

A. Introduction

Now that we have determined that Verizon must tariff its 271 obligations, we must consider the extent of our authority to set rates for those 271 offerings. Under state law, our authority is clear: 35-A M.R.S.A. § 301 requires that rates be just and reasonable and gives the Commission the authority to determine whether a utility's rates meet this standard. The Commission's authority under federal law is not as clear and requires a review of sections 251 and 252 of the TelAct, the *TRO*, and *USTA II*.

B. Applicable Law

Section 252 of the TelAct requires state commissions to apply the pricing standards found in section 252(d) to set the rate for interconnection pursuant to section 251(c)(2) and for UNEs unbundled pursuant to section 251(c)(3). Section 252(d) requires that the rate be based upon cost, be nondiscriminatory, and may include a reasonable profit. This standard has been interpreted by the FCC (and upheld by the

Supreme Court[18]) to require forward-looking TELRIC pricing for all UNEs unbundled pursuant to section 251 of the TelAct.

Section 271 does not contain its own pricing standard. Section 271(c)(2)(B)(ii) (Checklist Item No. 2) requires that ILECs make UNEs available "in accordance with the requirements of section 251(c)(3) and 252(d)(1)" while sections 271(c)(2)(B)(iv, v, vi, and x) (Checklist Items Nos. 4, 5, 6 and 10), which provide for access to loops, switching, trunk side transport, and databases, make no reference to a pricing standard.

In the *TRO*, the FCC interpreted the pricing provisions of the TelAct as requiring TELRIC pricing for section 251(c)(3) elements only and "just and reasonable" rates for 271(c)(2)(B)(iv, v, vi, and x) elements. The FCC found that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."[19] Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Communications Act empowered the Commission to adopt rules that implement the TelAct, the FCC found that it had authority to impose the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Communications Act. The FCC went even further and found that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or a 271 enforcement action, whether the price for a particular 271 element met the section 201/202 standard.[20] The FCC noted

[18]*See AT&T v. Iowa Utilities Bd.*, 525 U.S. 355 (1999)(*Iowa II*).

[19]*TRO* at ¶ 656.

[20]*TRO* at ¶ 664.

that prices similar to those currently charged in ILEC access tariffs would likely meet the standard, as would any prices negotiated through arms-length agreements.[21]

In its March 2004 decision in *UTSA II*, the D.C. Circuit affirmed the FCC's finding that the pricing standard for UNEs unbundled pursuant to § 271 is found in sections 201-202 of the TelAct and not section 251. Specifically, the court upheld the FCC's determination that TELRIC pricing was not required under section 271; all that was required was that the prices not be "unjust, unreasonable or discriminatory."[22] The Court did not address the FCC's assertion that it, rather than state commissions, should determine whether the price for a 271 element meets the just and reasonable standard. The Court did find, in the context of state unbundling authority, that claims relating to the preemptive scope of the *TRO* were not ripe, because no party had challenged a specific state decision.

Since the *USTA II* decision was released, several state commissions have directly addressed the issue of state authority to review pricing for 271 elements. The Massachusetts Department of Telecommunications and Electricity recently found that it could approve or deny, on the basis of market-based pricing, the prices included in Verizon's wholesale tariff for its §271 obligations because those services are jurisdictionally intrastate.[23] On June 21, 2004, the Tennessee Regulatory Authority (TRA) issued an order which sets a 271 switching rate in the context of a section 252

[21] *Id.*

[22] *USTA II* at 53.

[23] *Proceeding by the DTE on its own Motion to Implement the Requirements of the FCC's TRO Regarding Switching for Large Business Customers Serviced by High-Capacity Loops*, DTE 03-59-A (Jan. 23, 2004), fn. 9.

arbitration proceeding.[24] Bellsouth has appealed that decision to the FCC and asked for an emergency declaratory ruling by the FCC that the action taken by the TRA violates the TelAct, FCC Orders, and federal precedent. The FCC has asked for comment on Bellsouth's petition.

C. Position of the Parties

1. Verizon.

Verizon argues that the *TRO* makes clear that the FCC has exclusive jurisdiction over the pricing of 271 UNEs and that the "just and reasonable" standard, rather than TELRIC, should be applied to the rates for those elements. Verizon contends that even if TELRIC prices meet the "just and reasonable" standard, there is nothing that precludes Verizon from charging higher rates that also meet the "just and reasonable" standard. Verizon argues that the Commission would have no grounds for insisting on the lower TELRIC rate. Verizon also points out that while state commissions have authority to set rates for section 251 UNEs, there is no similar grant of authority for section 271 UNEs.

2. CLECs.

The CLEC Coalition argues that by agreeing to submit a wholesale tariff, Verizon agreed to file rate schedules for 271 UNEs over which the Commission would have the authority to review, accept, and/or reject. The Consolidated Intervenors did not directly address the Commission's authority to set prices for 271 UNEs because

[24] *In the Matter of Bellsouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-__ (July 1, 2004) at 1.

they believed, despite the specific questions posed in the Hearing Examiner's Procedural Order, that pricing issues would be addressed later.[25]

D. **Analysis**

Determination of the scope of the Commission's 271 pricing authority requires both interpretation of the *TRO* and a determination under both state and federal law of the Commission's authority to set rates for intrastate services and products. First, Verizon is correct that the FCC stated in the *TRO* that it would review rates for 271 UNEs in the context of 271 applications and enforcement proceedings. However, as described above and as acknowledged by Verizon, the FCC has already delegated significant authority to state commissions to enforce 271-related requirements. While the FCC stated it would conduct the review, the FCC did not specifically preclude state commissions from also conducting such an evaluation.

There are a number of factors which could support a state commission's authority to set prices for section 271 UNEs. First, the standard the FCC has announced for section 271 UNEs, "just and reasonable," is the same standard the Commission applies under 35-A M.R.S.A. § 301. Thus, the Commission has considerable experience in applying this standard to the rates of Verizon and many other public utilities. Further, state commissions, and not the FCC, are most familiar with the detailed company-specific data that will be used to support an ILEC's claim that particular rates are just and reasonable. Finally, both CLECs and the National

[25]It is true that pricing issues were scheduled to be addressed later in the proceeding. However, parties should have reasonably expected that if a specific question relating to the legal underpinnings of the Commission's authority was posed for briefing, that the question needed to be addressed.

Association of Regulatory Utility Commissioners (NARUC) have argued in filings related to the appeal of the *TRO*, that the Supreme Court's decision in *Iowa II* and the Eighth Circuit's decision in *Iowa III*[26] clearly establish that states, not the FCC, set rates for UNEs. Indeed, the Supreme Court stated that:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions .... The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[27]

These same parties also point to a state commission's authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct as another source of authority to set rates for elements provided pursuant to section 271.

Notwithstanding these arguments in favor of Commission authority to set 271 UNE rates, we decline at this time to exercise that authority. While we do not necessarily agree with the FCC's assertion of exclusive jurisdiction over 271 UNE rates, it is, nonetheless, the current law of the land. Rather than add an additional layer of confusion to an already complex situation, we will allow time for the process envisioned by the FCC to work, i.e., for Verizon to file federal tariffs or for the parties to reach arms-length agreements. While we will not set the rates charged by Verizon, we will exercise our authority to require Verizon to file those rates with us in its wholesale tariff. Indeed, before Verizon may begin charging any CLEC 271 UNE rates which are higher than its current TELRIC rates, Verizon must first obtain the FCC's approval for the specific rates

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[26] *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000).

[27] *Iowa II*, 525 U.S. at 384.

(in whatever form necessary) and then must file the rates here pursuant to our usual tariffing process. We will suspend any rates filed with us which have not been specifically approved by the FCC.

We leave open today the possibility that in the future, perhaps after the FCC has ruled on the BellSouth Emergency Petition or if the Supreme Court takes the *TRO* appeal and reverses the *USTA II* decision, we might revisit the issues decided today. We also leave open the possibility that we will step in and take action if the FCC abdicates its authority, either explicitly or by taking an undue amount of time to exercise its authority. We firmly believe that *all* parties would greatly benefit from increased certainty concerning wholesale pricing and if the FCC does not actively assert its jurisdiction, we will assert ours so as to ensure the continued viability of local competition in Maine.

V. COMMISSION AUTHORITY TO ORDER LINE SHARING PURSUANT TO STATE LAW

A. Legal Authority

In the *TRO*, the FCC overturned its earlier decision in the *UNE Remand Order*[28] and found that CLECs are not impaired without access to the high frequency portion of the loop (HFPL), i.e. access to line sharing. Specifically, the FCC shifted its focus from the revenues derived from a single service deployed using the HFPL to the potential revenues derived from all services that could be provided over the full functionality of the loop. Thus, the FCC concluded that the increased operational and

[28] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, rel. November 5, 1999 (*UNE Remand Order*).

economic costs of acquiring a stand-alone loop are offset by the increased revenue opportunities afforded by use of the whole loop for services such as voice, voice over xDSL, data and video services.[29] While the FCC declined to explicitly find that any decision by a state commission to require line sharing under state law was automatically preempted, in paragraph 264 it invited any party aggrieved by such a decision to seek a declaratory ruling from the FCC.

In *USTA II*, the D.C. Circuit upheld the FCC's line sharing decision, finding that:

> [E]ven if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment.

USTA II at 45. Thus, under federal law, section 251 line sharing will only be available on a grandfathered basis for the next three years, with the price increasing each year until it reaches the full price of the loop, at which time unbundling will no longer be required.

Neither the *TRO* or *USTA II* directly addressed whether an ILEC's continuing unbundling obligations under section 271 include continued access to line sharing with the ILECs. In its *Line Sharing Order*,[30] the FCC discussed the necessity of unbundling the HFPL as part of an ILEC's 251 unbundling obligations. In its *Oklahoma/Kansas 271 Order*, the first 271 Order issued after the *Line Sharing Order*,

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[29] *TRO at* ¶ 258.

[30] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*).

the FCC included its discussion of compliance with the line sharing requirement under its discussion of compliance with Checklist Item No. 4, access to local loops.[31] In the *Massachusetts 271 Order*, the FCC explicitly stated that:

> On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.[32]

Thus, the FCC appears to consider line sharing a form of access to the local loop that must be provided pursuant to section 271, regardless of whether it must also be provided pursuant to section 251.

B. Positions of the Parties

1. Verizon.

Verizon argues that in the *TRO*, the FCC determined that CLECs are not impaired without unbundled access to line sharing. Verizon argues that where federal law sets forth the legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, "the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns." Citing section 251(d)(3) and "long-standing federal preemption principles," Verizon asserts that state commissions have no authority to override the FCC's determination that the unbundling of certain network elements is not required under the TelAct.

[31] *Oklahoma/Kansas 271 Order* at ¶ 214.

[32] *In the Matter of Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) at ¶ 163 (*Verizon MA 271 Order*).

Verizon contends that the Commission has no independent authority under state law to impose additional unbundling requirements on Verizon. This is especially true where the FCC has explicitly declared that line sharing is not required. Verizon points out that the FCC authorized the state to perform "granular" review of specific elements only and that line sharing was not one of them.

Verizon further argues that the Commission does not have authority to order unbundling under section 271, but even if it did, Checklist Item No. 4 - the local loop - does not include separate access to the HFPL. Additionally, it argues that the pricing would not be TELRIC but would be "just and reasonable" which would require a "fact specific inquiry" conducted by the FCC.

In its Reply Brief, Verizon reiterated its position that "[t]he Commission is legally preempted from re-imposing unbundling obligations eliminated by the FCC's rulings in its *TRO*." In particular, Verizon disputes the CLECs' claim that the Commission has separate state authority to order line sharing and states that, "where the FCC determines that an element should not be unbundled, a state may not lawfully override that determination." Verizon also refutes the CLECs' claim that the Commission can unbundle HFPL based on Maine specific facts. Since the FCC has already found no impairment, they conclude, the Commission is not free to order line sharing.

In its Supplemental Brief, Verizon asserts that *USTA II* affirms the FCC's findings in the *TRO* on line sharing and unambiguously struck down the FCC's delegation of any unbundling authority to states.[33] Verizon also repeats its belief that

[33] *USTA II* at 12.

the "Commission may not lawfully rely on state law to impose an unbundling obligation for line sharing, feeder subloops, OCN transport, entrance facilities or other UNEs expressly eliminated or curtailed by the FCC in the *Triennial Review Order*." Referring to its previous statements concerning the absence of state law authorizing unbundling, Verizon argues that even if the state is authorized to order unbundling (which they insist, it is not), it may not do so in the case of line sharing because *USTA II* affirmed the FCC's decision in the *TRO* not to order line sharing because it discourages investment.

2. CLECs.[34]

In their Brief, the Consolidated Intervenors point to the Commission's reliance upon Verizon's performance in Maine on the number of line sharing arrangements when it found Verizon in compliance with Checklist Item No. 4 during Maine's 271 proceeding. They contend that allowing Verizon to discontinue line sharing now effectively repudiates one of the conditions for the Commission's support and is anti-competitive. The Consolidated Intervenors argue that the FCC took pains to make clear that 271 requirements remain unaffected by the *TRO* (citing to ¶¶ 653, 655). They suggest that the Commission follow the Pennsylvania Public Utilities Commission's lead in insisting that Verizon honor its 271 obligations. Finally, they cite 35-A M.R.S. A. § 7101 and argue that Verizon's proposal contradicts state telecommunications policy of promoting broadband, especially in rural areas. The Consolidated Intervenors argue that the Commission should order line sharing because it has been instrumental in creating and fostering competition in rural Maine.

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[34]The CLEC Coalition did not brief the line sharing issues but "supports the arguments and conclusions set forth in the briefs on Line Sharing issues submitted by GWI, Conversant and the Office of the Public Advocate".

In their Reply Brief, the Consolidated Intervenors again describe how Verizon and the Commission relied on the provisioning of line sharing to show that Verizon had opened up its network to competition during the 271 review. The Consolidated Intervenors also cite to paragraph 650 of the *TRO* where the FCC states that "Section 271(c)(2)(B) establishes an independent obligation for BOCs to provide access to loops...." The Consolidated Intervenors implore the Commission to enforce Verizon's 271 obligations.

In their Supplemental Brief, the Consolidated Intervenors state that the decision in *USTA II* confirms the FCC's conclusion that section 271's unbundling requirements for BOCs are independent of a BOC's section 251 requirements. They also argue that "the Court essentially held that the *TRO* has no impact whatsoever, from a legal standpoint, on a state Commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs."

C. **Decision**

We find, based upon the language quoted above from the FCC's *Massachusetts 271 Order,* that Verizon must continue to provide CLECs with access to line sharing in order comply with Checklist Item No. 4 of section 271. As discussed above, however, we will not exercise any authority we might have to set rates for 271-based UNEs such as line sharing and will leave those issues to the FCC, which has already stated what it believes to be the fair rate, i.e. three years of transition rates leading to up to the full cost of the loop. While our decision today does not provide the CLECs with all of the relief they requested, it does provide them with the continued

opportunity to share lines with Verizon, which retains the majority of local service lines in Maine.

We decline the opportunity to exercise any authority we have under either federal or state law to order line sharing at TELRIC rates at this time. While we do not concede the point as argued by Verizon, the FCC clearly intended to preempt state authority to order line sharing pursuant to section 251 or state law. Section 251(d)(3) of the TelAct states that the FCC may not preclude enforcement of any state commission decision establishing local exchange interconnection and access requirements which is consistent with section 251 and which "does not substantially prevent implementation of the requirements of this section." In the *TRO*, the FCC asserts that its interpretation of the requirements of section 251, i.e., its rules, was intended by Congress to be included under the "requirements of this section" language of section 251(d)(3).[35] Thus, according to the FCC, any state decision that is inconsistent with the FCC's Orders or Rules (the so-called "federal regime") violates section 251(d)(3) and is preempted. Any party aggrieved by a state decision to require line sharing after the effective date of the *TRO* can seek a declaratory ruling from the FCC

The Supreme Court has held that "preemption will not lie unless it is 'the clear and manifest purpose of Congress.'"[36] If the statute contains an express preemption clause, the court will first focus on the plain wording of the clause, "which necessarily contains the best evidence of Congress' preemptive intent."[37] Savings

[35] *TRO* at ¶ 191.

[36] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[37] *Id.*

clauses, which specifically reserve state authority, are "the best evidence of Congress' preemptive intent."[38] Generally speaking, preemption will be found when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[39]

The FCC's assertion that its rules are included in "the requirements of this section" language of section 251 was specifically rejected by the Eighth Circuit Court of Appeals in *Iowa I*.[40] The Eighth Circuit held that section 251(d)(3) does not require state commission orders to be consistent with all of the FCC's regulations promulgated under section 251.[41] It stated that "[t]he FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical."[42] While portions of the Eighth Circuit's decision were ultimately reversed by the Supreme Court, the FCC did not challenge, nor did the Supreme Court reverse, the Eight Circuit's holding on section 251(d)(3).[43] Thus, contrary to the assertions of both the FCC and Verizon, the mere fact that a state requires an additional unbundled element does not mean it

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[38] *Id.*

[39] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).

[40] *See Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd sub nom. on other grounds, AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

[41] *Id.* at 806.

[42] *Id.* It further held that section 261(c) of the TelAct (which requires state commission decisions to be consistent with the FCC's regulations) applies only to state requirements that are not promulgated pursuant to section 251. *Id.* at 807.

[43] *See TRO* at ¶ 192, fn. 611.

automatically will be preempted. Instead, consideration must be given to whether the requirement is consistent with section 251 and whether it prevents its implementation.

We find that, with respect to line sharing, there has been a clear policy decision at the federal level that line sharing should not be made available at TELRIC pricing. Any decision on our part, whether based upon federal or state law, to require line sharing at TELRIC prices would directly contradict federal policy and would, in fact, substantially prevent implementation of section 251 as interpreted by the FCC.[44] We do not reach the issue of whether the FCC's interpretation of 251 would limit state authority in every instance but instead find that here, with regard to line sharing, and where the federal policy has been so clearly enunciated and upheld by the D.C. Circuit, that the most appropriate action at this time requires denial of the CLECs' request for state-ordered unbundling at TELRIC rates. We leave open the possibility that if, at some future date the Supreme Court overturns the FCC's interpretation of its powers of preemption and/or overturns the FCC's decision concerning line sharing, we might revisit this issue and reach a different result. Until such time, the only line sharing that will be available in Maine will be pursuant to section 271 at "just and reasonable rates" as determined by the FCC.

[44] *But see, Investigation into Skowhegan Online's Request for UNE Loops*, Docket No. 2002-704, Orders (April 20, 2004 and June 16, 2004) where the Commission asserted its authority under 35-A M.R.S.A. §§ 301, 7101 and ordered Verizon to unbundle certain copper subloops not required under federal law.

VI. CONCLUSION

For the reasons discussed above, we order Verizon to include 271 UNEs in its state wholesale tariff and to continue to offer line sharing pursuant to Checklist Item No. 4 of section 271.

Respectfully submitted,

Trina M. Bragdon
Hearing Examiner

Balvin, Elizabeth

From: Doberneck, Megan
Sent: Wednesday, November 17, 2004 4:49 PM
To: Yeh, Joyce; Balvin, Elizabeth; Davis, Kandy; Chiu, Alice; Wan, Aileen; Lipski, Mona; Chang, Janet
Cc: Hankins, Lynn
Subject: RE: Line Shared Billing with Commercial Agreement

The recurring charge is $8. This will be the charge (1) as of 10/2/04 for all lines added between 10/2/03 and 10/1/04. Note, however, there will be no true up for the lines added in that year; the lines will be re-rated at the $8 MRC as of 10/2/04 and the new rate will be applied prospectively only; and (2) for all lines added between 10/2/04 and 10/1/05. Let Liz or I know if you have any additional questions.

PLEASE NOTE MY NEW PHONE AND FAX NUMBERS
Megan Doberneck
Vice President, External Affairs
Covad Communications Company
7901 Lowry Boulevard
Denver, CO 80230

Tel (720) 670-3636
Fax (720) 670-3350
Mbl (720) 989-0013
mdoberne@covad.com

-----Original Message-----
From: Yeh, Joyce
Sent: Wednesday, November 17, 2004 4:36 PM
To: Balvin, Elizabeth; Davis, Kandy; Chiu, Alice; Wan, Aileen; Lipski, Mona; Chang, Janet
Cc: Doberneck, Megan; Hankins, Lynn
Subject: RE: Line Shared Billing with Commercial Agreement

Liz,

Do you have the new MRC for LS at this time? Is it $8.00 for all LS loops in Qwest region? Please confirm.

Thanks,
Joyce

-----Original Message-----
From: Balvin, Elizabeth
Sent: Tuesday, November 16, 2004 1:54 PM
To: Davis, Kandy; Yeh, Joyce; Chiu, Alice; Wan, Aileen; Lipski, Mona; Chang, Janet
Cc: Doberneck, Megan; Hankins, Lynn
Subject: Line Shared Billing with Commercial Agreement

The Covad/Qwest Commercial Line Sharing Agreement became effective 10/2/04. That said, here are the terms that will impact billing:

1) New Non-recurring charge of $35 will be applied to lines installed on or after 10/2/04. Qwest has indicated this billing may lag a month.
2) New Monthly recurring charges will be applied to all lines installed on or after 10/2/03, with an effective date for these new charges of 10/2/04. There will not be a true up between 10/2/03 and 10/2/04, you will simply see the NEW MRC's post 10/2/04 for all line shared orders installed after 10/2/03.
3) Lines installed prior to 10/2/03 will be billed utilizing USOC UY23X.

4) Lines installed after 10/2/03 will be billed utilizing USOC UY2**S**X.

Per Qwest, "the basic USOCs Covad will see billed for commercial line sharing are:

1CRT9 -- NRC Basic Install
TYLCQ -- MRC ITP charge x 2
UY2SX -- MRC Shared Loop
UM3 -- MRC OSS, rate is 0.00 per Commercial Line Share Agreement, Exhibit A
XBMXN -- Class of service USOC, no charge"

Please let me know if you have any questions,

Liz Balvin
Covad Communications
Director - External Affairs
7901 Lowry Boulevard
Denver, CO 80230
Phone: 720-670-2423
Cellular: 720-233-8583
Fax: 720-670-3350
http://www.covad.com

Balvin, Elizabeth

From: Balvin, Elizabeth

Sent: Tuesday, May 03, 2005 4:20 PM

To: Vuong, Le

Cc: Smith, Erin

Subject: FW: C20 Colorado February 2005

Le/Mark,

Below/attached you will find the performance measurement results that lead to your review of the "raw data" (excel spreadsheets attached). Per Qwest, those orders highlighted in RED are the ones that did not meet the required "parity" standard. Parity simply means that Qwest must provide the same level of service for Covad orders as is provides to its own end users.

Thanks in advance for looking into,

Liz Balvin
Covad Communications
Director - External Affairs
7901 Lowry Boulevard
Denver, CO 80230
Phone: 720-670-2423
Cellular: 720-233-8583
Fax: 720-670-3350
http://www.covad.com

-----Original Message-----
From: Balvin, Elizabeth
Sent: Wednesday, April 06, 2005 11:31 AM
To: 'Yohe, Eric'
Cc: Berard, John; Doberneck, Megan
Subject: FW: C20 Colorado February 2005

Eric,

Upon review of most recent Qwest's published performance measures for Covad in the state of Colorado, I note the following:

Qwest is consistently failing to provide Parity service;

a) MR-3A Line Sharing "out of service cleared within 24 hours-dispatches within MSA"
b) MR-5A DS1 UBL "all troubles cleared within 4 hours-interval zone one"
c) MR-6A Line Sharing "mean time to restore-dispatches within MSA"
d) MR-6D ISDN UBL "mean time to restore-interval zone one"

How would you suggest we review these results? If you would like to send me the raw data, we can attempt to both review to gain Qwest and Covad perspective, what do you think?

Thanks,

Liz Balvin
Covad Communications
Director - External Affairs
7901 Lowry Boulevard
Denver, CO 80230
Phone: 720-670-2423
Cellular: 720-233-8583
Fax: 720-670-3350

http://www.covad.com

-----Original Message-----
From: Massey, Diana [mailto:Diana.Massey@qwest.com]
Sent: Thursday, March 31, 2005 8:12 AM
To: Yohe, Eric; Doberneck, Megan; Balvin, Elizabeth
Subject: C20 Colorado February 2005

Balvin, Elizabeth

From: Vuong, Le
Sent: Friday, May 20, 2005 4:32 PM
To: Berard, John; Balvin, Elizabeth
Cc: DL CORE
Subject: Qwest Parity Issue.xls

John,

I reviewed all the circuits included (in red)
Enclosed is the data that I had reviewed.
I do not believe we have a problem with Parity.

There were a few orders that had passed commits, but nothing excessive or exaggerated.
I do not think that Qwest intentionally missed their commits.
There was one circuit 101-673-601 (1958100) where the ILEC may not have resolved issue in a timely manner, but overall the other circuits do not appear to be an issue.

I hope this helps.
Thank you very much.

Mark Vuong

ATTACHMENT 3

DT 03-201
DT 04-176

VERIZON NEW HAMPSHIRE
SEGTEL, INC.

Proposed Revisions to Tariff NHPUC No. 84
(Statement of Generally Available Terms and Conditions)
Petition for Declaratory Order re Line Sharing

Order Following Briefing

ORDER NO. 24,442

March 11, 2005

I. PROCEDURAL HISTORY

A. Docket No. DT 03-201

On October 17, 2003, Verizon New England d/b/a Verizon New Hampshire (Verizon) filed with the New Hampshire Public Utilities Commission (Commission) certain proposed revisions to the Company's Statement of Generally Available Terms and Conditions (SGAT), as reflected in Tariff NHPUC No. 84 (Tariff 84), which sets forth the terms of interconnection Verizon offers competitive local exchange carriers (CLECs) as well as the network elements Verizon makes available to CLECs on an unbundled (*i.e.*, individual) basis. These SGAT changes were occasioned by the issuance of the Federal Communications Commission's (FCC's) Triennial Review Order, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978 (2003) (*TRO*) which evaluated and rewrote the FCC's rules regarding local exchange competition in compliance with the Telecommunications Act of 1996, Pub. L. 104-104, Feb. 8, 1996, 110 Stat. 56, and

subsequent amendments, codified as 47 U.S.C. § 151 *et seq*.

An Order of Notice was issued on October 31, 2003, scheduling a prehearing conference and establishing a deadline for intervention petitions. On November 11, 2003, Verizon provided a confidential list of customers with existing services affected by the proposed tariff revisions.

The prehearing conference took place as scheduled on December 2, 2003. Parties granted intervenor status were Biddeford Internet Corporation d/b/a Great Works Internet (GWI), Conversent Communications of New Hampshire (Conversent), Covad Communications Company (Covad), Freedom Ring Communications LLC d/b/a BayRing Communications (BayRing), New Hampshire Internet Service Providers Association (NHISPA), Otel Telekom Inc. d/b/a G4 Communications (G4), Revolution Networks (RevNets), segTEL Inc. (segTEL), and WorldCom Inc. (MCI). The Office of the Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers. A technical session followed the prehearing conference, at which the participants agreed on a briefing schedule and three questions that would be addressed by the briefs. The schedule was adopted by Secretarial Letter issued on December 19, 2003.

On December 12, 2003, Verizon filed a motion seeking relief from certain provisions in the Order of Notice entered by the Commission in DT 03-201. On the same date, Verizon filed a summary description of each of the terms and conditions Verizon believed would represent changes to its SGAT, the list of unbundled network elements (UNEs) that Verizon believed might be subject to future impairment proceedings in New Hampshire in accordance

with the *TRO*, and a copy of Verizon's proposed amendment to interconnection agreements eliminating provisions relating to line sharing pursuant to the *TRO*.[1] Objections to Verizon's Motion for Relief were filed on December 22, 2003, by BayRing, NHISPA, segTEL, and RevNets. GWI concurred with BayRing's objection. Briefs were timely filed by Covad, GWI, MCI, segTEL and Verizon. BayRing and the OCA concurred with segTEL's brief. Conversent filed a brief on December 30, 2003. Reply briefs were timely filed by Covad, GWI, segTEL, and Verizon. BayRing concurred with the reply briefs filed by segTEL and GWI.

On January 30, 2004, the Commission issued Order No. 24,268 on the pending Verizon motion, which concerned the determination in the Order of Notice that Verizon would be required to offer all UNEs contained in the SGAT, at then-current prices, pending review of the proposed tariff revisions. The Commission rejected Verizon's contention that section 3.3.2 of the SGAT required that the proposed revisions go into effect without Commission review. While the Commission denied Verizon's request without prejudice, pending a final ruling in DT 03-201, the Commission granted in part Verizon's request for alternative relief. Specifically, the Commission allowed Verizon to discontinue provisioning new orders for certain UNEs during the pendency of DT 03-201. These UNEs were (1) dark fiber feeder subloop, (2) interoffice transmission facilities (IOF) consisting of OCn (Optical Carrier number) and STS1 (Synchronous Transport Service) transport, and (3) transmission facilities that connect CLEC

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[1] "Impairment" refers to the standard, enumerated in section 252(d)(2) of the Telecommunications Act, with respect to when an Incumbent Local Exchange Carrier (ILEC) such as Verizon must make its network elements available on an unbundled basis pursuant to section 251 to Competitive Local Exchange Carriers (CLECs). Impairment exists when lack of unbundled access to the network element in question would impair a CLEC's ability to provide services to the public on a competitive basis.

central offices or switches to CLEC collocation sites in Verizon central offices (dark fiber channel terminations). The Commission reasoned that such a determination appeared to comport with the *TRO*, did not harm existing customers, and did not amount to a prejudgment of the outcome of DT 03-201. The Commission also directed Verizon to file revised SGAT pages to reflect the line sharing transition requirements of 47 C.F.R. §51.319(a)(1)(i),[2] emphasizing that no separate agreement should be necessary for parties to avail themselves of line sharing consistent with the FCC's rules.

In response, Verizon filed modified revisions to its SGAT on February 9, 2004, which were accepted as compliant by the Staff of the Commission (Staff) on March 25, 2004. On February 26, 2004, Covad requested that the Commission consider a recently-released decision of the Maine Public Utilities Commission (PUC) hearings examiner. Verizon responded on March 9, 2004.

In the meantime, the *TRO* was the subject of numerous appeals which were consolidated by the U.S. Court of Appeals for the District of Columbia Circuit. In its decision, *United States Telecom Association v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) (*USTA II),* the Court of Appeals vacated a number of the FCC *TRO* determinations, remanded some, and affirmed

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[2] In the *TRO*, the FCC determined that incumbent local exchange carriers (ILECs) were no longer required to offer line sharing to CLECs on an unbundled basis pursuant to section 251, given a lack of section 252 impairment. But the FCC recognized that some CLECs had relied on a previous FCC order reaching the opposite result in order to provide broadband services to consumers. Accordingly, the FCC mandated a three-year transition period with respect to new line sharing arrangements, with the price gradually approaching that of a full, stand-alone local loop, which remains a section 251 UNE. *See TRO* at ¶¶ 264-65.

others. In general, the appellate tribunal vacated decisions that maintained unbundling obligations of incumbent local exchange carriers (ILECs) such as Verizon and affirmed decisions that reduced ILEC unbundling obligations pursuant to section 251. In addition, the Circuit Court was silent on some parts of the *TRO*. On August 20, 2004, the FCC issued an order that required Verizon and other ILECs to continue providing, until February 20, 2005, unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under valid interconnection agreements as of June 15, 2004, and established transitional measures through August 20, 2006, in the absence of an FCC ruling on any particular UNE. *See In re Unbundled Access to Network Elements*, 19 F.C.C.R. 16,783. On October 12, 2004, the Supreme Court declined to hear the appeal of the Court of Appeals' *USTA II* decision, thus allowing it to stand. On February 5, 2005, the FCC issued its *In re Unbundled Access to Network Elements*, 2005 WL 289015 (*TRO Remand Order*). On February 22, 2005, Verizon filed revisions to Tariff 84 with the Commission in response to the FCC's *TRO Remand Order* which were docketed separately in Docket No. DT 05-034.

Supplemental briefs were filed on February 18, 2005, by Verizon and segTEL. Lightship Telecom (Lightship) filed a letter in support of segTEL's brief. The Association for Local Telecommunications Services, or ALTS, filed comments on February 18 as well.

B. Docket No. DT 04-176

On September 19, 2004, GWI and segTEL jointly filed a Petition seeking an order on an expedited basis that Verizon remains obligated to provide line sharing. On October 8, 2004, segTEL and Verizon jointly filed a pleading in which segTEL withdrew its request for

expedited relief and both parties asked the Commission to hold the underlying dispute in abeyance until November 15, 2004. On November 5, 2004, GWI and Verizon filed a similar notice and motion in regard to GWI.

On November 22, 2004, the Commission issued a secretarial letter asking the Parties in Docket No. DT 04-176 to advise the Commission of the status of their ongoing negotiations, and requesting that Verizon advise the Commission regarding its intentions with respect to filing the interim agreements it had reached with GWI and segTEL. Verizon filed comments in response to the secretarial letter on December 6, 2004. GWI and segTEL separately informed the Commission that no permanent agreement regarding line sharing had been reached.

On January 12, 2005, the Commission issued an Order of Notice scheduling a prehearing conference in Docket No. DT. 04-176 for January 26, 2005. The OCA entered an appearance on behalf of residential ratepayers and Lightship sought intervenor status. At the prehearing conference, GWI indicated that it had reached agreement with Verizon on line sharing but wished to remain a party to the docket. On January 28, 2005, Verizon filed changes to its Tariff 84, to comply with Commission Order No. 24,268 in Docket No. DT 03-201. That same day, segTEL filed a letter requesting the Commission suspend the effective date of Verizon's tariff filing. Verizon filed an objection to segTEL's request on January 31, 2005. Also on January 31, the Commission issued a Secretarial Letter consolidating DT 03-201 and DT 04-176, and setting out a briefing schedule, as described *supra*.

C. SGAT and Tariff 84

As noted, *supra*, the SGAT set out the general terms and conditions Verizon offers to competitors for interconnection and UNEs. The Commission, pursuant to 47 U.S.C. § 252(f), found Verizon's SGAT compliant with sections 251 and 252(d) of the Telecommunications Act on July 6, 2001. *See Bell Atlantic*, 86 NH PUC 419 (2001).

ILECS such as Verizon that were formerly entities of the regulated telephone monopoly broken up in 1984,[3] were precluded from offering so-called interLATA[4] long-distance service, *i.e.*, long distance service that crosses LATA boundaries. However, section 271 of the Telecommunications Act authorizes the FCC to grant an RBOC authority to offer interLATA long distance service upon satisfaction of certain conditions. In considering such a request from an RBOC, the FCC is obliged to "consult" with the relevant state utility commission concerning whether the RBOC meets the conditions, referred to in the statute as the "[c]ompetitive checklist."

On June 14, 2002, by letter from the Commission in Docket No. DT 01-151 (opened to consider Verizon's request for a favorable section 271 recommendation from the Commission to the FCC), the Commission set out ten conditions for a determination by the

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[3] These ILECs are generally referred to as RBOCs (regional Bell operating companies) or simply BOCs (Bell operating companies).

[4] LATA, or Local Access Transport Area, defines the service areas of the RBOCs. In New Hampshire, the LATA is approximately contiguous with the area designated by the 603 area code, making New Hampshire a single-LATA state. Therefore, in New Hampshire, interLATA and interstate long distance are interchangeable terms.

Commission that Verizon was in compliance with the requirements of section 271. Condition 1 stated:

> To avoid confusion, Verizon will explicitly convert the existing SGAT into a CLEC tariff from which competitors may directly order anything contained in the SGAT, without the need to negotiate an interconnection agreement or amend an interconnection agreement. The tariff may contain a standard form for competitors to complete which would provide Verizon with the information it needs about the competitor in order to interconnect, such as the location of the point of interconnection or identification for billing purposes. The tariff must reflect the SGAT rates, terms and conditions ordered by this Commission in Docket DE 97-171, except to the extent further reductions or changes are required below as a condition of Verizon's receipt of a favorable recommendation on its section 271 petition.

Accordingly, Verizon filed a revised Tariff 84 and a new Tariff NHPUC No. 86 (Tariff 86). These tariffs were approved by Commission Order No. 24,337 on June 18, 2004. Tariff 84 is now a wholesale tariff of UNEs, interconnection and collocation available to CLECs; Tariff 86 is a resale tariff of retail products available at discount to CLECs. Order No. 24,337 says, "Staff recommends adoption of the Tariffs; and states that any variations between the two documents are not intended to reflect a change in the terms and conditions as established in the SGAT." Verizon's January 28, 2005 filing to amend Tariff 84 brings Tariff 84 into agreement with the SGAT as it existed on June 18, 2004, the date the tariff was approved.

The *TRO* prompted Verizon to file revisions to its SGAT as reflected in Tariff 84. According to Verizon, its revisions affect three UNEs: (a) line sharing, (b) certain dark fiber, and (c) interoffice transmission facilities (IOF) consisting of OCn (Optical Carrier number) and STS1 (Synchronous Transport Service) transport. The *TRO*, however, discusses the UNEs in a manner that makes classification of the UNEs into four categories more useful. Therefore, this order will discuss the revisions in terms of four categories: (a) line sharing; (b) dark fiber feeder

subloop; (c) IOF at the OCn and STS1 level; and (d) dark fiber channel terminations.

According to Verizon, the tariff revisions are made pursuant to section A.1.4.3.B of Tariff 84[5] which authorizes Verizon to cease offering, with 30 days' written notice, any network elements that the FCC finds should be removed from the national list of UNEs required to be unbundled by ILECs. A number of CLECs objected to the proposed revisions as being inconsistent with the FCC's findings in the *TRO*.

II. BACKGROUND

A. Line Sharing

Line sharing is defined by the FCC as "the process by which a requesting telecommunications carrier provides digital subscriber line service over the same copper loop that the incumbent LEC uses to provide voice service, with the incumbent LEC using the low frequency portion of the loop and the requesting telecommunications carrier using the high frequency portion of the loop. The *TRO* provided that "the high frequency portion of a copper loop shall no longer be required to be provided as an unbundled network element," subject to a three year transition, and provided access to line sharing for an additional year for those CLECs currently utilizing line sharing. Availability of line sharing as a section 251 element expired by the terms of the *TRO* on October 2, 2004.

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[5] Previously section 3.3.2 of the SGAT, Tariff section A.1.4.3.B reads, "Notwithstanding anything herein to the contrary, if, as a result of any decision, order or determination of any judicial, regulatory or other governmental authority with jurisdiction over the subject matter hereof, it is determined that the Telephone Company is not required to furnish any service, facility or arrangement, or to provide any benefit required to be furnished or provided to the TC hereunder, then the Telephone Company may discontinue the provision of any such service, facility, arrangement or benefit to the extent permitted by any such decision, order or determination by providing thirty (30) days prior written notice to the TC."

B. Dark Fiber Feeder Subloop

A loop is a facility that connects from a customer's premises to a central office. Loops are composed of feeder, which extends out from the central office, and distribution, which branches out from the feeder to customer premises. Any portion of a loop can be called a subloop. The FCC defined subloops for the purposes of unbundling in its *Third Report and Order and Fourth Further Notice of Proposed Rulemaking in the Matter of Implementation of The Local Competition Provisions of the Telecommunications Act of 1996,* 15 F.C.C.R. 3696 (1999), which states that subloops are "portions of the loop that can be accessed at terminals in the incumbent's outside plant. An accessible terminal is a point on the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within." A hybrid loop consists of copper distribution plant plus fiber feeder facilities between the central office and locations at or near the serving area interface or remote terminal. Verizon's revisions propose eliminating the availability of the feeder portion of a subloop that consists of dark fiber.

C. IOF at the OCn and STS1 level

Unbundled interoffice facilities consist of dedicated transport. In the *TRO*, the FCC redefined the dedicated transport network element as those transmission facilities that connect incumbent LEC switches or wire centers, which we discuss further in section D, Dark Fiber Channel Terminations. The FCC determined that high-speed interoffice transmission facilities at OCn and STS speeds would no longer be section 251 elements. In its impairment analysis the FCC stated, "we find that dark fiber and multiple DS3 circuits provide reasonable

substitutes for OCn interface circuits at these capacities and find that requesting carriers are not impaired without OCn or SONET interface transport." *TRO* ¶389. Verizon's revisions propose eliminating the availability of interoffice transport (IOF) at OCn and STS levels.

D. Dark Fiber Channel Terminations

Verizon seeks to eliminate what it calls dark fiber channel terminations, which are also sometimes referred to as "entrance facilities." In response to the Commission's directive to identify the applicable cross references between each proposed tariff revision and the *TRO*, Verizon cited to *TRO* paragraphs 359, 365-369 and 381-385 as justification for eliminating dark fiber channel terminations. The cited paragraphs refer to dedicated transport and dark fiber transport. In paragraphs 359-369, the FCC explains that CLECs use dedicated interoffice transmission facilities to carry traffic from their end users' loops (in collocation arrangements) to the CLEC's switch (central office) or point of presence and named this type of circuit "entrance facilities." In the *TRO* the FCC found that the Telecommunications Act does not require ILECs to unbundle entrance facilities, and it excluded entrance facilities from the definition of dedicated transport. Dedicated transport, therefore, was limited only to those transmission facilities connecting ILEC switches and wire centers. Paragraphs 381-385 found, on a national basis, that CLECs were impaired without access to unbundled dark fiber; The paragraphs noted do not specifically reference dark fiber channel terminations.

USTA II, however, held that the FCC's exclusion of entrance facilities from the definition of dedicated transport was at odds with the definition of network element, which is "a facility or equipment used in the provision of a telecommunications service." *TRO Remand*

Order ¶ 136 and n. 380. In the *TRO Remand Order*, the FCC reinstated its original definition of dedicated transport, to the extent it included entrance facilities, and found that CLECs are not impaired without access to entrance facilities, *TRO Remand Order* ¶ 137.

Verizon's proposed revisions would eliminate the availability of dark fiber channel terminations between CLEC collocation arrangements and the CLEC's central office or point of presence.

III. POSITIONS OF THE PARTIES

A. Verizon

1. General Argument

Verizon contends that the *TRO* eliminated unbundling requirements for certain specified network elements, and that its proposed revisions reflect what it is authorized to do by the *TRO*. Verizon states that since its proposed modifications accurately reflect the FCC's rules and incorporate them by reference, the Commission should approve Verizon's filing as written. Verizon argues that there is no lawful basis for retaining these UNEs in its tariff, either permanently or on a transitional basis. According to Verizon the Commission lacks the authority to add to the list of UNEs established by the *TRO*, and is preempted from reimposing unbundling requirements on UNEs specifically eliminated by the FCC in the *TRO*. The *TRO* made specific findings of non-impairment and, in Verizon's view, the state has no lawful prerogative under the Supremacy Clause of the U.S. Constitution to frustrate or disregard the federal policy established by the FCC. Verizon makes reference to instances where the FCC has exercised its authority and preempted attempts by states to override its decision to remove certain network elements

from the national list of UNEs.

Verizon contends that the Commission has no independent authority under state law to ignore the FCC-ordered elimination of UNEs. According to Verizon, the FCC's decision may not be challenged collaterally by ignoring the *TRO* in favor of plenary authority conferred by state statute. Arguments that the Commission may conduct its own impairment analysis are also flawed, in Verizon's view, as the FCC did not authorize state commissions to conduct granular analysis where it has made national determinations. Further, Verizon argues, nothing in the Commission's rules or any state law sets forth any standard for unbundling beyond the sole applicable standard that unbundling obligations must comply with the Telecommunications Act.

Verizon characterizes claims that the Commission has separate authority under section 271 of the Telecommunications Act to determine UNEs, particularly line sharing, as seriously flawed. First, Verizon argues, the section 271 checklist item requiring unbundling of the local loop does not encompass separate access to the high frequency portion of the loop used to provide line sharing. Second, the terms of any required section 271 offerings, including "scope" and price, are governed by Federal law and will be determined by the FCC itself, according to Verizon. Verizon contends that the *TRO* reserves to the FCC the ability to determine whether a checklist element's rate satisfies the just and reasonable pricing standard of sections 201 and 202, through a fact-specific inquiry that the FCC would undertake in the context of an enforcement proceeding brought pursuant to section 271. Verizon expands on this in its reply brief, stating that the FCC sets the general pricing methodology for interconnection and unbundled access while the states are limited to applying that FCC-prescribed methodology

in setting rates. Verizon maintains that there is no basis for CLEC claims that the Commission has authority under section 271 to establish its own prices for line sharing. Further, Verizon contends that Covad's support for TELRIC (Total Element Long-Run Incremental Cost) pricing for section 271 elements is weak, stating that even if TELRIC pricing could be found to be just and reasonable under section 271 (and Verizon believes that it could not) that would not preclude Verizon from charging a higher rate that is also just and reasonable, giving the Commission no grounds to insist on a lower TELRIC rate.

Verizon contends that its proposed tariff revisions recognize the fact that, in some cases, Verizon may have a continuing obligation to provide certain UNEs pursuant to existing interconnection agreements. In that instance, Verizon says, it stands ready to negotiate individual agreements with CLECs for the continued availability of those elements. That process, according to Verizon, is independent of the obligations created by its tariff, and there is no reason for generic tariff provisions to be left in place in order to recognize or enforce what is a contractual obligation.

Verizon rejects segTEL's arguments against preemption, saying that mandatory unbundling in the absence of an impairment finding undermines the Telecommunications Act's principal goal of promoting facilities-based competition, such that when the FCC determines that an element should not be unbundled, a state may not lawfully override that determination.

In its supplemental brief, Verizon argues that the Telecommunications Act does not simply create federal rights and obligations that supplement state law requirements, but has unquestionably taken the regulation of local competition away from the states such that states

may take no action that is inconsistent with federal legislation and federal policy. Since the FCC eliminated these elements under section 251, Verizon says, the state may not reimpose unbundling obligations. The Commission cannot force Verizon to continue to make delisted UNEs available at TELRIC rates, says Verizon.

2. Line Sharing

Verizon argues that its tariff revisions regarding shared loops implement the FCC's rules governing grandfathered and new line sharing arrangements and should be approved as filed. According to Verizon, the FCC eliminated the requirement that ILECs must provide access to the high frequency portion of a loop and preempted the Commission from requiring the unbundling of shared loops. The FCC expressly declined to readopt its line sharing rules, Verizon says, and instead established a three-year transition period for new line sharing arrangements and grandfathered existing line sharing arrangements. Verizon describes the grandfathered line sharing arrangements as those arrangements over which the CLEC began providing DSL to a particular end user prior to the effective date of the *TRO*, and over which the CLEC has not ceased providing DSL service to that customer. Therefore, Verizon asserts, its tariff revisions properly reflect the FCC's intent that grandfathered line sharing arrangements extend not only to a particular end user customer, but to the exact loop (or subloop) serving that end user at a specific location. CLECs have a limited right to new line sharing arrangements, Verizon contends, for a limited transitional period, at rates which steadily increase toward the price of a standalone unbundled loop.

In its reply brief, Verizon takes issue with the claims of Covad, GWI and segTEL

that section 271 imposes additional unbundling requirements for line sharing. Section 271 does not require Verizon to offer the high frequency portion of the loop, says Verizon, as checklist item 4 applies to the local loop transmission from the central office to the customer's premise "*unbundled from local switching or other services*" (emphasis supplied by Verizon). According to Verizon the question is not whether a CLEC should be allowed access to line sharing, but whether the CLEC must take (and pay for) the entire loop when it orders the high frequency portion of that loop. With that in mind, Verizon avers, Congress's failure to require that the high frequency portion be unbundled from the rest of the loop, while expressly requiring that the loop itself be unbundled from switching is significant, and an indication that Verizon need not make the high frequency portion available separate from the low frequency portion. The CLECs have failed, in Verizon's view, to cite any decision by the FCC or any court interpreting section 271 as imposing an obligation on an RBOC – independent of any UNE requirement of section 251 – to unbundle the high frequency portion of the loop from the remainder of the loop.

Verizon continues this argument in its supplemental brief, updating the legal history of line sharing to show that the D.C. Circuit Court expressly upheld the FCC's determination that the high frequency portion of the loop was not subject to unbundling and that line sharing was therefore eliminated as a UNE. Since the Supreme Court denied *certiorari*, Verizon points out that the FCC's decision on this issue is binding as a final and unappealable determination. The Commission is preempted from ordering the continued provision of line sharing due to section 251(d)(3) and familiar principles of conflict preemption, according to Verizon. Verizon points out that both the Commission and the FCC share the common goal of

promoting broadband deployment and enhancing competition. The FCC has concluded, Verizon contends, that forced line sharing is not necessary to promote broadband deployment, and, in fact, will discourage competition and innovation, contrary to the express goals of the Telecommunications Act.

Verizon cites the Supremacy Clause as the source of the preemption on action by this Commission, saying that it is particularly clear in the area of line sharing since the FCC adopted transitional rules which have preemptive effect and displace inconsistent state law. A U.S. District Court in Wisconsin specifically rejected the notion that state commissions have residual authority under the Telecommunications Act to impose state line sharing requirements, alleges Verizon, citing *Wisconsin Bell v. AT&T*, 2004 WL 2059549 (W.D. Wis. June 30, 2004), which, according to Verizon, concludes that the Telecommunications Act preserves state authority only to the extent that state requirements are consistent with the FCC's regulations. Verizon goes on to summarize decisions in Massachusetts, Florida, Indiana and Virginia that reject petitions to retain unbundling obligations that the *USTA II* decision vacated.

Verizon also relies on certain language in the TRO pointing out that if section 251 impairment determinations applied only to ILECs that were neither RBOCs nor exempt from unbundling obligations as rural telephone companies, that would leave only 2.5 percent of access lines subject to the impairment determinations. This, according to Verizon, would trivialize the FCC's section 251 impairment determinations.

2. Dark Fiber Feeder Subloop

Verizon contends that its proposed revisions eliminate dark fiber feeder subloop

arrangements in compliance with the *TRO*. The FCC, according to Verizon, was specific in its determination that ILECs are not required to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE.

3. IOF

Verizon contends that its tariff revisions are consistent with the FCC's finding that CLECs were not impaired without OCn or SONET transport facilities.[6] Verizon states that the FCC made a nationwide finding of impairment for dark fiber, DS1 and DS3, however, and requires the Commission to determine whether those findings apply to individual routes based on specific criteria.

4. Dark fiber channel terminations

Finally, Verizon states that its tariff revisions in regard to dark fiber channel terminations are appropriate because the FCC changed the definition of IOF to exclude transport elements that do not connect ILEC switches and ILEC wire centers within a LATA.

B. segTEL

1. General Argument

segTEL describes itself as a New Hampshire CLEC that provides broadband services to residential and business customers, using collocation to access line sharing in 25 Verizon central offices. segTEL argues that the Commission is not preempted from requiring unbundling. According to segTEL, the Commission derives its legal authority to regulate

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[6] Verizon refers to STS as SONET; for purposes of this order, the two terms are interchangeable.

telecommunications in New Hampshire from two sources: the police power of the State, as delegated to the Commission by the General Court pursuant to RSA 374, *et. seq.*, and the regulatory power delegated to the Commission by the federal government, through the Telecommunications Act and the rules the FCC has promulgated to implement the Act. It is the Commission's role, segTEL claims, to try to harmonize these two sources of power, utilizing both its state authority and its federally delegated authority in a way that does not substantially prevent the implementation of the purposes of the Telecommunications Act. Thus, segTEL concludes, preemption would only occur when Commission actions interfere with overriding Federal interests.

segTEL describes three types of Federal preemption: (a) express preemption, where Congress clearly states it is preempting state action; (b) conflict preemption, where terms of Federal and State laws are in conflict; and (c) occupation of the field preemption, where Congress enacts a scheme so pervasive that there is no room left for State action. Citing section 251(d)(3) of the Telecommunications Act, segTEL claims that there is no express preemption, nor does the federal regulatory scheme occupy the field. Therefore, segTEL argues, section 251(d)(3) incorporates the standard recitation of conflict preemption. Paragraph 195 of the *TRO* simply offers the FCC's guess, says segTEL, that a State using its power under State law to require unbundling would be unlikely to survive a preemption challenge. Such *dicta*, segTEL argues, does not absolve this Commission of its duty under state law to make its own determination regarding ILEC unbundling. According to segTEL, the Commission's duty under state law requires that the Commission determine whether requiring UNEs would conflict or

substantially interfere with the Federal regime.

segTEL further argues that the *TRO* is not a mandate to cease unbundling, but permission to do so. Verizon's proposed tariff revisions, then, segTEL claims, are not a compliance filing made necessary by the *TRO*, but a request by Verizon to change its tariff in order to take advantage of new rules that roll back unbundling mandates. In all cases, segTEL avers, Verizon must explain how its proposal is consistent with its ongoing obligations under section 271 of the Telecommunications Act. According to segTEL, as an RBOC Verizon retains an obligation to provide UNEs that is independent of its section 251 duties. Verizon must, says segTEL, show how it will continue to meet its section 271 obligations through its tariff and its interconnection agreements.

According to segTEL, Verizon is attempting to make far more out of the *TRO* than the law warrants in order to advance Verizon's own interests and to avoid state-level review. segTEL goes on to say that Verizon is forcing a piecemeal review of the *TRO*'s provisions which will sap the limited resources of its competitors. Accordingly, segTEL recommends a cumulative review to implement all the provisions of the *TRO*, ensuring that final changes to the tariff comport with Verizon's section 271 obligations and incorporating changes that CLECs may request as a result of the *TRO*.

In its reply brief, segTEL reiterates that there is no preemption of state authority by the FCC in the matter of review of rates, terms and conditions for unbundled elements, as section 252(f)(2) of the Telecommunications Act expressly states that "nothing in [section 252] shall prohibit a state commission from establishing or enforcing other requirements of state law in its review."

In its supplemental brief, segTEL again explains that the purpose of Tariff 84 and its successors is to ensure maximum participation of competitors by reducing costs of entry on an open basis at published and Commission-approved rates. Verizon is required to offer line sharing and other elements under section 271 of the Telecommunications Act, according to segTEL, because section 271 creates separate and distinct unbundling obligations for RBOCs such as Verizon. According to segTEL, the FCC reiterated the section 271 obligation to provide line sharing in paragraph 653 of the *TRO*, and in subsequent orders where it stated that a section 251 non-impairment finding was not a barrier to continued section 271 requirements to provide access.

This Commission, segTEL argues, recommended approval of Verizon's entry into the interstate long distance market in part on the basis that Verizon was offering line sharing to CLECs, and conditioned its approval on the conversion of the SGAT to a tariff. Therefore, segTEL claims, the items in the SGAT were section 271 elements. As the Maine Commission found in 2004, segTEL contends, Verizon's unbundling obligations under sections 251 and 252 are synonymous with its section 271 obligations at the time when Verizon sought section 271 approval. Today, segTEL claims, an RBOC's section 251 obligations are narrower in most

respects than its section 271 obligations.

Even though the competitive landscape has changed since Verizon's section 271 approval, segTEL continues, Verizon may not change the conditions on which the approval was based by failing to honor one of those underlying commitments.

According to segTEL, the Telecommunications Act makes a clear distinction between sections 251 and 271: section 251, in subsections (d)(1) and (2), requires the FCC to determine what elements should be unbundled and, absent a determination by the FCC that CLECs are impaired without access to those elements, the elements cannot be required to be unbundled. Section 251 preserved the authority of the Commission, segTEL contends, so long as the Commission does not substantially prevent implementation of the Telecommunications Act. Compare this to section 271, segTEL suggests, which sets forth the requirements of an RBOC to enter the interstate long distance market. Section 271, according to segTEL, is a contractual obligation with no section 251 impairment standard: it is a separate prerequisite and an ongoing commitment.

segTEL goes on to assert that state commissions retain a role in review of an RBOC's continued compliance with the section 271 checklist. According to segTEL, not only does the Telecommunications Act specifically require the FCC to consult with state commissions, *see* 47 U.S.C. § 271 (d)(2)(b), but the FCC views state commissions as having the authority to enforce compliance. segTEL quotes from paragraph 171 of the FCC order granting Verizon section 271 authority in New Hampshire, which refers to the "continuing oversight" of the Commission to reasonably assure "that the local market will remain open after 271 authority

is granted." *In re Application by Verizon New England Inc.* 17 F.C.C.R. 18,660 (2002) (*NH 271 Order)* at ¶ 171. segTEL reiterates that Verizon had to meet the section 271 checklist to obtain approval, and must continue to meet the checklist after approval in order to maintain its authority to be in the interstate long distance market.

2. Line Sharing

Verizon's proposed tariff revisions cite CFR section 51.319(a)(1)(i)(A)-(B) and *TRO* paragraphs 255-269 as justification for changes to its line sharing offering. segTEL takes issue with Verizon's reliance on these provisions, taking the position that (a) nothing in the *TRO* requires CLECs to execute a separate agreement for line sharing, and (b) Verizon has not established that the elimination of line sharing complies with the requirements of section 271 of the Telecommunications Act. Further, segTEL argues, the FCC's rules are unclear as to what constitutes a "new" line sharing application. segTEL argues that its installation of line sharing terminations and splitter shelves constitute an existing line sharing application that should enable segTEL to continue to serve additional customers at existing TELRIC rates.

While segTEL concedes that the Commission may be preempted from mandating continued line sharing outside of the grandfathering and transition provisions of the FCC's rules under section 251, segTEL claims that Verizon's obligation to provide line sharing under section 271 is clear, inasmuch as paragraph 105 of the *NH 271 Order* explicitly states that the FCC's "conclusion that Verizon complies with checklist item 4 [271(c)(2)(B)(iv)] is based on [the FCC's] review of Verizon's performance for all loop types, which include, as in past section 271 orders, voice grade loops, xDSL capable loops, digital loops, high capacity loops, as well as our

review of Verizon's processes for hot cuts, line sharing and line splitting." (emphasis added by segTEL.)

In its reply brief, segTEL takes issue with the language of Verizon's revisions, claiming that Verizon's new tariff language is incorrectly line specific when the *TRO* is clearly customer specific. segTEL supports language that would allow customers to take existing line sharing services with them when they relocate.

In its supplemental brief, segTEL argues that the absence of line sharing in Tariff 84 will force CLECs to negotiate interconnection agreements with Verizon to continue to provide line sharing, a process segTEL describes as burdensome. segTEL argues that the promotion of competition and the development of broadband access to the Internet are important public policy goals, consistent with both the federal regime and state law and policy. Allowing Verizon to eliminate line sharing would thwart these clear public policy goals, according to segTEL, and exacerbate the difference between DSL rates in urban and rural areas due to the disparity in the price of full loops in Tariff 84 ($11.97 in urban areas and $25.00 in rural areas).

3. Dark Fiber Feeder Subloop

In its reply brief, segTEL asserts that Verizon ignores the plain language of the *TRO* in attempting to carve out dark fiber feeder subloops from the list of required UNEs. According to segTEL, the local loop element is designed as the facility between a distribution frame in a central office and the loop demarcation point at a customer premise, and nothing in the applicable regulation supports Verizon's argument that a segment of this element is excluded from the access requirements.

4. IOF

Verizon's proposal to terminate, as soon as possible, all current and future service over OC3, OC12, or STS1 transmission facilities except as provided for under an effective interconnection agreement may be consistent with the *TRO*'s implementation of the Telecommunications Act, segTEL concedes, but it ignores Verizon's obligations under section 271 of the Telecommunications Act. Further, segTEL states that a state decision mandating continuation of OCn/STS transport UNEs could not conflict with the FCC's rules, since nothing in the rules addresses such transport. segTEL asserts that although the *TRO* allows Verizon to remove UNEs from the list of available elements, there is nothing in the Telecommunications Act that requires Verizon to do so. Moreover, according to segTEL, there is nothing in the *TRO* to indicate that continued provision of such services would frustrate or substantially prevent an FCC goal, so no preemption of state law can exist for IOF.

5. Dark Fiber Channel Terminations

segTEL makes no explicit argument regarding the elimination of dark fiber channel terminations UNEs.

C. MCI

1. General Argument

MCI contends that the *TRO* does not preempt states from establishing additional unbundling under state law, citing the statement by the FCC at paragraph 191 of the *TRO* that "[m]any states have exercised their authority under state law to add network elements to the national list." Indeed, avers MCI, the FCC rejected Verizon's argument that there is no

independent state role in unbundling determinations. The FCC deferred the issues of preemption to future proceedings, MCI notes, suggesting that a conflict between state and federal law would require a declaratory ruling from the FCC. MCI suggests that any reading of the *TRO* that does not give substantial leeway to the states would itself conflict with the Telecommunications Act, which explicitly recognizes the power of states to order greater unbundling than the FCC at section 251(d)(3) and section 252(e)(3). Withdrawal of the UNEs proposed by Verizon, in MCI's view, would conflict with the Commission's rulemaking authority in RSA 365:8, its power to reject rates that are not just reasonable and in the public interest as set forth in RSA 378:7 and Rule Puc 1311 authorizing the unbundling of ILEC facilities.

Verizon's proposal fails to include adequate transition procedures, MCI asserts, which must be in place in order to prevent disruptions in customer service. In fact, MCI says, Verizon proposed to unilaterally discontinue access to the UNEs at issue on December 6, 2003, without regard to possible service disruptions, an action that MCI contends would fly in the face of FCC policy and the Commission's interest in preventing harm to consumers. MCI urges the Commission to ensure that Verizon establishes an adequate transition framework before its tariff revisions take effect.

2. Line Sharing

MCI takes issue with Verizon's revisions as they apply to line sharing for three reasons. First, MCI argues that Verizon uses the ambiguous term "existing rates" as opposed to the *TRO* language that sets the price to that "charged prior to the effective date" of the *TRO*. Second, according to MCI, Verizon's tariff revisions restrict grandfathering to an "end user

customer over that Loop or Subloop at that location," overstating the *TRO*'s non-location-specific standard of a "particular end-user customer." Finally, MCI contends that the *TRO* specifically provides for the inclusion of a "successor or assign" to the CLEC, while Verizon is limiting grandfathering to "the TC."

3. Dark Fiber Feeder Subloop

MCI contends that dark fiber feeder subloops must be made available on an unbundled basis because they are components of dark fiber loops and the *TRO* did not alter this requirement. MCI states that Verizon's justification for the elimination of dark fiber feeder subloops rests on paragraph 253 of the *TRO* which, MCI says, address fiber feeder subloops generally. Since the FCC treated dark and lit fiber quite differently throughout the *TRO*, according to MCI, Verizon's lit fiber analogy does not support its argument that the *TRO* bars the unbundling of dark fiber subloops. MCI argues that a proper conflict preemption analysis pursuant to section 251(d)(3) would result in a finding that the unbundling rules challenged by Verizon would stand, particularly with respect to dark fiber feeder subloops.

4. IOF

MCI asserts that Verizon has identified no provision or purpose of the Telecommunications Act that would be undermined by the unbundling on state law grounds of the high capacity transport UNEs at issue in this docket, because the question is not whether the state requirements and the *TRO* are identical, but whether state requirements substantially prevent the requirements of the Telecommunications Act itself.

5. Dark Fiber Channel Terminations

MCI did not address dark fiber channel terminations specifically.

D. GWI

1. General Argument

GWI asserts that Verizon has grossly overstated the purported preemptive sweep of the *TRO*. Citing section 251 of the Telecommunications Act, GWI argues that a state may require UNEs not unbundled by the FCC so long as the state's action does not undercut the Federal scheme. According to GWI, section 251(d)(3) states that the FCC shall not preclude the enforcement of any regulation, order or policy of a State Commission that (a) established interconnection obligations of LECs, (b) is consistent with the requirements of section 252, and (c) does not prevent implementation of section 252 and the purposes of the Telecommunications Act. Indeed, says GWI, the FCC acknowledged at paragraph 192 of the *TRO* that Congress explicitly declined to preempt states in the field of telecommunications regulation, concluding that "[i]f Congress intended to preempt the field, Congress would not have included §251(d)(3) in the 1996 Act." Instead, GWI explains, the FCC established a procedure by which aggrieved parties may seek review of a state's decision by the FCC, and subsequently test that review in court, if necessary. Citing action by the Pennsylvania Public Utility Commission (Pennsylvania PUC), GWI argues that the state can differ from the *TRO* if the Commission does not have enough information to forecast the outcome of FCC and court review of whether its varying requirements substantially prevent the Federal scheme. GWI attached to its brief the Comments of National Association of Regulatory Utility Commissioners (NARUC) to the Court of Appeals

that decided *USTA II*. NARUC's brief addresses whether the FCC can remove the states' authority that was preserved in section 251(d)(3). NARUC contended that the FCC's finding was contrary to the reservation of state's rights to set prices that are subject to review by federal district courts under section 252(e)(6).

In its reply brief, GWI characterizes Verizon's argument that New Hampshire is powerless to enforce Verizon's section 271 obligations as disingenuous. GWI points out that the FCC reviewed the pricing procedures at great length during approval of Verizon's petition for section 271 authority in New Hampshire and, although the FCC took issue with some aspects of the Commission's rate setting, the FCC in no way suggested that the Commission's authority to review rates was limited. In fact, according to GWI, the FCC noted that elements germane to the section 271 review might be altered by this Commission in the future if the Commission were to initiate a new rate proceeding. GWI contends that Verizon supports its position by extracting a quotation from paragraph 664 of the *TRO* which says that the FCC would determine whether section 271 rates were just and reasonable in the course of a section 271 enforcement proceeding. GWI points out that the FCC stated this during a discussion concerning the interplay between sections 251 and 271, noting that (a) an RBOC such as Verizon may be required to make elements available under section 271 that it might not otherwise be required to make available under section 251, and (b) that pricing for such elements would be judged under a "just and reasonable" standard. In further support, GWI cites the *NH 271 Order*, in which the FCC explicitly rejected AT&T's argument that the FCC was required to evaluate the checklist by looking at more than 150 UNE rates on an element-by-element basis. Clearly, according to GWI,

the FCC would not now exclude the states from the rate-setting business in connection with section 271 UNEs; rather, the FCC will continue to review state-set rates for those elements required to be unbundled under section 271.

2. Line Sharing

Citing paragraphs 255 through 270 of the *TRO*, GWI contends that the FCC considered economic and operational reasons for reinstating line sharing. Although Verizon's revisions are consistent with the *TRO*, GWI argues, the Commission should independently consider whether line sharing should be offered on an ongoing basis in order to further state policies in support of access to the Internet. GWI encourages the Commission to make an independent assessment, arguing that rural loop rates of $25 would make it impossible to deliver DSL at competitive prices, in direct conflict with the best interests of the residents and businesses of New Hampshire.

3. Dark Fiber Feeder Subloop

GWI takes the position that Verizon's tariff revisions regarding dark fiber feeder subloop are not consistent with the *TRO*. GWI points out that there is a category of dark fiber subloop that is not covered by the FCC's description of UNEs. This category is an intermediate part of the loop: not distribution, which requires an end point at a user premise; and not feeder, which requires an end point at a central office. According to GWI, this intermediate portion of the loop runs from a hard termination point to another hard termination point. To the extent that such dark fiber was already offered in the SGAT, GWI asserts, Verizon must continue to provide it. The FCC was careful, GWI avers, to ensure that ILECs would eliminate only those UNEs

that enable the transmission of packetized information, while Verizon's tariff revisions fail to capture that distinction and deny access to all features, functions and capabilities of the subloop.

4. IOF and Dark Fiber Channel Terminations

GWI took no position on IOF or dark fiber channel terminations.

E. Covad

1. General Argument

Covad asserts that the Commission has the authority to enforce Verizon's continuing obligations under section 271 because the Act preserves a state role in the review of RBOC compliance with its section 271 checklist obligations. Citing the Pennsylvania PUC's decision to retain UNE-P[7] as an unbundled element, Covad argues that the checklist contains an undisputed continuing obligation to unbundle local switching. In similar manner, Covad contends, the FCC anticipates that a state Commission's active oversight and comprehensive review would ensure that competitive markets remain open.

Covad further contends that a state may establish its own unbundling, asserting that courts have long held that federal regulation of a particular field is not presumed to preempt state law unless the nature of the regulation permits no other conclusion or Congress has unmistakably ordained that the federal law have preemptive effect. Covad contends that the U.S. Supreme Court has refused to diminish the role of state commissions in overseeing local competition, noting that although the FCC may have plenary authority to implement the

[7] UNE-P, or unbundled network element - platform, is the provision of local loop and switching UNEs in combination.

Telecommunications Act, the FCC would be precluded from eliminating state review altogether. Thus, Covad argues, the FCC's apparent intent to preclude states from exercising their section 251 and section 252 authority notwithstanding, this Commission should not be dissuaded from requiring Verizon to provide line sharing as a UNE.

Several states have independently required unbundling, says Covad, pointing to California and Minnesota as states that have unbundled line sharing, and to Illinois, Wisconsin, Indiana and Kansas as states that have unbundled hybrid loops. Further, Covad states that the FCC has acknowledged that the availability of UNEs may vary between geographic regions, thus, if state-specific circumstances exist, state rules requiring unbundling are permissible and would not substantially prevent the implementation of section 251.

Covad states that the Commission is authorized under section 271 to require that checklist UNEs be priced at cost-based, forward-looking rates. Even if an element is no longer a UNE pursuant to section 251, Covad explains, it must nonetheless be priced appropriately in accordance with sections 201, 202 and 271 of the Telecommunications Act. The FCC has neither ordered nor precluded the application of TELRIC prices that were developed under section 251 for these UNEs, says Covad. In fact, Covad claims, the principles of TELRIC must be applied in some form, as Congress has barred the use of traditional rate-base, rate of return methods of utility pricing since enactment of the Telecommunications Act.

The review of such rates is squarely within the jurisdiction of the Commission, Covad asserts, inasmuch as the U.S. Supreme Court has upheld TELRIC methodology on the condition that state commissions retain the authority to use and apply TELRIC in setting final

rates for their respective states. The Pennsylvania PUC determined that rates for UNE-P under section 271 would be existing, approved Pennsylvania UNE rates, according to Covad.

In its reply brief, Covad notes that the *TRO* is not self-executing. Rather, says Covad, the FCC's reiteration of the ILECs' obligations to comply with existing unbundling requirements demonstrates that the *TRO* rules are not immediately effective, but must be implemented in due course and in accordance with the authority granted by the Telecommunications Act. Thus, Covad asserts, this Commission is empowered to suspend, review and amend Verizon's proposed revisions to ensure compliance with federal and state law.

2. Line Sharing

Covad maintains that state-specific conditions exist that would allow the continued offering of line sharing in New Hampshire. The primary and deciding factor regarding the finding of non-impairment in the case of line sharing was the ability of competitors to obtain revenue from both the low and high frequency portions of the loop, including voice and data bundles using line splitting (which allows two CLECs to share the loop, with one providing voice service over the low-frequency portion and the other providing DSL over the high-frequency portion). Covad asserts that Verizon has not made line splitting operationally available in New Hampshire in a manner consistent with what Verizon provides to itself. In support of this claim, Covad contends that: (a) there are limitations on the timing of line splitting order which impact customers; (b) there are discriminatory "versioning" policies for submission of line splitting orders; (c) Verizon recently acted unilaterally to quash a change request that would allow line splitting migrations; and (d) Verizon refuses to provide line splitting with resold voice

services. Because of these operational and cost disadvantages, Covad argues, competitors face severe competitive disadvantages in obtaining all potential revenues from using the full functionality of the loop, making the FCC's impairment finding out of line with the facts as they exist in New Hampshire.

Covad asserts that the Commission has independent state law authority to order line sharing as a UNE pursuant to the Commission's independent authority to foster competition in the local telecommunications market. Covad further believes that the Commission should exercise its ratemaking authority under RSA 378 to require Verizon to provide line sharing at forward-looking, cost-based rates. Again citing to the Pennsylvania PUC, Covad believes that the Commission could set rates equivalent to those UNE rates that the Commission has already approved, as nothing in the Telecommunications Act or *TRO* would prohibit the Commission from determining that those rates remain just and reasonable. It is crucial, in Covad's view, that the Commission not cede its authority to set rates that are pro-competitive, pro-consumer, and which reflect Congress's goals for the Telecommunications Act.

In its reply brief, Covad asserts that the Commission is empowered under section 271 to require Verizon to provide access to line sharing at cost-based rates. Covad disagrees with Verizon, maintaining that line sharing falls squarely within the definition of a loop under checklist item 4, and, as such, must be priced at a rate not above costs that reflect a competitive forward-looking network. Covad claims that such rates are the bedrock of nondiscriminatory, just and reasonable pricing required by the Telecommunications Act and is unquestionably within the Commission's authority to regulate. Covad points to a Georgia Public Service

Commission (PSC) ruling that BellSouth must continue to provide line sharing pursuant to section 271. The Pennsylvania PUC, says Covad, also adopted the concept that section 271 imposes separate and independent obligations upon Verizon, irrespective of any impairment findings that may exist under section 251.

Covad rejects Verizon's argument that the only mechanism by which a competitor can obtain review of Verizon's pricing of line sharing is through an enforcement proceeding in front of the FCC. Such a process contravenes the dual-jurisdictional nature of regulation of telecommunications in the United States, according to Covad. Thus, in Covad's view, there is no cause to doubt the Commission's authority to enforce Verizon's section 271 obligations, including the provision of line sharing.

Finally, Covad takes issue with Verizon's proposed tariff language which denies continued line sharing to those customers whose loops require replacement or who change residences. The *TRO* makes clear, according to Covad, that a line-shared loop is grandfathered until a particular end user customer discontinues DSL service. Verizon has no right, Covad claims, to terminate line sharing due to a change in the physical loop that serves the customer, and Verizon's focus on "that loop or subloop" violates the FCC's grandfathering scheme. Similarly, Covad contends that if a customer moves from one location to another, Verizon's proposed language would allow it to terminate the grandfathering of that arrangement. That result is not permitted, says Covad, as the FCC rules state that grandfathering ends only when the ends user "cancels or otherwise discontinues its subscription." Covad also objects to Verizon's use of the ambiguous term "existing rates" instead of the *TRO* language setting the grandfathered

price to that "charged prior to the effective date" of the *TRO*.

3. Dark Fiber Feeder Subloop, IOF and Dark Fiber Channel Terminations

Covad made no argument regarding dark fiber feeder subloop, IOF or dark fiber channel terminations.

F. Conversent

1. General Argument

Conversent asserts that the Commission is not preempted from requiring the relevant UNEs, as the *TRO* contemplated a joint federal-state role in managing the transition to the new rules. Conversent maintains that, separate and apart from an ILEC's unbundling obligations under section 251, Verizon has an obligation under section 271 to offer access at just and reasonable rates. Conversent limited its argument to dark fiber transport, which was not one of the elements Verizon is seeking to remove from Tariff 84.

G. Lightship

Lightship concurs with and supports segTEL's arguments. Lightship contends that states may establish pricing and other terms of section 271 elements. In the *TRO*, according to Lightship, the FCC found that section 271 of the Telecommunications Act imposed separate unbundling obligations from those of section 251 at rates that are just, reasonable, and non-discriminatory. Lightship argues that, unlike sections 251(e) and 276(b) of the Telecommunications Act, section 271 does not unambiguously nor straightforwardly grant the FCC the authority to establish rates, terms and conditions for section 271 elements. Therefore, Lightship continues, it would be unlawful for the FCC to preempt this Commission from

exercising its section 152(b) authority to regulate section 271 rates, terms and conditions. In support, Lightship cites the U.S. Supreme Court decision in *AT&T vs. Iowa Utilities Board*, 525.U.S. 366 (1999), which upheld the determination that no preemption exists so long as state commissions apply the proper just and reasonable standard. Therefore, Lightship continues, the Supreme Court has endorsed state commissions' continuing role in the ratemaking process. Lightship wants the Commission to order Verizon to continue to comply with its section 271 obligations.

IV. COMMISSION ANALYSIS

The situation presented here is confronted in one form or another by all the states served by Verizon. It is, in point of fact, nearly identical to that confronted by the Maine PUC as described in its September 3, 2004 order in the agency's Docket No. 2002-682 (*Maine Order*). As we did, the Maine PUC proposed in connection with Verizon's request for section 271 authority that the Company's wholesale rates be filed with the state commission in the form of a tariff. As here, the FCC incorporated this commitment into the order granting section 271 authority. And, as with the approval of section 271 authority for Verizon in New Hampshire, the Maine PUC determination antedated the FCC's *TRO* and the *USTA II* decision of the U.S. Court

of Appeals for the District of Columbia Circuit.[8] Maine decided, *inter alia*, (1) that Verizon must include all wholesale offerings in its state wholesale tariff, including UNEs provided pursuant to section 271, and (2) the state commission had authority to approve "just and reasonable" rates for section 271 UNEs in accordance with the standard set forth in Sections 201 and 202 of the Telecommunications Act, 47 U.S.C. § 201-02. We agree for the most part with Maine's approach and reach generally the same conclusions, although we differ on certain specifics, making adjustments as appropriate to circumstances in New Hampshire.

In both Maine and New Hampshire, when Verizon obtained section 271 authority the RBOC's unbundling obligations under sections 251 and 271 were identical. *See Maine Order*, slip op. at 4. The intervening events – issuance of the *TRO* and the *USTA II* decision – changed this landscape, such that Verizon's section 251 obligations were narrowed because, as to some elements, CLEC ability to provide the corresponding services was not impaired without the ability to purchase section 251 UNEs from the RBOC. Among the obligations no longer within the section 251 ambit are the four UNEs at issue in this case which Verizon seeks to remove from its tariff, *i.e.*, line sharing, dark fiber feeder, interoffice transmission facilities (IOF) consisting of OCn (Optical Carrier number) and STS1 (Synchronous Transport Service) transport, and dark fiber channel terminations.

We address first Verizon's general argument that the FCC's elimination of an

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[8] There are also differences between the situations in the two states. Unlike this agency, the Maine PUC did not approve an SGAT prior to its appearance as a wholesale tariff in November 2002. Accordingly, as soon as Verizon filed a wholesale tariff the Maine PUC suspended the tariff. It remained suspended thereafter. Thus, before the Maine PUC when it issued the *Maine Order* was the entirety of the Verizon wholesale tariff, including provisions that are analogous to the tariff revisions that give rise to this proceeding. The legal issues, regarding the role of state commissions subsequent to RBOC receipt of section 271 authority, are identical.

element as a section 251 obligation allows Verizon to remove that element from its wholesale tariff altogether. The FCC made clear in the *TRO* that the removal of a UNE from the list of section 251 obligations because of a lack of impairment did not automatically resolve the question of whether an RBOC must still make that UNE available under section 271. *See TRO* at ¶¶ 652-655. The FCC's *TRO* has in fact rejected Verizon's arguments that once the FCC determined that a UNE is not necessary under section 251, the corresponding 271 checklist item should be construed as being satisfied. In rejecting this position, the FCC made it clear in the TRO that "the BOCs have an independent obligation under section 271 (c)(2)(B) to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at reasonable rates." The FCC further concludes that RBOC obligations pursuant to section 271 are "not necessarily relieved based on any determination [by the FCC] under the section 251 unbundling analysis." *Id.* at ¶ 655.[9] The FCC's conclusions were reaffirmed in *USTA II. See USTA II,* 359 F.3d at 589-90. Accordingly, determining whether the four elements at issue here remain as Verizon obligations under section 271 requires a case-by-case analysis. At the same time, it is clear as a general matter that, to the extent an obligation persists under section 271, the pricing standard changes. As a section 271 element, pricing will be based on a "just and reasonable" standard and not on TELRIC. *TRO* at ¶ 656.

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[9] In arguing to the contrary, Verizon invokes paragraph 660 of the *TRO*. In paragraph 660, the FCC noted that only 2.5 percent of ILEC switched access lines nationwide were served by LECs that are neither RBOCs nor rural telephone companies exempt from section 251 unbundling obligations. According to Verizon, in light of these facts it "trivializes" the FCC's decision to phase out line sharing as a section 251 obligation to determine, in effect, that the decision applies only to 2.5 percent of ILEC switched access lines. December 6, 2004 Comments of Verizon NH in Docket No. DT 04-176 at 15. Verizon reads too much into paragraph 660. The conclusion actually drawn by the FCC in paragraph 660 is that the agency's section 251 impairment determinations should not apply only to ILECs that are not RBOCs because that would tend to render section 251 "superfluous." Nothing in our decision today is intended to suggest that the FCC's impairment determinations should not apply to Verizon.

Before we undertake the case-by-case determinations, however, we examine the extent of our authority, under section 271 or otherwise, to determine whether Verizon must continue to offer delisted section 251 UNEs as section 271 elements. The first step in that examination focuses on Verizon's obligation to file a wholesale tariff.

As the FCC noted in the 271 Order, the Commission initially identified ten separate conditions as necessary for recommending that the FCC grant section 271 authority; Verizon agreed to comply with six of them. *See NH 271 Order* at ¶4 n. 10 and ¶5 n. 11. Among the conditions agreed to by Verizon was the requirement that Verizon "explicitly convert the existing statement of generally available terms and conditions (SGAT) into a competitive LEC tariff from which competitors may order anything contained in the SGAT without the need to negotiate or amend an interconnection agreement." *Id.* at ¶4 n. 10. Ultimately, the Commission recommended that the FCC grant section 271 authority subject to the conditions as set forth in a letter to Verizon dated June 14, 2002. *Id.* at 5. It is undisputed that these conditions, including the wholesale tariff obligation, form part of the basis for Verizon's receipt of section 271 authority.

The *NH 271 Order* notes that Verizon agreed to submit a wholesale tariff, and the order did not distinguish between section 251 and section 271 obligations. We find it reasonable and appropriate, as did the Maine PUC, to interpret Verizon's tariff filing obligation as embracing the unbundling obligations of both section 251 and section 271. Indeed, in the introduction to Verizon's SGAT Verizon notes that the SGAT is filed under sections 251, 252 and 271 of the Telecommunications Act. (SGAT p.1). Additionally, Verizon committed to

"promptly file modifications to its SGAT and tariff to reflect changes in the services and network elements required by the federal Telecommunications Act, as determined by the FCC or the courts" in its letter to the Commission filed in DT 01-151 on March 15, 2002. In other words, Verizon remains obligated to have a wholesale tariff on file with our agency and an FCC decision to remove a UNE as a section 251 requirement does not automatically eliminate it as an unbundled element that Verizon must offer in its wholesale tariff.

Having determined that Verizon is obliged to file a wholesale tariff, we next examine the implications of that obligation. In granting Verizon section 271 authority in New Hampshire, the FCC made explicit reference to an ongoing role for this agency under section 271 in paragraphs 172 through 174 of the *NH 271 Order.* After affirming that Verizon has continuing obligations under section 271 pursuant to subsection (d)(6), the FCC affirmed its own authority to exact compliance, *NH 271 Order* at ¶ 172. The FCC indicated its readiness to assert such authority while "[w]orking in concert" with this Commission. *Id.* at ¶ 173. The FCC also stated that it would not describe the post-approval enforcement framework because it had already done so in prior section 271 approvals, *i.e.*, those covering Kansas and Oklahoma, Texas and New York. *Id.* at ¶ 172.

The FCC's New York 271 approval order, *In re Bell Atlantic New York*, 15 F.C.C.R. 3953 (1999) (*NY 271 Order*), the earliest of those cited, offers the most complete description of the FCC's view of post-approval section 271 enforcement. The FCC noted that by enacting section 271 Congress intended to give RBOCs an incentive to take actions that would tend to accelerate competition in RBOC-dominated telecommunications markets, observing that

the incentive "may diminish" once an RBOC had received section 271 authority. *Id.* at ¶ 446. Therefore, reasoned the FCC, "[s]wift and effective post-approval enforcement of section 271's requirements . . . is essential to achieve Congress's goal of maintaining conditions conducive to achieving durable competition in local markets." *Id.*

After enumerating the various enforcement remedies in section 271, most particularly the ability to suspend an RBOC's section 271 authority, the FCC indicated that it intended to be active and vigilant in this regard. But the FCC went on to stress that

> [i]n addition to FCC-initiated enforcement actions (such as forfeitures, suspensions, and revocations), Congress provided for the expeditious review of complaints concerning failure by a BOC [*i.e.*, an RBOC] to meet the conditions required for section 271 approval. Such complaints may include requests for damages. The Commission will consider and resolve those complaints alleging violations of section 271 as well as the Commission's rules and orders implementing the statute. Complaints involving a BOC's alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, *should be directed to that state commission* rather than the FCC.

Id. at ¶ 452 (footnotes omitted, emphasis added).

Given these legal and factual circumstances, we share the view of the Maine PUC that as a state commission we have the authority to determine whether Verizon's wholesale tariff, including any changes proposed by Verizon, remains in compliance with the obligations Verizon voluntarily undertook in exchange for the right to offer interLATA service. Although, as Verizon notes, subsection (d)(6) of section 271 refers specifically to the FCC's role in post-approval section 271 enforcement, the FCC itself has repeatedly recognized that state commissions may receive and evaluate complaints of non-compliance with the conditions to which the RBOC and the state commission have agreed. In this case, like our Maine counterparts, we do not assert independent authority to define the scope of Verizon's section 271

obligations nor its compliance with those obligations under that section. We are performing our duty as the initial arbiter of disputes over whether Verizon continues to meet the specific commitments previously made to this Commission as a condition for its recommendation that Verizon receive section 271 interLATA authority. *See NY 271 Order* at ¶ 452.[10]

We now examine each of the four elements, line sharing, dark fiber feeder subloop, IOF and dark fiber channel terminations, in the context of the section 271 checklist, to determine whether Verizon remains obliged to offer them in its wholesale tariff. Subsection (c)(2)(B) of section 271 sets forth the "[c]ompetitive checklist" of items that RBOCs must offer CLECs in order to meet the "access and interconnection" requirements for interLATA long-distance authority. Two section 271 checklist items are relevant to determining whether Verizon remains obligated to provide the four elements noted above: checklist item 4, "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services;" and checklist item 5, "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services;" § 271(c)(2)(B)(iv) and

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[10] In arguing to the contrary – specifically, in the course of urging the Commission not to require Verizon to offer line sharing to CLECs as part of the wholesale tariff – Verizon relies on a statement in *SBC Communications v. FCC*, 138 F.3d 410 (D.C. Cir. 1998) that "Congress has clearly charged the FCC, not the state commissions," with making certain determinations under section 271. *Id.* at 416. At issue was whether the RBOC was entitled to section 271 authority, notwithstanding certain objections interposed by the relevant state commission, rather than whether the state commission had an enforcement role to play after the FCC allowed the RBOC to enter the interLATA market.

A similar point can be made about *Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (4th Cir. 2004), also relied upon by Verizon. At issue in that proceeding was whether, during the long-distance application process, a state regulatory commission had the power to enter an order designed to ensure the RBOC would continue to meet its section 271 obligations. The U.S. Court of Appeals for the Fourth Circuit answered the question in the negative, deciding the case on preemption grounds. The Court held that the state regulatory commission could not "parlay its limited role in issuing a recommendation" to the FCC on whether to grant section 271 authority "into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service." *Id.* at 497.

(v).

Of the four elements that Verizon seeks to remove from Tariff 84, it is line sharing, which uses the high frequency portion of the local loop, that has engendered the most controversy. We must determine whether checklist item 4, which requires the unbundling of local loops, includes a requirement for the continued provision of line sharing as a section 271 element. The FCC's regulations define line sharing as "the process by which a requesting telecommunications carrier provides digital subscriber line service over the same copper loop that the incumbent LEC uses to provide voice service, with the incumbent LEC using the low frequency portion of the loop and the requesting telecommunications carrier using the high frequency portion of the loop." 47 C.F.R. 319(a)(1)(i). According to the pleading submitted by ALTS on February 18, 2005, the widespread advent of line sharing in 2002 was largely responsible for creating broadband services that gave consumers high-speed access via DSL (digital subscriber lines) to the Internet, both because consumers could obtain this service from CLECs and because the competition induced ILECs themselves to offer DSL service at a more reasonable rate. Whether or not such an interpretation is a fair assessment, there is no question that the broader availability of line sharing, and therefore DSL, in New Hampshire, particularly in rural areas, is encouraged by this Commission and by state statute. *See* RSA 374:22-j, VI.

Checklist item 4 refers only to "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." If the phrase "local loop" can be understood as having been intended to include all the functionalities of a loop on an unbundled basis, then line sharing is required by checklist item 4. We conclude that it is, relying on, among other things, the Statutory Appendix to the *NH 271 Order*. In this appendix, the FCC specifically addressed how RBOCs can establish that they are in compliance with checklist item 4. *Inter alia*, the RBOC "must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested." *NH 271 Order*, Appendix F at ¶ 49. We understand the high frequency portion of the loop – or, more specifically, the use of that portion of the loop to provide DSL service – to be a "functionality of the loop." The D.C. Circuit has a similar understanding of what "functionality of the loop" means. *See USTA II*, 359 F.3d at 554 (referring, albeit in passing, to the "full functionality of the loop" as including "voice, data, video, and other services.") The discussion of line sharing in the FCC's *TRO Order* further buttresses the notion that line sharing is an individual "functionality of the loop." *See TRO Order* at ¶ 258 ("Whereas in the Line Sharing Order, the focus was only on the revenues derived from an individual service, our focus is on all the potential revenues derived from using the full

functionality of the loop.").[11] Additionally, the FCC specifically included line sharing in its analysis of Verizon's compliance with the competitive checklist, including line sharing as one of the elements it reviewed as part of Verizon's compliance with checklist item 4. See *NH 271 Order*. Also, Verizon itself listed line sharing as one of the items it offers to carriers in its checklist declaration to this Commission in Docket No. DT 01-151 filed on July 31, 2001. Accordingly, we determine that checklist item 4 includes a requirement to provide line sharing.

The next element we consider is dark fiber feeder subloop. Because a subloop is a distinct segment of a complete loop, we must determine whether checklist item 4 includes a requirement that subloops, in particular dark fiber feeder subloops, are required for section 271 compliance. We answer the question in the affirmative, noting that Verizon does not suggest to the contrary. The only argument Verizon makes about dark fiber feeder subloop is that the FCC determined in the *TRO* that ILECs were not required under section 251 to offer unbundled access to fiber feeder loop plant. TRO at ¶ 253 (determining that copper subloops were subject to section 251 unbundling). This is not dispositive of whether Verizon remains obliged to provide

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[11] We acknowledge that the FCC is not necessarily the final arbiter of what Congress meant when it used the phrase "local loop" in checklist item 4. However, we are aware of no federal court that has disagreed with the FCC's construction of this statutory language. A court faced with such a question would be required to grant deference to the FCC under the Supreme Court's *Chevron* doctrine. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (concluding that, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

such access under checklist item 4.[12] It is clear, however, that the FCC anticipated the provision of dark fiber feeder subloop as a section 271 element, stating, "we expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops." *Id.* We therefore determine that checklist item 4 includes dark fiber feeder subloops.

MCI and segTEL argue that Verizon's proposal to remove dark fiber feeder subloop as a section 251 element is a misreading of the clear language of the *TRO*. While the *TRO* does not specify "dark" fiber in the discussion of dark fiber feeder subloop, this issue is rendered moot by the plain language of the *TRO Remand Order*, which removes all dark fiber loops, and therefore all dark fiber subloops, from Verizon's section 251 unbundling obligations. *See* 47 C.F.R. 51.319 (a)(6).

The third element we consider is IOF. IOF is transport between Verizon locations, and thus we must determine whether checklist item 5 includes IOF at OCn and STS levels. Since IOF was not a matter of any controversy in the New Hampshire 271 proceeding it is not discussed in the *NH 271 Order*. It is noteworthy that, in discussing IOF, Verizon relies exclusively on the contention that IOF is no longer a section 251 obligation. We agree that IOF at the OCn and STS level is no longer a section 251 obligation, but we disagree as to the

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[12] GWI makes an additional, related argument that the intermediate portion of the subloop, i.e., that portion of the subloop connecting a remote terminal to another remote terminal rather than customer premises, is still subject to section 251 unbundling. Because our decision today means that Verizon is still obliged to offer the intermediate portion of the subloop as a checklist item 4 element, the only question implicated by GWI's argument is whether TELRIC pricing still applies to this portion of the subloop. We defer that question until such time as Verizon seeks to deviate from the rates currently reflected in Tariff 84.

implications on Verizon's section 271 obligations and commitments to this Commission. We therefore determine that checklist item 5 includes OCn and STS transport.

Next we turn to dark fiber channel terminations which, if considered as transport, would require a determination as to whether such facilities are required by checklist item 5. As previously noted, there were a series of developments between the FCC and the Courts, after which the FCC declared that dedicated transport included "incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers." *TRO* ¶ 365 (footnote omitted). Applying this definition, which appears to include entrance facilities, the FCC found that CLECs are not impaired without access to entrance facilities, thereby eliminating the section 251 obligation. (*TRO Remand Order* ¶ 137).

Because the FCC has included entrance facilities within the elements that fall within the category of dedicated transport, and because dark fiber channel terminations are a form of entrance facilities, we must conclude that they remain elements addressed by checklist item 5. Therefore, consistent with our analysis above, Verizon must make dark fiber channel terminations available to satisfy its section 271 commitments.

Having said that, however, we must make two important observations. First, we are sympathetic to Verizon's arguments (and the FCC's original position on this issue) that these facilities may not truly be the type that must be offered on an unbundled basis. It would not be appropriate for this Commission, however, to countermand the language of the FCC and the

courts and simply declare dark fiber channel terminations are no longer required to be offered because we think it makes no sense, any more than it would be appropriate for Verizon to make such a unilateral determination. Until there is clearer guidance from the FCC or the courts on this issue, we find no basis to do other than to conclude that Verizon may not discontinue offering this element.

Second, we note that MCI and segTEL argued that Verizon is wrong to state that entrance facilities such as dark fiber channel terminations are no longer section 251 facilities. They argue that Verizon should continue to provide them not as just and reasonable rates under section 271 but at TELRIC rates under section 251. This issue has not been adequately developed and we decline to rule on the section 251 status of these entrance facilities in this docket. In the event Verizon proposes a tariff change we will evaluate the issue, including what role the Commission should play in the determination.

We have now reviewed Verizon's proposed tariff revisions and find that Verizon must continue to provide line sharing, dark fiber feeder subloop, dark fiber channel terminations and IOF as part of its wholesale tariff. By our actions today, we are not adding UNEs to those Verizon is currently obliged to offer. Neither are we reimposing section 251 unbundling requirements or making any determinations as to impairment. It is more accurate to say that we are continuing our oversight of Verizon's section 271 obligations.[13]

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[13] The parties make a variety of additional arguments, largely based on section 251 and/or state law. Because we decide the case based on legal principles arising out of section 271, we need not address these additional arguments.

Because our decision today has the effect of preventing Verizon from discontinuing the provision of certain network elements to CLECs, we must address pricing issues as to those elements. To the extent an element is eliminated by the FCC as a section 251 obligation and it persists as a section 271 obligation, the pricing standard changes from TELRIC to "just and reasonable." Our analysis of Verizon's obligation to file a tariff leads us inexorably to a conclusion analogous to that reached by the Maine PUC. Specifically, it would be a "hollow promise" if Verizon were to file a tariff with the expectation that the state commission has no role in reviewing the rates, terms and conditions contained in that tariff. As did the Maine PUC, we do not foreclose the possibility that Verizon may turn to the FCC regarding rates but we conclude that, unless or until the FCC acts, pricing is an area of concurrent jurisdiction and an example of cooperative federalism. Accordingly, as a state agency and being closest to the issues, if and when Verizon files changes to rates under its wholesale tariff, we will review such proposed changes in the normal course.

Until new rates are established for line sharing, dark fiber feeder subloop, dark fiber channel terminations and IOF, Verizon shall offer these section 271 elements at existing Tariff 84 rates. Accordingly, Order No. 24,268 (January 30, 2004) granting Verizon's request for relief from a determination in the Order of Notice that existing rates would remain effective pending review of proposed tariff changes is hereby vacated. The result of this determination is that Tariff 84 reverts to the form it took prior to our authorization in Order No. 24,268 of certain tariff revisions on a temporary basis pending the outcome of DT 03-201.

Our decision that line sharing must remain an unbundled network element offered by Verizon pursuant to Tariff 84 is also determinative with respect to the relief requested by

segTEL in DT 04-176. Accordingly, we grant the petition in DT 04-176. Our decision today is not intended to express any view as to the just and reasonable rate for any unbundled element offered by Verizon pursuant to Tariff 84 or, indeed, what tribunal would ultimately make such a determination. We simply conclude that Tariff 84 remains unchanged from the version that was applicable at the commencement of DT 03-201, and that the elements therein must be made available to CLECs.

Based upon the foregoing, it is hereby

ORDERED, that the proposed revisions to Tariff No. 84 submitted by Verizon New England in DT 03-201 are rejected, as described fully in the order herein; and it is

FURTHER ORDERED, that the petition of segTEL in DT 04-176 for a determination that Verizon New Hampshire remains obligated to provision line sharing pursuant to Tariff No. NHPUC 84 is GRANTED.

By order of the Public Utilities Commission of New Hampshire this eleventh day of March, 2005.

Thomas B. Getz Chairman	Graham Morrison Commissioner	Michael Harrington Commissioner

Attested by:

Debra Howland
Executive Director and Secretary

ATTACHMENT 4

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Cbeyond Communications, LLP, Global TelData II, LLC f/k/a Global TelData, Inc., Nuvox Communications of Illinois, Inc. and Talk America Inc. -vs- Illinois Bell Telephone Company	:	**05-0154**
XO Illinois, Inc. and Allegiance Telecom of Illinois, Inc. -vs- Illinois Bell Telephone Company	:	**05-0156**
Complaint pursuant to 220 ILCS 5/13-515.	:	
McLeodUSA Telecommunications Services, Inc. -vs- Illinois Bell Telephone Company	:	**05-0174**
Verified Complaint pursuant to 220 ILCS 5/13-515(e).	:	

ADMINISTRATIVE LAW JUDGE'S DECISION

I. PROCEDURAL HISTORY

On March 7, 2005, Cbeyond Communications, LLP ("Cbeyond"), Global TelData, Inc. ("Global"), Nuvox Communications of Illinois, Inc. ("Nuvox"), and Talk America, Inc. ("Talk"), (collectively, "Joint Complainants"), filed their joint verified Complaint (in Docket 05-0154) against Illinois Bell Telephone Company ("SBC"), alleging that SBC is violating each of the following: its interconnection agreements ("ICAs") with each of the Joint Complainants; its Illinois intrastate tariffs; Sections 13-514 and 13-801[1] of the Illinois Public Utilities Act ("PUA"); this Commission's Order in Docket 01-0614; the Federal Communications Commission's ("FCC's") SBC/Ameritech Merger Order[2] and Triennial

[1] Respectively, 220 ILCS 5/13-515 and 13-801.

[2] Application of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and

Review Order on Remand ("TRRO")[3]. Joint Complainants contend that SBC committed the foregoing alleged violations by issuing certain documents, known as Accessible Letters ("ALs"), in which SBC describes policies and procedures under which it will interact, as an incumbent local exchange carrier ("ILEC"), with competitive local exchange carriers ("CLECs"), including Joint Complainants. On March 14, 2005, SBC filed an Answer and Contingent Counterclaim in response to the Complaint, denying the essential allegations against SBC (and seeking certain affirmative relief).

Also on March 7, 2005, XO Illinois, Inc. ("XO Illinois"), and Allegiance Telecom of Illinois, Inc. ("Allegiance") (collectively, "XO"), filed a joint verified Complaint (in Docket 05-0156) against SBC, alleging that SBC is violating each of the following: its ICAs with XO; Section 252 of the Federal Telecommunications Act of 1996[4] ("Federal Act"); Article IX and Section 13-514 of the PUA; and 47 C.F.R § 51.809(a). XO contends that SBC committed the foregoing alleged violations by issuing the Accessible Letters about which Joint Complaints also complain. Like Joint Complainants, XO is a CLEC. On March 14, 2005, SBC filed an Answer and Contingent Counterclaim in response to Joint Complainants' Complaint, denying the essential allegations against SBC (and seeking certain affirmative relief).

On March 14, 2005, McLeodUSA Telecommunications Services, Inc. ("McLeod"), also a CLEC, filed its verified Complaint (in Docket 05-0174) against SBC, alleging that SBC is violating the following: its ICA with McLeod; this Commission's Order in Docket 02-0230; Section 13-514 PUA; Section 252 of the Federal Act; the TRRO; and 47 C.F.R § 51.809(a). McLeod contends that SBC committed the foregoing alleged violations by issuing the Accessible Letters about which Joint Complaints and XO also complain. On March 21, 2005, SBC filed an Answer in response to Joint Complainants' Complaint, denying the essential allegations against SBC.

In each of the foregoing three Complaints, the complaining parties requested emergency relief from implementation of SBC's Accessible Letters. On March 9, 2005, the Administrative Law Judge ("ALJ") handling Dockets 05-154 and 05-0156 granted the following interim emergency relief in each proceeding:

> SBC is ordered to continue to offer the same UNEs as required by the parties' current ICAs until those ICAs are amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding.

On March 16, 2005, another ALJ granted the following interim emergency in Docket 05-0174:

310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, CC Docket 98-141, Memorandum Opinion and Order, FCC 99-279 (1999).

[3] In the Matter of Unbundled Access to Network Elements / Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, FCC No. 04-290, WC Docket No. 04-0313, CC Docket No. 01-338 (Dec. 15, 2004, rel. Feb. 4, 2005).

[4] 47 USC 252.

> SBC is ordered to continue to offer the same unbundled local switching service as required by the parties' current ICAs until those ICAs are amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding.

Pursuant to the terms of Section 13-515(e) of the Act[5], the foregoing ALJ decisions became Orders of the Commission because it did not enter superseding Orders of its own. SBC then sought rehearing of those Orders. On March 23, 2005, the Commission issued Amendatory Orders in all three dockets. The following directive was added to each:

> [P]ursuant to [Section] 252 of the Federal Telecommunications Act, SBC is not required to provide new UNE-P[6] to customers who are not, as of March 11, 2005, part of the CLECs' customer base.

Additionally, the Commission further amended ist Order in Docket 05-0174 by adding the specific interim emergency relief already awarded in Dockets 05-0154 and 05-0156 (quoted above). Consequently, the interim emergency relief in all three dockets is identical.

On March 17, 2005, the Commission Staff ("Staff") filed an Emergency Motion to Consolidate the three dockets. No party opposed that motion. On March 23, 2005, the Commission ordered that the three dockets be consolidated. With the agreement of all parties, the ALJ determined that the consolidated proceeding would be conducted on a schedule consistent with the statutory obligations associated with Docket 05-0174.

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, this matter was heard by an ALJ at the Commission's offices in Chicago, Illinois on March 18 and April 8, 2005. During the April 8 hearing, the ALJ concluded, upon recommendation by all parties, that no evidentiary hearing would be necessary in this case, provided that certain exhibits and stipulations were admitted to the record. Accordingly, the following written testimony was admitted without cross-examination or objection: (for Joint Complainants) Edward Cadieux of Nuvox, Julie Strow of Cbeyond, Francie McComb of Talk America and Mark Lieberman of Global TelData (for XO); Gladys G. Leeger; (for Mcleod) Julia A. Redman-Carter and Patrick J Herron; (for SBC) Carol Chapman. Additionally, motions for administrative notice by Joint Complainants and by McLeod were granted by the ALJ.

On April 25, 2005, the evidentiary record in the consolidated proceedings was marked "heard and taken."

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[5] 220 ILCS 5/13-515(e).

[6] "UNE-P" is the acronym for "unbundled network element platform."

Joint CLECs, XO, McLeod, SBC and Staff have each filed an Initial Brief ("Init. Br.") and a Reply Brief ("Rep. Br.") addressing the issues here.

II. JURISDICTION

Joint Complainants, XO and McLeod each invoke the Commission's jurisdiction under Sections 13-514 and 13-515 of the PUA. XO and McLeod also invoke Section 13-516, and Joint Complainants also invoke 13-801 of the PUA and subsection 251(d)(3) of the Federal Act. SBC characterizes some of complainants' jurisdictional assertions as "legal conclusions" with which it "does not agree." However, it admits XO's assertions (which are also made by McLeod) "to the extent they are consistent with the statutes referenced therein."

The Commission finds that Section 13-515 of the PUA provides our jurisdiction to entertain complaints concerning purported violations of Section 13-514, and to impose the remedies set forth in Section 13-516. We also find that subsection 13-801(k) authorizes us to entertain complaints for violation of Section 13-801 through the procedures in Section 13-515. Subsection 251(d)(3) of the Federal Act does not, on its face, confer jurisdiction upon this Commission. Rather, it precludes federal preemption of state enforcement actions under the circumstances described in the subsection.

III. THE NATURE OF THE DISPUTE

This is a dispute among business adversaries in the context of regulated competition. One competitor, the ILEC, has been required by state and federal regulators (acting under legislative mandates) to provide the CLECs with access to (and use of) its own facilities and systems, which those competitors then use to serve customers obtained in competition with SBC and with each other. This arrangement has been predicated on the entwined rationales that competition would produce public benefit, that the ILEC's facilities and systems were already connected to customers, that such facilities and systems arose from (and were funded by) an historic and government-authorized monopoly, and that those facilities and systems were necessary inputs (whether financially or technologically) for the CLECs' competitive offerings. This has been a dynamic arrangement, as technology, market behavior and regulatory requirements have been in transformation since the inception of authorized competition.

The FCC's TRRO is the most recent transformative regulatory pronouncement. It alters existing requirements concerning three categories of the unbundled network elements ("UNEs") that CLECs obtain from ILECs in order to serve CLEC customers - "mass market" unbundled local switching ("ULS")[7], DS1 or DS3 local loops in ILEC wire centers meeting specified criteria (and all dark fiber loops), and unbundled, dedicated, DS1, DS3 and dark fiber interoffice transport on certain routes between ILEC wire

[7]"Mass Market" ULS serves end user customers using DS0 capacity loops.

centers. In each instance, the ILECs were relieved of obligations previously required by regulators and still included in their ICAs with CLECs. However, questions about the extent, timing and procedural prerequisites for such relief, and about the viability of state and other federal requirements, have occasioned a flurry of litigation.

Based on its view that the new TRRO requirements take immediate effect, prior to bilateral negotiations with CLECs, SBC initiated unilateral implementation by issuing the ALs mentioned above (AL-17 through AL-20[8]). The complaining CLECs lodged objection to the ALs; SBC rejected those objections, which led to the instant proceeding. In pertinent part, AL-17 addresses SBC's provision of ULS/UNE-P:

> Accordingly, as of the effective date of the TRO Remand Order, i.e., March 11, 2005, CLECs are no longer authorized to place, nor will SBC accept, New (including new lines being added to existing Mass Market Unbundled Local Switching/UNE-P accounts), Migration or Move LSRs for Mass Market Local Switching/UNE-P. Any New, Migration or Move LSRs placed for Mass Market Unbundled Local Switching/UNE-P after March 11, 2005 will be rejected. The effect of the TRO Remand Order on New, Migration or Move LSRs for Mass Market Unbundled Local Switching/UNE-P is operative notwithstanding interconnection agreements or applicable tariffs.[9]

AL-18 also addresses SBC's provision of ULS/UNE-P and includes the following:

> As explained in [AL-17] as of the effective date of the TRO Remand Order, i.e., March 11, 2005, you are no longer authorized to send, and SBC will no longer accept, New (including new lines being added to existing Mass Market Unbundled Local Switching/UNE-P accounts), Migration or Move LSRs for Mass Market Unbundled Local Switching/UNE-P. Any New, Migration or Move LSRs placed for Mass Market Unbundled Local Switching/UNE-P on or after the effective date of the TRO Remand Order will be rejected.

AL-19 concerns SBC's loop and transport offerings, and includes the following:

> ...As set forth in the TRO Remand Order, specifically in Rule 51.319(a)(6), as of March 11, 2005, CLECs "may not obtain," and SBC and other ILECs are not required to provide access to Dark Fiber Loops on an unbundled basis to requesting

[8] CLECALL05-017 ("AL-17"), CLECALL05-018 ("AL-18"), CLECALL05-019 ("AL-19"), and CLECALL05-020 ("AL-20").
[9] "LSR" is the abbreviation for local service request.

> telecommunications carriers. The TRO Remand Order also finds, specifically in Rules 51.319(a)(4), (a)(5) and 51.319(e), that, as of March 11, 2005, CLECs "may not obtain," and SBC and other ILECs are not required to provide access to DS1/DS3 Loops or Transport or Dark Fiber Transport on an unbundled basis to requesting telecommunications carriers under certain circumstances. Therefore, as of March 11, 2005, in accordance with the TRO Remand Order, CLECs may not place, and SBC will no longer provision New, Migration or Move Local Service requests (LSRs) for affected elements.

AL-20 also concerns SBC's loop and transport offerings, and includes the following:

> As explained in CLECALL05-019, as of the effective date of the TRO Remand Order, i.e., March 11, 2005, you are no longer authorized to send, and SBC will no longer accept, New, Migration or Move LSRs for unbundled high-capacity loops or transport, as is more specifically set forth in that Accessible Letter, and such orders will be rejected.

After the ALJ granted emergency relief to XO and Joint Complainants, SBC issued AL-39[10], prescribing procedures by which CLECs must make the self-certification for obtaining high capacity loops and dedicated transport. In SBC's view, this AL implements the requirements of 234¶ of the TRRO.

SBC attached "TRO Remand Amendments" to AL-18 (ULS/UNE-P) and AL-20 (loops and transport) that SBC contends will, upon CLEC signature, immediately constitute the requisite revision to a complaining CLEC's ICA with SBC. SBC apparently views its proposed amendments as mechanisms for satisfying the FCC's requirement that ICAs be revised to reflect the TRRO, not as preconditions to implementation of the TRRO on March 11, 2005.

Accordingly, SBC's position is that its ALs, taken together, accurately characterize the regulatory changes announced in the TRRO, that unilateral implementation is permissible (indeed, expected) under the TRRO, that such implementation may take effect on March 11, 2005, whether or not SBC's ICAs with the CLECs have been revised, and that nothing else in federal or state law precludes such implementation on SBC's terms. (SBC acknowledges that ICA revision must occur, but that the provisions in the ALs can take effect before such revisions are completed.[11]) The position of the complaining CLECs is that SBC misconstrues what the TRRO requires substantively (particularly with respect to the definition of a CLEC's embedded customer base), that implementation of all of the TRRO's regulatory changes must

[10] CLECALL05-039.

[11] SBC also avers that some of the complaining CLECs' ICAs automatically incorporate regulatory changes, without negotiation.

occur through - and cannot occur until completion of - the change-of-law processes in the parties' ICAs, and that implementation cannot disregard the imperatives of state and federal laws and FCC orders.

IV. ANALYSIS AND CONCLUSIONS

A. ULS/UNE-P

In the TRRO, the FCC declared that it would "impose no section 251 unbundling requirement for mass market switching nationwide."[12] Because the FCC also found that CLECs utilize ULS "exclusively in combination with [ILEC] loops and shared transport in an arrangement known as...UNE-P,"[13] the TRRO rulings concerning ULS also determine the availability of UNE-P under Section 251[14].

Nonetheless, the FCC ordered the ILECs to continue providing ULS/UNE-P for the CLECs' embedded base of end-user customers during a 12-month transition period following the effective date of the TRRO[15]. There is no dispute that these directives were embodied in FCC Rule 51.319(d)(2), which became effective on March 11, 2005, as directed by the FCC in ¶235 of the TRRO. It is also undisputed that the TRRO itself took effect on that date.

SBC's essential stance in this proceeding is that, in view of the FCC's non-impairment determination under Section 251, the provision of ULS/UNE-P after the effective date of the TRRO (and its associated rules) would be unlawful. But if that position were correct, the FCC would lack the authority to establish a transition period at all[16]. SBC does not attack the transition period before this Commission, however. Instead, it seeks to implement its view of the transition, to preclude the CLECs from obtaining UNE-P for use beyond their embedded bases after March 11, 2005. Accordingly, the issue presented here does not concern whether the FCC can require an ILEC to continue providing UNEs after an FCC nonimpairment declaration. Rather, it concerns the FCC's intent regarding the timing of such provisioning[17] and the customers to whom the relevant UNEs can be dedicated.

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[12] TRRO ¶199.
[13] *Id.*, fn. 526.
[14] "To the extent that unbundling of shared transport...[was] contingent upon the unbundling of local circuit switching in the [TRO], the availability of [that] element[] on an unbundled basis continue[s] to rise or fall with the availability of [ULS]." *Id*, ¶200, fn. 529.
[15] *Id.*, ¶227.
[16] The FCC also established a post-nonimpairment transition period in the TRO. TRO, ¶532 ("By five months *after a finding of no impairment*, [CLECs] may no longer request access to [ULS]" (emphasis added).) The FCC expressly defended the legality of this post-nonimpairment mechanism. *Id.*, fn. 1630 ("We disagree with Chairman Powell's claim that permitting [CLECs] to transition their mass market customers off of unbundled switching over the course of a three-year period is either unreasonable or unlawful...Chairman Powell concedes that the Commission has the discretion to set forth reasonable transition periods....").
[17] "The only real dispute is one of timing, i.e., how soon may [an] ILEC stop providing new UNEs?" SBC Init. Br. at 3.

What, then, did the FCC intend for the transition period mandated by the TRRO? More specifically, did the FCC intend that the TRRO's substantive directives concerning ULS/UNE-P (and loops and transport) be implemented by the ILECs on March 11, 2005, prior to revision of the parties' ICAs? And if the FCC intended implementation before completion of the ICA amendment process, did it contemplate unilateral determination of the terms of implementation by an ILEC?

1. Must Bilateral ICA Amendment Precede TRRO Implementation?

In the TRRO, the FCC states that the transition period "shall apply only to the embedded customer base, and does not permit [CLECs] to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order."[18] Putting aside, for the moment, the exception clause in the quoted text (i.e., the final clause in the sentence), the FCC is plainly declaring that UNE-P is now unavailable outside of the CLECs' embedded customer bases. There is no transition for what might be called "non-customers."

The question therefore becomes whether there is anything "otherwise specified in this [TRRO]" that would permit CLECs to obtain ULS/UNE-P for customers beyond the embedded base after March 11. In the footnote to the exception clause, the FCC specifies that a requesting CLEC "shall continue to have access to shared transport, signaling, and the call-related data bases as provided in the [TRO] for those arrangements relying on [ULS] that have not yet been converted to alternative arrangements."[19] Do the "arrangements" that "have not yet been converted to alternative arrangements" include "arrangements" for all customers, or only for customers within the embedded base? This Decision concludes that what is "otherwise specified" in the TRRO is that *embedded* customers can be served by "new UNE-P arrangements" during the transition, until "alternative arrangements" have been made for *those* customers. There is nothing "otherwise specified" in the TRRO that authorizes "new UNE-P arrangements" for non-embedded customers.

Stating the CLECs' remaining entitlement during the transition period more affirmatively, the ILECs must provide, under the terms of a pre-transition ICA, ULS/UNE-P for the use of a customer served by the CLEC before the transition period began (i.e., the embedded base). However, customers properly identified as new customers are not included in this universe. They are not part of the embedded base for whom the transition period was designed by the FCC. Thus, there is no need for pre-implementation negotiation on this point. The FCC has already determined that embedded customers are entitled to ULS/UNE-P during transition, and non-customers are not.

Nevertheless, the fact that the embedded/non-embedded customer dichotomy is beyond negotiation does not mean that negotiation is unnecessary to the

[18] TRRO ¶227.
[19] *Id.*, fn. 627.

implementation of that dichotomy. Having mandated different post-impairment treatment for embedded and non-embedded customers, the FCC left open the practical task of distinguishing one group from the other. The embedded customer base is not self-defining. Indeed, SBC and the complaining CLECs do not even agree with respect to whether the embedded base pertains to customers or to the particular ULS/UNE-P arrangements used by those customers as of March 11.

Assuming here that the embedded base is defined by customers rather than lines (as this Decision concludes below), several practical implementation issues require consideration in order to effectuate the FCC's intention to treat new and embedded customers differently. Moreover, there are implementation issues affecting different stages of the transition period, because the carriers will need to identify *both* the customers that are in the embedded base on March 11 and the embedded customers who will be deemed to have subsequently lost their embedded status during the transition.

By way of example, and without purporting to be comprehensive this Decision identifies the following issues. Regarding the status of customers at the beginning of the transition, if SBC were processing an order for a new CLEC customer on or before March 11, 2005, would that customer be in the embedded base? Would it matter if the customer's order had been placed with the CLEC before that date, but not presented to SBC until afterward? If a timely order has been rejected by SBC, but resubmitted after March 11, must SBC process that order? Does it matter if the cause of rejection was an SBC error?

With respect to customers embedded on March 11, can the identity of a business customer be sufficiently altered to constitute a new customer? Would a business customer retain its embedded status if it subsequently moves to a nearby location, merges with another entity or is spun off? Would a residential customer remain in the embedded base after changing her/his residence? Would it matter if s/he retains her/his phone number? When a residential customer adds a new service line, is that part of embedded base? What is the status of an embedded customer who restores service after a cutoff during the transition? Importantly, these questions affect customer expectations – about which the TRRO expresses considerable concern[20] - as much as they do the revenues of the carriers here.

The FCC, in the TRRO, did not supply express criteria for answering the foregoing questions in particular, or for otherwise separating new and embedded customers. Consequently, the reasonable conclusion is that the FCC intended that the identification of new and embedded customers would be managed by the state Commissions as part of TRRO implementation at the state level. The FCC evinces a

[20] "In particular, eliminating unbundled access to [ILEC] switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors [footnote omitted]." TRRO ¶226.

clear preference in the TRRO for inter-carrier negotiations[21], with state Commission oversight, during which the ILEC will be assured of the increased prices established by the TRRO. Nothing in the TRRO suggests that SBC (or, for that matter, a CLEC) can unilaterally determine whether embedded base is comprised of customers or lines or, assuming it is comprised of customers, how to distinguish embedded from new customers[22]. Therefore, SBC and the complaining CLECs must negotiate the terms, conditions and processes by which embedded customers will be identified and by which their embedded status is forfeited.

Such negotiations should be confined to establishing the bases for distinguishing embedded and non-embedded customers. They should commence immediately and need not be conducted with, or on the same schedule as, the broader TRRO-mandated negotiations to amend the parties' ICAs. Instead, such negotiations must be completed within 28 days of the entry of this Decision[23]. This will carry out the FCC's two-pronged intention to promptly freeze ULS/UNE-P while assuring continuity of service to embedded customers as they make substitute telecommunications arrangements.

Once the guidelines and processes for separating embedded and non-embedded customers are in place, SBC will be free to deny ULS/UNE-P for service to properly identified non-embedded customers, irrespective of the status of other negotiations – that is, the negotiations conducted on a Section 252 track, consistent with TRRO directives, to remove SBC's Section 251 unbundling duties per the TRRO, to establish the terms governing ULS/UNE-P procurement and maintenance for embedded customers during the transition, and, where needed, to determine prices for UNEs provided under Section 271 of the Federal Act and Section 13-801 of the PUA.

It is certainly conceivable that, pending completion of the foregoing negotiations, some number of non-embedded customers will receive ULS/UNE-P to which they are not entitled under Section 251. However, SBC has already assumed that risk, having pledged to continue filling the CLECs UNE-P requests until certain state law issues (discussed below) have been resolved. And more to the point, this Decision does not authorize the CLECs to obtain ULS/UNE-P for non-embedded customers. To the contrary, it unambiguously declares that only embedded customers can be served via those UNEs during the transition. Accordingly, a CLEC is prohibited from requesting such UNEs to serve any customer it believes to be non-embedded (for example, a customer that had neither received no applied for that CLEC's services before March 11, 2005). There is nothing in the record suggesting that any party here will ignore this limitation. And if a non-embedded customer does temporarily obtain service through ULS/UNE-P, the involved CLEC will pay (when initially billed or through true-up) the increased ULS/UNE-P rates imposed by the TRRO.

[21] "Thus, the [ILEC] and [CLEC] must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rules changes [footnote omitted]." TRRO ¶233.
[22] Moreover, even if SBC were empowered to decide the customers-versus-lines issue unilaterally, its unilateral interpretation has been rejected by the overwhelming majority of commissions considering that question, as will be discussed in greater detail below.
[23] Insofar as the parties in this proceeding are also parties to Docket 04-0606, they can, but are not required to, use the collaborative sessions in the latter case to conduct their negotiations.

In sum, the complaining CLECs are prohibited from serving non-embedded customers through Section 251 ULS/UNE-P as of March 11, 2005. However, guidelines are needed to identify such customers, and to protect the transition entitlement of embedded customers. Such guidelines must be established through bilateral processes on the schedule imposed above. After those guidelines are established – but not before - SBC can deny any request for Section 251 ULS/UNE-P to serve a non-embedded customer. Each complaining CLEC is immediately prohibited from requesting Section 251 ULS/UNE-P for customers it believes to be non-embedded. SBC is prohibited from denying any CLEC drop, migrate or move request for an embedded ULS/UNE-P customer. Any ULS/UNE-P provided to a CLEC after March 11, 2005 is subject to the rate increase established in the TRRO. To the extent that SBC's ALs are inconsistent with these conclusions, they cannot be enforced.

2. Improper Unilateral Implementation of the TRRO

In the TRRO, the FCC plainly stated that its order should be implemented through bilateral negotiations.

> We expect that [ILECs] and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an [ILEC] or a [CLEC] to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the [ILEC] and [CLEC] *must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes.*[24]

SBC has fallen short of the FCC's negotiation requirement in several instances.

First, the FCC contemplates a true-up for ULS/UNE-P provided during the transition period. "UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the applicable transition rate *upon the amendment of the relevant interconnection agreements*, including any applicable change of law processes."[25] Thus, the FCC expects the ILECs to continue to provide some "arrangements" at something other than the transition rate *until ICAs are amended* (at which time the transition rate would be retroactively applied).

In AL-18, SBC explicitly contravenes the FCC's TRRO directive that true-ups follow - rather than precede - completion of the ICA revision process. AL-18 states that "to ensure accurate billing based on current lines in service each month, the most effective mechanism to facilitate the rate modification is to apply it beginning March 11, 2005, and *eliminate the need for manual true-ups at the end of the transition period.*"[26]

[24] TRRO ¶233 (footnotes omitted) (emphasis added).
[25] *Id.*, ¶228, fn. 630 (emphasis added).
[26] AL-18, p. 2 (emphasis added)[26].

The efficacy of SBC's proposal is beside the point. The course of events has been determined by the FCC, and even if that course can be altered, that must be done by mutual agreement of the parties. Consequently, billing for ULS/UNE-P must conform to existing ICA rates and terms, until the ICAs are amended.

As the FCC explained, during the transition period the TRRO-mandated UNE price increases "provide some protection of the interests of the [ILECs] in those situations where unbundling is not required."[27] Though that protection is applied to the entire 12-month transition, it is accomplished retroactively through true-up. That scheme constitutes the FCC's balancing of the carriers' interests and precludes additional self-help by the carriers, outside of "applicable change of law processes."[28]

Second, the TRRO prescribes a self-certification process by which a CLEC can obtain unbundled loops and transport[29] (UNEs that will be discussed more substantively later in this Decision). Nothing in SBC's February 11, 2005 ALs (ALs 17-20) acknowledged or implemented this requirement. After XO and Joint Complainants received emergency relief, however, SBC issued AL-39, to unilaterally implement CLEC self-certification. AL-39 included a request form[30] and directs the requesting CLEC to include "the factual or other basis for its belief" that impairment is extant at a wire center. The TRRO does not require such an explanation. Again, the efficacy of SBC's implementation mechanism is beside the point. What is germane here is that SBC initially ignored self-certification, then unilaterally imposed terms for its implementation.

Third, in AL-39, SBC announced that it had filed with the FCC a list of the wire centers that SBC believes satisfy the FCC's non-impairment criteria. SBC advised the CLECs that they could review certain underlying data by contacting a named SBC attorney[31]. McLeod contends that SBC has "listed certain wire centers and routes as not meeting the new impairment criteria which McLeodUSA's analysis, using data from a third-party data source, indicated do meet the TRRO impairment criteria."[32] Whether McLeod is correct is not important here. What matters is that SBC unilaterally

[27] TRRO ¶228.

[28] To be sure, SBC does state that it "will not require CLECs to pay the difference between the rates currently in the ICA and the new rates (or engage in collection activity on this difference) until the CLEC'S [ICA] has been amended." SBC Ex. 1.0 at 19. Nevertheless, this caveat does not appear in an AL, it is not legally binding upon SBC, it is contrary to the language of the TRRO and it was unilaterally imposed, without negotiation.

[29] "Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority." TRRO ¶234.

[30] The FCC had suggested, but not required, a letter to the ILEC from the CLEC. *Id.*, fn. 658.

[31] The Joint CLECs allege that they have yet to be given access to SBC's data. Joint CLEC Rep. Br. at 18, fn. 9.

[32] McLeod Init. Br. at 19.

determined which wire centers were free of impairment, in derogation of the TRRO directive that the parties negotiate implementation of the FCC's rules changes.

Fourth, as already noted, SBC's opinion is that a CLEC's embedded base is comprised of the UNE arrangements serving those customers on March 11, 2005, rather than the customers served by those arrangements. The complaining CLECs disagree. That dispute has been addressed in several jurisdictions, by state commissions and courts (and is addressed in the next subsection of this Decision). Nevertheless, SBC unilaterally decides that dispute in ALs 17-20, in which it declares that it will not fulfill "New, Migration or Move" requests. SBC affronted the TRRO by disposing of that issue unilaterally.

To the extent that SBC's ALs purport to authorize any of the foregoing unilateral actions, they cannot be enforced.

3. Embedded Base: Lines or Customers?

The parties agree that a CLEC's "embedded customer base" is entitled to participation in the transition period during which ULS/UNE-P (and unbundled dedicated transport and high capacity loops) will be phased out. The parties dispute whether the TRRO's embedded customer base consists of CLEC customers, as of March 11, 2005, or the particular UNEs employed to serve those customers on that date. The key sentence in the TRRO does not, on its face, rule out either interpretation[33]. On the one hand, the FCC reference to the "customer" base supports the CLECs' construction. If the FCC had meant to limit the transition to extant UNEs, it could have said so. On the other hand, the prohibition against new UNE-P "arrangements" buttresses SBC's position, because it focuses on facilities, not customers.

The better resolution of this issue is derived from the essential purpose of the transition period – to avert substantial service disruption for "millions of mass market customers, as well as the business plans of [CLECs]."[34] The FCC surely understood that an embedded customer's circumstances could change long before the serving CLEC had completed its phase-out of ULS/UNE-P. That is, the customer's need to move, add or drop a facility or feature is independent of, and not on the same timetable as, the CLEC's transition arrangements. The former are determined by the customer's personal or business activities, while the latter are dependent upon the CLEC's progress with, *inter alia*, "deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversions."[35] If the serving CLEC cannot meet customers' changing needs during the transition, those customers will have to choose between doing without service modifications or changing

[33] "This transition period shall apply only to the embedded customer base, and does not permit [CLECs] to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order." TRRO ¶227.
[34] *Id.*, 226.
[35] *Id.*, 227. The FCC noted comments asserting that these processes could also require CLECs to generate needed capital, partner with other CLECs or exit particular markets. *Id.*, fn. 629.

carriers. The first choice would likely diminish service quality, while the second may be adverse to the customer, particularly if the choice was triggered by an emergency. Moreover, market dynamics would also be adversely affected. Precluding CLECs from answering the needs of their existing customers during the transition would hardly be competitive neutral.

The CLECs here correctly emphasize that a substantial majority of state commissions has adopted the CLEC position that the embedded base consists of customers rather than facilities.[36] The Indiana Utility Regulatory Commission stated:

> We think the TRRO is clear in its intent that a CLEC's embedded base (its UNE-P customer, and those customers for which UNE-P has been requested, as of March 1-, 2005) not be disrupted. We would expect an embedded base customer to be able to acquire or remove any feature associated with circuit switching during the transition period.[37]

The Michigan Public Service Commission also adopted this position:

> The distinction between the embedded base of *lines* versus the embedded base of end-user *customers* is critical and recognizes that the needs during the transition period of an existing CLEC customer may go well beyond the level of service provided as of March 11, 2005. By focusing on the needs of the embedded base of end-user customers rather than on lines, the FCC has ensured that the transition period will not serve as a means for an ILEC to frustrate a CLEC's end-user customers by denying the CLEC's efforts to keep its customers satisfied.[38]

Other state commissions reaching the same conclusion include Kansas and Texas[39]. However, as SBC accurately demonstrates, the California commission adopted a contrary position[40].

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[36] *E.g.*, XO Rep. Br. at 6 *et seq.*

[37] Complaint of Indiana Bell Tel. Co., Cause No. 42749, Order, Indiana URC., Mar. 9, 2005, at 8. The IURC reaffirmed this view in a subsequent Order in the same docket. Order, April 6, 2005, at 2 ("the TRRO is consistent in establishing transition periods running from the effective date of the TRRO so that the embedded customer base (*existing customers*) can be moved in an orderly fashion to alternative arrangements") (emphasis added). SBC's claim to the contrary, based on general language elsewhere in the IURC Order, is disingenuous.

[38] In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC Michigan and Verizon, Case No. U-14447, MPSC, March 9, 2005, at 11 (citation omitted)(emphasis in original).

[39] In the matter of a General Investigation to Establish a Successor Standard Agreement, Docket No. 04-SWBT-763-GIT, Order Granting in Part and Denying in Part Formal Complaint and Motion for an Expedited Order, Kan. SSC, Mar. 10, 2005 at 6 ("...the Commission finds that it is the intent of the FCC in its TRRO to permit CLECs to consistently serve its customer base, which includes adding services, lines

To be sure, the FCC plainly intends to discontinue the availability of ULS/UNE-P under Section 251 of the Federal Act. The provision of additional ULS and related services to embedded CLEC customers during the transition can appear, superficially, to inhibit realization of that objective. However, it is just as plain that the FCC also intends to minimize customer disruption and promote competition. Both of those objectives are achieved by an orderly phase-out – which, in turn, necessitates enabling the CLECs to meet their current customers' needs until alternative arrangements are in place. Indeed, the FCC expressly elected to *lengthen* the phase-out[41], to assure that CLECs and CLEC customers could maintain such continuity. Moreover, upholding CLEC service quality during the transition will not harm SBC. The CLECs will pay an approved price for whatever they buy, informed CLEC embedded customers will not profligately add or move services that can be transitioned away in 12 months, and no existing SBC customers will be eligible to purchase any add-on services restricted to the CLECs' embedded base (and thus will not be lured away from SBC by such services).

The remaining task is the identification of embedded customers, who will be able to move, add and drop ULS-related services during the transition. That should be accomplished through the processes, and on the schedule, already discussed above.

To the extent that SBC's ALs are inconsistent with the foregoing conclusions respecting the composition of the CLECs' embedded customer bases, they cannot be enforced. Moreover, as already concluded in this Decision, SBC acted unreasonably in resolving the customers-versus-lines issue unilaterally, through its ALs.

B. DEDICATED TRANSPORT

In the TRRO, the FCC determined that CLECs are impaired without access to DS1 transport unless both ends of the pertinent route terminate at a Tier 1 wire center[42]. Thus, an ILEC must provide unbundled DS1 transport when either end terminates at a

and servicing customers at new locations:)"; Arbitration of Non-Costing Issues, Docket No. 28821, Proposed Order on Clarification, Approved as Written, Tex. PUC, Mar. 9, 2005, at 1("...until a final disposition of this issue, SBC Texas shall have an obligation to provision new UNE-P lines to CLECs' embedded customer-base, including moves, changes and additions of UNE-P lines for such customer base at new physical locations").

[40] Petition of Verizon California Inc., App. No. 04-03-014, Assigned Commissioner's Ruling, Cal. PUC Mar. 11, 2005 ("we conclude that 'new arrangements' refers to any new UNE-P arrangement, whether to provide service for new customers or to provide a new arrangement to existing services. The TRRO clearly bars both"), confirmed by the CPUC on March 17, 2005.

[41] "We believe it is appropriate to adopt a longer, twelve-month, transition period than was proposed in the Interim Order and NPRM...the twelve-month period provides adequate time for both [CLECs] and [ILECs] to perform the tasks necessary to an orderly transition." TRRO ¶227.

[42] A Tier 1 wire center contains four or more fiber-based collocators or at least 38,000 business access lines. TRRO ¶112.

Tier 2 or Tier 3 wire center[43]. CLECs are impaired without access to DS3 or dark fiber transport when each end of a route terminates at a Tier 1 or Tier 2 wire center[44]. On routes without DS3 impairment (i.e., routes connecting Tier 2 wire centers), a CLEC is limited to obtaining 10 DS1 transport circuits from the ILEC[45]. Where there is DS3 impairment, the CLEC is limited to 12 DS3s per route[46].

Having established the foregoing quantitative criteria, the FCC instructed every CLEC to conduct a "reasonably diligent inquiry" and provide a self-certification that it is "entitled to the unbundled access to the particular network elements" it requests from an ILEC after March 11, 2005[47]. In turn, the ILEC "must immediately process the request" and "subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority."[48]

The TRRO applies some of the same directives to dedicated transport that it applies to ULS/UNE-P. Among these are transition periods for phasing out unbundled dedicated transport when non-impairment is present. The FCC prescribed a 12-month transition for DS1 and DS3 transport, and an 18-month transition for dark fiber transport[49]. As with ULS/UNE-P, those transitions are limited to the CLEC's embedded customer base[50]. Also, "[d]edicated transport facilities no longer subject to unbundling shall be subject to true-up to the applicable transition rate[51] upon the amendment of the relevant interconnection agreements, including any applicable change of law processes."[52]

Accordingly, insofar as the TRRO provisions governing, respectively, ULS/UNE-P and dedicated transport are identical, much of the analysis in this Decision pertaining to the former also applies to the latter. There is a significant difference, however. The TRRO declares that there is no impairment associated with ULS/UNE-P anywhere and that, for that reason, no unbundling of either the network element or the platform is required anywhere (except during transition). In contrast to that across-the-board determination, non-impairment is the exception, not the rule, with regard to dedicated

[43] A Tier 2 wire center contains three or more fiber-based collocators or at least 24,000 business access lines. *Id.* ¶118. A Tier 3 wire center is any wire center not in Tiers 1 or 2, and is considered by the FCC to include the lowest degree of competitive activity. *Id.* ¶123.
[44] *Id.* ¶¶129 & 133.
[45] *Id.* ¶128.
[46] *Id.* ¶131.
[47] *Id.* ¶234.
[48] *Id.* After the instant complaints were filed in Dockets 05-0154 and 05-0156, SBC issued an AL (CLECALL05-039 ("AL-39")) that purports to implement this provision.
the time
[49] *Id.* ¶142.
[50] *Id.*
[51] The transition rates provide an increase over the price paid as of June 15, 2004 or a subsequent price, whichever is greater. *Id.* ¶145.
[52] *Id.* ¶145, fn. 408.

transport[53]. This is not only true in the TRRO's text, but in the actual circumstances of Illinois wire centers[54].

Consequently, implementation of the TRRO's transport provisions requires multiple stages: first, to determine whether impairment exists on a given route for circuits of the requested capacity (or for dark fiber); second, when there is no impairment, to determine whether the particular route serves the CLECs' embedded customer base (and therefore must be available to the CLEC during the applicable transition); third, when there is impairment, to determine whether the CLEC has reached the TRRO's numeric limits (10 DS1 circuit, 12 DS3s per route); and, fourth, to accommodate the TRRO's self-certification mechanism.

Moreover, since the self-certification mechanism, by its terms, applies only when a CLEC "submit[s] an order" for transport, it is not expressly applicable to unbundled transport already provided to the CLECs on or before March 11, 2005. Consequently, even though existing transport would presumably be eligible for transition, the CLECs and their affected customers will want to know whether an existing transport route is impaired, in order to make transition plans when necessary. The FCC expressly contemplates this and, importantly, mandates *negotiations* to adopt a process to address changes in impairment status[55].

Therefore, this Decision concludes that the FCC did not intend that its new unbundled transport rules would permit ILECs to deny requests for Section 251 transport before ICA revision is completed. The multi-stage analysis described in the preceding paragraph presents too many disputable issues - and, indeed, the parties in fact already dispute SBC's identification of impaired wire centers, its definition of the embedded base and its self-certification scheme. Nothing in the TRRO indicates that SBC has been authorized to resolve these issues unilaterally. On the other hand, the implementation provision in paragraph 233 of the TRRO and the negotiation directive in footnote 399 demonstrate that the FCC expects bilateral implementation.

As this Decision acknowledges regarding ULS/UNE-P, some quantum of non-embedded customers will obtain service through unbundled dedicated transport, without a Section 251 entitlement, while negotiations are completed. Again, however, this Decision does not permit the CLECs to procure unauthorized transport (i.e., transport

[53] "The determination that in certain situations a CLEC is impaired without unbundled access to high capacity loops and transport is, therefore, different from the nationwide determination that CLECs are not impaired without unbundled access to UNE-P." Complaint of Indiana Bell Tel. Co., Cause No. 42749, Order, Indiana URC., April 6, 2005, at 2.

[54] "[T]here are, in fact, relatively few wire centers and routes that meet the FCC's non-impairment criteria for high capacity loops and transport. Of the over 278 wire centers in Illinois, SBC Illinois has determined that only 5 meet the non-impairment criteria for DS1 loops and 11 meet the criteria for DS3 loops. SBC Ill. Ex. 1.0 (Chapman) at 32 ...The [TRRO] does *not* prevent carriers from obtaining high capacity loops and transport at all other wire centers and routes. SBC Init. Br. at 45 (emphasis in original).

[55] "We recognize that some dedicated transport facilities not currently subject to the non-impairment thresholds established in this Order may meet these thresholds in the future. We expect [ILECs] and requesting carriers to *negotiate appropriate transition mechanisms for such facilities through the section 252 process.*" TRRO ¶142 fn. 399 (emphasis added).

for non-embedded customers when impairment is absent, or transport in excess of numeric limits on circuits and routes where impairment exists). To be clear: every CLEC is prohibited from requesting dedicated Section 251 transport to serve, through non-impaired wire centers, any customer it believes to be non-embedded.

Moreover, the FCC provides two safeguards protect SBC's interests as its Section 251 transport unbundling duty is phased out. First, the good-faith requirement in TRRO paragraph 234 is intended to constrain CLEC abuse of the self-certification process. Second, as with the other UNEs involved here, when CLECs erroneously use unbundled dedicated transport to temporarily serve customers, they will do so at the higher rates mandated by the TRRO (either initially or via true-up).

In sum, as of March 11, 2005, the complaining CLECS are prohibited from serving non-embedded customers through unbundled Section 251 transport unless there is impairment at the relevant wire centers, as defined by the TRRO. Additionally, the CLECs are prohibited from obtaining unbundled Section 251 transport in a quantity that exceeds TRRO limits. Any unbundled Section 251 dedicated transport provided to a CLEC after March 11, 2005 is subject to the rate increase established in the TRRO.

Also (insofar as they have not already done so), each complaining CLEC, and SBC, must immediately start negotiations to implement the multistage process described above for effectuating the new TRRO directives, and associated rules, concerning unbundled dedicated transport. Insofar as the TRRO (and the 01-0614 Remand Order), trigger ICA change of law provisions in a manner that affects contract rights derived from 271 of the Federal Act or Section 13-801 of the PUA, negotiations pertaining to unbundled dedicated transport under Section 271 (except negotiations with Cbeyond and Nuvox[56]) and under Section 13-801 (except negotiations with Talk, Nuvox and Global[57]) should also be conducted, consistent with the discussion of those statutes below.

Additionally, SBC must comply with the self-certification provisions of paragraph 234 of the TRRO (as it has stated it will do in AL-39), and is hereby prohibited from imposing on a CLEC any self-certification requirement that does not expressly appear in paragraph 234 or in an approved ICA with that CLEC. In the resolution of any dispute resulting from application of paragraph 234, the Commission will enforce - with respect to the composition of the CLEC's embedded customer base, the identification of non-impaired wire centers or the implementation of the TRRO's numeric thresholds for DS1 and DS3 transport where impairment exists - only those ICA provisions derived from bilateral (or, where permitted by the Commission, multilateral) negotiations and (where used) dispute resolution processes. Also, SBC is prohibited from: 1) denying new transport requests for service through impaired wire centers unless the TRRO numeric limits have been reached; 2) denying any drop, migrate or move request for dedicated transport service to a complaining CLEC's embedded customer; or 3) denying new, drop, migrate or move requests for a customer served through dedicated transport

[56] These CLECs and SBC are free to negotiate Section 271 issues voluntarily, however.

[57] These CLECs and SBC are free to negotiate Section 13-801 issues voluntarily, however.

because of CLEC self-certification (unless the Commission orders otherwise). To the extent that SBC's ALs are inconsistent with these conclusions, they cannot be enforced.

C. HIGH CAPACITY LOOPS

The TRRO provides that CLECs are impaired without access to DS3-capacity loops in any building served by a wire center with fewer than 38,000 business lines and four fiber-based collocators[58]. Even with impairment, a CLEC may obtain only one DS3 loop per building from the ILEC[59]. An ILEC must provide unbundled DS1 loops for CLEC use in buildings served by wire centers with fewer than 60,000 business lines and four fiber-based collocators[60]. A CLEC is limited to ten DS1 loops per impaired building[61]. CLECs are never considered impaired without access to dark fiber loops[62].

As with dedicated transport, the FCC directed each CLEC to conduct a "reasonably diligent inquiry" and provide a self-certification that it is "entitled to the unbundled access to the particular network elements" (here, loops) it requests from an ILEC[63]. And again, the ILEC "must immediately process the request" and "subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority."[64]

The TRRO also established transition requirements for loops. When non-impairment is present, the transition for DS1 and DS3 high capacity loops is 12 months, and there is an 18-month transition for dark fiber loops[65]. As with ULS/UNE-P, those transitions are limited to the CLEC's embedded customer base[66]. Additionally, "[h]igh capacity loops no longer subject to unbundling shall be subject to true-up to the applicable transition rate[[67]] upon the amendment of the relevant interconnection agreements, including any applicable change of law processes."[68]

Much of the analysis in this Decision pertaining to transport and to ULS/UNE-P is equally applicable to loops. There are also important differences. As discussed above, the TRRO finds no impairment anywhere for ULS/UNE-P and, consequently, requires no unbundling of either the network element or the platform (except during transition). That is also the case with dark fiber loops (although with a longer transition). However,

[58] TRRO ¶174.
[59] *Id.* ¶177.
[60] *Id.* ¶178.
[61] *Id.* ¶181.
[62] *Id.* ¶182.
[63] *Id.* ¶234.
[64] *Id.* After the instant complaints were filed in Dockets 05-0154 and 05-0156, SBC issued AL-39, ostensibly to implement this provision.
the time
[65] *Id.* ¶195.
[66] *Id.*
[67] The transition rates provide an increase over the price paid as of June 15, 2004 or a subsequent price, whichever is greater. *Id.* ¶198.
[68] *Id.* ¶198, fn. 524.

as with transport, non-impairment is the exception, not the rule, respecting DS1/DS3 loops - both in the conclusions of the TRRO and in the actual circumstances of Illinois wire centers[69].

Consequently, implementation of the TRRO's high capacity loop provisions requires multiple stages, as was the case with transport: first, to determine whether impairment exists for loops of the requested capacity; second, when there is no impairment, to determine whether the particular loop serves the CLECs' embedded customer base (and therefore must be available to the CLEC during the applicable transition); third, when there is impairment, to determine whether the CLEC has reached the TRRO's numeric limits (10 DS1 loops or one DS3 loop per building); and, fourth, to accommodate the TRRO's self-certification mechanism.

Again, since the self-certification mechanism, by its terms, applies only when a CLEC "submit[s] an order" for loops, it is not expressly applicable to unbundled transport already provided to the CLECs on or before March 11, 2005. Consequently, even though existing loops would presumably be eligible for transition, the CLECs and their affected customers will want to know whether an existing loop is impaired, in order to make transition plans when necessary. The FCC expressly contemplates this and, importantly, mandates negotiations to adopt a process to address changes in impairment status[70].

Therefore, as it does regarding transport, this Decision concludes that the FCC did not intend that its new unbundled loop rules would permit ILECs to deny requests for Section 251 loops before ICA revision is completed. The multi-stage analysis described in the preceding paragraph presents too many disputable issues - and, indeed, the parties in fact already dispute SBC's identification of impaired wire centers, its definition of the embedded base and its self-certification scheme. Nothing in the TRRO indicates that SBC has been authorized to resolve these issues unilaterally. On the other hand, the implementation provision in paragraph 233 of the TRRO and the negotiation directive in footnote 519 demonstrate that the FCC expects bilateral implementation.

As with ULS/UNE-P and dedicated transport, some non-embedded customers will obtain service through unbundled loops, without a Section 251 entitlement, while negotiations are completed. To repeat, however, this Decision does not permit the CLECs to procure unauthorized loops (i.e., loops for non-embedded customers when impairment is absent, or loops in excess of numeric limits at locations where impairment exists). Each CLEC is prohibited from requesting dedicated Section 251 high capacity loops to serve, through non-impaired wire centers, any customer it believes to be non-embedded.

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[69] SBC Init. Br. at 45 (see quotation in **fn. XX,** ***supra***).

[70] "We recognize that some high capacity loops with respect to which we have found impairment may in the future meet our thresholds for non-impairment. For example, as competition grows, [CLECs] may construct new fiber-based collocations in a wire center that currently has 38,000 business lines but 3 or fewer collocations. In such cases, we expect [ILECs] and requesting carriers to *negotiate appropriate transition mechanisms for such facilities through the section 252 process.*" TRRO ¶196, fn. 519 (emphasis added).

Moreover, the FCC provides two safeguards, as it did with transport, to protect SBC's interests as its Section 251 loop unbundling obligations are phased out. First, the good-faith requirement in TRRO paragraph 234 is intended to constrain CLEC abuse of the self-certification process. Second, as with the other UNEs involved here, when CLECs erroneously use unbundled high capacity loops to temporarily serve customers, they will do so at the higher rates mandated by the TRRO (either initially or via true-up).

In sum, as of March 11, 2005, the complaining CLECS are prohibited from serving non-embedded customers through unbundled Section 251 high capacity loops unless there is impairment at the relevant wire centers, as defined by the TRRO. Additionally, the CLECs are prohibited from obtaining unbundled Section 251 loops in a quantity that exceeds TRRO limits. Any unbundled Section 251 loop provided to a CLEC after March 11, 2005 is subject to the rate increase established in the TRRO.

Also (insofar as they have not already done so), each complaining CLEC, and SBC, must immediately start negotiations to implement the multistage process described above for effectuating the new TRRO directives, and associated rules, concerning unbundled high capacity loops. Insofar as the TRRO (and the 01-0614 Remand Order), trigger ICA change of law provisions in a manner that affects contract rights derived from 271 of the Federal Act or Section 13-801 of the PUA, negotiations pertaining to unbundled high capacity loops under Section 271 (except negotiations with Cbeyond and Nuvox[71]) and under Section 13-801 (except negotiations with Talk, Nuvox and Global[72]) should also be conducted, consistent with the discussion of those statutes below.

Additionally, SBC must comply with the self-certification provisions of paragraph 234 of the TRRO (as it has stated it will do in AL-39), and is prohibited from imposing on a CLEC any self-certification requirement that does not expressly appear in paragraph 234 or in an approved ICA with that CLEC. In the resolution of any dispute resulting from application of paragraph 234, the Commission will enforce - with respect to the composition of the CLEC's embedded customer base, the identification of non-impaired wire centers or the implementation of the TRRO's numeric thresholds for DS1 and DS3 loops where impairment exists - only those ICA provisions derived from bilateral (or, where permitted by the Commission, multilateral) negotiations and (where used) dispute resolution processes. Also, SBC is prohibited from: 1) denying new loop requests for service through impaired wire centers unless the TRRO numeric limits have been reached; 2) denying any drop, migrate or move request for service to a complaining CLEC's embedded customer; or 3) denying new, drop, migrate or move requests for a customer served through high capacity loops because of CLEC self-certification (unless the Commission orders otherwise). To the extent that SBC's ALs are inconsistent with these conclusions, they cannot be enforced.

[71] These CLECs and SBC are free to negotiate Section 271 issues voluntarily, however.
[72] These CLECs and SBC are free to negotiate Section 13-801 issues voluntarily, however.

D. UNBUNDLING UNDER SECTION 271 OF THE FEDERAL ACT

In the TRO, the FCC stated that "we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs[[73]] to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251."[74] This pronouncement was explicitly upheld on appellate review:

> The FCC reasonably concluded that checklist items four, five, six, and ten posed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52. In other words, even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching and call-related databases in order to enter the interLATA market[75].

It is therefore settled that Sections 271 and 251 of the Federal Act provide independent sources of authority for access to switching, loops and transport. This Commission acknowledged that in the recent XO-SBC Arbitration Order, where it held that "Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis."[76]

Accordingly, since the TRRO determines only the impairment standard of Section 251, and does not address the scope of Section 271, ILEC duties and SBC rights under the latter statute remain unchanged by the TRRO. The question, then, is whether the CLECs can assert rights derived from Section 271 in these proceedings.

SBC argues that Section 271 "makes clear that the FCC, and only the FCC, has authority under [S]ection 271 to enforce that provision."[77] It follows, in SBC's view, that once an ILEC's application to provide interLATA service has been approved by the FCC, Section 271 "provides authority only to the FCC to enforce continued BOC compliance with the conditions for approval."[78] SBC is right that the FCC has exclusive authority to enforce its order approving the ILEC's application. Only the FCC can impose the remedies set forth in subsection 271(d)(6) – i.e., a corrective order, a penalty or suspension or revocation of interLATA toll authority.

However, Staff maintains that the complaining CLECs are not seeking enforcement of the FCC's Section 271 for SBC, but enforcement of "the parties' respective ICAs."[79] Moreover, Staff asserts, the Commission "undoubtedly...does have

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[73] "BOCs" is the acronym for the former Bell Operating Companies, from which is SBC is a merged entity.
[74] TRO ¶653.
[75] United States Telecom Association v. FCC, 359 F.3d 554, 588 (DC Cir. 2004)("USTA II")
[76] XO Illinois, Inc., Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, Docket 04-0371, Order, Sept. 9, 2004, at 47).
[77] SBC Init. Br. at 41.
[78] *Id.*, at 41-42.
[79] Staff Rep. Br. at 24.

the authority to resolve disputes brought to it regarding ICAs, and no party disputes this authority.[80] Staff is correct on these points. In addition to fulfillment of its Section 251 compliance duties, SBC entered into ICAs in order to advance its discretionary request for interLATA authority. This included demonstrating, first to this Commission, and then to the FCC, that SBC was supplying contractual access to loops, transport and switching, under subsections 271(c)(2)(B)(iv), (v) & (vi), distinguished from the access to these unbundled elements required by Section 251, reinforced by subsections 271(c)(2)(B)(ii). Therefore, in any ICA in which SBC committed to furnishing those unbundled elements under Section 271 (in addition to Section 251), it took on a contractual obligation that can be asserted to this Commission. That does not entail enforcement of the FCC's 271 Order for SBC, but of the ICA provisions this Commission approved, which SBC *then used as evidence*, before the FCC, of fulfillment of the Section 271 checklist.

Which, if any, of the complaining CLECs has an ICA with SBC that contains an SBC obligation to provide loops, transport and switching in order to satisfy Section 271? Staff contends that McLeod, the XO complainants and one of the Joint CLECs (Global) have ICAs that incorporate rights derived from Section 271 that can asserted to the Commission[81]. Staff avers that the other Joint CLECs have not shown that they have ICA rights with SBC that are "afforded bye Section 271."[82]

Staff is certainly correct with regard to Global and XO Illinois. Both the Global/SBC ICA and the XO Illinois/SBC ICA state that: "*[t]his agreement is the exclusive arrangement under which the Parties may purchase from each other the products and services described in Sections 251 and 271 of the [Federal] Act* and, except as agreed upon in writing, neither Party shall be required to provide the other Party a product or service described in Sections 251 and 271 of the Act that is not specifically provided herein."[83] This provision not only cites Section 271 as a source for the ICA's unbundling requirements, but also makes the ICA the sole mechanism by which Section 271 UNEs can be obtained. Thus, Global and XO Illinois each have a clear contractual right to 271 UNEs (unaffected by the TRRO), have surrendered their ability to assert 271 rights outside the ICA, and have, accordingly, an irrefutable enforcement right under the contract.

The pertinent text in the Allegiance/SBC ICA is more general: "SBC Illinois shall have no obligation to provide access to [UNEs] under the terms of the Amended Agreement beyond those required by *the [Federal] Act*, including effective FCC rules and associated FCC and judicial orders, or other Applicable Law...."[84] This Decision adopts "Staff's view [that] the reference to the federal Act and FCC orders includes

[80] *Id.* The Commission's authority is derived from both the Federal Act and the PUA, including Section 13-514(8).
[81] *Id.*, 23-28.
[82] *Id.*, 27.
[83] Joint Complainants Ex. 4.3, sec. 29.20; XO Ex. 2.5, sub-ex. F, Sec. 29.20 (emphasis added).
[84] XO Ex. 2.5, sub-ex. J, para. 5 (emphasis added). This text appears in a TRO-related amendment that applies to both XO complainants.

SBC's Section 271 obligations."[85] Further, the ICA text links Allegiance's contract rights to whatever the Federal Act (including Section 271) provides, thereby emphasizing the enforcement of Allegiance's contract rights will mirror enforcement of its statutory rights.

The relevant language in the McLeod/SBC is similarly general: SBC's "provision of UNEs identified in this Agreement is subject to the provisions of the Federal Act, including, *but not limited to,* Section 251(d)."[86] There is also an exclusivity provision in the ICA[87], which confines McLeod to obtaining Section 271 UNEs through their respective contract. Therefore, McLeod's right to Section 271 UNEs is grounded in, and can be enforced through, its ICA.

The Talk/SBC ICA contains language identical to the language in McLeod's agreement, quoted in the preceding paragraph (that is, the "not limited to" provision[88] and the exclusive source provision[89]). Both appear in the ICA's UNE Appendix. However, there is also text, under the heading "Unbundled Network Elements – Sections [sic] 251(c)(3)," that arguably limits Talk to 251 UNEs: "[SBC] will provide CLEC access to [UNEs] for the provision of telecommunications services as required by sections 251 and 252 of the [Federal] Act and appendices hereto."[90] To the extent that these provisions conflict, the UNE Appendix should prevail, because it is more specific to the provision of UNEs.

The Cbeyond/SBC ICA and Nuvox/SBC ICA do not demonstrate that either CLEC has a contractual right to Section 271 elements. Section 1.1.1 of the Cbeyond/SBC ICA's General Terms and Conditions says that the ICA's UNE provisions appear in Article 9 of the agreement. Article 9 is entitled "Access to Unbundled Network Elements – Section 251(c)(3)".[91] The Nuvox/SBC ICA also has an Article 9, entitled "Unbundled Access – Section 251(c)(3). Nothing in either Cbeyond's or Nuvox's Article 9, including their general provisions, suggests that Cbeyond's or Nuvox's rights under Section 271 are incorporated into their respective ICAs.

This does not mean, of course, that Cbeyond and Nuvox lack UNE rights under Section 271. It means that such rights were not incorporated into the CLECs' ICAs, which the Commission has the authority to enforce. However, the CLECs retain statutory rights that are enforceable *outside* of the ICAs. But that enforcement must be sought exclusively from the FCC, under subsection 271(d)(6) of the Federal Act, in the form of redress for violating the FCC Order granting interLATA authority to SBC.

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[85] Staff Rep. Br. at 26.
[86] McLeod Ex. 5, *sec.* 20.1 (emphasis added). There is also a direct reference to Section 271 in the McLeod/SBC ICA, but it specifically concerns the nondiscrimination provision in subsection 271(c)(2)(B)(ii). *Id.*, section 2.2.
[87] SBC "has no obligation to provide access to any network element, or to provide terms and conditions associated with any network element, other than expressly set forth in this Agreement" McLeod Ex. 5, sec. 1.5.
[88] Joint CLEC Ex. 3.4, sec. 18.1.
[89] *Id.*, sec. 1.5
[90] Joint CLEC Ex. 3.3, sec. 47.7.11.1.
[91] Joint CLEC Ex's. 1.2 (Nuvox) & 2.2 (Cbeyond).

(Alternatively, the CLECs can request negotiations to incorporate 271 rights in their ICAs.)

Therefore, SBC must continue providing Section 271 unbundled loops, transport and switching to XO, McLeod, Global and Talk (but not Cbeyond and Nuvox) under the terms of their respective ICAs, unless and until those ICAs are amended to terminate SBC's Section 271 obligations. Such Section 271 UNEs must be priced under "the just, reasonable, and nondiscriminatory rate standard of Sections 201 and 202 [of the Federal Act]," as the FCC has mandated[92]. Since the parties' ICAs all require Section 251 TELRIC pricing, they will need to be amended - to the extent SBC has been relieved of the Section 251 pricing obligation - to provide for Section 271 pricing (and, for that matter, Section 13-801 pricing). Until those amendments are approved, SBC should collect the TRRO-mandated transition rates for ULS/UNE-P and (where no impairment is present) for loops and transport. SBC does not have to provide combined UNEs under Section 271, but must continue to do so where Section 251 access is still required, where Section 13-801 allows CLECs to demand combinations, and where an ICA authorizes combinations.

E. STATE UNBUNDLING UNDER SECTION 13-801

Section 13-801 establishes state unbundling requirements for Illinois. That section permits, for any affected telecommunications carrier, unbundling obligations that are equivalent to the obligations under Section 251 of the Federal Act. However, for carriers subject to alternative regulation plans under the PUA - as SBC is - Section 13-801 allows "requirements or obligations...that exceed or are more stringent than those obligations imposed by Section 251...and regulations promulgated thereunder."[93] Accordingly, this Commission determined in a 2002 Order that, for alternatively regulated carriers, Section 13-801 unbundling need not predicated on Section 251-like finding of necessity and impairment[94]. Just weeks ago, on remand of that Order, the Commission confirmed its conclusion: "Among the specific differences between federal law and Section 13-801 is the absence of the federal 'necessary and impair' test as a precondition to access network elements."[95]

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[92] TRO ¶663.

[93] The full text of subsection 13-801(a) is as follows: "This Section provides additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996, and not preempted by orders of the Federal Communications Commission. A telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act shall not be subject to the provisions of this Section, to the extent that this Section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 and regulations promulgated thereunder."

[94] Illinois Bell Telephone Co., Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act, Docket 01-0614, Order, June 11, 2002.

[95] Illinois Bell Telephone Co., Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act, Docket 01-0614, Order on Remand (Phase I), April 20, 2005 ("01-0614 Remand Order").

Therefore, so long as the Commission's Orders in Docket 01-0614 remain in effect, Illinois' unbundling requirements under Section 13-801 are unaffected by the FCC's findings in the TRRO concerning necessity and impairment. The Commission's orders have not been overturned by the judiciary, and neither their contents nor the Commission's power to issue them has been preempted by the FCC or a court. SBC can seek a preemption declaration from the FCC, as did another ILEC in a proceeding relied upon by SBC[96], but it has yet to do so. SBC has requested preemption in an action filed in the United States District Court[97], but such relief was denied on an interim basis. To be sure, the federal court did preliminarily conclude that the "likelihood of success on the preemption question favors SBC." However, unless and until a formal and final ruling issues from that court, the pertinent Orders of this Commission are in force.

Additionally, the parties here apparently concur that the proper forum for resolving the question of preemption is the federal judiciary[98]. That is entirely consistent with the Commission's position that "it is not empowered to declare portions of Section 13-801 preempted or unconstitutional." [99] Thus, for the time being, the text of Section 13-801 that authorizes unbundling for alternatively regulated carriers without regard to the federal necessary impair standard, and this Commission's interpretation and application of that authority in Docket 01-0614, must be taken as they are.

The next step, then, is to identify the substantive content of the Commission's application of Section 13-801 authority to ULS. "SBC Illinois acknowledges that the Commission's June 11, 2002 Order in Docket 01-0614 interpreted Section 13-801(d)(4) to require SBC Illinois to provide CLECs with access to 'network element platforms' without regard to the whether the FCC has unbundled all of the network elements (including switching) that comprise the platform."[100] SBC also recognizes that the 01-0614 Remand Order "expanded the scope of the June 2002 Order and reinterpreted 13-801 to require that SBC Illinois provide access to network elements without regard to the necessary and impair tests not only in the 'platform' context but also on a stand-alone basis and as part of combinations that do not constitute platforms."[101] Although the present case concerns mass market switching, while the 01-0614 Remand Order addressed switching for large-enterprise customers, the Commission declared that:

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[96] In the Matter of BellSouth Telecommunications, Inc., Request for Declaratory Ruling, WC Dckt. No. 03-251, WL 704118, rel. March 25, 2005.
[97] Illinois Bell Telephone Co v. Hurley, et al., *supra*.
[98] *E.g.*, "These same [preemption] arguments are before the Northern District of Illinois, and that Court – not this Commission – is the appropriate forum in which those arguments should be considered," SBC Init. Br. at 37; "There seems to be agreement that SBC's federal preemption argument regarding the state law requirements should be resolved in the federal court litigation, not in this case," McLeod Rep. Br. at 26.
[99] 01-0614 Remand Order at 61. This limitation should be contrasted with the Commission's authority and duty to take into account, in its decision-making, a preemption finding by a superior sovereign.
[100] SBC Init. Br. at 31.
[101] SBC Rep. Br. at 25.

> The plain language of Section 13-801 makes it obvious that the General Assembly did not contemplate a distinction between providing service to business customers and residential customers in regard to SBC's obligation to provide network elements. We note that the General Assembly was aware of the distinction between business customers and residential customers because it declared services to business customers as competitive in the same piece of legislation. However, in Section 13-801, it did not make any attempts to differentiate between services provided to business customers and services provided to residential customers. Because the legislature did not create such an explicit distinction, we are reluctant to engraft one onto the statute.[102]

The foregoing analysis, which is specific to ULS, reflects the Commission's more general conclusion that the absence of "limiting language" in Section 13-801 impl[ies] that the General Assembly intended to grant unrestricted access to network elements from Alt-Reg companies."[103]

It follows that SBC is required by Section 13-801 to provide ULS/UNE-P and unbundled loops and transport to the complaining CLECs. Moreover, unlike the TRRO, state law does not limit the use of those UNEs to existing CLEC customers (that is, to the CLEC's "embedded base") and imposes no time limit on their availability (i.e., the termination of the TRRO-mandated transition period does not apply). Also, in the <u>01-0164 Remand Order</u>, the Commission held that a CLEC, under Section 13-801, could exceed federal caps on the quantity of DS3 loops and transport obtainable from an ILEC, albeit at non-TELRIC prices.[104] Unless and until these principles are preempted, modified by the Commission, overturned by a court or altered by the state legislature, they must govern SBC's conduct now and must be reflected in the parties' ICAs[105] when those agreements are modified to incorporate the TRRO[106].

SBC contends, however, that none of the complaining CLECs have a present contractual right to obtain the relevant UNEs under state law. SBC's contention is based on its view that the CLECs' ICAs contemplate access to UNEs under federal law alone[107]. Staff apparently concurs, with respect to some of the CLECs[108].

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[102] *Id.* <u>01-0614 Remand Order</u> at 69.
[103] *Id.*, at 61-62.
[104] *Id.*, at 61.
[105] The significance and purpose of Section 13-801 in specific ICAs is addressed elsewhere in this Decision.
[106] To whatever extent SBC may be correct that the 01-0614 Remand Order "expanded the scope" of the June 2002 Order in that docket, or "reinterpreted 13-801," it may also constitute a change of law under any or all of the parties' ICAs.
[107] SBC Rep. Br. at 26.
[108] Staff Init. Br. at 29.

Initially, it should be noted that even if SBC's argument prevailed on this point, its victory would likely be transitory. The 01-0614 Remand Order, which SBC perceives as an expansion of the unbundling power under Section 13-801, may well constitute a change of law under the parties' ICAs. As such, unbundling requirements under Section 13-801 would presumably be incorporated into the ICAs through the same processes that will reduce or excise the unbundling requirements of Section 251.

That said, SBC's characterization of the contents of the XO/SBC ICA is incorrect. The parties were directed to reflect 13-801 unbundling obligations in their amended contract[109]. Language subjecting SBC to the unbundling duties of "other Applicable Law" was thus included in the TRO Amendment approved by the Commission in Docket 04-0667. The other applicable law must be construed to include Section 13-801, both because the parties were instructed via arbitration to incorporate that statute in their ICA, and because, simply, it is the law in Illinois.

The McLeod/SBC ICA also incorporates the UNE rights and obligations included in Illinois law. SBC has the duty to furnish non-discriminatory access to UNEs "[o]nly to the extent it has been determined that these elements are required by the 'necessary and impair' standards of the [Federal] Act, Section 251(d)(2) *and/or in accordance with state law* within the state this [ICA] is approved."[110]

Concerning Cbeyond, the parties' ICA provides that the UNEs identified in that agreement are not necessarily exclusive, that "CLEC may identify and request that SBC...furnish additional or revised [UNEs] required by applicable federal and/or state laws...[and] [f]ailure to list a network element herein shall not constitute a waiver by CLEC to request a network element identified by the FCC and/or by the Illinois Commerce Commission or Illinois General Assembly."[111] With specific regard to UNE-P, the ICA states that "[a]s required by Section 13-801(d)(4) of the [PUA] and all Illinois Commerce Commission rules and orders interpreting Section 13-801(d)(4), CLEC may use a network elements platform consisting solely of combined Network Elements of SBC...."[112] This language is sufficient to establish a contractual right to UNEs under Illinois law, enforceable by this Commission.

In contrast, the Nuvox ICA is devoid of language that can be fairly construed as incorporating Illinois law. In Section 29.3 of the ICA, the parties "acknowledge that the respective rights and obligations of each Party as set forth in this Agreement are based on the text of the [Federal] Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date."[113] The ICA also states that "[e]ach Party agrees that this Agreement is satisfactory to them as an agreement under Sections 251 and 252 of the [Federal] Act."[114]

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[109] CITE TO AMENDED ORDER 04-0371.
[110] McLeod Ex. 5, sec. 2.2.9 (emphasis added).
[111] Joint CLEC Ex. 2.2, Sec. 9.2.7.
[112] *Id.*, Sec. 9.3.1.
[113] Joint CLEC Ex. 1.2, Sec. 29.3.
[114] *Id.*, Sec. 29.1.

Talk's ICA also lacks language that would fairly support a finding that the agreement incorporates a CLEC's UNE rights under state law. Rather, the ICA states that "t]his Agreement is the arrangement under which the Parties may purchase from each other the products and services described in Section 251 of the Act and obtain approval of such arrangement under Section 252 of the Act."[115] The UNE Appendix to the ICA provides that SBC's "provision of UNEs identified in this Agreement is subject to the provisions of the Federal Act, including, but not limited to, Section 251(d)."[116]

Similarly, there is nothing in the in the Global ICA, in which the UNE provisions have been amended twice, that would fairly sustain the conclusion that the agreement invokes state law.

Therefore, irrespective of the impact of the TRRO on SBC's unbundling duties under Section 251 of the Federal Act, the independent, and presently viable, requirements of Illinois law remain effective wherever they are incorporated in an ICA. Thus, state unbundling requirements incorporated in the XO, McLeod and Cbeyond ICAs are properly enforceable in this proceeding.

As for pricing, since the Commission determined in the 01-0614 Remand Order that 13-801 UNEs should be provided and cost-based, but non-TELRIC rates, revisions will likely be necessary in the XO, McLeod and Cbeyond ICAs. Without suggesting a ruling on the issue here, it does appear that certain ICAs arguably contemplate immediate rate adjustments (as SBC contends with respect to Section 251-based revisions). In other instances, negotiation and (when needed) dispute resolution will have to occur[117]. A true-up will then be necessary, so that SBC can recover the difference between the TELRIC rates at which the relevant UNEs have been provided, and the non-TELRIC, cost-based rates associated with UNEs under Section 13-801.

It should be noted that SBC has "pledged that as long as that [UNE-P] access requirement remains in effect, SBC Illinois will nor reject UNE-P orders to the extent the requesting CLEC has a right to purchase such a 'state law' UNE-P under its existing [ICA] or tariff."[118] Since that pledge is non-binding (and since it places Illinois law in dismissive quotation marks), its substance should be made mandatory and unequivocal. Again, the PUA and Commission orders plainly obligate the alternatively regulated SBC to provide ULS and UNE-P, whether through ICA or tariff.

F. SBC'S MERGER AGREEMENT

[115] Joint CLEC Ex. 3.3, Sec. 43.1.
[116] Joint CLEC Ex. 3.4, sec. 18.1.
[117] Such processes would be triggered by, for example, Section 2.11.3 of the McLeod/SBC ICA. McLeod Ex. 3.
[118] SBC Rep. Br. at 24.

The complaining CLECs contend that the 1999 SBC/Ameritech Merger Order CITE requires SBC to continue providing the UNEs at issue here. The pertinent provision, which appears in Appendix C of the Merger Order, states:

> SBC/Ameritech shall continue to make available to telecommunications carriers, in the SBC/Ameritech Service Area within each of the SBC/Ameritech States, such UNEs or combinations of UNEs that were made available in the state under SBC's or Ameritech's local interconnection agreements as in effect on January 24, 1999, under the same terms and conditions that such UNEs or combinations of UNEs were made available on January 24, 1999, until the earlier of (i) the date the [FCC] issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area. This Paragraph shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable [FCC] order in the UNE remand proceeding.[119]

In the body of the Merger Order, the FCC explained the purpose of the foregoing directive:

> Offering of UNEs. In order to reduce uncertainty to competing carriers from litigation that may arise in response to the Commission's order in its UNE Remand proceeding, from now until the date on which the Commission's order in that proceeding, and any subsequent proceedings, become final and non-appealable, SBC and Ameritech will continue to make available to telecommunications carriers each UNE that was available under SBC's and Ameritech's interconnection agreements as of January 24, 1999, even after the expiration of existing interconnection agreements, unless the [FCC] removes an element from the list in the UNE Remand proceeding or a final and non-appealable judicial decision that determines that SBC/Ameritech is not required to provide the UNE in all or a portion of its operating territory.

[119] Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control, 14 FCC Rcd 14712 (1999), App. C, ¶53.

SBC emphasizes that the Appendix provision contains the FCC's actual instructions, so that any conflict between the Appendix and the body of the Merger Order should be resolved in favor of the Appendix. SBC Rep. Br. at 33. There is no conflict, however. The body of the Merger Order provides the overarching rationale for the precise operative terms in the Appendix. The latter implements the former.

In any event, SBC's position is that the UNE access obligations imposed by the Appendix provision have been terminated by fulfillment of conditions in the text of that provision. The CLECs disagree, asserting that the "successor" to the UNE remand proceeding – the TRO – remains appealable through the TRRO (which, in fact, is under appeal) CITE. The CLECs' characterization of the TRO as the UNE remand successor undermines their argument. If the TRO *is* the UNE remand proceeding, then a final FCC order ending certain unbundling obligations - the TRRO - has been issued in that proceeding, thus satisfying the "earlier" of the express conditions in the Appendix provision (i.e., condition (i)).

More importantly, however, the preceding analysis misses the forest for the trees. The six-year old Merger Order was issued before the series of FCC and appellate decisions that determine the present context of UNE access. When it released the TRRO a few months ago, the FCC, which was inarguably familiar with its own Merger Order, rendered paragraph 53 of the Appendix obsolete. It would make little sense (even if this Decision adopted the CLEC view of the Merger Order's text, which it does not) to conclude that the FCC intended to simultaneously terminate (over 12 months) Section 251 ULS/UNE-P via the TRRO, yet also intended to preserve the Merger Order obligation to provide ULS/UNE-P under a distant predecessor to the TRRO[120].

G. SPECIFIC 13-514 PROVISIONS

Section 13-514 identifies certain actions as "per se impediments to the development of competition." Some or all of the complaining CLECs have asserted violations of subsections 13-514(1), (2), (4), (5), (6), (8) (10), (11) and (12). In this Decision, SBC's ALs have contravened UNE rights for certain CLECs under Section 271 of the Federal Act and Section 13-801 of the PUA. The ALs also initially failed to implement the TRRO's self-certification procedures for unbundled loops and transport. Additionally, the ALs denied additional services and service modifications to the CLECs' embedded base customers. The issue, then, is whether any of these SBC actions constitute some or all of the per se impediments in the subsections of Section 13-514, or constitute some other anticompetitive action within the meaning of that section.

[120] As the Indiana Commission put it, the Merger Order (and other authorities cited) do not "supersede the significant weight of authority carried by the TRRO." Indiana Bell Tel. Co., Cause No. 42749, Order, Indiana URC., April 6, 2005, at 4.

1. 13-514(1) ("unreasonably refusing or delaying interconnections or collocation or providing inferior connections to another telecommunications carrier")

The CLECs have employed "shotgun" pleading, alleging violation of each subsection of Section 13-514 for which a plausible argument can be offered. Such pleading is standard operating procedure in litigation (indeed, the failure to raise a colorable claim could subject legal counsel to complaint) and no criticism of that practice is intended in this Decision. Nonetheless, there are disputes in which new statutory construction is inevitable (e.g., when there is no provision clearly applicable to the particulars of the case) and disputes in which certain provisions are plainly designed for the particulars of the case, rendering a construction of other statutory provisions superfluous. This proceeding presents the latter situation with respect to Subsection 13-514(1). There are other subsections of section 13-514 that squarely address the circumstances of this case. To decide, on the limited argument offered here, whether SBC's ALs constitute a refusal, delay or diminution of interconnection would be an unwise use of the Commission's authority. There is no need to create precedent (albeit nonbinding precedent) here, where the components and ramifications of such precedent have not been adequately briefed.

2. 13-514(2) ("unreasonably impairing the speed, quality or efficiency of services used by another telecommunications carrier")

SBC asserts that the pertinent UNEs here are not "services and that, for that reason, subsection 13-514(2) is inapplicable to this proceeding[121]. That assertion, even if true, would not preclude application of the subsection. The relevant question is whether a CLEC service has been impaired, not whether the ILEC behavior or instrumentality causing that impairment is a service. Put differently, an ILEC does not have to impair a service *with a service* in order to violate the subsection. Thus the essential principle articulated by the Commission, in the case on which SBC relies, was whether "the facilities eventually provided have otherwise adversely affected the services that [the CLEC] seeks to provide to end users."[122]

McLeod argues that if it needed to procure alternatives to the relevant UNEs, because of SBC's ALs, it would potentially face "costly and cumbersome workarounds, which could result in lower quality of service, and also use more costly, complex and time consuming processes (i.e., slower and less efficient) for placing orders and addressing maintenance issues."[123] McLeod further contends that "efficiency," within the meaning of the subsection, "carries an economic connotation," so that restriction on access to less costly UNEs constitutes an impairment of efficiency[124].

[121] SBC Init. Br. at 47.
[122] North Country Communications Corporation v. Verizon North, Inc., and Verizon South, Inc., Docket 02-0147, Order, Oct. 6, 2004, at 26.
[123] McLeod Rep. Br. at 41 (footnote omitted).
[124] *Id.*

These arguments are persuasive. This case is about competition for revenue and profit. When services provided directly to the public are made slower, less attractive or more expensive to the CLEC, revenue is lost or profit shrinks. It would ill-serve the pro-competitive intentions of Section 13-514 - and, indeed, it would be unconstructively naïve - to construe speed, quality and efficiency apart from this competitive context. Accordingly, SBC impaired the speed, quality and efficiency of CLEC services utilizing ULS and unbundled loops and transport, by issuing ALs that: disregarded unbundling duties under Section 271 of the Federal Act and Section 13-801 of the PUA; failed, initially, to implement the TRRO self-certification option; increased amounts billed rather than awaiting true-up; determined non-impaired wire centers without negotiation; and refused, without negotiation, to fulfill move, migration and add orders for embedded customers, Moreover, by acting unilaterally, when the TRRO explicitly mandated negotiation, and by ignoring substantive law provisions in Orders of the Commission and the FCC (as discussed in this Decision), SBC was unreasonable within the meaning of this subsection.

3. 13-514(4) ("unreasonably delaying access in connecting another telecommunications carrier to the local exchange network whose products or services requires novel or specialized requirements")

The discussion concerning subsection 13-514(1) is applicable here as well. Moreover, there is virtually nothing in the record to establish that "novel or specialized requirements" are involved for any CLEC.

4. 13-514(5) ("unreasonably refusing or delaying access by any person to another telecommunications carrier")

Again, the discussion concerning subsection 13-514(1) is also applicable to this subsection. Furthermore, assuming that a telecommunications carrier has standing to assert a violation of this provision, which was taken for granted in <u>North Country Communications</u>, the Commission found it decisive in that docket that no refusal or delay of access to a particular person was proven. Despite the text of SBC's February 11 ALs, the CLECs offer no evidence of such denial or delay here, and SBC maintains that it has actually fulfilled the CLECs' orders for the pertinent UNEs (whether because of SBC's "pledges" or due to emergency relief awarded in this case).

5. 13-514(6) ("unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers")

Concerning whether SBC's ALs had a substantial adverse effect on the ability of the complaining CLECs to provide services to their customers, much of the above analysis for subsection 13-514(2) also applies here. The ALs purported to unilaterally, prematurely and (in some respects, as discussed in this Decision), erroneously determine the availability of lower cost inputs for the CLECs' services. The substantiality of the cost differential between UNEs and other alternatives has driven

unceasing federal and state litigation among carriers for many years. Although SBC mounts a defense on this issue, the bases for its denial of substantial adverse impact are contrived and manifestly unpersuasive.

With regard to reasonableness, however, the results are mixed. As this Decision finds above, it was not unreasonable for SBC to conclude that it could stop providing ULS/UNE-P before comprehensive amendment of its ICAs was completed. It was, though, unreasonable to issue ALs withholding UNE-P from embedded customers without first determining, through bilateral or multilateral processes, how such customers would be distinguished from new customers. It was also unreasonable to issue ALs that: disregarded unbundling duties under Section 271 of the Federal Act and Section 13-801 of the PUA; failed, initially, to implement the TRRO self-certification option; increased billed amounts rather than awaiting true-up ; determined non-impaired wire centers without negotiation; and refused, without negotiation, to fulfill move, migration and add orders for embedded customers. Moreover, by acting unilaterally, when the TRRO explicitly mandated negotiation, and by ignoring substantive law provisions in Orders of the Commission and the FCC (as discussed in this Decision), SBC was unreasonable within the meaning of this subsection.

6. 13-514(8) ("violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the [Federal] Act...in a manner that unreasonably delays, increases the cost, or impedes the availability of telecommunications services to consumers")

This Decision holds, above, that XO, McLeod, Global and Talk each have the right of access, under the terms of their respective ICAs, to UNEs under Section 271 of the Federal Act. Similarly, this Decision finds, above, that XO, McLeod and Cbeyond have rights of access under the terms of their respective ICAs, to UNEs under Section 13-801 of the PUA. The ALs violated those terms by purporting to withhold the relevant UNEs generally, not merely pursuant to Section 251. Furthermore, to the extent that SBC acted unilaterally and without negotiation through the ALs, in contravention of each CLEC's present ICA rights to the relevant UNEs under Section 251 of the Federal Act, as discussed throughout this Decision, it has violated subsection 13-514(8).

Every breach of an ICA identified in the foregoing paragraph, if left unchecked by the emergency relief issued in these proceedings, or by SBC's nonbinding pledges, or by the requirements of this Decision, was likely to delay, increase the cost, or impede the availability of telecommunications services to consumers, for the reasons set forth in the analyses of subsections 13-514(2) and (6) above. Further, such adverse consequences were unreasonable, since SBC was aware of the contents of its own ICAs and lacked a reasonable basis for taking unilateral action, without negotiations, through the ALs.

7. 13-514(10) ("unreasonably failing to offer network elements that the Commission or the [FCC] has determined must be offered on an

unbundled basis to another telecommunications carrier in a manner consistent with the Commission's or [FCC's] orders or rules requiring such offerings")

This Decision holds, above, that XO, McLeod, Global and Talk each have the right of access, under the terms of their respective ICAs, to UNEs under Section 271 of the Federal Act. The TRO makes this clear, and nothing in the TRRO changes those rights. And, as already established in this Decision, Section 13-801, as interpreted by the Commission, imposes unbundling obligations on SBC that are independent of SBC's unbundling duties under Section 251 of the Federal Act. The 2002 Order in Docket 01-0614 described those duties and the 01-0614 adjusted (according to SBC, expanded) them. XO, McLeod and Cbeyond have negotiated the right to obtain Section 13-801 UNEs through their ICAs. It was unreasonable of SBC, in its ALs, to ignore those Commission and FCC requirements

Also, although this Decision finds that SBC will be relieved of Section 251 ULS/UNE-P obligations after the brief negotiations described above, SBC retains Section 251 duties to embedded UNE-P, loop and transport customers, to customers served through loops and transport provided pursuant to CLEC self-certification, to loop and transport customers served through wire centers unilaterally deemed unimpaired by SBC, and to all customers subject to *post*-ICA amendment true-up under the TRRO. Those duties are determined by FCC orders or rules. SBC was aware of those orders and rules, and of the contents of its own ICAs, and lacked a reasonable basis for purporting to abandon those duties, without negotiations, through the ALs.

11. 13-514(11) (prohibits "violating the obligations of Section13-801")

As already established in this Decision, Section 13-801, as interpreted by the Commission, imposes unbundling obligations on SBC that are independent of SBC's unbundling duties under Section 251 of the Federal Act. XO, McLeod and Cbeyond have negotiated the right to obtain Section 13-801 UNEs through their ICAs. To the extent that SBC's ALs purport to deny such state law UNEs to those CLECs, they violate Section 13-801.

12. 13-514(12) ("violating an order of the Commission regarding matters between telecommunications carriers")

For reasons articulated elsewhere in this Decision, SBC's ALs violate the 2002 Order in Docket 01-0614. Insofar as SBC has not withdrawn those ALs since the Commission issued the <u>01-0614 Remand Order</u>, SBC has violated the latter Order as well. The CLECs argue that SBC is also in violation of the Orders approving their respective ICAs with SBC. However, it is not clear that SBC's actions violate those Orders, as contrasted with the terms of the ICAs themselves. Nor is it clear that exploring that distinction would be constructive in light of the other findings and conclusions in this Decision. Consequently, for the reasons set out in connection with

subsection 13-514(1), no decision will be made regarding violation of the Orders approving ICAs.

H. REMEDIES

All of the complaining CLECS request an Order containing each of the following forms of relief: 1) a declaration that SBC is in violation of the Federal Act, the PUA, the parties' ICA provisions, and orders and rules of the FCC and the Commission; 2) a requirement that SBC cease the foregoing violations; and 3) recovery of CLEC costs and attorney's fees in this proceeding. Joint CLECs also request that SBC be held responsible for damages, penalties and reimbursement of all of the Commission's costs in conducting these dockets. SBC, in a counterclaim against XO and Joint CLECs, but not McLeod, also requests relief.

1. Declaration of Violation/Cease and Desist

Consistent with the analysis and conclusions above, this Decision reaches certain conclusions regarding the lawfulness of SBC's conduct and, as the consequence of those conclusions, requires cessation of completion of certain activities or policies.

First, SBC cannot lawfully deny a complaining CLEC's Section 251 request for ULS/UNE-P, unbundled dedicated transport or unbundled high capacity loops that will be used to serve an embedded CLEC customer. This includes a prohibition against denying any CLEC new, drop, migrate, move or functionally similar request pertaining to for an embedded customer. Accordingly, to prevent or minimize such denials regarding ULS/UNE-P, SBC and each complaining CLEC shall, during a period not to exceed 28 days from the date on which this Decision becomes final, negotiate and agree upon terms, conditions and processes by which embedded and new ULS/UNE-P customers will be distinguished[125]. Thereafter, SBC may deny any Section 251 request for ULS/UNE-P that will be used to serve a new customer[126].

Second, SBC cannot lawfully determine by any unilateral act or omission (including, but not limited to, its ALs) the terms, conditions or processes by which any complaining CLEC will obtain from SBC, under Section 251, unbundled dedicated transport, unbundled high capacity loops or ULS/UNE-P. This prohibition includes, but

[125] During the 28-day period, CLECs will continue to pay the ULS/UNE-P prices in their ICAs as of March 11, 2005, which will be subject to true-up for embedded customers, per the TRRO, after the ICAs are amended. However, for any customer served after March 11, 2005 that is identified as a new customer under the terms negotiated during the 28-day period, the true-up must enable SBC to recover the difference between the rates a CLEC actually paid to procure ULS/UNE-P for such customer(s) and the lowest-priced alternative for which such customer(s) would have been eligible during the post-March 11 period.

[126] If SBC and any CLEC are unable to reach agreement in 28 days, the parties may resort to the dispute resolution processes in their ICA. The true-up requirements in the preceding footnote will apply, however, both to the 28-day period and the dispute resolution period.

is not limited to, the identification of impaired or non-impaired wire centers, the implementation of the quantitative limits on loops and transport served through impaired wire centers, the self-certification process under ¶234 of the TRRO, and the implementation of true-ups required by the TRRO and this Decision.

Third, SBC retains unbundling obligations for unbundled dedicated transport, unbundled high capacity loops and ULS/UNE-P under Section 271 of the Federal Act and Section 13-801 of the PUA (and Commission Orders implementing that statute). Where these obligations are incorporated into a complaining CLEC's ICA (as determined by this Order), SBC is prohibited from denying access to unbundled dedicated transport, unbundled high capacity loops and ULS/UNE-P.

2. Attorney's Fees/Litigation Costs and the Commission's Costs

"[I]t is well established that fee-shifting statutes are to be strictly construed and that the amount of fees to be awarded lies within the Commission's 'broad discretionary powers.'"[127] Because the complaining CLECs have established that violations of Section 13-514 have occurred, they are entitled to an award of attorney's fees and costs under subsection 13-516(a)(3) of the PUA[128]. The question is how much. In Globalcom, Inc., v. Illinois Bell Telephone[129], the Commission tied the award of fees and costs under 13-516 to a party's litigation success. It did so to reflect the fact that Commission complaint proceedings often result, as does this one, in a "split decision" for the parties.

Here, each of the Complaining CLECs obtained emergency relief regarding loops and transport in this proceeding (but McLeod and Joint CLECs were denied such relief on ULS/UNE-P), then prevailed on several issues addressed in this Decision. On the other hand, Joint CLECs and McLeod asserted the unsupportable claim that SBC must provide ULS/UNE-P until amendments to their respective ICAs are approved. Those parties also pursued an unsuccessful claim based on the SBC/Ameritech Merger Order. Additionally, certain Joint CLECs asserted rights under Section 271 of the Federal Act or Section 13-801 of the PUA that they had not incorporated into their ICAs.

Because XO did not present ULS/UNE-P claims, it prevailed on most of its claims. However, XO asserted unsuccessful claims under subsections of Section 13-514, claims for which it offered scant support, but which caused SBC to mount a defense. It would not be fair for SBC to subsidize those claims. XO is awarded recovery of 90% of its attorney's fees and costs.

Having achieved a more mixed success, McLeod will be awarded 75% of its fees and costs. McLeod does emphasize that it "asked SBC if it would apply the Emergency

[127] Globalcom, Inc. v. Illinois Commerce Commission, 347 Ill.App.3d 592, 618 (1st Dist. 2004).

[128] 220 ILCS 5/13-516(a)(3) (the Commission "shall award" such fees and costs).

[129] Docket 02-0365, Order on Rehearing, Dec. 11, 2002. The Commission's treatment of fees and costs was upheld in Globalcom, Inc. v. Illinois Commerce Commission.

Relief Orders issued in Dockets 05-0154 and 05-0156 to McLeodUSA as well, but SBC refused...Because of SBC's refusal...it was necessary for McLeodUSA...to prepare and file its own Complaint and incur the costs of participating in this proceeding."[130] However, when McLeod requested relief from SBC, the emergency relief granted by the ALJ in the then-existing dockets included UNE-P. Since the Commission's Amendatory Orders subsequently deleted that portion of the emergency relief, SBC's refusal to satisfy McLeod's request was not, in hindsight, unreasonable.

Joint CLECs were not as successful as McLeod in this case, given their failed 271 and 13-801 claims regarding certain CLECs. On the other hand, unlike the other complaining CLECs, Joint CLECs did not press certain claims under subsections of 13-514 that had little likelihood of success and received little or no attention in the other CLECs' filings. Joint CLECs are awarded 70% of fees and costs. The Commission has no apparent authority to apportion such recovery among the Joint CLECs, so that matter is left to those parties.

All fees and costs presented to SBC by the Complaining CLECs should be reasonable and properly associated with this proceeding. In any dispute concerning such fees and costs, the CLEC shall bear the burden of demonstrating reasonableness and propriety. SBC shall pay the required portion of each CLEC's fees and costs within 60 days of the day on which this Decision becomes final and unappealable, or within 60 days of receipt of a billing for such fees and cost from the CLEC, whichever is later.

Concerning the Commission's own costs, which it is obligated to recover under subsection 13-515(g)[131], the Commission, in Globalcom, Inc., v. Illinois Bell Telephone, linked such costs to the apportionment of attorney's fees and costs. Although that was a two-party proceeding, the CLECs here have, for the most part, presented identical claims, thereby creating two "sides" in this case. Therefore, SBC shall be assessed for its half of the Commission's costs, plus 78% (i.e., the average CLEC award here for attorney's fees and costs) of the CLEC's half.

All of the foregoing awards are "approximate quantifications" of the CLECs' litigation success in this proceeding, as the Commission stated in Globalcom, Inc., v. Illinois Bell Telephone. "Absolute precision regarding this quantification is simply not practicable."[132]

3. Damages and Penalties

SBC maintains that it "did not refuse to provision a single UNE-P circuit, or a single high capacity loop or dedicated transport circuit, based on the Accessible Letters complained of here. Indeed, CLECs do not even assert that they were denied access to

[130] McLeod Rep. Br. at 47.
[131] 220 ILCS 5/13-515(g).
[132] Docket 02-0365, Order on Rehearing, Dec. 11, 2002, at 51.

any such UNEs."[133] SBC is correct that the CLECs have presented no basis for monetary damages. Despite the contents of SBC's ALs, the complaining CLECs have apparently not been denied access to the pertinent UNEs, even under Section 251, because of the combined effect of emergency relief and SBC's forbearance. Nor have they provided evidence of any damage directly or indirectly associated with the *potential* for denied access contained in the ALs.

As for penalties, subsection 13-516(a)(2) of the PUA provides, *inter alia*, that:

> for a second and any subsequent violation of Section 13-514 committed by a telecommunications carrier after the effective date of this amendatory Act...the Commission may impose penalties of up to $30,000 or 0.00825% of the telecommunications carrier's gross intrastate annual telecommunications revenue, whichever is greater...Each day of a continuing offense shall be treated as a separate violation for purposes of levying any penalty under this section.

83 Ill.Adm.Code 766.400 *et seq.* sets out specific procedures governing the imposition of penalties. Under subsection 13-516(b), the Commission may waive penalties "if it makes a written finding as to its reasons for waiving the penalty."

Joint CLECs are the only proponents of penalties here, and they have offered, at best, minimal support for their proposition. Consequently, the record is devoid of meaningful argument on this subject. The Commission is thus given little reason to expend the time and resources (its own and the parties') necessary to comply with the procedures detailed in 83 Ill.Adm.Code 766[134]. Penalties will be waived in this proceeding.

4. SBC's Relief

SBC requests that the complaining CLECs be required to execute a TRRO-related amendment prepared by SBC for inclusion in their respective ICAs. In effect, SBC proposes unilateralism with Commission approval. As discussed in this Decision, the FCC, in the TRRO, expects bilateral negotiations to amend ICAs.

Alternatively, SBC asks the Commission impose a time limit (i.e., until June 11 2005) on the parties' ICA amendment negotiations (after which, absent agreement, SBC would return to unilateral implementation of the TRRO). In the TRRO, the FCC directed the parties to proceed promptly. It also reminded the parties of their duty to

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[133] SBC Init. Br. at 55.

[134] For example, Ameritech would have a right to a hearing, in order to address the "factors to be considered by the Commission" under Section 766.415 when assessing penalties, as well as a right to a written order under Section 766.410.

negotiate in good faith. But the FCC imposed no deadlines, other than the duration of the transition periods, and the time limits under Section 252 of the Federal Act (assuming those limits establish the outer temporal boundaries of the parties' negotiations).

This Decision will not impose additional time limits. Regarding ULS/UNE-P, SBC's interest in expedition is addressed here through the 28-day negotiation mandated above. Moreover, SBC has pledged to continue to furnish UNE-P while state law obligations remain. With respect to loops and transport, nothing demonstrates a need to rush the negotiations concerning the interrelated unbundling requirements under Sections 251 and 271 of the Federal Act and Section 13-801 of the PUA, or the multistage processes required for Section 251 loops and transport. Also, given the date of the Instant Decision, June 11 is an utterly unrealistic deadline for approval of ICA amendments.

V. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Joint Complainants, XO and McLeod are entities that own or control, for public use in Illinois, property or equipment for the provision of telecommunications services in Illinois and, as such, are telecommunications carriers within the meaning of §13-202 of the PUA

(2) SBC is an Illinois corporation that owns or controls, for public use in Illinois, property or equipment for the provision of telecommunications services in Illinois and, as such, is a telecommunications carrier within the meaning of §13-202 of the PUA;

(3) the Commission has jurisdiction of the parties hereto and the subject matter hereof;

(4) the recitals of fact and conclusions and conclusions of law reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and conclusions of law;

(5) the remedies described in Section IV.H of this Decision should be adopted, and made mandatory, as specifically set forth above;

(6) the Amendatory Orders for Emergency Relief entered in each of these combined dockets should remain in effect;

(7) any objections, motions or petitions filed in this proceeding which remain undisposed of should be disposed of in a manner consistent with the ultimate conclusions herein contained.

IT IS THEREFORE ORDERED that pursuant to §13-514 of the PUA, the remedies described in Section IV.H of this Decision are adopted, and made mandatory, as specifically set forth in this Decision.

IT IS FURTHER ORDERED that the Amendatory Orders for Emergency Relief entered in each of these combined dockets shall remain in effect.

IT IS FURTHER ORDERED that any objections, motions or petitions not previously disposed of are hereby disposed of consistent with the findings of this Order.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, and unless reviewed by the Commission under Section 13-515(d)(8) of the Public Utilities Act, this Decision is final; it is not subject to the Administrative Review Law.

DATED:	MAY 9, 2005
PETITIONS FOR REVIEW DUE:	MAY 16, 2005, BY 12 NOON
RESPONSES TO PETITIONS FOR REVIEW DUE:	MAY 18, 2005, BY 5PM

David Gilbert
Administrative Law Judge

ATTACHMENT 5

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

XO Illinois, Inc.	:	
	:	
Petition for Arbitration of an Amendment	:	
to an Interconnection Agreement with	:	04-0371
Illinois Bell Telephone Company Pursuant	:	
o Section 252(b) of the Communications	:	
Act of 1934, as Amended.	:	

ARBITRATION DECISION

September 9, 2004

TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND 1
II. JURISDICTION 2
III. DEFICIENT FRAMING OF OPEN ISSUES 3
IV. ISSUES FOR RESOLUTION 6
A. OPEN ISSUES PRESENTED BY XO 6
1. 6
2. 14
4. 19
5. 27
6. 31
7. 35
B. OPEN ISSUES PRESENTED BY SBC 40
1. 40
2. 50
3. 57
4. 62
5. 68
6. 73
7. 79
8. 82
9. 84
10. 85
11. 87
12. 89
13. 91
14. 93
V. GENERAL APPLICATION OF THE STATUS QUO ORDER 94
VI. ARBITRATION STANDARDS 96

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

XO Illinois, Inc.	:	
	:	
Petition for Arbitration of an Amendment	:	
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Illinois Bell Telephone Company Pursuant	:	
o Section 252(b) of the Communications	:	
Act of 1934, as Amended.	:	

ARBITRATION DECISION

By the Commission:

I. PROCEDURAL BACKGROUND

This proceeding was initiated by a Petition for Arbitration ("Petition") filed with this Commission on May 3, 2004 by XO Illinois, Inc. ("XO"), pursuant to subsection 252(b) of the federal Telecommunications Act of 1996 ("Federal Act")[1] and 83 Ill.Adm.Code 761, to amend an interconnection agreement (the "ICA") with Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC"). SBC is an incumbent local exchange carrier ("ILEC") in certain geographic areas of Illinois. XO is a competitive local exchange carrier ("CLEC") providing telecommunications services in, *inter alia*, areas in which SBC also provides local services.

SBC filed its Response to XO's Petition on June 1, 2004. SBC also identified additional disputed issues for resolution, as it is permitted to do under subsection 252(b)(4) of the Federal Act[2]. XO filed its Response to SBC's issues on June 15, 2004. That filing included an Unresolved Issues Matrix, which contained, *inter alia*, the parties' disputed issues and their respective proposed amendatory texts for the ICA.

XO initially identified seven issues for arbitration. SBC filed a motion to dismiss on May 13, 2004, to which XO and Commission Staff ("Staff") filed responses on May 21, 2004. The Administrative Law Judge ("ALJ") issued a Ruling on the SBC motion on June 3, 2004, dismissing XO Issue 1 and postponing ruling on XO's other issues pending additional flings. On June 8, 20004, XO requested reinstatement of XO Issue 1 and voluntarily withdrew XO Issue 3. On June 24, 2004, the ALJ issued a Ruling reinstating XO Issue 1 and acknowledging withdrawal of XO Issue 3.

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[1] 47 U.S.C. § 252(b).
[2] 47 U.S.C. § 252(b)(4).

On June 9, 2004, XO filed a motion to dismiss certain SBC arbitration issues and to strike related language in SBC's proposed amendment to the ICA. On June 16, 2004, SBC and Staff filed their respective responses to XO's motion. On June 24, 2004, the ALJ issued a Ruling denying XO's motion (except with regard to certain forward-looking contract language proposed by SBC).

The ALJ conducted a pre-trial hearing on May 11, 2004 in Chicago, Illinois. The parties agreed that open issues would be addressed and contested through written briefings and waived evidentiary hearings. This was consistent with XO's Request for Waiver or Variance of Commission's Rules, filed in conjunction with the Petition, in which XO requested that no evidentiary hearings be conducted[3]. The case was marked "heard and taken" on June 29, 2004.

On June 28, 2004, XO filed a Motion to Withdraw Petition and Terminate Arbitration Proceedings. On June 29, Staff filed a Response recommending that XO's motion be granted. On July 6, 2004, SBC filed a Response opposing XO's motion. XO withdrew the motion on July 13, 2004.

An Initial Brief ("Init. Br.") and Reply Brief ("Reply Br.") were each filed by XO, SBC and Staff. An ALJ's Proposed Arbitration Decision was served on all parties. Briefs on exceptions ("BOEs") were filed by each participant on August 20, 2004.

Also on August 20, 2004, the Federal Communications Commission ("FCC") issued its "*Status Quo* Order,"[4] which significantly affects certain substantive issues in this proceeding. Accordingly, SBC and XO each filed a Supplemental Brief ("Supp. Br.") on August 31, 2004, and Staff filed its Supplemental Brief on September 1, 2004. Each party filed a Supplemental Reply Brief ("Supp. Rep. Br.") on September 3, 2004. Each such brief addressed the impact of the *Status Quo* Order on this case.

II. JURISDICTION

Subsection 252 of the Federal Act provides that within a specified time period "after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." Both XO's Petition and SBC's Response assert that there are open issues between the parties. There is no dispute that the Petition was timely filed. Consequently, the Commission has jurisdiction to arbitrate the issues presented.

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[3] On May 21, 2004, SBC filed its Response to XO's Motion for Waiver or Variance, in which it declared "no objection" to XO's motion insofar as it pertained to arbitration issues presented by XO.

[4] In the Matter of Unbundled Access to Network Elements & Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313 & CC Docket No. 01-038, Order and Notice of Proposed Rulemaking (rel. Aug. 20, 2004). (Note: We use "*Status Quo* Order" to avoid confusion with the FCC decision colloquially known as the "Interim Order.")

Section 252 of the Federal Act proscribes certain procedures, standards and outcomes for arbitrations conducted under that section. In addition, the Commission has adopted rules and procedures for such arbitrations in 83 Ill.Adm.Code 761. The foregoing federal and state provisions apply to this proceeding.

In its dismissal motion of May 13, 2004, SBC argued that this proceeding could not be conducted under Section 252. As the ALJ ruled, this arbitration was compelled by paragraph 703 of the TRO, which mandates that carriers use Section 252 arbitration processes to incorporate TRO-related changes in their ICA, when that ICA is "silent" on legal change and transition timing. Since the change-of-law provision in the SBC-XO ICA contemplates negotiation, but has no dispute resolution mechanism to resolve an impasse (other than a reference to "applicable law"), the ALJ held that the ICA was "silent" and that the parties therefore defaulted to FCC-required arbitration.

III. DEFICIENT FRAMING OF OPEN ISSUES

In many instances in this arbitration, the parties have failed to conform to the letter or the spirit of Section 252 of the Federal Act. That statute contemplates a period of 135 days for voluntary negotiations between an ILEC and CLEC for the purpose of achieving an ICA. During the 25 days thereafter, either party can request state commission arbitration of "open issues." Arbitration is requested by a petition, accompanied by documents concerning "the unresolved issues" between the parties. The other carrier may respond within the subsequent 25 days. The Commission must then resolve each of the "unresolved issues" presented in the petition and response, within a period of between 85 and 100 days (depending upon when arbitration was requested). Both Section 252 and Section 251(c)(1) of the Federal Act impose an obligation to negotiate in good faith.

The Commission believes that the foregoing statutory framework requires diligent and persistent negotiation by the carriers, in support of the clear Congressional intention to foster interconnection. Thus, the initial 135-day negotiation period should be spent doing just what the statute says – negotiating. This inherently involves identifying both a party's own interests and its differences with its prospective interconnection partner, followed by a resolute effort to clarify and narrow those differences. By the 135th day, negotiations should have either produced a complete agreement or precisely framed the parties' remaining unresolved issues. Then, if either party perceives that negotiations are truly at an impasse, this Commission's processes can be enlisted for deciding "unresolved issues."

In the Petition here, XO asserts that "[o]ther than exchanging a few letters and proposed amendments, the parties have not engaged in direct negotiations with each other...XO repeatedly requested that SBC provide dates and times that it was available for negotiations. However, SBC did not do so." Petition at 6. SBC has never addressed these assertions; thus, it has never denied them.

Accordingly, XO complains that it was not "able to completely determine SBC's positions on each and every issue" that XO presented for arbitration. *Id*., at 7. This may explain why XO frames certain issues that are either far too general (e.g., "[w]hat eligibility and certification requirements should apply for access to high-capacity EELs pursuant to FCC and ICC rules," XO Issue 6) and/or unconstructively self-evident (e.g., "[s]hould SBC's right to audit...be limited consistent with FCC rules," XO Issue 7). XO may have been attempting to keep these issues broad enough to accommodate whatever specific disputes SBC eventually raised under those general topics. (Alternatively, XO may have hoped to retain the flexibility to alter its own strategies as the case unfolded.)

In the Response, SBC re-frames several of XO's issues, as well as presenting its own. In many instances, however, those issues exceed the inappropriate generality of the XO issues quoted above. Repeatedly, SBC presents this question: "What terms and conditions should apply to...[a service or process]?" Such catch-all questions, along with those XO issues that are comparably over-broad, are not proper "open" or "unresolved" issues within the meaning of Section 252. Rather, they reflect the absence of negotiations between the parties. It is inconceivable to this Commission that after 135 days of the diligent negotiations contemplated by the Federal Act, carriers would need to ask us to decide *every* term and condition that should, and should not, apply to wholesale service conversions, high-capacity EELs, dark fiber, line conditioning, SS7, call-related data bases and other important services and provisioning processes.

Several serious adverse consequences flow from the failure to negotiate, to narrow differences, and to properly frame unresolved issues. First, the resources of this Commission and its Staff are squandered. The parties, who are, after all, commercial enterprises, should be expending *their own* resources to determine the terms of their interconnection, as the Federal Act contemplates. The Commission should be presented only with carefully framed disagreements after resolute discussions have led to impasse, not broad and open-ended topics that reflect the absence of discussions. A "let the Commission figure it out" approach is not what the Congress intended and it diverts us from other duties.

Second, the arbitrating carriers, our Staff and our ALJ are hampered in their preparation for, and conduct of, arbitration proceedings, when the parties frame their actual disputes and stake out their positions on an amorphous, rolling basis, as they have here. Thus, there is often considerable divergence between the "unresolved" issues initially presented by each carrier and the issues each actually addresses in its position summaries (required by the ALJ) and supporting arguments. Further, in several instances, the parties brief different points under the same vague issue or sub-issue. Worse, the carriers settled issues without informing Staff, with the result that Staff briefed resolved issues.

Such circumstances are especially deleterious within the compressed time frame allotted to arbitration under Section 252. Precious time is wasted as the real disputed issues gradually take shape (and sometimes change shape), and as the parties, Staff

and ALJ adjust on the fly to the changing landscape of the case. Moreover, the truncated arbitration time frame is itself indicative of Congress's expectation that precise, unambiguous and fully negotiated issues would be presented for resolution, not broad topics more appropriate for a rulemaking or industry-wide workshop.

Third (and related to the preceding two paragraphs), ambiguous issues tend to produce an under-developed or poorly targeted record. Thus, the parties here frequently accuse each other of failing to produce necessary evidence, and Staff declares that it cannot form an opinion on certain issues due to the absence of sufficient factual evidence. Those excessively broad issues initially framed by the parties apparently appeared to be, by their terms, amenable to resolution without evidentiary hearings. However, by the time the carriers framed some of their actual disputes - which should have been properly framed in the first place – the time to develop a suitable factual record had passed.

Fourth, the federal and state policies favoring interconnection and effective competition are frustrated. This Commission is obligated by the Federal Act to impose conditions and establish rates in the ICA that appropriately implement the substantive requirements of the law. The carriers, in turn, are required to present an ICA for approval that meets statutory requirements and FCC regulations. These outcomes are far more difficult when the parties have not earnestly negotiated or presented clear and concise issues for final resolution. Absent diligent negotiations, interconnection without arbitration is less likely. Absent carefully framed and properly narrowed issues for arbitration, a complete, unambiguous and approvable ICA is less likely.

It is not enough that XO and SBC each presented its own proposed contract terms. A densely worded schedule of contractual text is not an unresolved issue. It is a monologue. Furthermore, laying those texts side-by-side is not the same as presenting satisfactory open issues. Those texts are lengthy, detailed and highly technical and the movement or deletion of even a single word can dramatically alter the parties' rights and responsibilities. It is not up to the Commission or its Staff to cull those texts in an attempt to discern what elements present a meaningful dispute for which the parties want a specific resolution. That is the job of the parties.

Moreover, it is clear that SBC and XO each know how to frame a clear, concise and carefully tailored issue when they want to. XO Issues 2 and 5, and SBC Issues 3 and 6 (except subsection (d)) are particularly strong examples.

SBC takes exceptions to the foregoing assessment. It asserts that "[w]hile the parties included topic headings in the arbitration petitions and matrices, those headings were and are intended only as a short-hand description of the topic of an issue." SBC BOE at 28. "[T]he parties presented their competing contract language for arbitration, and briefed their particular disputes regarding that contract language." *Id.*, at 29

SBC's comments reflect a severe and disappointing misunderstanding of what the Federal Act requires and of the consequences of noncompliance. This Commission

"shall limit its consideration...to *the issues set forth in the petition and response.*" 47 CFR 252(b)(4)(A) (emphasis added). The Federal Act clearly distinguishes *issues* from a party's supporting materials. "A party that petitions a State Commission...shall, at the same time as it submits the petition, provide...all relevant documents concerning (i) *the unresolved issues* [and] (ii) *the position of each party with respect to those issues.*" 47 CFR 252((b)(4)(C) (emphasis added). Thus, the Federal Act regards issues as separate from "the position of [a] party with respect to those issues." While "topic headings," "short-hand descriptions" and "contract language" might constitute the latter, they are not the former. The Commission cannot resolve such non-issues under subsection 252(b)(4)(A). The Commission can only resolve issues - which, in the context of Section 252, are precisely delineated disputes on points of fact, law or policy.

Nevertheless, in addition to resolving the properly framed unresolved issues presented here, the Commission has endeavored in this Decision to offer specific guidance regarding several ill-formed issues as well. To do otherwise would only delay the process of incorporating the "TRO,"[5] as well as the impact of recent *Status Quo* Order[6], into the parties ICA, as the FCC requires. However, we have done no more than what can be supported by the record created by the parties.

IV. ISSUES FOR RESOLUTION

A. OPEN ISSUES PRESENTED BY XO

1. (a) Should SBC be required to make routine network modifications to unbundled network elements ("UNEs"), including loops and transport (including dark fiber), consistent with FCC rules and at the current nonrecurring rates approved by the Commission?

(b) Should unbundled network elements UNEs that require network modifications be subject to the standard performance measure provisioning intervals of all UNEs?

SBC re-characterizes this issue as follows:

(a) Must SBC make routine network modifications at "no additional cost" to XO?

(b) Should network modification projects be subject to the standard performance measurement provisioning intervals?

[5] The FCC's Triennial Review Order, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, etc., CC Docket No's 01-338, 96-98 & 98-147, Report and Order and Order on Remand and Notice of Proposed Rulemaking (rel. Aug. 21, 2003).

[6] The Status Quo Order creates an "Interim Period" and "Transition Period." The Interim Period starts on the date of publication of the order in the Federal Register and the Transition Period begins immediately after the Interim Period ends. The Commission expects publication of the order on or before September 9, 2004. Even if publication occurs after entry of this Arbitration Decision, however, we nonetheless believe that we are bound by the mandates in the *Status Quo* Order. That Order has already been released by the FCC, and publication will take place in accordance with federal procedures.

1. Parties' Positions and Proposals[7]

a.) XO

(XO-1a). FCC rules require SBC to make routine network modifications to UNEs, including loops, transport, and dark fiber. 47 C.F.R. § 51.319(a)(8) & (e)(5). The *TRO* requires ILECs to make the same routine modifications to these UNEs that they make for equivalent services provided to their own customers. *TRO* ¶ 639. The costs of these modifications are captured in SBC's current recurring or nonrecurring charges for these UNEs. Indeed, SBC normally performed these functions for CLECs until an internal SBC policy change halted such work. In addition, SBC regularly performs this work, without additional charge, on special access circuits. If SBC seeks to recover additional charges for routine network modifications, SBC has not produced any evidence to demonstrate the need for, or amount of, any such additional charges and should seek to do so through the proper UNE costing proceeding at the Commission and not through this arbitration.

(XO-1b). The *TRO* expressly stated that to the extent that routine network modifications to existing loop facilities affect loop provisioning intervals contained in performance metrics, "we expect that states will address the impact of these modifications as part of their recurring reviews of incumbent LEC performance." *TRO* at ¶ 639. Thus, the FCC assumes that these performance metrics apply to all UNEs, including those requiring routine network modifications. Indeed, the FCC observed that at least one ILEC "provides the routine modifications listed above with minimal delay, in most cases, to their own retail customers." *Id.*, fn.1940. SBC has provided no evidence to the contrary in this proceeding, and should present any such evidence as part of the Commission's review of SBC's performance, not this arbitration.

b.) SBC

Issue XO-1 involves several discrete disputes. *First*, the Federal Act, the FCC's rules, and the *TRO* are clear that SBC Illinois is entitled to recover its costs of performing routine network modifications. XO proposes to deny SBC cost recovery on the theory that SBC should (or already does) recover these costs in its recurring rates, but XO has proposed no mechanism to adjust SBC's recurring rates to account for such costs, nor has it even attempted to demonstrate that such costs are somehow already recovered in SBC's current UNE loop prices. The Commission should thus reject XO's proposal, and adopt SBC's proposal that pricing for such modifications should be determined on an individual case basis. (SBC proposed Section 3.16.1.) SBC acknowledges its duty to avoid double recovery of costs, but this can be dealt with through the ICB pricing process rather than attempting, in this proceeding, to determine

[7] Each party summarized its own positions and proposals, at the direction of the ALJ. Those summaries appear in this Order as drafted by the parties, without any substantive change by the Commission or the ALJ. Minor editorial revisions were made by the ALJ for the sole purpose of standardizing the legal citations, abbreviations and format used throughout this Order. Under no circumstance should anything in the "Parties' Positions and Proposals" sections of this Order be presented or construed as an assertion, finding or conclusion of the Commission.

whether and to what extent a large variety or work may or may not be included in current unbundled loop prices. This is consistent with the approach of the FCC's Wireline Competition Bureau in the Cavalier[8] arbitration.

Second, the Commission should reject XO's proposal in Section 3.16.1 to require SBC to construct new loops under the pretext of a "routine network modification." Constructing new facilities is not a "modification" of existing facilities at all. Moreover, in the *TRO* the FCC held *without qualification* that ILECs are not required to "build[] a loop from scratch by trenching or pulling cable," and are not "required to trench or place new cables for a requesting carrier." *TRO*, ¶¶ 636, 639. XO's proposed contract language runs afoul of these directives.

Third, the Commission should also reject XO's proposal in Section 3.16.2 to add several specific vague items, not listed by the FCC, as examples of routine network modifications. Those items do not appear in the *TRO*, and XO has provided no evidence that the listed activities in fact constitute routine network modifications under the FCC's rule. SBC'S proposed language, by contrast, accurately tracks the FCC's language and clear intent, and should be adopted.

Fourth, XO's proposal in Section 3.16.3 to require SBC to "provide light continuity and functional signal carriage across both ends of a dark fiber" is unsupported by the *TRO*. Dark fiber is just that – dark. The FCC concluded that CLECs must activate dark fiber themselves using "self-provided optronic equipment," and that "carriers that request dark fiber transport . . . must purchase and deploy necessary electronics." *TRO*, ¶¶ 381-82. XO cannot sneak in the back door, under the guise of a "routine network modification," precisely what the FCC prohibited. Moreover, the FCC's routine network modification rule provides that, with respect to dark fiber, such modifications include activities to "enable a requesting telecommunications carrier to light a dark fiber." 47 CFR 319(e)(5). In other words, again the FCC confirmed that it is the CLEC that must do the "lighting."

Fifth, the provisioning of network elements that require routine network modifications should not be made subject to the standard provisioning intervals used for UNEs that do not require such modifications. (XO Section 3.16.4.) There is no reason to alter SBC's existing performance measures that govern network element modification. Performing routine network modification activities manifestly increases the time reasonably necessary to provision a network element. It would be against all reason to subject routine network modifications to the same provisioning intervals that were created to measure the provisioning of network elements that do not require such modifications. Moreover, the FCC directed states to "address the impact of these modifications as part of their recurring reviews of incumbent LEC performance." *TRO*, ¶ 639. If XO believes that performance measures should be used to measure the provisioning of network elements that require routine network modifications, it can raise that issue at the appropriate time (for example, in the 6-month performance measure

[8] Petition of Cavalier Telephone LLC, FCC DA 03-3947 (Order, adopted & released Dec. 12, 2003).

and remedy plan review that the Commission has already established as part of the Section 271 Plan, in which all CLECs may participate).

c.) Staff

Staff notes that SBC is required to perform certain routine network modifications upon XO's request. SBC's opposition appears to the Staff to be to XO's assertion that it must perform these modifications without charge. SBC asserts that: "SBC ILLINOIS' UNE Loop rates do not take into consideration any additions or modifications to the existing UNE Loop. The existing UNE Loop is already established to capacity. Any modifications to increase capacity, pursuant to the TRO rules, have not been cared for [sic] in the existing UNE Loop rates."

It appears to the Staff that a great many, if not all, of the costs associated with routine network modifications (i.e., with those modifications that SBC performs for its own customers) *may* be costs that SBC recovers in its UNE rates. Specifically, the Staff understands that certain of these costs are recovered in the Annual Charge Factor, which is an adder to UNE rates. The Commission addressed this question in its recent *Loop TELRIC Order*. *See* Loop TELRIC Order at 262, 265.

In the Staff's view, this may include such activities as: 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 suchlike other tasks. However, neither party has identified with any degree of specificity what it considers "routine network modifications" to consist of.

This presents a problem, inasmuch as the record before the Commission in this proceeding is simply not adequate to make a determination of this issue. The Commission may determine this issue based upon which party is determined to have the burden of proof. *However, the Staff recommends that both parties frame their positions with greater particularity in their reply briefs.*

2. Analysis and Conclusions

XO Issue 1-a. There is no dispute that FCC rules require SBC to make routine network modifications to UNEs. It is also settled that the TRO, along with the FCC's pre-existing rules, assure SBC "an opportunity to recover the cost of the routine network modifications" required in the TRO. TRO, ¶ 640. XO acknowledges this. XO Init. Br. at 3. Thus, SBC's reframed version of XO Issue 1-a (SBC/XO 1-a) is readily answered - SBC is not required to make routine network modifications at no additional cost to XO, unless SBC's opportunity to recover such modification costs lies elsewhere. "The issue, then, is whether the recurring or non-recurring UNE rates that the Commission has authorized SBC to charge include such costs, and if they do not, what are those costs, and what type of cost recovery mechanism should be used."[9] XO Init. Br. at 3.

[9] This is one of many examples of a party presenting an open issue for resolution, then substantially reframing the issue for argument purposes. The "real" issue should have been presented in the first place

The parties agree that SBC does recover some network modification costs in its TELRIC-based UNE rates. The parties disagree as to whether *all* of the costs of routine modifications are so recovered. Using the example of "a doubler or repeater to enhance voice transmission," SBC Init. Br. at 3, SBC claims that some routine modifications are not accounted for in SBC's existing rates. *Id.* "Some" other network modifications, SBC avers, "might or might not be included [in TELRIC-based prices] depending on the nature of the work presented." *Id.* XO counters that SBC is "fully compensate[d]" through UNE rates for the costs of modifications, principally because SBC "already undertakes [those modifications] for its end user and tariff customers" and includes the associated costs in reports used to develop UNE rates. XO Init. Br. at 4.

Staff's position is that "a great many, if not all, of the costs associated with routine network modifications (i.e., with those modifications that SBC performs for its own customer[10]) may be costs that SBC recovers in its UNE rates. Specifically, the Staff understands that certain of these costs are recovered in the Annual Charge Factor, which is an adder to UNE rates." Staff Init. Br. at 31. (In Staff's tentative view, the costs associated with adding a doubler or repeater are among those recovered in existing UNE rates.[11] *Id.*, at 32.)

The identification of the modification costs recovered through SBC's existing UNE rates is not in the record. XO and SBC accuse each other of failing to establish such identification. XO Init. Br. at 4; SBC Init. Br. at 3. Both are correct. Neither side offered an identification in their filings[12]. Therefore, as Staff suggests, the Commission has no adequate foundation for a conclusion on this issue. Staff Init. Br. at 31.

That said, XO argues that the Commission should address SBC's recovery of any presently un-recovered modification costs in a generic costing proceeding, not in an arbitration. XO Init. Br. at 4. SBC's preferred alternative is that "pricing for routine network modifications be addressed on an individual case basis ('ICB')," using pricing provisions SBC would incorporate in the parties' ICA. SBC Init. Br. at 3. SBC supports this proposal with the assertion that "ICB pricing will allow it to determine whether the costs associated with any particular XO request are or are not already included in the UNE loop price." *Id.* This is a curious assertion, since it implicitly concedes that SBC already knows which network modification costs are presently recovered through UNE rates. Had it provided that information for the record, we would have been able to offer more specific resolution to the parties' disputes regarding network modifications.

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in the Petition or Response. Furthermore, the issue XO discusses in its brief is really a compilation of several issues, each of which should have been expressly presented as separate issues or sub-issues in XO's Petition or issues matrix.

[10] "By 'routine network modifications' we mean that incumbent LECs must perform those activities that incumbent LECs regularly undertake for their own customers." TRO ¶ 632.

[11] The FCC states that the addition of a doubler or repeater is a routine modification. TRO ¶ 634. The FCC's regulations reflect that determination. *E.g.*, 47 CFR 51.319 (e)(5).

[12] Indeed, neither party framed an open issue concerning the identity of the modification costs encompassed in such rates.

Given the state of the record, however, the Commission can only provide principles that the parties will have to apply in order to amend their ICA in accordance with this Decision. First, SBC is prohibited from imposing a charge for any cost already recovered through its existing UNE rates or any other rate. Second, SBC may impose a charge, on an ICB basis, for any routine network modification cost that is not recovered through existing UNE rates (or any other rate) and for any network modification cost that is not "routine" (see below).

We reject XO's recommendation to address SBC's recovery of any presently un-recovered modification costs in a generic costing docket. As noted, the TRO establishes that SBC is entitled to an opportunity to recover such costs, and we will not delay that opportunity until the close of a docket that does not now exist.

The question of how to distinguish routine network modifications from any other service SBC might provide to XO is not expressly presented in either parties' version of XO Issue 1. Consequently, we will provide only those conclusions and requirements respecting network modifications that we deem essential to completing an ICA.

First, we note that the TRO (as stated above) defines routine network modifications as those an LEC regularly undertakes for its own customers. The FCC specifically applies this principle to an ILEC's provision of high capacity loop facilities to competitors. TRO ¶ 633. The FCC also gives this principle broad application to transmission, excepting only the construction of "an altogether new loop" from its general requirement that an ILEC "modify an existing transmission facility in the same manner it does for its own customers." *Id.*, ¶ 639. On the other hand, the FCC concluded that an ILEC is not required "to trench or place new cables[13] for a requesting carrier, whether [to serve] a new customer or along an existing route." *Id.*, ¶ 636. We hold that the parties' amended ICA must strictly incorporate the foregoing FCC principles.

Second, specifically regarding unbundled DS1 circuits and loops, the FCC concluded that routine modifications to local loops shall include the addition of the "types of electronics that [ILECs] ordinarily attach to a loop for a customer requiring a DS1 loop, even if such electronics are not attached to a particular loop." TRO ¶ 398. The Commission holds that this FCC requirement must be fully reflected in the XO/SBC amended ICA. We flatly reject SBC's claim that the term "electronics" is vague and in flux. SBC Init. Br. at 5. As the FCC, which found the term sufficiently clear, explains, the key variable is not what electronics are at any moment in time, but whether there is equivalence between what the CLEC and the ILEC's own customers are receiving. TRO ¶ 634.

We similarly disregard SBC's objection that "tasks listed by XO regarding cross-connects and terminating a DS1 loop to the appropriate NID do not appear anywhere in the *TRO*'s discussion of ordinary network modifications." SBC Init. Br. at 5. Again, the

[13] New cable includes installation of new aerial or buried cable. TRO ¶ 632.

distinguishing characteristic of a routine network modification is whether the ILEC performs it for its own customers, not whether it is expressly mentioned in the TRO. TRO ¶ 634.

Third, with specific respect to dark fiber – which XO includes in the text of XO Issue 1 – certain FCC principles discussed above are applicable. SBC is no more required to install new dark fiber than it is to install a new cable. Nor is SBC obliged to perform modifications for CLEC dark fiber that are not routinely provide to other ILEC customers.

Additionally, the CLEC has the duty to furnish its own optronics to activate dark fiber. TRO ¶¶ 311, 381-82. However, as SBC recognizes, an ILEC must perform the "activities needed to enable a requesting telecommunications carrier to light a dark fiber transport facility." 47 CFR 51.319 (e)(5), cited in SBC Init. Br. at 7. Whether this includes the activities described by XO in its proposed section 3.16.3 (activities to "enable CLECs to have light continuity and functional signal carriage across both ends of a dark fiber transport or loop facility") cannot be discerned from the record, which is silent on the subject. Nonetheless, if such activities are among the routine modifications SBC provides its customers, or if they are "needed to enable a requesting telecommunications carrier to light a dark fiber transport facility," they are routine modifications that SBC must supply to XO in connection with unbundled dark fiber.

On exceptions, XO stresses that only SBC knows - and XO has no way to verify - whether SBC provides a network modification for its own customers, whether SBC already covers the cost of a routine modification through another charge or rate, or whether costs are accurately reflected in SBC's proposed modification charge to XO. XO BOE at 2. Therefore, XO asks that we require SBC to provide "information sufficient to verify" SBC's position on the foregoing matters whenever SBC either refuses to perform a modification for XO or imposes a modification charge. *Id.* XO's concerns are commercially reasonable, but its remedial proposal goes too far. The question of what information is "sufficient" is likely to embroil the parties, and this Commission, in frequent dispute, as are SBC objections that XO wants confidential or competitively sensitive data. Accordingly, to address XO's legitimate concerns in this competitive context, without inviting disputes or jeopardizing confidentiality, we will require SBC to expressly certify (when it refuses to perform a modification) that it does not perform such modification for its own customers or (when it imposes a modification charge) that no cost recovered by such charge is recovered by any other rate or charge. We will not oblige SBC to certify that its charges are cost-based, since that obligation is already associated with UNEs generally and no additional requirements are needed for network modifications specifically.

XO Issue 1-b. The FCC states that "to the extent that certain routine network modifications to existing loop facilities affect loop provisioning intervals contained in, for example, section 271 performance metrics, we expect that states will address the impact of these modifications as part of their recurring reviews of incumbent LEC performance." *TRO* at ¶ 639. XO is therefore correct that the FCC directs us to

incorporate routine modifications in our measurement of UNE provisioning performance. XO Init. Br. at 4. The question is how.

SBC maintains that it "*already has performance measures* that separately measure the performance of the facilities modification process for orders that are worked through that process." SBC Init. Br. at 8 (emphasis in original). However, a "facilities modification process" is not, by its terms, the same as a loop and transport provisioning process, and neither party explains the extent to which the former captures the latter. Moreover, insofar as existing performance measures address loop and transport provisioning, the record does not reveal whether routine modifications are already considered.

In any event, SBC argues that the "recurring review" of SBC performance (as contemplated by the FCC, above) was built into the "Section 271 Plan" developed in our Docket 01-0662. That plan includes a semi-annual process for altering the performance measures addressed by the plan. However, Section 6.4 of the Section 271 Performance Plan, on which SBC relies, SBC Init. Br. at 8, simply refers the parties back to the Commission for dispute resolution when they cannot agree upon revisions. The parties certainly disagree here with respect to the reasonableness of measuring modified and un-modified provisioning together. Moreover, although the FCC directs us to account for routine network modifications in our "recurring reviews" of ILEC performance, it does not prohibit us from (or even advise against) addressing this subject in arbitration proceedings. For that matter, it is not clear that we can refrain from resolving an open arbitration issue on the subject (although requiring the parties to use the Section 271 Performance Plan procedures is arguably a permissible resolution of that open issue).

Accordingly, so that the parties can proceed toward a completed ICA, we will articulate certain conclusions respecting routine modifications and performances measures, with the proviso that the procedures in the Section 271 Performance Plan should not be disturbed in the process. First, it necessarily follows that XO's proposed text (XO 3.16.4) dramatically overreaches, by declaring that SBC's performance with respect to network modifications would be factored into the calculation of remedies *outside the parties' ICA*. The tail would thus wag the dog, as the calculation of Section 271 Performance Plan remedies (to the extent that they do or will address loop and transport provisioning) would be subordinated to the terms of this arbitrated agreement.

Second, the Commission perceives no benefit in creating a discrepancy between the treatment of routine modifications in the Section 271 Performance Plan and in the instant ICA. To the contrary, we would be creating administrative burdens without policy justification. Therefore, the treatment here should mirror the Section 271 Performance Plan – if that plan presently addresses SBC' loop and transport provisioning performance and if it already accounts for routine modifications (whether by *express* inclusion or exclusion of such modifications). If the plan does not address

routine modifications for loop and transport provisioning, then the principles adopted in the next paragraph should be incorporated in the parties' ICA[14].

Third (and only if the Section 271 Performance Plan is silent on the subject), we conclude that routine network modifications should be included in any standard loop and transport provisioning intervals and performance measurement calculations contained in the parties' ICA. Provisioning tasks do not have to be identical in all instances to be fairly included in the same aggregated analysis. Modifications that are, in common practice, "routine" – that occur frequently and are accomplished through customary procedures – are reasonably regarded as part of provisioning itself. Since SBC did not inform the record that routinely modified provisioning typically requires substantially more time and materials than un-modified provisioning, so as to constitute an apples-to-oranges comparison, the Commission has no basis for declaring it so[15]. Indeed, it could be that routine modifications are part of most provisioning [16] (but, again, the parties created no record on the subject). It obviously follows that non-routine network modifications (that is, modifications outside the definition of routine modifications used above) should not be included in standard intervals or performance calculations.

2. (a) Must SBC permit XO to commingle unbundled network elements, combination of unbundled network elements, and wholesale services, consistent with FCC rules?

(b) Should XO be required to submit a bona fide request ("BFR") and go through the BFR process in order to commingle?

(c) Should SBC be permitted to charge XO on a time and material basis for commingling?

SBC re-characterizes this issue as follows:

May XO commingle UNEs with a non-UNE that is offered by SBC-Illinois pursuant to Section 271 or commingled UNES that are no longer lawful UNEs?

1. Parties' Positions and Proposals

a.) XO

(XO-2a). SBC is required under the FCC's rules to permit commingling of UNEs, combinations of UNEs, and wholesale services. As explained in XO's motion to dismiss

[14] However, even if the Section 271 Performance Plan does not presently address routine modifications to loop and transport provisioning, the parties' ICA should contain a provision to incorporate any future Section 271 Plan provisions on the subject, using the ICA's change-of-law provision.

[15] Moreover, a properly weighted performance measure need not prejudice anyone. Logically, both simple and complex tasks can be reasonably measured together, so long as the resulting factor accurately reflects both. Rationale comparisons of annual performance can then be made.

[16] The FCC states that "Verizon provides the routine modifications listed above [in the TRO], with minimal delay, in most cases, to their own retail customers." TRO ¶639, fn. 1940.

certain SBC issues, XO objects to SBC's attempt to include only what it defines as "Lawful UNEs" in the language SBC has proposed for the Amendment. SBC is improperly attempting to modify or alter the change-in-law provisions of the Agreement so that any change of law with regard to UNEs would be self-effectuating or automatic. Nothing in the *TRO* provides ILECs this right, and the FCC expressly rejected the proposals of SBC and other ILECs to make such automatic changes to agreements.

SBC's contract language also states that SBC shall not have an obligation to perform the functions necessary to commingle unless certain conditions are met. The FCC, however, explicitly requires an ILEC "upon request," to "perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services." *TRO* at ¶ 579. SBC's contract language inserts a number of other grounds upon which SBC may refuse to perform the functions to commingle, which are not found in the FCC's rules or the *TRO*. SBC incorporates this language from the U.S. Supreme Court Case in Verizon Communications, Inc. v. FCC, 535 U.S. 467, which is a case that did not address commingling. The FCC was fully aware of that decision and did not include any of the restrictions that SBC has somehow derived from that case. SBC's proposed contract language, therefore, unlawfully seeks to have this Commission impose restrictions that the FCC refused to authorize.

XO has included network elements pursuant to Section 271(c) because of the current state of uncertainty. While the FCC declined to require commingling of Section 271 network elements with wholesale services, the FCC did not preclude commingling of Section 271 network elements and UNEs. In addition, the ultimate fate of UNEs and Section 271 network elements has yet to be decided. Accordingly, XO has proposed to incorporate commingling requirements "to the extent required by Applicable Law." Thus, to the extent that Applicable Law does not require commingling of Section 271 network elements, such commingling would not be required.

(XO-1b). There is no basis for SBC to require XO to submit a bona fide request ("BFR") for commingling. Requests for commingling generally are comparable to a request to convert wholesale services to UNEs, which is merely a billing change. The ILECs have been required to perform conversions since at least the issuance of the FCC's UNE Remand Order, several years ago, and SBC has completed such requests for XO. SBC, however, has never required XO to submit a BFR in order to have SBC process XO's conversion or billing change requests, nor has SBC offered any evidence to demonstrate that a BFR is necessary to process a commingling request.

(XO-2c). The *TRO* states that ILECs may assess monthly recurring rates for commingling on an element-by-element basis and a service-by-service basis, but the FCC has not authorized any non-recurring charges for commingling. *TRO* at ¶ 582. SBC's proposal to assess unspecified "time and material" charges for performing commingling functions thus is inconsistent with applicable law. Nor has SBC introduced any evidence on the nature of these functions, much less the costs that SBC claims it will incur. In any event, this issue in general, and any such evidence in particular, should be reviewed in the context of a generic costing proceeding, not this arbitration.

b.) SBC

First, XO's proposed language to require the commingling of "section 271 network elements" should be rejected. In its *Errata* to the *TRO*, the FCC expressly deleted the *single* reference to section 271 network elements that it originally made in its commingling discussion (in ¶ 584), indicating that that reference was in error. As a result, nowhere in that discussion does the FCC include section 271 network elements in the list of wholesale services that CLECs may commingle with UNEs. To the contrary, the FCC refers only to tariffed access services and section 251(c)(4) resale services. *TRO*, ¶¶ 579-84. Thus, the Commission should reject XO's attempt to include section 271 network elements in the parties' commingling contract language, and instead direct the parties to incorporate SBC Illinois' proposed language. (Section 3.14.1.)

Second, the Commission should adopt SBC Illinois' proposal to include the so-called "Verizon restrictions" in the parties' commingling contract language. (Section 3.14.1) Even if Verizon addressed only combinations, that does not mean XO should be allowed to demand commingling where doing so would, for instance, threaten the security or reliability of the network or discriminatorily impede the ability of other CLECs to access UNEs or interconnect.

Third, the Commission should approve the use of the bona fide request process for submitting commingling requests. (Sections 3.14.1.3 and 3.14.1.3.1.) That process, which is well-defined and has a long history, has previously been approved for use in situations for ordering undefined or unidentified arrangements, and there is no need to depart from the process here. Moreover, SBC Illinois has made a commitment to develop processes to eliminate the need for BFRs, as commingled arrangements are identified and defined.

Fourth, XO's suggestion that SBC Illinois should be required to perform commingling functions free of charge must be rejected. *See* Section 3.14.1.3.2. In the *TRO*, the FCC simply did not address the nonrecurring charges for performing the activities necessary to establish commingling arrangements. But that silence cannot be interpreted to mean that SBC Illinois cannot impose cost-based charges to recover the costs it incurs in performing such functions, any more than the FCC's failure to expressly address, for instance, the monthly charges for mass market loops means that all loops are now free. Nor can that silence be interpreted as an attempt to overrule the pricing requirements of the Federal Act (something the FCC could not lawfully do in any event) or the FCC's TELRIC rules, which allow incumbents to recover the costs they incur in providing network elements to competitors.

c.) Staff

XO is correct that commingling of certain UNEs and combinations of UNEs is required. SBC is correct to the extent that it contends it need not commingle UNEs unbundled pursuant to Section 271 with other UNEs or combinations thereof.

Neither party's proposed contract language reflects the state of the law. XO proposes language that would, if adopted, require SBC to commingle Section 271 UNEs with other UNEs and services. XO Issues Matrix at 5, Proposed Contract Provision 3.10.1.[17] SBC, on the other hand, makes several proposals that are equally improper, but rather more complex.

SBC appears to be positioning itself, in its proposed contract provisions, to unilaterally withdraw UNEs when some court or tribunal determines that they no longer need be offered on an unbundled basis. SBC's contract proposal absolves it of any responsibility to combine or commingle any UNEs not on the SBC-maintained list of so-called "Lawful UNEs." SBC Issues Matrix at 25, Contract Provision 3.14.1.4. Under its contract proposal, SBC appears to reserve to itself the right to determine – and, indeed, from time to time *re*-determine – what constitutes a "Lawful UNE." *See* SBC Issues Matrix at 1 *et seq*., Contract Provisions 1.1, 2.2, 6 (SBC only required to provide UNEs as required by law, as it changes from time to time, notwithstanding contract provisions to the contrary).

This, however, is not the only defect in SBC's contract proposal. SBC's proposed contract provisions state as follows:

> SBC-ILLINOIS shall have no obligation to perform the functions necessary to Commingle (or to complete the actual Commingling) if (i) the CLEC is able to perform those functions itself; or (ii) it is not technically feasible, including that network reliability and security would be impaired; or (iii) SBC-ILLINOIS's ability to retain responsibility for the management, control, and performance of its network would be impaired; or (iv) SBC-ILLINOIS would be placed at a disadvantage in operating its own network; or (v) it would undermine the ability of other Telecommunications Carriers to obtain access to Lawful UNEs or to Interconnect with SBC-ILLINOIS's network; or (vi) CLEC is a new entrant and is unaware that it needs to Commingle to provide a Telecommunications Service, but such obligation under this Section ceases if SBC-ILLINOIS informs CLEC of such need to Commingle.

SBC Issues Matrix at 23, Provision 3.14.1

The limitations that SBC places upon commingling are found nowhere in the *TRO*. The *TRO's* findings with respect to commingling are abundantly clear: "We...modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services..., and to *require incumbent LECs to perform the necessary functions to effectuate such commingling upon request.*" TRO, ¶579 (emphasis added). Thus, SBC's proposal clearly over-reaches, and should be rejected.

[17] SBC, in its Issues Matrix, refers to XO's proposal as Provision 3.14.1. SBC Issues Matrix at 22.

Staff favors XO's contract provision, with an exclusion for Section 271 UNEs.

2. Analysis and Conclusions

XO Issue 2-a. This sub-issue is appropriately resolved in conjunction with SBC's version (SBC/XO-2). SBC is obliged to commingle[18] UNEs, combinations of UNEs and wholesale services. TRO ¶ 579. SBC is not required to commingle UNEs and UNE combinations with network elements unbundled pursuant to Section 271. The FCC specifically removed that requirement from TRO ¶ 584 when it issued its TRO Errata. XO's interpretation of the remaining text in TRO ¶ 584 is unsupportable.

The Commission rejects SBC's proposal to label the UNEs that SBC must commingle as "lawful." For the reasons discussed more extensively in connection with SBC Issue 1, this is superfluous terminology that appears designed to confer unilateral power on SBC and is likely to engender wasteful litigation. In particular, we agree with XO and Staff that SBC's proposed application of the term "lawful" would enable SBC to unilaterally incorporate changes of law concerning UNEs into the parties' ICA, in derogation of the ICA's existing change-of-law provision and the FCC's directive, in TRO ¶ 701, to use that provision to incorporate such changes. XO Init. Br. at 6-7; Staff Init. Br. at 38-39.

Regarding SBC's proposal to incorporate into the ICA, for commingling purposes, elements of the decision in Verizon Communications, Inc., v. FCC, 535 U.S. 467 (2002), concerning UNE *combinations*, SBC is straying beyond the boundaries of this proceeding. As the ALJ established by a Ruling on June 3, 2004, the scope of this arbitration is limited to the subject of the parties' negotiations, which focused solely on changes of law mandated by the TRO, as modified by USTA v. FCC, 359 F. 3d. 554 (D.C. Cir. 2004) ("USTA II"). The Verizon decision, which preceded the TRO and was therefore known to the parties when negotiations were requested, was not the subject of negotiation[19]. SBC Motion to Dismiss, Attach's 1 & 2; Petition, Ex. 1.

That said, even assuming *arguendo* that the principles of Verizon were arguably within the scope of this arbitration (for example, as part of the legal context surrounding the FCC's analysis in the TRO), we would still decline to apply the Verizon UNE combination rules to the ICA's provisions concerning the commingling of UNEs and wholesale services. The FCC did not elect to apply the pre-existing Verizon combination rules to commingling and we will not second-guess that decision. To the contrary, such threshold tests as whether SBC "would be placed at a disadvantage in operating its own network," which SBC proposes, are virtual invitations to delay and

[18] Commingling refers to the use of UNEs and wholesale services in the same network. Under previous FCC rulings prohibiting commingling, the CLECs had to operate two functionally equivalent networks or rely solely on either UNEs or wholesale services. TRO ¶580. Commingling thus "raise[d] the costs of competitive LECs." *Id.*, fn. 1788.

[19] Furthermore, to the extent SBC (or, for that matter, XO) believed Verizon constituted a material change of law under the parties' ICA, it could have invoked existing change-of-law provisions to address that decision.

dispute between competitors[20]. Additionally, SBC did not lay an evidentiary foundation for the conclusion that commingling creates functional issues similar to those posed by combinations.

XO Issue 2-b. SBC's proposed BFR process is cumbersome and, as a standardized procedural requirement, unnecessary. Although SBC is correct that this Commission has previously approved the BFR process for "specialized requests," SBC Init. Br. at 11, SBC has not established that commingling is typically (or even frequently) a specialized request. Indeed, XO maintains, and we concur, that commingling is generally comparable to a billing change. XO Init. Br. at 9. This is not to say that a BFR would never be appropriate for an individual commingling request. But a BFR, which can involve several months just for an SBC *response*, e.g., SBC Init. Br. at 11, is inapposite (and arguably anti-competitive) as a standardized mechanism for requesting commingling.

XO Issue 2-c. SBC's proposed commingling charge is unsupported by discussion – much less, approval – in the TRO. Nor has SBC otherwise established the justification (whether practical or legal) for such a charge. As the FCC notes, commingling originated as a *regulatory* construct, not a practical one, intended to temporarily impede the admixture of Section 251 UNEs and wholesale services[21]. TRO ¶ 579 & 583. In contrast, SBC's proposed commingling charge treats commingling as a practical task that differs from the practical tasks associated with combining, say, two Section 251 UNEs or two wholesale services. The Commission disagrees and, accordingly concludes that any cost of commingling is already recovered through SBC's rates for, respectively, UNEs and wholesale services, and any standard or extraordinary charges already imposed for provisioning such items[22]. SBC adduced no evidence to the contrary[23]. Additionally, we are concerned – though we need not decide here – that a discrete commingling charge could constitute an unreasonable condition on the procurement of wholesale services, per Section 251(c)(4)(B) of the Federal Act.

4. Is SBC required to convert a wholesale service, or a group of wholesale services, to unbundled network elements or combinations of unbundled network elements consistent with FCC and ICC rules?

SBC re-characterizes this issue as follows:

What terms and conditions should apply to conversions form wholesale services to UNEs?

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[20] Indeed, the FCC did not include this factor in its rules pertaining to *combinations*. 47 CFR 51.315.

[21] Thus, in the TRO, the FCC concluded that "the commingling restriction is no longer necessary to preserve the status quo while the [FCC] grapples with potential modifications to its universal service and access charge policies." TRO ¶583.

[22] "The work SBC Illinois performs to provide XO a commingled UNE is part of the cost of providing that UNE." SBC Init. Br. at 12.

[23] "SBC Illinois is not proposing to identify and quantify particular costs in this proceeding." SBC Reply Br. at 10.

1. Parties' Positions and Proposals

a.) XO

The FCC has required that upon XO's request and conditioned on XO satisfying the appropriate eligibility requirements, SBC must convert a wholesale service, or a group of wholesale services, to UNEs or a combination of UNEs. The D.C. Circuit's decision in USTA II should not be at issue in this proceeding, as XO explained in its motion to dismiss certain SBC issues. But even if it were, nothing in USTA II addresses conversions, much less relieves SBC of any obligation to undertake such conversions. In addition, as discussed in the context of the previous issues, XO objects to SBC's attempt to modify or alter the change-in-law provisions of its existing Agreement.

SBC is not entitled to charge for conversions of wholesale services to UNEs or UNE combinations. The FCC noted that ILECs may not impose termination charges, disconnect or re-connect fees and that because ILECs never have to perform a conversion to continue serving their own customers, it is inconsistent with the Act for an ILEC to impose such charges. *TRO* at ¶ 587. The FCC further noted that such conversions are "largely a billing function." *Id.* at ¶ 588. No service order charges are appropriate under such circumstances, but even if they were, the Commission should address this issue in a generic cost proceeding, not this arbitration, particularly when SBC has asked for *carte blanche* to charge whatever it likes without producing any evidence whatsoever of any costs that SBC will incur to make the conversions.

Similarly, SBC's proposed language that SBC will "develop and implement processes" for ordering conversions is improper and unreasonable. See, e.g., 3.15.4. SBC has already completed conversions for CLECs. Thus, the processes should be in place. The FCC concluded that, if necessary, carriers will establish necessary procedures to perform conversions through negotiations, which is what XO is proposing here. *TRO* at ¶ 585. XO currently submits orders for most UNEs and special access services via the ASR process. It only makes sense to revise that process to permit electronic orders for conversions. SBC, however should not be permitted to burden or delay XO's ability to obtain conversions while allegedly developing an appropriate process, as SBC has proposed. XO's contract language thus tracks the FCC requirements while SBC proposes language that would modify those requirements for the benefit of SBC.

Other provisions of SBC's proposed language are also unreasonable and would provide SBC with too much unilateral power. For example, the *TRO* provides no authority for SBC to engage in self-help if it believes that XO has not met the applicable eligibility requirements. Indeed, SBC's language leaves unclear how SBC would make such a determination, thus leaving SBC with virtually unfettered discretion to reconvert UNEs to special access services. Such discretion is fundamentally inconsistent with the FCC's objectives in the *TRO*.

b.) SBC

A "conversion" is the process of changing the provision of a wholesale service to the provision of the equivalent UNE (or combination of UNEs). In USTA II the D.C. Circuit disagreed with the FCC's "decision to allow 'conversions' of wholesale special access purchases to UNEs." USTA II, 359 F.3d at 593. The D.C. Circuit agreed with the ILECs that those rules were "too lax," because "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . precludes a finding that the CLECs are 'impaired' by a lack of access to the element." *Id.* at 592-93. While XO suggests the Commission should ignore USTA II, the Commission cannot, consistent with the arbitration provisions of the Federal Act or the federal Constitution, ignore binding federal law. Thus, the Commission should adopt SBC Illinois' proposed contract language regarding USTA II (Section 3.15.1), which provides that upon the issuance of the mandate in USTA II, SBC Illinois is not required to perform conversions unless "lawful and effective FCC rules or orders require conversion."

The Commission should also approve SBC Illinois' proposed language to govern conversions in the event "lawful and effective FCC rules or orders require conversion," and reject XO's competing language. First, XO's proposal to prohibit SBC Illinois from assessing *any* charges in connection with conversions is clearly inconsistent with the *TRO*. In the *TRO*, the FCC identified only particular "wasteful and unnecessary charges" that should not be assessed. *See TRO*, ¶ 587. It did not prohibit all charges, as XO proposes. (Section 3.15.3.)

Moreover, nonrecurring charges to cover the costs that SBC Illinois actually incurs to process a conversion request are neither "wasteful" nor "unnecessary." To the contrary, they are required by the Federal Act and the FCC's pricing rules. XO does not deny that SBC Illinois actually performs activities and incurs costs to process an XO order for a conversion, such as service ordering and billing change functions and costs. Pursuant to the Federal Act and the FCC's TELRIC pricing rules, SBC Illinois is entitled to recover these costs from XO. Furthermore, the Commission recently approved cost-based non-recurring project administration charges applicable to conversions of special access services and resale private line circuits to UNEs. Order, Docket No. 02-0864, at 214-15 (June 9, 2004).

Similarly, the FCC held that CLECs cannot "supersede or dissolve existing contractual arrangements through a conversion request." *TRO*, ¶ 587. Thus, to the extent that XO seeks to do just that through a conversion request, it is appropriate (and required by the *TRO*) that SBC Illinois assess any applicable early termination or similar charges, as SBC Illinois' proposed language provides. Moreover, the FCC expressly refused to grant CLECs a "fresh look" with respect to special access to UNE conversions, holding that doing so "would neither be in the public interest nor represent a competitively neutral approach." *Id.* ¶ 696. Thus, SBC Illinois' proposed Section 3.15.10 should be adopted to implement these FCC requirements. Moreover, the Commission should reject XO's proposed section 3.15.7, which would require SBC Illinois to convert a special access service within 30 days, with no minimum period

termination liability, where SBC Illinois denies a request for a UNE (*e.g.*, for a lack of facilities). That proposed language finds no support in the *TRO*, and is contrary to the FCC's holdings regarding the applicability of early termination charges.

The Commission should also approve SBC Illinois' proposed language regarding the ordering processes for conversions. (Sections 3.15.4, 3.15.5, 3.15.6.) Where SBC Illinois has not developed processes for conversion orders, it should follow the change management guidelines. The change management process has previously been examined and approved by this Commission (and the FCC), and there is no reason to depart from that process. While XO would like to dictate new ordering processes via a two-party arbitration, the development of new processes is more appropriately handled through a process that allows for the input of all CLECs, as the change management process does. Moreover, the contract should require XO to "follow the guidelines and ordering requirements" in place for the particular service to be converted, as SBC Illinois proposes.

Finally, the Commission should approve SBC Illinois' proposed language regarding eligibility criteria. (Sections 3.15.2 and 3.15.8.) In the *TRO*, the FCC held that a CLEC must "meet[] the eligibility criteria that may be applicable" to convert services, and held that "the serving incumbent LEC may convert the UNE or UNE combination to the equivalent wholesale services in accordance with the procedures established between the parties" in the event the CLEC "fails to meet the eligibility criteria for serving a particular customer." *TRO*, ¶ 586. XO does not propose any language to implement these requirements. SBC Illinois' proposed language, on the other hand, appropriately implements these requirements.

c.) <u>Staff</u>

XO appears to be entitled under the *TRO* to seamless, quick, and inexpensive conversion of eligible wholesale services to UNEs. It is not clear how this is to be accomplished. XO proposes an "ASR-driven" conversion process, while SBC's proposed contract provisions appear to posit that there is no conversion process for wholesale service to UNEs currently in place, and accordingly one will be developed pursuant to SBC's so-called "Change Management Process". XO also proposes that conversions be completed within 15 days of XO's request for such conversion, while SBC does not propose any minimum period.

Staff is unclear as to why XO proposes an "ASR-driven" ordering process, or what precisely it means by "ASR" under these circumstances. "ASR" is an acronym for "Access Service Request", which is, as Staff further understands it, an obsolescent form of electronic ordering platform used for many years by ILECs and CLECs. Staff is unaware of any legal obligation that SBC is under to deploy such a platform, why it ought to be expected to do so, or whether such a platform is effective or standard. In any case, the TRO clearly does not require an "ASR-driven" ordering process.[24]

[24] The FCC specifically declined to order the adoption of any specific procedure or process for conversions. TRO, ¶585.

XO properly requests that conversion orders be processed within 15 days. The *TRO* clearly calls for "expeditious" conversions that are "seamless" to end users. The Staff therefore consider some time limitation upon the completion of conversions to be proper, and SBC fails to propose one. Moreover, the FCC directs that such timeframes be negotiated and memorialized in contracts. *Id.*, ¶¶588-89. In light of SBC's failure to make any proposal, XO's proposal for 15 days[25] appears reasonable, and the Staff urges its acceptance.

With respect to conversion charges, SBC proposes that it be permitted to charge applicable service ordering and record change charges.

While the FCC did not make clear in the *TRO* what charges it considers properly assessed for conversions, it made clear what charges it considers *improper*. First, it noted that ILECs never have to perform conversions to serve their own retail customers, and accordingly that termination, re-connection, and disconnection fees, and "other non-recurring charges associated with establishing a service for the first time" are inconsistent with Section 202 of the federal Act and an ILEC's duty of non-discrimination. Clearly, therefore, imposition of any such charges is improper.

Second, the FCC recognized that conversions are almost entirely billing functions. This appears to exclude any charges or fees not associated with executing a billing change.

While SBC might lawfully be permitted to assess a modest record change fee of some sort, any additional charge is clearly improper. SBC's request for a service ordering charge falls squarely within the prohibited category of "other non-recurring charges associated with establishing a service for the first time".

The Staff therefore recommends that SBC be permitted to assess a billing change charge, but no other.

2. Analysis and Conclusions

SBC's reframed version of XO Issue 4 (SBC/XO-4) is among those not properly presented as an open arbitration issue. It is a general and over-broad question that calls upon the Commission to draft a portion of the parties' ICA, not to resolve a dispute. Taken literally, it asks us to start from scratch on the subject of conversions, and to select every term and condition that will and will not apply. XO's version of this issue, when taken at face value, merely asks whether SBC must comply with FCC conversion rules. The answer to that question is self-evident and gets the parties no closer to interconnection. Patently, the real disputes here concern specific TRO directives concerning conversion, but XO did not properly frame those disputes as open issues.

[25] The FCC declined to adopt a 10-day interval, but not, apparently because of the brevity of the 10-day interval itself. TRO, ¶588.

Consequently, the Commission will identify those disputes that significantly impede amendment of the parties' existing ICA and provide guidelines for resolution.

The threshold issue concerns the effect of USTA II on the ILEC conversion duty established at TRO ¶ 586. SBC contends that USTA II removed that duty wherever parallel service is available at wholesale. SBC Reply Br. at 11. However, the court neither said that nor overturned the FCC's imposition of the conversion obligation. Rather, it articulated principles for the FCC to consider while it revisited the qualifying/non-qualifying services distinction remanded (but not vacated) on other grounds by the court. Those principles focus on the state of competition, not on the availability of wholesale service. Specifically, the court stated that where wholesale services have produced "robust competition," impairment is precluded. 359 F.3d at 593. Similarly, (with respect to EELs in particular) the court said that "if history showed that lack of access to EELs had not impaired CLECs in the past," that would be "evidence" of future non-impairment. *Id*. Unless and until the findings suggested by the court are made (presumably, by the FCC), the TRO conversion duty remains in effect.

Moreover, the court expressly upheld the TRO's eligibility requirements for CLEC access to EELs, *id.*, which the FCC specifically applied to conversions from special access. TRO ¶ 593. That ruling is inconsistent with SBC's position that USTA II overturned the conversion obligation created by the TRO. Accordingly, the Commission concludes that the conversion obligation survived USTA II.

Regarding SBC's proposed non-recurring charges for processing conversions, there is no substantial disagreement that the charge we approved in Docket 02-0864[26], for conversions of special access to EELs (and conversions of resale private lines to UNEs), is appropriate here. SBC Reply Br. at 12; XO Reply Br. at 11; Staff Rep. Br. at 11. However, although SBC cites this "project administration charge" in support of including a conversion cost in the ICA, it is not clear that this charge is equivalent to what SBC characterizes as "service order charges and record change charges" in SBC proposed Section 3.15.3. If those latter charges address different underlying costs than does the administration charge, it was up to SBC to prove that fact. Moreover, our Order in Docket 02-0864 indicates that the activities associated with processing a conversion are either captured by the administrative charge or were disapproved for recovery in that case. Therefore, for conversion of access to EELs (and conversions of resale private lines to UNEs), SBC should be limited to the amount of the project administration charge approved in Docket 02-0864.

For other conversions, the TRO precludes imposition of conversion charges. TRO ¶ 587. SBC misreads TRO ¶587, presuming that the FCC intended to bar only those nonrecurring charges associated with a new service. SBC Reply Br. at 12. First-time charges were simply one example of the charges prohibited by the FCC. The essential principle in ¶587 is nondiscrimination – that is, since ILECs "are never required to perform a conversion in order to continue serving their own customers," *id.*,

[26] Illinois Bell Telephone Co., Filing to Increase Unbundled Loop and Nonrecurring Rates, Order, June 9, 2004, at 214-15.

CLECs would be disadvantaged by conversion-related charges. To avert that result - which the FCC characterized as unjust, unreasonable and discriminatory within the meaning of Sections 202 and 251 of the Federal Act - the FCC knowingly subordinated ILEC conversion cost recovery to parity among competitors[27].

SBC objects that the foregoing tradeoff is impermissible under the Federal Act, because it contravenes the cost-based pricing requirement of subsection 252(d)(1)(A)(i). SBC BOE at 19. That objection is better directed to the FCC, the agency that resolved the tension among federal statutory commandments concerning nondiscrimination (Sections 202 and 251) and cost recovery (Sections 252). In any case, this Commission notes that Section 252 itself treats nondiscrimination as co-equal with cost recovery[28]. We will not second-guess the FCC's balancing of these requirements in the TRO[29]. As for SBC's contention that the FCC barred only conversion charges that are not cost-based, SBC BOE at 19, the Commission observes that the FCC never said so and, moreover, that the FCC's examples of prohibited charges (e.g., re-connect and disconnect fees, TRO ¶587) *are* presumably cost-based, like SBC's own such charges. Docket 02-0864, Order, June 9, 2004, at 196-99.

However, in TRO ¶587, the FCC exempted properly applicable early termination penalties from its limitation on conversion related charges. Although XO posits that such penalties can be reduced or eliminated pursuant to TRO ¶698, XO Reply Br. at 12, that would simply mean that such penalties were no longer properly applicable (or "appropriate," as the TRO uses the latter term in ¶698). It has nothing to do with the FCC's intentional and detailed exemption of those penalties from its conversion charge limitation.

Regarding order processing and timing, SBC, despite having argued elsewhere in this arbitration for precision, clarity and detail in the ICA, proposes that parties develop procedures in the future through the industry-wide change management process associated with OSS. SBC Init. Br. at 18. Alternatively, SBC proposes to unilaterally develop processes at some unspecified future point. SBC proposed Section 3.15.4. SBC proposes no time limit for the completion of conversions.

For its part, XO proposes manually processing by SBC until an "ASR-driven conversion process" is developed. XO proposed Section 3.15.4. However, XO also asserts that the "necessary processes...already must be in place," including an ASR process, XO Init. Br. at 13, so it is not clear why XO's proposed text assumes that an ASR-driven conversion process still needs to be developed. SBC denies that an ASR

[27] We will not apply the parity principle to access-to-EEL conversions or resale-private-line-to-UNE conversions, in order to avoid inconsistency with our holding in Docket 02-0864, which addressed charges solely under our state jurisdiction.

[28] That is, just as subsection 252(d)(1)(A)(i) mandates rates based on cost, subsection subsection 252(d)(1)(A)(ii) mandates nondiscrimination.

[29] SBC also endeavors to position *itself* as the object of discrimination with respect to conversion costs. It avers that because it receives no CLEC "contribution" for its own expenses, it would be disadvantaged if it had to give CLECs a "free ride" on conversions. SBC BOE at 20, fn. 7. However, as the FCC emphasized, an ILEC never has to convert its own services.

process is already in place, SBC Init. Br. at 18; SBC Reply Br. at 15, while Staff calls the ASR process obsolete. Staff Init. Br. at 43.

Since the parties waived evidentiary hearings, the record does not permit us to make findings regarding the foregoing claims. We can only articulate principles that the parties should employ in their amended ICA. First, a clear conversion ordering process must be included in the ICA and immediately available once the arbitrated amendment is approved and in effect. The purpose of this proceeding is to incorporate the TRO, including its conversion mandates, into the parties' ICA. Resort to the change management process unnecessarily and inefficiently postpones that incorporation indefinitely.

Second, the parties' ICA must specify a time frame for processing conversions, in keeping with the FCC's declaration that it "expect[s] carriers to establish any necessary timeframes to perform conversions in their [ICAs] or other contracts." TRO ¶¶ 588. Furthermore, such time frame must facilitate "expeditious" conversions. *Id*. We cannot determine, however, whether XO's 15-day proposal is reasonable. XO proposed Section 3.5.16. XO supplied no supporting evidence or argument, which might have demonstrated, for example, that a 15-day (or similar) interval is already used in comparable circumstances.

Third, SBC's proposed Section 3.15.8 is disapproved, for reasons also discussed in connection with SBC Issue 1 (below). It would empower SBC to refuse or discontinue a conversion, based upon SBC's unilateral assessment of the ramifications of regulatory and judicial authorities. Moreover, that proposed section wrongly authorizes SBC to act immediately upon service of written notice, without response, much less assent, from XO.

To be clear - our objection to Section 3.15.8 is not that it bars or terminates unwarranted conversions, but that it allows SBC to, first, unilaterally decide what conversions are unwarranted and, second, immediately disturb XO's provision of service to customers. Accordingly, as we require in connection with SBC Issue 2 (below), changes in law must be subjected to the ICA's existing change-of-law mechanisms, to determine whether SBC may bar conversions based on those changes. Disputes about individual conversions must first be addressed by the ICA's dispute resolution processes, to determine whether conversion is indeed unwarranted in each disputed case. Thereafter, if remedial action is appropriate, SBC must allow a reasonable amount of time, before implementing self-help measures, for XO and its customers to select alternative provisioning.

5. May XO, consistent with FCC rules, provide non-qualifying services using the same unbundled network elements it uses to provide qualifying services?

SBC re-characterizes this issue as follows:

Should the agreement clearly set forth the terms and conditions pursuant to which XO may provide non-qualifying services using the same unbundled network elements it uses to provide qualifying services?

1. Parties' Positions and Proposals

a.) XO

The FCC has concluded that XO may provide non-qualifying service using the same UNEs it uses to provide qualifying services. *E.g., TRO* at ¶ 148. XO's proposed language incorporates this concept, while SBC's proposed language includes numerous provisions that go beyond the requirements of the *TRO*, including additional certification and audit provisions that the FCC never envisioned, much less authorized. These provisions are unreasonable and would make it difficult and unduly burdensome for XO to use UNEs for non-qualifying services even though XO satisfies the conditions required by the FCC.

XO also objects to SBC's proposed definition of "local." Again, the FCC has adopted no such definition, nor is a definition warranted. The Parties' interconnection agreement has established the terms and conditions under which XO can obtain UNEs from SBC. Indeed, XO has been obtaining UNEs from SBC for years, and the Parties have a clear understanding of what XO can obtain from SBC as a UNE. Even were that not the case, SBC's proposed definition would unreasonably restrict XO's access to UNEs. XO, for example, may obtain interoffice dedicated transport from SBC between wire centers that are not within the same local calling area to enable XO to provide local services to customers in an SBC exchange other than the one in which XO's switch is located. The FCC did not even remotely contemplate such a restriction.

b.) SBC

In the *TRO*, the FCC promulgated "qualifying service" rules, intended to ensure that CLECs requesting UNEs use those UNEs to provide services in competition with traditional ILEC services, and not, for instance, solely to provide long distance. The D.C. Circuit concluded that "the prevention of 'gaming' by CLECs seeking to offer services for which they are not impaired" is a "legitimate" goal. USTA II, 359 F.3d at 592. Thus, the parties should include qualifying service language in their contract.

SBC Illinois' proposed language most accurately reflects the qualifying service restrictions, and should be adopted. SBC Illinois' proposal that a carrier cannot access UNEs unless it is a "telecommunications carrier" providing "telecommunications

services" (Section 1.2) is required by the Federal Act, which contains those very limitations. 47 U.S.C. § 251(d)(2). Thus, this language is appropriate regardless of the state of the FCC's qualifying service rules.

The Commission should also adopt SBC Illinois' proposed language providing that to access UNEs, XO must "provide" at least one "qualifying service" (that is, a service offered in competition with the telecommunications services traditionally the exclusive or primary domain of SBC Illinois, like local voice service) on a common carrier basis. (Sections 1.2, 2.22.2.) XO should not be allowed to access UNEs to provide solely "non-qualifying services," like long distance service. Section 251(d)(2) of the Federal Act provides for unbundled access where the lack of access would impair the ability of the entrant "to provide the services it seeks to offer," and it has never been shown (and SBC Illinois does not believe could ever be shown) that CLECs are "impaired" in offering solely non-qualifying services like long distance service without access to UNEs.

XO's proposed language, which would not require XO to actually provide any qualifying service, but only to "offer" a qualifying service, and even then only on a private carriage basis, would impermissibly allow XO to "game" any qualifying service restriction. For instance, XO could satisfy its proposed requirement by "offering" local service to select customers on a private carriage basis for ten times the prevailing prices, knowing full well that that offer would never be accepted, and then proceed to access UNEs to provide solely non-qualifying services. The Commission should also conclude, as did the FCC, that XO must offer qualifying services on a common carrier basis, to "ensure[] that the benefits of competition accrue to the general public." *TRO*, ¶ 151.

Further, SBC Illinois' proposed language regarding certification of compliance with qualifying service restrictions is reasonable and should be adopted. (Sections 1.2.3, 1.2.4, 1.2.4.1.) SBC Illinois' language provides that the CLECs' use of UNEs constitutes a representation that it complies with the qualifying service requirements, and requires the CLEC to provide written certification only upon request. Finally, the Commission should adopt SBC Illinois' proposed definition of "local." (Sections 2.22.1 and 2.22.3.) The term is significant in the context of the qualifying service provisions of the parties' contract, and should not be left undefined as XO proposes.

c.) Staff

XO is correct in its assertion that it is undoubtedly permitted to provide non-qualifying services using UNEs so long as it is also providing qualifying services. The Staff further notes that SBC is correct in asserting that it has provided "detailed language regarding the conditions pursuant to which XO may provide non-qualifying services using the same unbundled network elements it uses to provide qualifying services." There are several anomalies in SBC's language, however.

First, for purposes of determining what qualifies as a "telecommunications services offered by requesting carriers in competition with those telecommunications

services that have been traditionally within the exclusive or primary domain of incumbent LECs." SBC would define "local" as "within the SBC Illinois designated local calling area in which the requested lawful UNE is provided."

While SBC makes much of the detailed nature of the contract provisions it proposes, it is silent upon what an "SBC ILLINOIS designated local calling area" might be. The Staff suspects, however, that SBC does not mean "within the same LATA," but more probably "within the same exchange or Band." The Staff further suspects that this restriction might have the effect of preventing XO from using UNEs to provide certain types of intraLATA service. The Staff therefore recommends that "local" be defined as "intraLATA". The Staff sees no impediment to the adoption of the remainder of SBC's proposal.

2. Analysis and Conclusions

XO's version of this issue is easily resolved – FCC rules permit XO to provide non-qualifying services using the same UNES it uses for qualifying services. TRO ¶ 143. SBC does not dispute this.

As for SBC's version of XO-5 (SBC/XO-5), a resolution of the issue, as phrased, would not address the actual disputes presented. That is, SBC is not really asking us to determine whether contract terms should be "clearly set forth," but to decide several specific - but unframed - issues concerning what those terms should be. Again, the presentation of differing contract provisions is not the same as framing issues, and it is not up to the Commission to determine what disputed issues arise from those provisions. That said, we will resolve those actual disputes between the parties that we find to be essential to completing ICA provisions addressing the mixture of qualifying services and non-qualifying services.

First, the Commission agrees with SBC's recommendation that the ICA define "common carrier" and require XO to offer at least one qualifying service on a common carrier basis. The purpose of the parties' negotiations has been to incorporate the TRO in their ICA. The common carrier requirement is a clear regulatory directive that the TRO freshly and emphatically attached to the identification of qualifying services[30]. TRO ¶ 149-153. We also approve SBC's proposal to incorporate, into the ICA the definition of common carrier in NARUC v. FCC, 533 F.2d 601 (**xx Cir**. 1976). The term "common carrier" is not self-defining and the FCC discussed the NARUC definition favorably in its analysis. *Id*., ¶ 152.

Second, we cannot perceive the basis for XO's objection to SBC's proposed requirement that XO be a "telecommunications carrier" under the law. It is a fundamental requirement (indeed, only a "telecommunications carrier" could participate in this arbitration under Section 252 of the Federal Act).

[30] That is, the qualifying service that must be provided with non-qualifying service(s) using UNEs.

Third, the Commission rejects SBC's contention that a definition of the term "local" should be included in the ICA terms pertaining to the use of qualifying services for both qualifying and non-qualifying services. Presumably, SBC is endeavoring to distinguish qualifying services ("telecommunications services offered by requesting carriers in competition with those telecommunications services that have been traditionally within the exclusive or primary domain of [ILECs]," TRO ¶ 140) from long distance services, which the FCC regards as non-qualifying. *Id.*, fn. 466. However, USTA II has clouded the meaning and viability of that distinction by questioning the FCC's analysis and remanding the pertinent TRO provisions for reconsideration. 359 F.3d 592.

Moreover, SBC's recommended definition of "local" ("within the [SBC] designated local calling area [LCA] in which the...UNE is provided") is unsuited to its purported purpose of delineating those services in "direct competition" with SBC's "core services." SBC Init. Br. at 23. Assuming, as Staff surmises, that SBC's intended LCA is less than the pertinent LATA, Staff Init. Br. at 48, it is not reflective of the manner in which local providers wage "direct competition" for, *e.g.,* POTS[31] customers. Such competition is conducted on a LATA-wide playing field. Indeed, SBC's restrictive definition gives support to the suggestion by Staff and XO that SBC's actual purpose is to hinder XO's provision of FX services. *Id.*; XO Init. Br. at 15.

Fourth, the Commission will not approve several of the conditions SBC attaches to its provision of qualifying services. While SBC purports that these conditions will tend to preclude ambiguity and dispute, we find that the opposite result is at least as likely.

For example, SBC's proposed Section 2.1 would allow XO to use a UNE to provide non-qualifying service only when "FCC orders and rules" so permit. At its most benign, this is a superfluous provision that merely says the parties will adhere to the law. More probably, however, it will become a source of contention as the contracting parties quarrel about the effects of future FCC rulings. Again, the purpose of this ICA amendment arbitration is to incorporate the provisions of the TRO, which *do* permit XO to provide non-qualifying service with a UNE. It is preferable to accommodate future regulatory rulings through the ICA's change-of-law mechanisms, rather than scattering litigious language among the day-to-day working provisions of the agreement.

SBC's proposed Section 1.2.1 contravenes the TRO, by requiring each UNE in a combination to meet criteria that the TRO either does not contain or expressly rejects. For example, the TRO states that certification is "unnecessary to verify that carriers provide qualifying services over [the "last-mile UNEs]." TRO ¶ 592, fn. 1824 & ¶ 623, fn. 1899. Thus, SBC Section 1.2.1 should not be included in the ICA.

SBC argues that the written certification requirement in its proposed Section 1.2.3 will only apply "upon request" from SBC and is, therefore, not an impediment to obtaining qualifying UNEs. SBC Init. Br. at 22. However, nothing in SBC's proposed amendatory ICA text would preclude SBC from making standardized requests. We

[31] Section 2.22 of the proposed ICA (undisputed); TRO ¶ 135.

disapprove the written certification requirement, both in its own right and as it would operate in conjunction with Section 1.2.1. Furthermore, it is unnecessary in light of the "continuous warrant" provision in Section 1.2.3, which we approve.

The Commission rejects the "offer" versus "provide" distinction urged by SBC in support of its proposed Section 1.2. SBC Init. Br. at 22. It is a false distinction and an invitation to needless dispute. Indeed, the FCC defines a qualifying service as one that is "*offered* by requesting carriers." TRO ¶ 135 (emphasis added). A carrier that offers a service will have to provide it to any qualified customer. If it does not do so, SBC can invoke our complaint processes.

We will render no judgment on the remaining terms proposed by SBC, since, as noted above, SBC framed no particular issues about them.

6. What eligibility and certification requirements should apply for access to high-capacity EELs pursuant to FCC and ICC rules?

1. Parties' Positions and Proposals

a.) XO

The *TRO* specifies the eligibility and certification requirements for obtaining enhanced extended links ("EELs"). XO's proposed contract language properly reflects those requirements, while SBC proposes additional language that exceeds the FCC mandates. SBC's contract language regarding certification is unnecessary, confusing, and goes beyond the requirements of the *TRO*. For example, SBC requires the CLEC to certify that it provide certification on a specific form provided by SBC that has not yet been developed by SBC nor seen by XO. Further, SBC requires CLEC to maintain documentation to support eligibility certifications. XO's language in contrast, is simpler and ensures compliance with the requirements of the FCC's rules and the *TRO*. SBC's alleged need for uniformity does not justify SBC's overreaching and in any event, can be accommodated in XO's proposed language through *negotiation*, rather than by having SBC unilaterally impose certification requirements.

As discussed in the issues above, moreover, XO objects to SBC's proposal to use the terms "Lawful UNE," as inconsistent with the change of law provision in the Parties' existing Agreement, and "local," as beyond the scope of the *TRO* and unduly restrictive of XO's rights to obtain UNEs. SBC's inclusion of the term "end user" should be rejected on the same grounds.

b.) SBC

In the *TRO*, the FCC promulgated specific eligibility criteria to govern access to EELs, designed to ensure that CLEC use EELs to provide local service, and imposed upon CLECs certain obligations to certify their compliance with those criteria. The D.C. Circuit affirmed the EEL eligibility criteria, finding them to be "reasonable" and "satisfactorily explained." USTA II, 359 F.3d at 592-93.

The FCC's rules requiring the unbundling of dedicated transport and high-capacity loops have been vacated, and the FCC's rules require the provision of combinations (including EELs) only of network elements that the FCC has found should be unbundled under Section 251. However, to the extent that the FCC were to require SBC Illinois in the future to provide unbundled high-capacity loops and dedicated transport (and thus EELs), the FCC's EEL rules would apply, and thus it is reasonable to reflect the FCC's EEL eligibility and certification rules in the parties' contract, although those rules (and corresponding contract language) would come into play only if the FCC adopts new rules that require EEL unbundling.

Thus, SBC Illinois' proposed contract language should be adopted. SBC Illinois' proposed language appropriately tracks and implements the FCC's EEL eligibility rules, while XO's proposed language does not. For instance, SBC Illinois' proposed definition of an EEL tracks the FCC's definition, while XO's proposed definition includes "entrance facilities" – which the FCC expressly held are *not* UNEs. (Section 2.13.) *See TRO*, ¶¶ 365, 368, n.1116. Similarly, the *TRO* (¶ 604) holds that an EEL must terminate in a collocation arrangement; SBC Illinois' proposed language incorporates this requirement, while XO's inexplicably does not.

The parties also dispute the appropriate language governing certification with the eligibility criteria. XO should be required to use a standard certification form, as SBC Illinois proposes, to increase efficiency and lower the costs of processing such forms. Sections 3.14.3.2 and 3.14.3.3. It would be inappropriate to allow XO to certify compliance via any undefined "method of its choosing," as XO proposes.

XO also opposes contract language proposed by SBC Illinois that provides commercial certainty regarding the types of documentation that XO must preserve in accordance with the requirements of the *TRO*. Section 3.14.3.6.2. But it is commercially reasonable to specify the records that must be maintained, rather than leave it open for future disputes, and SBC Illinois' proposed language should be adopted.

Further, XO would deny an auditor's finding of non-compliance with the EEL eligibility criteria any effect, but would instead require that an audit be "confirmed" by the Commission or the FCC. (Section 3.14.3.2.) That proposal is directly contrary to the *TRO*, which provides that *'[t]o 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." *TRO*, ¶ 627 (emphasis added). Giving the auditor's report such effect is especially reasonable in light of the fact that an auditor must be *independent* and mutually agreed upon by *both* parties. Moreover, XO is not barred from seeking further review if it believes an auditor's report is in error. Pursuant to the *TRO*, however, SBC Illinois cannot be required in every instance to bear the burden to seek further review and "confirmation" from the Commission or the FCC if the auditor concludes XO has not complied with the EEL eligibility requirements.

The parties also have several disputes regarding the precise language to implement the FCC's detailed eligibility criteria. XO's proposed language violates those criteria, and must be rejected. SBC Illinois' proposed language, on the other hand, is directly supported by FCC's actual rule and the *TRO*, and should be adopted. For instance, SBC Illinois proposes (and XO opposes) language in Sections 3.14.3.3, 3.14.3.3.2, 3.14.3.3, 3.14.3.4, 3.14.3.5, 3.14.3.3.4.1, 3.14.3.3.4.2, and 3.14.3.3.5 that parallels the FCC's rule and its discussion in the *TRO* near or literally *verbatim.*

Finally, XO opposes SBC Illinois' proposed language providing that the failure of SBC Illinois to enforce the eligibility criteria does not constitute a waiver of its right to subsequently enforce those criteria. Section 3.14.4. XO has not explained its objection to this commercially reasonable language, and this language should be adopted.

c.) <u>Staff</u>

XO's proposed contractual provision that defines an EEL as "sometimes includ[ing] ... entrance facilit[ies]", is clearly contrary to the *TRO*, and cannot be adopted.

With respect to certification, SBC's proposal, goes beyond the requirements for certification imposed by the *TRO*. The *TRO* does not require self-certification by a CLEC to take any specific form, but instead states that a letter sent by a CLEC to an ILEC is a "practical" method. SBC's proposal, which requires specific certification to eight different facts, goes beyond practical and verges upon "the imposition of [an] undue gating mechanism[] that could delay the initiation of the ordering or conversion process," which the FCC clearly prohibited. Moreover, since the *TRO* clearly places the obligation to retain records associated with the certification process upon the CLEC, a simpler certification process does not prejudice SBC's rights in any way.

XO proposes that, in the event of an audit finding that it is not in compliance with certification requirements, SBC should be required to continue to provide the non-compliant circuits until such time as the Commission confirms the audit findings. This, while not quite as "incredible" as SBC appears to consider it, nonetheless is inconsistent with the TRO.

It is clear that the *TRO* requires a CLEC to convert non-compliant circuits upon an adverse finding by the auditor, not the confirmation of the auditor's findings by the Commission. The TRO does not provide for state Commission confirmation of an auditor's findings, nor does it provide for what effectively constitutes a stay of conversion of non-compliant circuits pending such Commission confirmation. Accordingly, XO's proposal must be rejected.

XO is not without a remedy if it considers itself aggrieved by perceived misuse of the audit process. As noted above, it can resort to the Commission to challenge the independence of any auditor SBC might select. Moreover, it may vindicate its rights under Sections 13-514 and 13-515 of the Illinois Public Utilities Act ("PUA"), which, respectively, prohibit a variety of anti-competitive acts, and provide for a complaint

process pursuant to which an aggrieved carrier may obtain relief from the Commission. Thus, XO's proposed remedy should not be adopted.

2. Analysis and Conclusions

In this instance, it is XO that has not properly presented an open arbitration issue. Again, the question posed is general and over-broad and asks the Commission to draft a portion of the parties' ICA, not to resolve a dispute[32]. Taken literally, it asks us to start from scratch on the subject of EELs, and to select every term and condition that will and will not apply. Consequently, as we do with other ill-framed issues in this proceeding, the Commission will address certain disputed factors that we perceive to be fundamental to drafting ICA provisions regarding high-capacity EELs[33]. However, we decline to speculate about other questions that the parties might have framed, based on their differences in proposed contract text.

First, we concur with SBC and Staff that entrance facilities are not included within the definition of EELs. SBC Init. Br. at 25; Staff Init. Br. at 53. The FCC was quite clear on this point. TRO ¶¶ 365-68 & fn. 1116, & ¶ 575.

Second, as SBC and Staff recommend, SBC Init. Br. at 25; Staff Init. Br. at 53, we disagree with XO (XO Section 3.14.3.2) that an auditor's nonconformance finding must be confirmed by this Commission before remedial action can be required. The FCC directed CLECs to come into compliance and make reparations based on *the auditor's* conclusions. TRO ¶ 627. The FCC also prefers that the audit occur "in a self-executing manner with minimal regulatory involvement." *Id.*, ¶ 628. This does not mean that an auditor's report is beyond challenge before this Commission[34]. But the FCC has concluded that a CLEC's obligation to take corrective action arises from the audit report, apart from Commission ratification. (Other issues concerning audits will be analyzed in connection with XO Issue 7, below.)

Third, the parties jockey for advantage by selective incorporation of elements in 47 CFR 51.318. To settle several disputes associated with that regulation, the Commission holds that the ICA should either incorporate it by reference in its entirety, or

[32] The Commission also disapproves SBC's reference to disputes about "miscellaneous provisions" in its proposed contract language. SBC Init. Br. at 27. If a proposed contract provision elicits a dispute that a party wants resolved through arbitration, it is not "miscellaneous." It is, or should be, the subject of a properly posed open arbitration issue. Furthermore, when no properly framed issue is presented, as in the case of XO-6, how is the Commission to separate the material contract provisions from "miscellaneous" text?

[33] USTA II vacated the FCC's national impairment finding concerning dedicated transport, a principal component of the EEL. However, the FCC's *Status Quo* Order requires an ILEC to continue providing unbundled access to dedicated transport on "the same rates, terms and conditions that applied under their [ICAs] as of June 15, 2004" for a six-month period. *Status Quo* Order, ¶¶ 1 & 16. Additionally, USTA II did not vacate the TRO's EEL eligibility requirements.

[34] We will not address here what the appropriate mechanism(s) for an audit challenge would be under our enabling statutes and rules. Nor do we address now whether the Commission has authority to stay implementation of an audit report. We do conclude, however, that EEL compliance audits are subject to our jurisdiction.

spell out all of its provisions in the amended ICA. In either case, every provision should govern the parties' conduct.

Fourth, the Commission specifically disapproves of SBC's proposed Section 3.14.3.7. In that provision, SBC promises to abjure self-help *so long as XO is in compliance with all applicable requirements.* This begs the question of why SBC would need *any* remedy, self-executed or otherwise, if XO is in compliance. Furthermore, this illusory promise allows SBC to unilaterally determine XO's compliance status and, after rendering self-interested judgment, to impose a remedy. This effectively affronts the TRO, which bars self-help once *the CLEC* certifies compliance with FCC rules. TRO ¶ 623, fn. 1900.

Fifth, we reject SBC's insistence (in SBC Section 3.14.3.6) that XO must certify its eligibility for a high-capacity EEL on a specific form provided by SBC. The FCC indicated that a letter from the CLEC would suffice. TRO ¶ 624. In any event, SBC cannot achieve its purported goal of standardization for all carriers, SBC Init. Br. at 26, through an individual arbitration. On the other hand, XO's proposal to use some method "of its own choosing" (in XO Section 3.14.3.2) is capricious and potentially inefficient. It is better that XO use a "reasonably compliant" method (probably the letter described by the FCC), as XO also suggests[35].

Sixth, the Commission finds it preferable that the ICA refer to the "customer," rather than the "end user customer," as XO recommends. There is merit in XO's concern that "end user" has the potential to engender unproductive disputes. Our requirement, above, that the ICA include all of the provisions in 47 CFR 51.318 vitiates SBC's apprehension that customers other than local voice customers will improperly receive service. SBC Reply Br. at 24-25. Although SBC expresses a particular worry about wholesale customers, *id.*, at 25, the FCC declared that "[a]s a further check on potential for abuse, we make clear that there requirements apply to all *wholesale* as well as retail service offerings over high-capacity EELs." TRO ¶ 588 (emphasis added).

7. Should SBC's right to audit XO's compliance with the qualifying service eligibility criteria for high-capacity EELs be limited consistent with ICC rules?

SBC re-characterizes this issue as follows:

What terms and conditions should apply to audits to confirm that the CLEC meets service eligibility criteria?

1. Parties' Positions and Proposals

[35] If SBC prepares a standardized form[35], XO (and other CLECs) would presumably utilize it voluntarily if it promotes efficiency for all carriers. The fact that the parties cannot agree on an ordering mechanism suggests that the real dispute is not SBC's form versus XO's letter, but about substantive terms that will or will not be included therein.

a.) <u>XO</u>

XO's proposed language is consistent with the requirements that the FCC established for audits of compliance with high capacity EEL eligibility and certification obligations. Specifically with respect to XO's proposal to require SBC to identify particular circuits and eligibility criteria at issue and limit the audit accordingly ensures that SBC does not abuse its limited audit rights to undertake a regulatory fishing expedition. Indeed, because XO would be responsible for the audit costs if the auditor finds material noncompliance, SBC's unnecessary expansion of the audit to include circuits with which there are no compliance issues merely inflates the cost that XO could be required to pay.

SBC's proposed language gives SBC additional rights that are not included in the *TRO* and burdens the agreement with unnecessary verbiage. For instance in Section 3.14.3.8.5, XO proposes to track the requirements contained in the *TRO* and requires that XO convert non-compliant circuits. SBC, in contrast, adds language saying that SBC may convert these circuits without input from XO. SBC also proposes language that eliminates the *TRO* limit of one audit per twelve month period and potentially allows itself multiple audits within the course of a year. All of the language that SBC proposes to add to this section is inconsistent with the *TRO*.

SBC's proposed language also would burden the agreement with unnecessary detail. For example in Section 3.14.3.8.3, SBC proposes specifically to list auditing standards. Such a list is unnecessary because these standards are part of the standards of the American Institute for Certified Public Accountants.

b.) <u>SBC</u>

SBC Illinois' language best reflects and implements its "right to audit compliance with the qualifying service eligibility criteria" (*TRO*, ¶ 626), while XO's proposed language would impermissibly restrict that right.

The FCC held that "incumbent LECs may obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." *TRO*, ¶626. XO's proposal to limit such audits (and resulting remedies) to instances where SBC Illinois identifies specific circuits with respect to which it asserts specific eligibility criteria are not satisfied is unreasonable and inappropriate, and should be rejected. *See* XO Sections 3.14.3.8.1 - .2 and 3.14.3.8.5 - .6. The *TRO* contains no such limitation on the ILEC's audit rights. And such a limitation would not make any sense. The FCC created the audit right precisely because ILECs do not possess the data required to determine whether a CLEC is in compliance with the eligibility criteria – that data is possessed by the CLEC. *See TRO*, ¶ 626 (audits are appropriate to satisfy "the incumbent LECs' need for usage information").

Moreover, the FCC already created the safeguards necessary to balance the ILECs' right to demand an audit to determine compliance against the risk of illegitimate audits. In particular, the FCC limited the right to require an audit to an annual basis,

requires the ILEC to pay for the audit, and requires the ILEC to reimburse the CLEC's costs if the auditor concludes the CLEC was in compliance.

With respect to auditing standards, SBC Illinois proposes (and XO opposes) tracking the FCC's language precisely. (Section 3.14.3.8.3.) In paragraph 626 of the *TRO*, the FCC provided specific guidance on the auditor's duties, and these requirements should be reflected in the parties' contract. XO's suggestion that incorporating the FCC's specific requirements "would burden the agreement with unnecessary detail" should be rejected. There is nothing "unnecessary" about the FCC's requirements.

The parties also disagree regarding proposed language governing true-up payments and the application of TELRIC-based rates where it is determined that XO was not in compliance with the eligibility criteria. (Section 3.14.3.8.5) While the *TRO* calls for true-up payments in such an event (¶ 627), it does not specify when such payments begin. The parties' contract should fill in this detail, as SBC Illinois' proposed language does. Moreover, TELRIC-based rates do not apply for any period where XO is not in compliance with the eligibility criteria, because for such periods XO is not entitled to UNEs at TELRIC-based rates. Indeed, that is the entire point of the eligibility criteria, and XO's objection to this language is unfathomable.

With respect to the conversion of noncompliant circuits (*e.g.*, the conversion of an EEL to special access where XO does not satisfy the EEL eligibility criteria), SBC Illinois' proposed language provides that it may "initiate and affect such a conversion on its own." (Section 3.14.3.8.5.) XO's contrary language would allow XO to delay compliance with the eligibility requirements until such time as XO chooses to submit a conversion request to convert noncompliant circuits. That is an unreasonable proposal. SBC Illinois' language, on the other hand, treats noncompliant EELs and other noncompliant conversions in an identical manner, and with respect to conversions in general the FCC held that "[t]o the extent a competitive LEC fails to meet the eligibility criteria for serving a particular customers, *the serving incumbent LEC may convert the UNE or UNE combination to the equivalent wholesale service*." *TRO*, ¶ 586 (emphasis added).

Finally, SBC Illinois' cost-shifting language should be adopted, and XO's rejected. (Section 3.14.3.8.6.) The FCC held that the burden to bear auditing costs depends on whether or not the auditor concludes that the CLEC has substantially complied with the eligibility criteria. If the CLEC was in substantial compliance, then the ILEC must bear auditing costs. If the CLEC was not in substantial compliance, then the CLEC must bear the costs. *TRO*, ¶¶ 627-28. SBC Illinois' language properly reflects the FCC's holding. XO's proposed "pro-rata" cost apportionment, on the other hand, is contrary to the FCC's requirements, and must be rejected.

C.) Staff

The TRO grants an ILEC the right to audit a CLEC's compliance with certification requirements "on an annual basis, compliance with the qualifying service eligibility

criteria." It does not specifically require the ILEC to indicate which, if any, circuits its believes to be non-compliant, nor does it require the ILEC to allege any sort of good cause or good faith belief that the CLEC in question is using non-compliant circuits. *Id.*

XO's proposal, however, explicitly requires SBC to specify which circuits it considers non-compliant, and to limit its audit to those facilities, and moreover appears to require SBC to show, or at least have, good cause to conduct an audit before it does so. This provision is at variance with the *TRO*, and cannot be adopted.

2. Analysis and Conclusions

Again, the parties fail to properly frame their disputed open issues for arbitration. SBC requests broad guidance on a topic, while XO poses a question (in essence, "should SBC comply with FCC rules?") that not only answers itself, but produces an answer SBC would not dispute. Such questions move the parties no closer to interconnection. Thus, the Commission will address those disputed factors that we perceive to be fundamental to drafting ICA provisions regarding audits.

We agree with XO that the FCC intended to grant ILECs a right, not a duty, to audit CLECs' compliance with qualifying service eligibility criteria. XO Init. Br. at 19. We further agree with XO that the right conferred on ILECs is a "limted" right, per TRO ¶626, and that such audits may occur no more than annually, again per TRO ¶626. *Id.* However, we disagree with XO's argument that an ILEC can exercise its annual audit right "only when the ILEC has reason to believe that the CLEC is not in compliance with applicable requirements." *Id.*, at 20. Nothing in TRO ¶¶625-29 indicates that an ILEC must have "cause" to initiate the annual audit[36].

Instead, the Commission concludes that the FCC gave ILECs the option of initiating an audit, with or without suspicion of noncompliance, no more than once every 12 months. By requiring the ILEC to pay auditing costs (at least initially), TRO ¶626, the FCC created a disincentive against invoking that option, even on an annual basis[37]. Thus, while the FCC imposed no "cause" requirement, it discouraged ILECs from acting without cause by allocating audit costs to the ILEC (unless an audit establishes material CLEC noncompliance, TRO ¶627).

XO's perception of the audit as a mechanism for resolving specific disputes was apparently based on text in TRO ¶623, fn. 1900, ("an [ILEC] that questions the competitor's certification may do so by initiating the audit procedures set forth below [in TRO ¶¶625-29]"). While XO's perception is certainly not unreasonable, we find that TRO footnote 1900 is better reconciled with TRO ¶¶625-29 by assuming that the

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[36] SBC's own proposed contract text (Section 3.14.3.8.1) does state that SBC will identify "specific cause" when invoking its audit right. However, SBC rejects the cause requirement at SBC Init. Br. at 30-31. To whatever extent SBC believes its audit right is dependent upon suspicion of XO's non-compliance, it is, like XO, incorrect.

[37] That is, the FCC allocated audit cost "so that [an ILEC] will only rely on the audit mechanism in appropriate circumstances," TRO ¶628).

footnote does not imply a cause requirement, but simply describes circumstances that might well prompt the ILEC to invoke its annual audit right.

Therefore, the Commission disapproves of XO's proposed contract language that would require SBC to identify either specific EELs alleged to be out of compliance, or specific criteria purportedly violated. That said, because of the cost burden associated with a general audit (including the additional responsibility to pay XO's audit participation costs if material compliance is established by the audit, TRO ¶628), SBC might well choose to focus on specific allegations (and for that matter, the parties can *agree* about this in their ICA). We will not impose this requirement, however.

The Commission will also not approve SBC's request to set aside the 12-month limit on audits once non-compliance is established. SBC Init. Br. at 32, fn. 14. As already noted, the audit right is a *limited* one, and noncompliance is not necessarily a result of improper CLEC conduct. More frequent audits would upset the "appropriate balance" between CLEC and ILEC interests that the FCC fashioned in TRO ¶626. Moreover, because the FCC requires the CLEC to true-up "any difference in payments" between what the CLEC actually paid and should have paid, TRO ¶627, the ILEC will be made whole in any case. The CLEC would also risk paying the ILEC's audit costs in any subsequent annual audit, which is the FCC's intended disincentive against continued noncompliance.

The Commission additionally rejects SBC's request, in SBC proposed Section 3.14.3.8.5, that true up payments begin "from the date that the non-compliant circuit was established." As SBC knows, noncompliance does not necessarily start when a circuit is established[38]. Consequently, true-up responsibility should begin when noncompliance begins. While fixing the start of noncompliance may not always be simple, the answer to that concern is not to require true-up for time periods when the CLEC was *in* compliance.

On the other hand, we approve SBC's request to convert a noncompliant circuit at its own volition without CLEC consent (SBC proposed Section 3.1.4.3.8.5). This is not a form of self-help that contravenes TRO ¶623, fn. 1900, as XO contends. XO Init. Br. at 20. By its terms, SBC's proposed language only permits SBC to act *after* an auditor establishes noncompliance. We will, however, require the parties to include a reasonable notice provision in the ICA, so that XO, and the customers involved, will have time to consider alternative arrangements before SBC converts a circuit.

The parties disagreement concerning apportionment of auditing costs, when the auditor finds the CLEC is not compliant "in all material respects" with eligibility criteria, is a harbinger of future disputes regarding proportionality. XO is presumably apprehensive that, with an all-or-nothing approach, it will bear the entire cost of an audit because of a trivial instance of noncompliance. On the one hand, the FCC was creating

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[38] *See*, e.g., SBC proposed Section 3.14.3.2 ("facilities...*at any time* determined to be noncompliant...") and SBC proposed Section 1.2.3 ("CLEC *continuously* represents and warrants that it satisfies Qualifying Service(s) conditions...") (emphasis added).

"an incentive for [CLECs] to request EELs only to the extent permitted by the rules we adopt here." TRO ¶623. On the other hand, the FCC strove to avoid "imposing undue burdens upon [CLECs]" with its auditing procedures. TRO ¶622. Furthermore, this Commission does not want to encourage an ILEC to initiate an audit it might not otherwise initiate, knowing that even a minor transgression will impose substantial cost and inconvenience on the CLEC. Accordingly, although we will not adopt XO's pro-rata allocation, which is unsupported in the TRO, we hold that the materiality requirement must be construed to require more than trivial violations before cost responsibility can be transferred to XO.

B. OPEN ISSUES PRESENTED BY SBC

1. Should the ICA obligate SBC to continue to provide network elements that have been declassified or should the ICA state that SBC is required to provide only "lawful" UNEs?

XO re-characterizes this issue as follows:

(a) Whether based upon the FCC's directive in the TRO, SBC may attempt to modify the Interconnection Agreement between the parties, to make changes in the law or the rules or regulations promulgated by the FCC or the [ICC] (including USTA II) self-effectuating or automatically effective without any need to negotiate those changes as required by the "Change of Law" provision in the ICA.

b) Does the issuance of USTA II mean that through this proceeding SBC may no longer make certain UNEs available under Section 251?

1. Parties' Positions and Proposals

a.) SBC

Issue SBC-1 concerns whether the interconnection agreement should obligate SBC Illinois to continue to provide network elements that are no longer required to be unbundled (*i.e.*, that have been "declassified") at the same rates, terms, and conditions that would apply if the network elements were required to be unbundled. SBC Illinois' proposed language appropriately reflects the scope of SBC Illinois' obligation to provide UNEs, stating that SBC Illinois is required to provide as UNEs only those network elements that are actually, and lawfully, UNEs. XO's proposed language, on the other hand, would have the inappropriate and unlawful effect of requiring SBC Illinois to provide, as UNEs, network elements that are not actually, lawfully UNEs.

The contract language SBC Illinois proposes provides that SBC Illinois is required to provide only "Lawful UNEs," defined as "UNEs that SBC Illinois is required to provide pursuant to Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders or lawful and effective orders and rules of the [ICC] that are necessary to further competition in the

provision of telephone exchange service or exchange access and that are not inconsistent with the [Federal Act] or the FCC's regulations to implement the [Federal Act]." Network elements that do not satisfy this standard, but were previously provided as UNEs, are considered "declassified." This language appropriately reflects SBC Illinois' obligations to provide UNEs under the *TRO* and the Federal Act.

While section 251(c)(3) of the Act requires ILECs to "unbundle" certain network elements, Congress did not specify the particular network elements that must be unbundled. Rather, it directed the FCC to determine which network elements must be unbundled by applying the "impairment" test of section 251(d)(2). Moreover, as the D.C. Circuit made clear in USTA II, it is the *FCC* that must determine which network elements satisfy the "impairment" requirement of section 251(d)(2), and thus must be offered as UNEs pursuant to section 2512(c)(3). USTA II, 359 F.3d at 561. In short, "the UNEs that SBC Illinois is required to provide pursuant to Section 251(c)(3) of the Act" are limited to those "determined by lawful and effective FCC rules and associated lawful and effective FCC . . . orders," precisely as SBC Illinois' proposed contract language provides.

SBC Illinois' proposed contract language also provides that "lawful UNEs" include those network elements that SBC Illinois is required to unbundle pursuant to "lawful and effective orders and rules of the [ICC] that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [Federal Act] or the FCC's regulations to implement the [Federal Act]." Again, such language is required by the *TRO* and the Federal Act. In the *TRO*, the FCC held that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations." *TRO*, ¶ 187. Rather, the FCC held, such actions must be "consistent with the Act" and with "the [FCC's] section 251 implementing regulations" (*TRO*, ¶ 193 & n.614), which is precisely what SBC Illinois' proposed language provides. This language is also directly supported by section 261(c) of the Act ("additional state requirements"), which states: "Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are *necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with* [sections 251-261 of the Act] *or the [FCC's] regulations to implement* [those sections]." 47 U.S.C. § 261(c) (emphasis added).

SBC Illinois' proposed language appropriately implements the *TRO*. XO's objection that the language might have the effect in some circumstances of creating new "change in law"-like procedures, to the extent it would apply to future UNE declassifications, is without merit. XO also proposes contract language to govern future UNE declassifications in some situations, as well as additions to the list of UNEs, instead of relegating all such events to the parties' existing change of law process. Thus, XO's assertion that SBC Illinois' language must be rejected simply because it has the same effect as XO's proposed language must be rejected.

Moreover, the *TRO* unequivocally "declassified" certain network elements, including OCn loops, OCn dedicated transport, and enterprise switching, holding that

these facilities are no longer UNEs. These new rules were either not challenged on appeal, or were not disturbed on appeal. SBC Illinois' proposed contract language appropriately implements the *TRO* by classifying these facilities as "declassified" rather than "lawful UNEs," thus making clear SBC Illinois is no longer required to provide these elements as UNEs under the parties' contract.

Finally, XO's attempt to add section 271 checklist items to the parties' contract as items SBC Illinois must provide as section 251 UNEs must be rejected. Pursuant to the *TRO*, determination of the rates, terms, and conditions for section 271 checklist items is a matter for the FCC under sections 201 and 202 of the 1934 Communications Act. And even if this Commission did have jurisdiction to address the issue, XO's proposal must be rejected because the FCC unequivocally held that section 251 rates, terms, and conditions do *not* apply to section 271 checklist items, and the D.C. Circuit unequivocally approved that determination. TRO, ¶¶ 655-59; USTA II, 359 F.3d at 589.

b.) XO

(SBC/XO-1a). As an initial matter (and as previously noted in XO's prior filings), XO does not believe that SBC's proposed language associated with SBC Issue 1 should be considered in this arbitration or that it belongs in the Amendment, because the proposed language would make changes to the Agreement that are not required to implement the *TRO,* is beyond the scope of parties' negotiation, and is beyond the scope of this arbitration.

XO and SBC agreed to negotiate conforming changes to their Agreement to implement the *TRO* and that is the subject of this arbitration. The *TRO* expressly required parties to negotiate changes pursuant to existing "change-of-law" provisions in parties' underlying Agreements. The change of law provisions of the XO/SBC Agreement require that parties agree and negotiate mutually acceptable new terms.[39] SBC's proposed language, however, does not implement the *TRO* and would instead make sweeping changes to the Agreement's underlying change-of-law provisions by defining broadly and preemptively those UNEs that SBC may in the future unilaterally decide no longer to provide.

Specifically, an overarching problem with SBC's proposed language is that it gives SBC too much subjective power to determine when it will discontinue providing a UNE to requesting carriers. For example, SBC's proposed language defines a lawful UNE as that required under Section 251(c), as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders, and effective orders and rules of the state commission "that are not inconsistent with the [Act] or the FCC's regulations." *See* SBC proposed language at Section 1.1. Under this proposed language, SBC could unilaterally disregard state decisions or requirements, to the extent that SBC deems them to be inconsistent with the FCC's rules, which would be contrary to the intent of the Act and the FCC's orders.

[39] XO/SBC Interconnection Agreement, §28.2.

Moreover, SBC does not limit the scope of its unilateral authority to discontinue providing UNEs to changes of law effected by the *TRO*, or state decisions implementing the *TRO* and instead would modify the change of law provision itself to make any favorable changes of law self-effectuating upon 30-day notice (as discussed below in SBC I ssue 2). For example, SBC's proposed language could potentially permit SBC unilaterally to discontinue providing UNEs upon any event that it argues is a "change of law" (including, for example, the issuance of the D.C. Circuit decision in USTA II – without negotiating such changes of law, as required by the Agreement and the *TRO.* SBC could improperly assert that, based on USTA II, certain UNEs are no longer required to be unbundled, or provided at cost-based TELRIC rates. Such an action would, however, be contrary to the Act and the FCC's intent. Section 251(c) establishes the requirement that ILECs provide UNEs at cost-based rates and even in the absence of FCC rules, such UNEs must be provided at TELRIC (which is the FCC-established standard for UNE prices). Indeed, the FCC has noted that it will issue very shortly interim UNE rules in light of USTA II; thus any decision by SBC to discontinue providing UNEs on the grounds that USTA II vacated certain FCC rules would be premature.

In contrast to such broad and subjective language, XO's proposed language accurately and objectively implements the *TRO* and provides that SBC may only discontinue offering a network element to the extent that SBC is no longer required to provide UNEs under applicable law, which would include Sections 251, 271, FCC's orders and rules, *and orders of this Commission. See* XO proposed language, Section 1.1. Moreover, the PUA mandates the unbundling of network elements where technically feasible. 220 ILCS 5/13-801(a). The Commission has pre-existing authority under Section 13-801 to require unbundling to the fullest extent possible to maximize competition among telecommunications providers. *Id*. As elucidated by this Commission, its authority is not limited to the jurisdiction of the FCC or the Act; the Commission has the power to consider and include any appropriate provisions and terms. *See* Sage Arbitration Decision in Docket 03-0570, Order, December 9, 2003, at 6 (asserting the Commission has the power to address "many matters outside federal purview"). This Commission has already rejected SBC's claim that Section 13-801 is inconsistent with the federal Act and thus preempted. As noted by the Commission in Docket 01-0614: "In our view the legislature has determined that, in Illinois, it is appropriate that [SBC] be required to bear additional obligations as the price to pay for being the only ILEC being regulated under an alternative form of regulation." *See* Illinois Bell Telephone Company, Filing to implement Tariff Provisions related to 13- 801 of the Public Utility Act, Docket 01-0614, Order, June 11, 2002, at ¶41 ("01-0614 Order"). In other words, by deciding to take advantage of alternative rate regulation under the PUA, SBC has chosen to be subject to the additional requirements of Section 13-801.

In addition, XO's proposed language would not override existing change of law provisions by making such changes of law automatically self-effectuating.

(SBC/XO-1b). As discussed above, SBC's proposed language would modify the existing change of law provisions, by allowing SBC unilaterally to discontinue providing

UNEs upon any event that it considered a change of law without undergoing the required negotiations. Nothing in the *TRO,* orders of this Commission, the FCC, or the law gives SBC the right to modify the underlying change of law provisions of the existing Agreement. Instead, the FCC rejected the ILECs' request to override the Section 252 process and "unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions." *See TRO* at ¶ 701. The FCC specifically noted "voluntary negotiations for binding interconnection agreements are the very essence of section 251 and section 252." *Id.* Thus, it would thwart the purpose of the Act to permit SBC, under the guise of implementing substantive changes resulting from the *TRO*, to modify the underlying change of law language so that SBC may automatically implement any future changes of law regarding UNEs.

This Commission has previously identified a provision as "superior" when it provides for negotiation between the parties as opposed to "immediately disrupt[ing] the working relationship created by the ICA."[40] An SBC provision was undesirable in that it allowed for "immediate disability" and "immediate invalidation in the event of regulatory change." *Id.* The Commission realized a smooth transition implementing a change in law would be elusive with a provision allowing immediate paralyzation of any agreements. "The Commission does not want ICA's, which are intended to provide stability among interconnected competitors, to rest on such a precarious foundation." *Id.*

XO's proposed language does not modify the underlying change in law language. XO's proposed Section 1.1 provides that SBC should provide UNEs to the extent required by Section 251(c)(3), Section 271(c), the FCC rules, and/or other applicable law (including orders and rules of this state commission). Such language merely establishes the applicable law that governs SBC's obligations. As discussed further below in SBC Issue 2, XO's proposed language would - consistent with the change-of-law provisions of the Agreement - require parties to negotiate and mutually agree to amend their Agreement when additional changes of law occur.

Moreover, XO's proposed language requiring a "final and nonappealable" order of the FCC or a state commission before SBC may discontinue providing access to DS1 or DS3 loops or transport at a specific customer location does not, contrary to SBC's contentions, modify the underlying change of law provisions of the Agreement, as SBC contends. *See* XO Section 3.5.2.3 and 3.5.3.7. XO/SBC Interconnection Agreement, §28.2 XO's proposed language reflects and is consistent with the underlying language in the parties' Agreement regarding changes of law. Finally, in contrast to SBC's proposed language, XO's language does not broadly and preemptively implement *all* future changes of law without negotiation, and would instead implement specific provisions of the *TRO* by recognizing that a final and nonappealable state decision pursuant to the *TRO* would relieve SBC of a UNE obligation.

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[40] Sage Petition For Arbitration, December 9, 2003, Decision in Docket 03-0570 at p. 26.

c.) Staff

SBC's proposed "Lawful" UNEs language reflects a position that goes beyond the TRO requirements. First, as the Staff noted above in XO Issue No. 2, SBC appears to be positioning itself, in its proposed contract provisions, to unilaterally withdraw UNEs when some court or tribunal determines that they no longer need be offered on an unbundled basis. Under its contract proposals, SBC appears to reserve to itself the right to determine – and, indeed, from time to time *re*-determine – what constitutes a "Lawful UNE." *See* SBC Issues Matrix at 1 *et seq.*, Contract Provisions 1.1, 2.2, 6 (SBC only required to provide UNEs as required by law, as it changes from time to time, notwithstanding contract provisions to the contrary).

In fact, SBC asks this Commission to do what SBC previously requested of the FCC, and which BOC request was specifically rejected by the FCC.[41] SBC's proposed language would have the effect of granting to SBC, alone, the authority to unilaterally implement any arguable Section 251(c)(3) changes of law based solely upon SBC's interpretation of any such potential change of law. The FCC directly declined to permit such unilateral implementation.

This Commission, like the FCC, should be loath to take the "extraordinary step" of "interfering with [the] contract process," which is the "very essence" of sections 251 and 252. XO, moreover, correctly perceives SBC's proposal to be an attempt to use a change of law to negotiate an alteration in the existing "change of law" provision, in a manner that would permit SBC to unilaterally abrogate UNE unbundling obligations. The *TRO* specifically contemplates the use of existing change of law provisions to negotiate conforming changes pursuant to the TRO. In other words, the TRO is itself a change of law, but not one that has any effect upon change of law provisions. SBC's attempt to bootstrap a change in the change of law provision should be rejected. Staff, accordingly, recommends that the Commission reject SBC's proposed language that would override the Section 252 process and allow SBC to unilaterally change the ICA to reflect its interpretation of any potential change of law regarding its obligations to provide requesting CLECs UNEs.

SBC's proposed language also limits SBC's obligations to provide CLECs with UNEs solely to any obligations formulated under Section 251(c)(3). In the TRO, the FCC stated, "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." It is the Staff's position, consequently, that SBC continues to be obligated to provide UNEs under both Section 251 and under any independent obligation it has to provide UNEs under Section 271.

Further, although SBC's proposed language references orders and rules of the

[41] See TRO, ¶ 701, n. 2085, which cites a Letter from Michael K. Kellog, Counsel for SBC, Qwest, and BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338 at 3-5 (filed Jan. 21, 2003)(arguing that the FCC may "negate" certain contract terms under the Mobile-Sierra doctrine).

applicable state commission, SBC's proposed language is heavily qualified with vague limitations.

Staff recommends that the Commission reject SBC's unreasonably vague language.

Regarding the issue of whether "the issuance of USTA II means that through this proceeding SBC may no longer make certain UNEs available under section 251", the ALJ explained that:

> Regarding USTA II, although XO personnel did decline negotiations concerning that decision, the inescapable fact is that USTA II modifies and nullifies portions of the TRO. The latter cannot be properly interpreted or implemented without reference to the former. Therefore, even if USTA II, qua USTA II, were excluded from negotiations, its impact on the TRO would have to be incorporated in the Commission's analysis of the issues properly presented for arbitration. Except insofar as there may be some practical distinction between consideration of USTA II in its own right and consideration of the TRO as modified by USTA II (and the ALJ can perceive none), the instant Motion cannot be granted.

ALJ Ruling, June 23, 2004, at 2.

It is the Staff's position that, at least as far as applying the proposed language at issue in this issue is concerned, the ALJ's perception that there is likely no difference between the TRO and USTA II is accurate. The stated FCC preference for negotiations, over language that would allow the BOC to over-ride section 252 negotiations, can address TRO related issues as modified by USTA II. Staff, accordingly, recommends that the Commission adopt XO's proposed language for all of the reasons articulated in detail above.

The Staff, moreover, takes the position that SBC is also obligated to provide UNEs to CLECs under the applicable state law, including the orders and rules of this Commission but also under the applicable requirements of the PUA.

2. Analysis and Conclusions

SBC-1. The Commission rejects SBC's proposal to insert the term "lawful" in the sections of the amended ICA that SBC discusses in connection with SBC-1, and in connection with any other disputed issue in this arbitration as well. Such language is unnecessary, likely to trigger future disputes between the parties, and could be readily abused to delay XO's access to SBC services. Since XO cannot hope to successfully demand access to "unlawful" UNEs, inclusion of this term serves no constructive

purpose. Indeed, if such inclusion were necessary to the identification of what is permissible under the ICA, the "lawful" modifier would have to be inserted before every material noun in the ICA.

Similarly, SBC proposes to place the "lawful" modifier before references to the orders and/or rules of the FCC, the courts and this Commission. Unless they are under stay by a superior authority, such orders and rules are inherently lawful and effective. In effect, SBC's proposed language would empower SBC to implement the ICA by second-guessing - outside regular appellate processes - the viability of regulatory and judicial rulings.

SBC compounds its error by proposing, in SBC Section 1.1, to add the condition that "lawful" and "effective" orders and rules must also be "necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [Federal Act] or the FCC's regulations to implement the [Federal Act]." Thus, within the operation of the ICA, administrative and judicial decisions will be judged SBC for their consistency with SBC's view of the Federal Act and associated FCC regulations. At the logical extreme, nothing in SBC's proposed language would preclude SBC from holding that a conclusion in an administrative or judicial decision affronted the Federal Act, even when that decision expressly held to the contrary.

It is entirely reasonable for SBC to propose ICA language that will assure that SBC is not obligated to provide services at TELRIC prices unless those services, and the carriers requesting them, are entitled to such prices. It is entirely unreasonable to achieve the objective by empowering SBC to unilaterally adjudge the content, validity and viability of non-stayed judicial and administrative authorities[42]. Moreover, by arrogating such power, SBC will elicit disputes with XO and delay XO's access to competitive services. The far better course is to employ language providing that when SBC is relieved of the obligation to furnish a UNE under federal and state law, its corresponding obligation under the ICA will also be relieved (by the process discussed in relation to SBC-2, below).

The answer, then, to SBC-1 is that SBC is not obligated to continue providing UNEs under the ICA when no such obligation exists under federal or state law. However, SBC's "unlawful" UNE scheme is ill-suited to excluding that obligation from the ICA.

SBC-1 & SBC/XO-1a. Section 271 of the Federal Act creates an unbunding obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis[43]. "[T]he requirements of section 271(c)(2)(B)

[42] SBC itself objects, in the context of SBC Issue 13, that "XO cannot unilaterally determine the effect of...change in law, including whether that change in law will be give any effect at all." SBC Init. Br. at 89.
[43] SBC asserts that this Commission lacks "jurisdiction" to "require the parties to include in the contract language governing access to section 271 network elements." SBC BOE at 6. We disagree. Our detailed discussion of this claim appears in our analysis of SBC Issue 4, below. That discussion fully

establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251." TRO, ¶ 653. However, the FCC also held that Section 271 "does not require TELRIC pricing" for elements unbundled pursuant to that statute. TRO ¶ 659. Instead, prices for Section 271 UNEs must be just, reasonable and non-discriminatory, per Sections 201 and 201 of the Federal Act. TRO ¶ 656.

The parties' disagreement respecting 271 UNEs is reflected in so many provisions throughout their respective proposed TRO Attachments that we cannot address them individually. Nevertheless, certain principles should be adhered to throughout the parties' ICA. Language relieving SBC of its obligation to unbundle elements under Section 271 is prohibited; correspondingly, language authorizing such unbundling (e.g., XO proposed Section 3.1.4.1) is permissible. Language requiring SBC to offer 271 UNEs, qua 271 UNEs, at TELRIC prices, is prohibited; correspondingly, language authorizing SBC to offer 271, qua 271 UNEs, at prices determined per the criteria Sections 201 and 201 of the Federal Act is permissible.

SBC contends, however, that the *Status Quo* Order precludes incorporation into the ICA of provisions pertaining to Section 271 (or state law), on the ground that such provisions would impermissibly expand the XO's contract rights, thereby altering the status quo. SBC Supp. Br. at 5. Since the ICA is not in the record, the Commission cannot assess the factual support for this claim by comparing current ICA text with XO's proposed language. In any event, the Status Quo Order addresses and "freezes" only an ILEC's unbundling obligations under Section 251. The Section 271 obligations confirmed in the TRO are not addressed and, indeed, did not need to be, since (unlike Section 251 obligations) they were not vacated by USTA II. Furthermore, Section 271 unbundling rights are not an "expansion" upon Section 251 rights. They are lesser rights, involving higher prices to the CLEC and no right to demand combinations.

This state has also established unbundling requirements, characterized in Section 13-801 of the Act[44] as "additional" to federal unbundling requirements. When the pertinent ILEC is subject to an alternative regulation plan under Section 13-506.1 of the Act[45], as SBC is, such additional obligations may exceed or be more stringent than Section 251 obligations. *Id.* We have held that we lack authority to declare that Section 13-801 is preempted by federally authority, insofar as that statute authorizes unbundling in excess of federal requirements. Docket 01-0614, Order, June 11, 2002, ¶ 42.

The *FCC* does have the power to preempt, as subsection 13-801(a) expressly acknowledges. That power is codified in Section 253(d), and the FCC observed in the TRO that "[p]arties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may" request preemption under that section. TRO ¶ 195. SBC has apparently not done so. XO Init. Br. at 28.

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applies with respect to SBC Issue 1, and to all the other open issues for which SBC makes the same assertion.

[44] 220 ILCS 5/13-801.

[45] 220 ILCS 5/13-506.1.

The FCC also explained in the TRO that:

> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment - and thus has found that unbundling that element would conflict with the limits in Section 252(d)(2) - or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.

TRO ¶195. Consequently, this Commission has reopened our Docket 01-0614 "to determine whether the Commission's unbundling decisions in this case are in conflict with federal law, and, if so, to determine the appropriate unbundling provisions to be established consistent with Illinois and federal law." Docket 01-0614, Order on Reopening, June 23, 2004, at 9.

Thus, this Commission is presently reconsidering its unbundling power and associated decisions under, *inter alia*, state law, while the FCC is simultaneously reconsidering its own unbundling decisions under federal law, after the remand in USTA II. Within this state of flux, we must nevertheless determine how *presently existing* state authority and regulatory decisions are to be reflected in the parties' ICA, without speculating about (or prejudging, with respect to Docket 01-0614) future developments. We conclude that our unbundling decisions, as well as the Section 13-801 authority on which they are premised, *presently* determine the state-based unbundling obligations of SBC (and XO's corresponding rights of access to unbundled elements). Therefore, ICA provisions that reflect these obligations and rights (e.g., XO proposed Section 1.1) should be included in the SBC-XO amended ICA.

Moreover, for purposes of the ICA, our presently effective rulings must be taken at face value. Although SBC may believe that we have required unbundling under Section 13-801 (including TELRIC-priced unbundling) that exceeds what Section 251 would allow, that belief is irrelevant at present. Similarly irrelevant is the argument that our rulings are inconsistent with Section 261(c) of the Federal Act, which would contravene Section 13-801. Our currently viable unbundling rulings were based on our judgment that they are consistent with Section 261(c). Such judgment would have to be overturned on appeal or preempted through Section 253(d), not collaterally challenged in arbitration (or worse, unilaterally by SBC, within the context of the ICA). Put simply, our unbundling mandates are effective today, and unless or until they are altered

(whether by us or by superior authority) they must be incorporated in the parties' ICA. Future unbundling developments should be accommodated through change-of-law provisions.

In view of the foregoing principles and conclusions, the Commission rejects XO's recommendation that only "final and non-appealable" non-impairment decisions will terminate an SBC unbundling obligation. The terms of a non-stayed regulatory order must be obeyed.

SBC/X0-1b. The Commission concurs with XO and Staff that SBC's proposals would essentially replace the change-of-law provisions in the parties' existing ICA with unilateral powers for SBC. XO Init. Br. at 29; Staff Init. Br. at 62. Those provisions contemplate bilateral negotiations between the signatories. In contrast, SBC's amendatory contract language (e.g., SBC proposed Section 1.1) would empower SBC to decline to provide UNEs, based upon, first, its unilateral assessment of the ramifications of regulatory and judicial authorities, and, second, its unilateral judgment of the efficacy of those authorities themselves, based on criteria we rejected above. Such provisions do not belong in the parties' ICA, whether to incorporate changes already compelled by the TRO or any future changes associated with the TRO and USTA II.

2. What is the appropriate transition and notification process for declassified UNEs?

XO re-characterizes this issue as follows:

(a) Whether SBC may attempt to modify the "Change of Law" provisions in the Agreement, in order to implement automatically any future changes in law to the agreement.

(b) What are the circumstances under which SBC may no longer be required to make certain UNEs available?

(c) May SBC unilaterally discontinue providing a UNE after a 30-day transitional period if the parties have not mutually agreed to negotiate terms and conditions regarding such UNE?

1. Parties' Positions and Proposals

a). SBC

In order to properly implement the *TRO*, the parties' contract must be amended to provide a clear, orderly, and definite process for the transition of network elements that are no longer UNEs. XO's proposed language does not provide for any real transition plan at all to implement the *TRO*'s declassifications, and thus does not appropriately implement the requirements of the *TRO*. (*See* XO Section 3.13.1.1.) In particular, XO's proposed language would allow for a transition only if the parties were

able to agree on a "transition schedule." In the event the parties could not agree on a transition schedule, the Commission would have to step in.

If that sounds familiar, it is because that is precisely where we are today. The parties were unable to agree on a transition schedule, and thus the Commission has been forced to step in to arbitrate the matter. XO's proposal to delay the creation of any transition schedule for many more months, pending more negotiation and after the Commission is forced to step in again, is unreasonable.

It is also contrary to the FCC's direction in the *TRO*. The FCC stated that, if the parties could not agree on "transition timing," state commissions should "conclude their consideration of such disputes within nine months of the effective date of this Order." *TRO*, ¶ 703. Under XO's proposal, however, the Commission's "consideration" of the transition timing dispute has not even begun. Thus, XO's proposed language, and SBC Illinois' should be adopted.

SBC Illinois' proposed transition plan language provides for a final, concrete, and well-defined transition period for those facilities that XO is no longer entitled to access as UNEs. That language appropriately defined "declassified" facilities and expressly identified network elements declassified by the *TRO* and USTA II (Sections 1.3, 1.3.1, 1.3.1.1, 2.20), and specifies that such facilities are subject to the transition procedures of the contract (Sections 1.3.1.3, 1.3.2, and 1.3.3). The transition procedures provide for written notice of a declassification, followed by a 30-day transition period where the CLEC can issue disconnect orders or agree upon an alternative arrangement (*e.g.*, resale or special access). (Section 1.3.4.) If the parties cannot agree, SBC Illinois may convert the facilities to resale or special access. (Section 1.3.4.)

XO's assertion that SBC Illinois' language would somehow inappropriately modify the parties' change in law language rather than implement the *TRO* should be rejected. As an initial matter, XO's proposed language too applies to certain future "declassifications," and to that extent would appear to supplement the parties' existing change of law process. XO cannot object merely because SBC Illinois' language might have the same effect.

In any event, SBC Illinois' proposed language appropriately implements the *TRO*'s new impairment standard and the *TRO*'s new approach to unbundling. Under this new regime, network elements are subject to frequent "de-listing," and may be de-listed at different times and in different places. XO's suggestion that each such future declassification should be followed by another round of negotiations, and likely another proceeding before this Commission, is unreasonable and inappropriate.

b.) XO

(SBC/XO-2a). To the extent that certain UNEs are no longer required by the *TRO*, XO proposes a specific mechanism for transitioning from these UNEs. Subsequent to the effective date of the Amendment, in the event that there is a change

in the status of certain UNEs pursuant to applicable law, XO proposes to incorporate these changes to the Agreement through the parties' mutual agreement.

For example, XO's proposed language in Section 3.13.2 provides that, as to network elements that the state commission determines (after the effective date of this amendment) to be no longer required to be unbundled (or "nonconforming facilities"), the parties "agree to amend the Agreement promptly to reflect the change and establish a mutually acceptable transitional mechanism if no transitional mechanism has been previously agreed upon or specifically dictated by the state commission."[46] As noted in SBC Issue 1, this is consistent with the *TRO* as it specifically requires the parties to negotiate changes to their agreements, consistent with underlying change of law provisions of their ICAs. *TRO* at ¶ 701. XO/SBC Interconnection Agreement, §28.2.

In contrast, SBC proposes a 30-day transition period for discontinuing its provision of certain UNEs that are no longer required to be provided pursuant to events that SBC deems to be changes of law. The effect of adopting SBC's language may not only be confusion but violation of the Act, the FCC's orders and rules, and this Commission's rules and requirements. For example, any attempt by SBC to discontinue providing UNEs based on USTA II would be premature and conflict with interim rules that the FCC has stated that it will promulgate within the next few weeks in the wake of USTA II. An attempt by SBC to abruptly discontinue providing UNEs is also contrary to Illinois law, which established rights to access network elements if technically feasible wherever competition would be promoted. 220 ILCS 5/13-801.

(SBC/XO-2b). Neither party may modify the underlying change of law provisions, as that is beyond the scope of the negotiations and this arbitration. However, SBC proposes unilaterally to discontinue providing UNEs, alone, or combined, upon 30 days notice to the CLEC. SBC Section 1.3.4. For the same reasons discussed above in SBC Issue 1, SBC's proposed language regarding declassified and unlawful UNEs is overly broad and improper and effectively constitutes an attempt to modify the change of law provisions, by eliminating the negotiation process specified in the change of law language in the Agreement. Thus, upon the issuance of USTA II, SBC's proposed language could potentially allow it to discontinue provision of certain UNEs, after the 30-day notice. This is inconsistent with the *TRO* and other applicable law, including past Commission decisions. Sage Telecom Arbitration, Docket No. 03-0570, Order, December 9, 2003, at 26 (preservation of parties' existing contractual rights.)

c.) Staff

The ALJ addressed the issue of future declassifications in his June 23, Ruling. In his Ruling, the ALJ found:

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[46] Similarly, as noted above, to the extent that a change in applicable law requires SBC to provide UNE, combination, or commingling that is not offered under the amended agreement, XO's proposed language similarly states "the Parties shall *negotiate* an appropriate amendment to the Agreement that will contain the rates, terms and conditions for such UNE, Combination, or Commingling." Joint Matrix, XO Position, Section 1.4.

> Regarding future declassifications, a forward-looking process is not unrelated to implementation of the TRO (as modified by USTA II), to the extent that such process is designed to apply the modified TRO's principles and conclusions to future activity. Moreover (and as concluded above), the fact that amendatory provisions associated with implementation of the modified TRO may affect the operation of existing COL provisions does not mean that SBC Issue 2 exceeds the scope of the parties' pre-petition negotiations.
>
> On the other hand, future declassifications that are not based on the provisions of the modified TRO are beyond the scope of those negotiations. Accordingly, any proposed SBC text that purports to account for future declassifications required by authorities other than the modified TRO (e.g., SBC proposed section 2.20(e)) is hereby stricken.

ALJ Ruling, June 23, 2004, at 2-3.

In a footnote to the last sentence cited above, the ALJ further explained that:

> SBC may believe that the stricken text is inherently arbitrable because it concerns SBC's rights and duties under Section 251. It is not. It is inherently *negotiable*, and had it been negotiated (or even offered for negotiation), it would now be arbitrable. However, non-TRO related future rulings by, for example, any "judicial body," were not negotiated (or offered for negotiation) by the parties. *Id*.

Assuming that the language pertaining to "non-TRO related future rulings by, for example, any 'judicial body,' were not negotiated (or offered for negotiation) by the parties" is properly stricken, it is the Staff's position that the FCC has clearly articulated its preference for the parties to negotiate language to accommodate TRO related modifications. A process for future UNE declassifications could be negotiated at the same time as the current TRO related modifications, if, as the ALJ explained, it had been a subject of the parties negotiations. Staff, accordingly, recommends that the Commission adopt XO's proposed language for all of the reasons above and articulated in detail above in SBC Issue 1.

2. Analysis and Conclusions

SBC-2 is another over-broad request for guidance on a general subject matter, rather than a proper framing of specific open issues. SBC/X0-2b is similarly deficient, as well as substantively duplicative of SBC-1. Accordingly, we will specifically resolve

SBC/XO-2(a) and (c), and those related disputes concerning UNE "declassification" that we view as impediments to amending the ICA.

SBC/XO-2a & 2b. Important elements in the parties' discussion of SBC-1 more logically belong here. For instance, Staff maintains that "the TRO is itself a change of law, but not one that has any effect upon change of law provisions." Staff Init. Br. at 62. If that assertion is correct, the parties cannot establish a new "transition and notification process" in this arbitration. As Staff observes, the ALJ ruled that future UNE declassifications that are not based on the TRO (as modified by USTA II) are beyond the scope of arbitration here, because they were beyond the scope of the parties' limited negotiations. *Id.*, at 66.

SBC posits, however, that modification of the parties' existing change-of-law provisions is "consistent with implementing the requirements of the *TRO*. In other words, to the extent the *TRO* created a new legal landscape which the parties' existing change of law language is insufficient to reasonably and properly implement, then invoking the existing change of law process to negotiate a new change in law process that will accommodate the new legal landscape is perfectly appropriate."[47] SBC Init. Br. at 45. SBC's argument is conceptually valid. If modification of the parties' present change-of-law provision were necessary to proper incorporation of the TRO into the existing ICA, then such modification would be within the scope of this proceeding.

However, that is not the case here. To the extent that the TRO (as modified by USTA II and superceded by the *Status Quo* Order) has determined that specific network elements no longer need to be unbundled (or offered at TELRIC prices) – and to the extent that such unbundling is not required under presently applicable state law – there is no need to establish a process for *identifying* those elements and *incorporating* them into the ICA. The FCC has already identified them. They can be incorporated by simply listing them in the parties' amendment as elements that will not be unbundled (or TELRIC priced). Indeed, one of the apparent purposes of this arbitration was to reflect such "declassifications" in the ICA.

On exceptions, SBC insists that it has indeed propounded contract language that directly identifies services that the modified TRO exempts from unbundling (SBC proposed subsections 1.3.1.1 and 1.3.1.2). SBC BOE at 25-26. There are several flaws in SBC's proposed text, however. First, subsection 1.3.1.2 has been overtaken by the Status Quo Order. All of the listed items must remain unbundled (assuming they presently are in the parties existing ICA) during the time periods specified in that order. That is also true for several listed items in subsection 1.3.1.1 (ii, iv).

Second, several enumerated items in Section 1.3.1.1 are infected by SBC's insertion of the counter-productive term "lawful," which we rejected in our discussion of SBC Issue 1. Third, several items in that same section (e.g., subsections (i), (ii), (iv),

[47] To be clear, the Commission does not find that either party invoked the change of law process in their ICA in this instance. As we stated in Section II of this Decision, the ALJ ruled that this arbitration was compelled by TRO ¶ 703.

(xv)) would accommodate general, and future, regulatory directives from any source. These improperly bypass the ICA's change-of-law processes (see below). Fourth, SBC's lists contain items for which state law requirements have not been taken into account (e.g., subsections (i) & (ii) (dark fiber), (iv) and (viii)). Fifth, we have not determined that SBC is free of unbundling obligations regarding certain enumerated items in Section 1.3.1.1 (e.g., subsections (x), (xi)), or we have attached modifications and conditions that are not reflected in their bare enumeration (e.g., viii).

If the foregoing deficiencies are corrected, however, SBC's proposed Sections 1.3.1.1 and 1.3.1.2 can be included in the ICA (presumably as a single, combined section). The Commission has no preference between SBC's preferred term, "declassified," and XO's preferred term,"non-conforming." SBC's proposed Section 1.3.1.3, which is predicated on the concept of "lawful UNEs, should not be included in the ICA.

Regarding *future* identification of elements that must be "declassified" under rules and principles established in the TRO (as modified by USTA II), SBC has not demonstrated that the parties' existing change-of-law provisions are inadequate. SBC emphasizes that the TRO injected considerable granularity into the impairment analysis, so that unbundling may be discontinued for specific elements on specific routes. SBC Init. Br. at 45-46. SBC also stresses that, first, the FCC was responding to the finding in USTA I that the FCC's impairment analysis had been insufficiently granular, and, second, that USTA II did not "disturb" the FCC's revised impairment analysis in the TRO. *Id*. at 44. SBC concludes that the parties' existing change-of-law mechanism is not suitable for addressing the volume and frequency of "declassifications" that are likely to flow from the TRO's more granular analysis. *Id*., at 45-46.

However, SBC's assessment of the TRO impairment standards, and of the impact of USTA II on them, is too literal, too narrow and, in this context, self-serving. It is too literal because, although the Court of Appeals did not remand the impairment standard, it did characterize an "important" element of that standard as "vague almost to the point of being empty," and noted that "the issue of whether the standard is too open ended is likely to arise again." USTA II, 359 F.3d at 572. Consequently, while the impairment standard remains viable in its present form (at least until the release of interim rules by the FCC), its usefulness in SBC's predictions regarding the future volume and frequency of "declassifications" is placed in doubt.

More substantively, in the TRO, the FCC found *national* impairment for certain UNEs. That finding could only be overcome with an evidentiary presentation related to specific criteria provided by the FCC. There was no guarantee that any particular ILEC would prove up any non-impairment. Moreover, the FCC established the process for proving non-impairment with the expectation of significant state commission involvement. Since USTA II has overturned that process, it cannot be assumed that the FCC would have included the same level of granularity in its impairment analysis, or that the granularity it would have required - without the findings of the state commissions - would have produced the volume and frequency of "declassifications"

SBC predicts. Accordingly, we do not adopt SBC's selective assessment of the impact of USTA II on the TRO, which treats the remanded elements of the TRO as if they were dissociated from, rather than integrated with, other elements that were not expressly reversed by the court. It follows that we do not agree that the TRO is likely to generate a future quantum of legal changes that will overwhelm the parties' change-of-law processes[48].

Additionally, neither SBC nor any other participant in this proceeding created an evidentiary record that would enable us to compare the volume, frequency and pace of "declassifications" before the TRO with what SBC predicts will occur under the modified TRO. Thus, an appraisal of the sufficiency of the present ICA change-of-law provisions would be based, to an uncomfortable extent, on guesswork.

For the foregoing reasons, we cannot conclude that the parties' present change-of-law provisions would be inadequate for identifying and incorporating "declassified" UNEs (either the UNEs expressly "declassified" in the TRO or UNEs "declassified" in the future pursuant to the principles of the modified TRO) into the parties' ICA. It follows that future disputes regarding the identification of network elements that must be unbundled (or sold at TELRIC prices) per the modified TRO should be subject to existing ICA change-of-law and dispute resolution provisions. It also follows that the amended ICA should reflect the modified TRO's explicit identification of those network elements that must, or need not, be unbundled[49]. However, any such elements that must be unbundled pursuant to presently valid state law or order should not be exempted from unbundling in the ICA.

SBC-2 and SBC/X0-2C. Once it has been determined that the unbundling obligation associated with a network element has been altered (either because the TRO has already altered that status or because the principles of the modified TRO so require in the future), practical steps must be taken by the parties to effectuate that change. Those practical measures are not a change of law, but a consequence of such change. That is, a change of law re-determines what must be unbundled; practical measures implement that change.

Each arbitrating party understandably proposes an implementation process that favors its own business case. Neither is satisfactory. XO would handle implementation on a "project basis," with resort to dispute resolution if the parties cannot agree, in a period of no less than 90 days, on implementation. Given our conclusion, above, that the identification of network elements with altered unbundling obligations will be subject to ICA change-of-law and dispute resolution provisions, the Commission sees no

[48] Similarly, the Status Quo Order also suggests that the parties will not be inundated by frequent and piecemeal changes in unbundling requirements. That order posits the withdrawal of certain unbundling duties on a *national* basis, presumably supported by a blanket non-impairment finding.

[49] For example, the TRO expressly finds that OCn loops and OCn dedicated transport need not be unbundled. That finding should be incorporated into the ICA, through the amendment that is the subject of this arbitration.

reason to delay commencement of implementation for at least three months, with the likelihood of additional dispute resolution concerning implementation itself.

SBC's proposal is flawed in two respects. First, its proposed 30-day "transition" period is too short to serve the public interest. Irrespective of the impact of change on XO, the Commission's first concern is the welfare of XO's customers. Unless XO seamlessly absorbs the additional costs associated with the loss of unbundling, its customers (depending upon the available options in their agreements with XO) will likely need time to assess the effect of change on their own telecommunications budgets and to confer with XO (and, perhaps, SBC or other providers). Second, SBC's transition procedure is linked to other proposed SBC provisions (discussed above) that allow SBC to make unilateral and inappropriate judgments regarding the content and validity of federal and state laws, orders and regulations.

Accordingly, we will articulate certain conclusions. First, the amended ICA should have a standard procedure for implementing TRO-related changes in unbundling obligations. Second, as previously discussed, any such future changes must be identified through the current change-of-law and dispute resolution procedures in the ICA. Third, if it is determined through those procedures that an unbundling obligation has been changed, no such change can be implemented in less than 60 days after service of written notice by the party demanding implementation (unless otherwise agreed by the parties). Fourth, upon expiration of the 60-day interval (or any shorter interval agreed to by the parties), the party serving such notice may either implement change unilaterally or request a Commission order requiring implementation. Fifth, the "disputed" texts of the arbitrating parties pose dozens of additional issues for resolution. Yet those issues have not been properly framed – or, in most instances, even mentioned - for resolution. The Commission will not resolve disputes that have not been framed as open issues, and cannot do so without briefing by the parties.

3. (a) Does a subloop include "house and riser cable and insider wire?"

(b) When SBC retires copper loops or subloops must it provision an alternative service over any available facility?

(c) Should the ICA include terms and conditions related to the loop "caps" set forth in 47 CFR 51.319(a)(5)(iii)?

(d) Should the pricing appendix contain pricing for declassified subloops?

1. Parties' Positions and Proposals

a). <u>SBC</u>

The parties have several disputes regarding the proper contract language governing access to unbundled loops. However, sub-issue SBC-2a has been settled.

First, the parties disagree regarding network disclosure requirements in the event of certain loop retirements. (Section 3.3.1.5.) In the *TRO*, the FCC promulgated new

rules that require certain disclosures before an ILEC retires copper loops that are replaced with fiber-to-the-home ("FTTH") loops. *TRO*, ¶¶ 281-83. While SBC Illinois' proposed language properly tracks these rules, XO proposes additional language that finds no support in the *TRO* or the FCC's rules. In particular, XO proposes that SBC Illinois be required to "provision an alternative service" before making any retirement. But the FCC's rules, by their plain terms, only require an ILEC to make certain disclosures before effecting such retirements. Similarly, section 251(c)(5) of the Federal Act, upon which the FCC's network disclosure rules are based, only requires public notice of certain network changes. Neither the Act nor the FCC's rules require an ILEC to first make alternative service arrangements before retiring copper loops, as XO proposes.

Second, the parties disagree regarding implementation of the *TRO*'s DS3 loop cap, which provides that a CLEC may obtain a maximum of two DS3 loops at any single customer location. *TRO*, ¶ 324. While XO does not object to reflecting the *TRO*'s DS3 loop cap in the parties' contract, it does oppose some additional language proposed by SBC Illinois that more clearly spells out how that cap would be implemented if the FCC were to require the unbundling of DS3 loops at some point in the future. XO, however, has not explained its objection to this additional language, and SBC Illinois' language is reasonable and appropriate. As the FCC itself recognized, carriers may sometimes need to "negotiate specific terms and conditions necessary to translate our rules into the commercial environment." *TRO*, ¶ 700.

SBC Illinois notes that the FCC's rules requiring the unbundling of high-capacity loops have been vacated. Accordingly, SBC Illinois' language would come into play only if the FCC were to re-institute such an unbundling requirement. Nevertheless, it is reasonable to adopt SBC Illinois' language, because that language clearly defines how the DS3 loop cap would be calculated (by making clear that it applies to each end user customer premises location) and applied in a commercial environment if the FCC were to require DS3 loop unbundling at some point in the future.

Third, XO opposes SBC Illinois' proposal to delete from the parties' pricing schedule the prices for three fiber feeder subloops identified by SBC Illinois. In the *TRO*, the FCC held that ILECs are not required to unbundle fiber feeder subloops. *TRO*, ¶ 253. Thus, SBC Illinois is not required to unbundle the three fiber feeder subloops it identified, and those prices may appropriately be deleted.

b.) <u>XO</u>

(SBC-3b). XO's proposed language, which would require SBC to provision alternate service over any available facility when SBC retires a copper loop or subloop, is consistent with the *TRO*. The *TRO* provides that competitors will continue to have access to loop facilities when copper loop is retired because of the installation of fiber-to-the-home. Specifically Paragraph 281 provides that "[s]uch notification [of retirement of copper loops] will ensure that incumbent and competitive carriers can work together to ensure that competitive LECs *maintain access to loop facilities*." (Emphasis added.) Further, 47 C.F.R. § 52.319(a)(3)(ii)c provides that upon retirement of a copper loop, the

ILEC "shall provide non-discriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the fiber-to-the-home loop on an unbundled basis." XO's proposed language simply ensures that XO will have access to loop facilities consistent with the requirements of the *TRO*.

The TRO also contemplated this Commission's role in evaluating copper loop retirement, stating "that many states have their own requirements related to discontinuance of service, and our rules do not override these requirements." *TRO* at ¶ 284. The threat to access is subject to the state review process, which should "address the concerns...regarding the potential impact of an incumbent LEC retiring its copper loops." *Id.* This analysis must recognize that "the retirement of copper loop plant is a network modification that affects the ability of competitive LECs to provide service." *Id.* at ¶ 281.

(SBC-3c). XO agrees that the ICA should state that SBC is not required to provide more than two DS3 UNE local loops per requesting carrier to any single customer location, consistent with 47 C.F.R. § 51.319(a)(5)(iii) and XO's proposed language acknowledges that SBC has no obligation to provide XO more than two DS3 UNE local loops to any single customer location. However, the additional language SBC adds regarding how it may handle orders that may exceed two DS3 UNE local loops per requesting carrier to any single customer location is not necessary to implement the DS3 loop cap in 47 C.F.R. § 51.319(a)(5)(iii).

(SBC-3d). There is no basis, in light of the FCC's finding that SBC must make subloops available, for SBC to delete the pricing provisions for a wide range subloops. Paragraph 253 of the *TRO* only finds an ILEC should not be required to make feeder plant available as a subloop UNE where (1) the feeder is provided over fiber facilities and (2) where it is not necessary to provide a complete transmission path between the central office and the customer premises when ILECs provide unbundled access to the TDM-based capabilities of hybrid loops. SBC's proposed deletion of subloop pricing is not limited to subloops that meet these conditions. Thus, SBC is attempting to grant itself greater relief than the FCC granted it in the *TRO*.

c.) Staff

(SBC-3a). Staff agrees with SBC that the TRO and its accompanying implementing rules only defined the subloop to include inside wire "owned or controlled" by the SBC.

XO's proposed language, however, appears to posit that the FCC defined inside wire as facilities owned or controlled by SBC. Since the parties appear to be in agreement that a subloop includes inside wire only if SBC owns or controls such facilities, this is a non-issue and, accordingly, the Staff takes no position other than to acknowledge that it concurs with the proposition that a subloop includes inside wire only if SBC *owns or controls* such facilities.

Consequently, the issue remaining is whether House and Riser Cable are included in the FCC's definition of inside wire. As noted above, inside wire is defined as all loop plant owned or controlled by the incumbent LEC at a multiunit customer premises between the minimum point of entry as defined in § 68.105 of this chapter and the point of demarcation of the incumbent LEC's network as defined in § 68.3 of this chapter. Sections 68.105 and 68.3 provide an analysis that is fact specific.

Without the benefit of the specific facts, including the defined parameters of house and riser cable, required to determine whether house and riser cable are included in the FCC's definition of inside wire, the Staff is unable to offer an opinion on this issue.

(SBC-3b). The FCC clearly requires SBC to provide an alternative service when it retires copper loops or subloops. The Staff, accordingly, recommends that the Commission adopt language reflecting the FCC's requirements in 47 C.F.R. § 51.319(a)(3)(ii)(C).

(SBC-3c). This issue appears to the Staff to be a non-issue. The Staff agrees with SBC that XO's proposed language fails to reflect the FCC's cap on unbundling DS3 circuits. XO acknowledges the DS3 cap and also recommends that the ICA should contain language reflecting the DS 3 CAP. See Joint Issues Matrix, at 67. Staff agrees with both parties that the ICA should contain language reflecting the DS3 cap found in 47 C.F.R. § 51.319(A)(3)(iii).

(SBC-3d). Because XO has not taken issue with SBC's proposed language for § 3.10 (HFPL), the Staff takes no position on SBC's proposed language because it does not appear to be an issue in dispute. Staff, however, reserves the right to comment on SBC's proposed language in § 3.10 (HFPL) should XO object to it in XO's Initial Brief.

2. Analysis and Conclusions

SBC-3a. The parties settled this sub-issue during briefing.

SBC-3b. SBC's proposed Section 3.1.3.2.3 literally tracks the FCC's requirement in 47 CFR 51.319(A)(3)(II)(c) and should be included in the parties' ICA. XO's demand for "an alternative service over any available, compatible facility (e.g., copper or fiber)," XO proposed Section 3.3.1.5, exceeds the directives in the TRO and FCC regulations and should be excluded from the ICA.

SBC's briefings suggest that this is also a *timing* dispute[50]. If that is so, the Commission notes that customer welfare is paramount. A compliant voice-grade circuit must be available in a manner that makes the transition from copper to fiber as

[50] "[N]othing in the *TRO* or the FCC's rules requires that an ILEC actually provision alternative service *before*, and as a pre-condition to, a retirement. SBC Illinois is required only to make unbundled access to a voice-grade circuit *available*; the CLEC may or may not wish to actually take advantage of that offer." SBC Reply Br. at 43 (emphasis in original).

seamless to the customer as is technically feasible under current systems and processes. Narrowband service must not be interrupted unless, given current systems and processes, such interruption is necessary to effectuate the transition, or unless the customer requests interruption. Where service interruption is necessary, SBC shall minimize such interruption to the extent practicable.

SBC-3c. XO's principal concern with SBC's treatment of the DS3 loop cap is that SBC would be empowered to unilaterally convert an excess loop request to a special access request, without giving XO notice or an opportunity to "opt out or...challenge the cap assessment." XO Init. Br. at 37. SBC's countervailing concern is that its rights, when XO appears to have exceeded the cap, should be clearly delineated in the ICA. SBC Init. Br. at 53. Both parties' concerns are reasonable and can be accommodated in the amended ICA. Therefore, SBC's proposed Section 3.1.2.2.1 should be modified to provide written or electronic notice to XO, and a fair and specific time interval in which XO can object or select alternative treatment for an excessive DS3 loop request. Objections should be resolved through the ICA dispute resolution mechanism, and the status quo should not be altered pending such resolution.

XO's recommendation to address this issue through "industry discussions," XO Reply Br. at 37-38, is rejected. As we said in relation to XO Issue 4, *this* proceeding was initiated (by XO) for the purpose of incorporating TRO requirements, including the DS3 cap, into the parties' ICA. The Commission perceives no benefit in delaying that process, particularly for something as vague as "industry discussions."[51]

SBC's proposal to clarify the identity of the DS3 loop "customer," in SBC 3.1.2.2.1 is reasonable on its face, and XO does not support its objection to it. It should be included in the amended ICA.

SBC-3d. h the TRO, the FCC states that "the rules we adopt herein do not require [ILECs] to provide unbundled access to their *feeder* loop as stand-alone UNEs, thereby limiting [ILEC] subloop unbundling obligations to their *distribution* plant." TRO ¶ 254 (emphasis added). SBC asserts, without contradiction from XO, that the subject subloops are each part of SBC's feeder plant, not its distribution plant. SBC Init. Br. at 54. Therefore, SBC can delete subloop pricing for the three pertinent loops. However, XO will still have access to SBC's fiber feeder plant "as necessary to provide a complete a transmission path between the central office and the customer premises" under the circumstances set forth in TRO ¶ 253. However, such access does not require that the subloop component be available as a stand-alone UNE, but as part of the complete transmission path described in TRO ¶ 296.

[51] Although XO cautions that, absent industry-wide discussions, SBC is likely to "make system changes and procedures [regarding the DS3 loop cap] that it will apply to all other CLECs," XO BOE at 6, the Commission does not perceive how SBC (or any ILEC) can unilaterally alter existing ICAs or determine the terms of new ICAs.

4. (a) Must SBC provide loop conditioning free of charge?
(b) Is SBC required to provide unbundled access to the packet switched features, functions and capabilities of its hybrid loops?
(c) What terms and conditions should apply to line conditioning?
(d) What terms and conditions should apply to the high frequency portion of a copper loop ("HFPL")?

1. Parties' Positions and Proposals

a). SBC

With respect to hybrid loops, SBC Illinois proposes to precisely track the detailed new rules promulgated by the FCC in the *TRO* regarding hybrid loops. XO's proposed language, on the other hand, states that SBC Illinois shall provide access to hybrid loops on an unbundled basis, and vaguely refers to "applicable law" and section 271. That language is unreasonable, because it fails to specify the parties' rights and obligations with respect to hybrid loops. The purpose of an interconnection agreement is to translate applicable law into the commercial environment, and spell out the parties' respective rights and obligations. SBC Illinois' proposed language does just that, closely following the FCC's hybrid loop rules. Moreover, the Commission should reject XO's attempt to invoke section 271 to require SBC Illinois to provide access to hybrid loops at section 251 rates, terms, and conditions, for the reasons explained above under Issue SBC-1.

With respect to line conditioning, the Commission should approve SBC Illinois' proposed contract language. That language properly implements the FCC's line conditioning rule (FCC Rule 319(a)(1)(iii)(A)), and XO has not explained its objection to SBC Illinois' proposed language.

With respect to access to the HFPL (line sharing), the Commission should adopt SBC Illinois' proposed language. In the *TRO*, the FCC conclusively held that ILECs are not required to unbundle the HFPL, and held that such a requirement would contravene Congress' goals in the Federal Act. *TRO*, ¶¶ 258-63. Thus, the FCC established detailed rules to govern the phase-out of the HFPL. FCC Rule 319(a)(1)(i). Moreover, the D.C. Circuit upheld the FCC's findings and rules in USTA II. Therefore, the parties' contract should be amended to precisely track and implement these new FCC rules, as SBC Illinois' proposed contract language does.

XO's proposed language, on the other hand, falls far short of implementing the *TRO*'s new line sharing rules. For instance, XO would define "grandfathered" line sharing arrangements in a manner different than the definition contained in the FCC's actual rules; would require SBC Illinois to provide the HFPL under section 271, even though the HFPL is not a section 271 checklist item (and even if it were, the Commission lacks jurisdiction over section 271 checklist items, and in any event could not require the provision of a checklist item at section 251 UNE rates, terms, and conditions, as explained above); and suggests that SBC Illinois might be required to

provide the HFPL under state law, even though the FCC (and NARUC and several other state commissions) made clear that any such requirement would be preempted.

Finally, the Commission should not address the additional language that XO inserted into the parties' joint issues matrix that does not relate the any of the issues raised by XO in its arbitration petition or by SBC Illinois in its response to that petition (*e.g.*, language relating to line splitting). Section 252(b)(4)(A) of the Federal Act expressly limits the issues to be considered in this arbitration to "the issues set forth in the petition and in the response," and XO's attempt to introduce new issues is thus contrary to the Act.

b.) XO

(SBC-4a & c). The Parties have settled these sub-issues with the exception of the use of the "lawful" FCC rules. As stated in the context of other issues, SBC improperly attempts to amend the existing Agreement's change of law provision to automatically incorporate SBC's interpretation of future events.

(SBC-4b). XO's proposed language establishes that SBC shall be required to provide nondiscriminatory access to hybrid loops on an unbundled basis, including narrowband and/or broadband transmission capabilities pursuant to *applicable law*, including but not limited to Section 271 of the Act and state law. The *TRO* states that "competitive LECs have [the right] to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers." *TRO* at ¶ 294. In addition, the FCC requires ILEC to provide an entire non-packetized transmission path capable of voice-grade service on a hybrid loop for a requesting carrier to provide narrowband service. *TRO* at ¶ 296. XO's proposed language also identifies applicable law as including, but not limited to Section 271 and Illinois law.

XO shares the goal of the *TRO* to "prohibit incumbent LECs from engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop UNEs" (including hybrid loops); the TRO also labels any ILEC practice that disrupts or degrades access to hybrid loops "prohibited under the section 251(c)(3) duty to provide unbundled access to loops on just, reasonable and nondiscriminatory terms and conditions." *TRO* at ¶ 294. SBC does not propose any language related to hybrid loops.

(SBC-4d). XO's proposed language regarding access to the HFPL is consistent with the *TRO* and should be adopted.

c.) Staff

Although SBC raises a number of sub-issues here, XO, apparently, only takes issue with SBC's proposed language for line conditioning. More specifically, XO objects to SBC's line conditioning charges and its restrictive definition of line conditioning

The Staff agrees with SBC that "[t]he TRO specifically contemplates that an ILEC

may seek compensation for line conditioning." On the other hand, the Staff also agrees with XO that line conditioning is a routine network modification and line conditioning is an intrinsic part of the local loop.

It appears to the Staff, that network modifications that are only provided upon request, such as line conditioning, are network modifications for which costs would not already have been recovered by SBC in its Local Loop UNE charges. Staff, accordingly, recommends that the Commission adopt SBC's proposed language for § 3.2.1 regarding line conditioning costs.

Regarding SBC's definition of line conditioning, the Staff agrees with XO that SBC's definition is overly restrictive, based upon the FCC's definition of line conditioning.

SBC's proposed language is overly restrictive in that it limits line conditioning to removing "bridge taps, load coils, and/or repeaters." Clearly, the FCC's definition of line conditioning in FCC Rule 51.319(a)(1)(iii)(A) is not as restrictive and its list of devices that must be removed in line conditioning goes beyond SBC's proposed language and, moreover, specifically states that such devices are not limited to the devices listed.

Staff, accordingly, recommends that the Commission adopt ICA language that properly reflects the FCC's definition of line conditioning in 47 C.F.R. § 51.319(a)(1)(iii)(A). In Staff's opinion, XO's proposed language regarding line conditioning more appropriately reflects the FCC's definition of line conditioning and should, thus, be adopted by the Commission.

XO also objects to alleged limitations that SBC's proposed language imposes on *when* it will provide line conditioning. SBC's proposed language states that it will provide line conditioning "upon CLEC's request." The Staff is hard-pressed to understand why XO would object to SBC providing line conditioning when XO requests it. The Staff, nonetheless, reserves its right to address any objection XO may have regarding when SBC will provide line conditioning if XO more fully articulates its position in its Initial Brief.

Likewise, Staff reserves the right to comment on SBC's proposed language at issue in SBC Issue No. 5 should XO articulate objections in its Initial Brief that are not contained in its preliminary position.

2. Analysis and Conclusions

SBC-4a & c. The arbitrating parties appear to have settled these sub-issues.

The Commission notes that SBC-4c was improperly framed as an open issue. Furthermore, to the extent that the parties belatedly attempted to modify the many discrete disputes residing under this over-broad question, those disputes were presented as dueling texts, not as properly framed open issues. Moreover, SBC avers

that we *cannot* address issues posed outside of the Petition and Response, SBC Init. Br. at 65, and we agree. Therefore, even if those disputes have not been settled, the Commission will not address them.

SBC-4b. SBC's proposed text would essentially incorporate the language of 47 CFR 51.319(a)(2) into the ICA. Despite XO's claim to the contrary, XO Reply Br. at 41, that text includes the degree of access to broadband capabilities required by the FCC. Such language is unobjectionable and the Commission approves it.

The parties' real disagreement concerns XO's demand (in XO proposed Section 3.1.4.1) for access to the broadband transmission capabilities of hybrid loops to the extent such access is required under Section 271 of the Federal Act or under state law. SBC argues, first, that this Commission lacks authority to address the terms and conditions of access to Section 271 UNEs and, second, even if we do have such authority, the modified TRO precludes the conclusion that 271 UNEs must be offered at TELRIC prices. SBC Reply Br. at 47.

Regarding our authority, SBC contends that "the states only have authority under [S]ection 252 to arbitrate issues arising under [S]ection 251," and that issues concerning Section 271 do not arise under Section 251. SBC BOE at 9. SBC's premises are incorrect. While subsection 251(c)(1) establishes an ILEC *duty* to negotiate the items enumerated in subsection 251(b), subsection 252(a)(1) empowers the parties to "negotiate and enter into a binding contract... *without regard to the standards set forth in subsections (b) and (c) of section 251*." (Emphasis added.) Thus, although SBC *had to* negotiate the subsection 251(b) items if XO so requested, the parties *could* negotiate anything pertaining to their interconnection, including the impact of the TRO on obligations arising under Section 271.

The foregoing analysis is entirely congruent with Coserv Limited Liabililty Corp. v. Southwestern Bell Telephone Co., 350 F. 2d 482 (5th Cir. 2003). There, the court stated:

> An ILEC is *required* by the [Federal] Act to negotiate about those duties listed in § 251(b) and (c). During negotiations, however, the parties are free to make any agreement they want without regard to the requirements of § 251(b) and (c). To that extent, the parties are free to include interconnection issues that are not listed in § 251(b) and (c) in their negotiations....
>
> ***
>
> ...That is, Congress contemplated that voluntary negotiations might include issues other than those listed in 251(b) and (c) and still provided that *any issue* left open after unsuccessful negotiation would be subject to arbitration by the [state commission].

350 F. 3d 487 (emphasis in original).

SBC also emphasizes that subsection 252(c)(1) directs us to resolve open arbitration issues in a manner that "meet[s] the requirements of section 251." SBC BOE at 8. In SBC's view, this provision precludes us from arbitrating (or even approving) "obligations other than those set forth in section 251." *Id.*, at 9. The principles from Coserv refute this argument. The "requirements of section 251" mandate compliance with "the requirements...of section 252," including the requirement that we assess an ICA that has been negotiated, as subsection 252(a)(1) states, "without regard to the standards set forth in subsections (b) and (c) of subsection 251."

Furthermore, with specific regard to unbundled access (here, access to hybrid loops), subsection 251(c)(3) requires an ILEC to provide such access on rates, terms and conditions "that are just, reasonable, and nondiscriminatory *in accordance with the terms of the agreement* **and** the requirements of this section and section 252." (Emphasis added.) Thus, Section 251 allows incorporation, into the ICA, of standards other than those explicitly set forth in Sections 251 and 252. Within the Federal Act, the "just and reasonable" standard is imposed by Section 201, while the nondiscrimination standard derives from Section 202. These two sections apply to the rates, terms and conditions for Section 271 UNEs.

Moreover, SBC's objection to the presence of 271 UNEs in this arbitration appears newly minted. In Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission, 359 F.3d 493 (7th Cir. 2004), cited by SBC, the court observed that SBC itself had negotiated a Section 271 performance assurance plan *"as an amendment to its [ICA]."* 359 F.3d at 496 (emphasis added). We note that the court's holding had nothing to do with that plan, however. Rather, the court overturned a separate, "stand-alone" order establishing a different performance plan created by the IURC, which was available to any CLEC outside the ICA process. Significantly, the court did do on the ground that the IURC had thus "interfere[d] with...the process for [ICAs] for local service under Sections 251 and 252." *Id.*, 497. The court thus concluded that a Section 271 performance plan was properly addressed in the Section 252 ICA negotiation and arbitration process (as well as in a Section 271 application for long distance authority).

Additionally, the nature and extent of the "authority" we are exerting over Section 271 UNEs must not be exaggerated here. The only purpose of this arbitration is to incorporate into the ICA, at the FCC's direction, federal requirements set forth in the modified TRO. To resolve the parties' open issues that fall within that limited scope, we are, *inter alia*, directing the parties to incorporate in their ICA *the FCC's* substantive provisions pertaining to Section 271 UNEs. We are not altering those FCC rulings, nor are we attempting to define the extent to which Section 271 governs the parties' conduct. We are simply saying, in effect, "incorporate what the FCC said about 271 UNEs into your ICA, and it will have whatever effect the FCC said it will have." Indeed, if we permitted the parties to ignore the FCC's directives regarding 271 UNEs, *then* we would be contravening both the FCC and the Federal Act. Moreover (and in addition to

the Sections 251 and 252 authority discussed above), we can impose regulatory requirements under the power reserved to us by Section 261(c) of the Federal Act[52], so long as they are not inconsistent with FCC requirements.

Concerning the substantive content of the FCC's directives regarding Section 271 UNEs, we have already noted the FCC's view that Section 271 does contain unbundling requirements that are independent of Section 251. TRO ¶ 653. As for pricing, XO's proposed text does not request UNE access at TELRIC prices. Thus, XO's references to Section 271 and "state law" would give XO no more than whatever those authorities would provide. Since SBC correctly interprets the TRO (e.g., ¶ 656) and USTA II, TELRIC pricing is not accorded to 271 UNEs under federal law.

Therefore, we conclude that XO's references to Section 271 and state law are permissible. However, to prevent over-reaching, and to keep XO's text within the boundaries of this arbitration, we revise XO's proposed Section 3.1.4 as follows: "SBC Illinois shall provide nondiscriminatory access to hybrid loops on an unbundled basis, including narrowband and/or broadband transmission capabilities, to the extent required by 47 CFR 51.319(A)(2), Section 271 of the Act and state law."

SBC-4d. For the most part, SBC's proposed text pertaining to XO's access to the HFPL (also referred to as "line sharing") accurately mirrors the FCC's mandates in the TRO and in 47 CFR 51.319(1)(i). To that extent, it should be included in the amended ICA. However, we agree with XO that SBC proposed Section 3.10.1.2 alters the terms of subsection 47 CFR 51.319(1)(i)(A). That subsection refers to disconnection *by the customer*, not to the broader category of disconnection *of the service* (xDSL). Consequently, SBC's text should be revised to more accurately track 47 CFR 51.319(1)(i)(A). XO also appropriately complains that SBC's text automatically incorporates changes of law. Such changes should be specifically incorporated into the ICA through its existing change-of-law provisions and SBC's text must be revised accordingly.

On the other hand, the Commission agrees with SBC that XO's proposed Section 1.19.1.4 contains an "intent" provision that is not supported by the TRO, and is, in our view, unworkable. XO's text is therefore rejected, and the language in SBC proposed Section 3.10.1.1 should be placed in the ICA instead.

As for XO's contention that the ICA should reflect line-sharing obligations under Section 271 and state law, the Commission notes that the HFPL is not a 271 checklist item. SBC Init. Br. at 61; Staff Reply Br. at 27. Patently, no reference to Section 271 obligations belongs in the ICA. Regarding state law, Staff explains that:

[52] "Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part of the [FCC's] regulations to implement this part." 47 USC 261(c).

> Unlike hybrid loops and dark fiber, the Commission did not implement a state law requirement that SBC provide HFPL under mandatory statutory language found in the PUA, but, rather, the Commission exercised its prerogative authority under the discretionary language found in Section 13-506.6 of the PUA, which exercise of authority was then consistent with existing federal law. The Commission, moreover, re-opened ICC Docket No. 00-0393 because subsequent to the FCC issuing the TRO "changes to the federal scheme indicates several areas which implicate the need for a reapplication of Illinois and federal law to the issues addressed by this Commission in earlier orders in this docket."

Staff Reply Br. at 27.

However, no new final order has yet been issued in Docket 00-0093. Nor has our authority over the HFPL been preempted by the FCC pursuant to Section 253(d) of the Federal Act. Therefore, reference to state line sharing obligations can be placed in the amended ICA (although, depending on the final outcome of Docket 00-0093, XO may derive little benefit from that reference).

5. (a) What are the appropriate definitions of dark fiber loop and dark fiber transport?

(b) What terms and conditions should apply to SBC's provision of dark fiber loop and dark fiber transport?

1. Parties' Positions and Proposals

a). SBC

SBC Illinois' proposed language properly reflects the scope of SBC Illinois' obligation to provide unbundled dark fiber. In particular, SBC Illinois is required to provide unbundled dark fiber only where dark fiber is lawfully a UNE under section 251 of the Act. XO's proposed language, on the other hand, would unlawfully require SBC Illinois to provide unbundled dark fiber whether it was lawfully a UNE or not. (Section 3.5.3.1.) XO's proposed language must be rejected, and SBC Illinois' adopted, for the same reasons discussed above under Issue SBC-1.

The FCC's rules requiring the unbundling of high-capacity loops and dedicated transport (including dark fiber) have been vacated. Accordingly, SBC Illinois' language would come into play only if the FCC were to re-institute such unbundling requirements. Nevertheless, it is reasonable to adopt SBC Illinois' proposed language, because that language would most appropriately define SBC Illinois' obligations should the FCC require the unbundling of dark fiber in the future, while XO's language would not.

XO's proposed language regarding the declassification of dark fiber loops by this Commission must be rejected. (Section 3.1.6.) That language appears intended to implement an FCC Rule (the FCC's dark fiber loop rule, Rule 319(a)(6), which provides for state commission non-impairment determinations) that has been vacated.

XO opposes SBC Illinois' proposed contract language providing that, to the extent SBC Illinois is required by an FCC rule to unbundle dark fiber, unbundled dark fiber will be provided only where a CLEC is collocated. (Sections 3.1.6 and 3.5.3.1.) In the *TRO*, the FCC explained that a CLEC purchasing unbundled dark fiber must also collocate and provide optronics to light the dark fiber. *TRO*, ¶¶ 313, 381-82. SBC Illinois' proposed language is consistent with the FCC's language, and thus should be included in the parties' *TRO* amendment.

Finally, the Commission should approve SBC Illinois' proposed description of dark fiber dedicated transport, and reject XO's. (Section 3.5.3.1.) In the *TRO*, the FCC redefined dedicated transport to *include* only transmission facilities between ILEC switches and to *exclude* transmission facilities outside the ILEC's network, such as transmission facilities connecting the ILEC's network to a CLEC's network. *TRO*, ¶ 366. XO proposes to include only the first half of this new definition in the parties' contract. But XO has not identified any basis for excluding the second half of the FCC's definition from the parties' contract, and there is none. Rather, the parties' contract should be revised to make clear that dedicated transport now excludes transmission facilities between SBC Illinois' and a CLEC's network, as SBC Illinois' proposed language does.

b.) XO

SBC's proposed language would impermissibly limit the availability of dark fiber EELs (combination of dark fiber loop and dark fiber transport). For dark fiber loops, SBC would require XO to have collocation space in the central office where the dark fiber loop terminates. Similarly for dark fiber transport, SBC's proposal would require that XO have collocation space in each SBC central office where the requested dark fiber transport terminates. These requirements would not allow XO to order dark fiber EELs because XO would not have a collocation at the central office where the dark fiber loop terminates in the case of a dark fiber EEL (which is of course why an EEL would be used). There is no basis in the *TRO* or elsewhere for this restriction.

The TRO actually emphasizes *not* limiting the availability of dark fiber, declaring "we recognize the hard work of the state commissions to make dark fiber meaningfully available and endorse such efforts here." *TRO* at ¶ 385. Illinois' efforts to promote competition and provide unbundled elements are further supported by the directives of Section 13-801 of the PUA. 220 ILCS 5/13-801.

In fact, SBC's attempt to limit the availability of dark fiber EELs is inconsistent with the FCC's findings regarding the pro-competitive benefits of EELs. At ¶ 576, the FCC states: "[b]ased on the record before us, we conclude that EELs facilitate the growth of facilities-based competition in the local market. The availability of EELs extends the geographic reach for competitive LECs because EELs enable requesting

carriers to serve customers by extending a customer's loop from the end office serving the customer to a different end office in which the competitive LEC is already located. In this way, EELs also allow competitive LECs to reduce their collocation costs by aggregating loops at fewer collocation locations and then transporting the customer's traffic to their own switches." By imposing collocation requirements to obtain dark fiber loops, SBC is attempting to increase XO's costs and prevent it from realizing the economies of using dark fiber EELs to aggregate its traffic.

SBC's proposed language, providing for the provision of Dedicated Transport Dark Fiber only "when CLEC has collocation space in each SBC-12STATE CO where the requested dark fiber(s) terminate" creates another possible problem in addition to the inability to access the dark fiber UNE for EELs. XO may wish to order Dedicated Transport Dark Fiber that is routed through multiple SBC central offices. XO may not, and need not, have collocations in those intermediate central offices. Although XO would maintain that the dark fiber does not "terminate" in those intermediate central offices, SBC could interpret its proposed language as imposing such a collocation requirement and improperly refuse to provision Dedicated Transport Dark Fiber along the desired route.

SBC's proposed language contains yet another incorrect limitation on the provision of Dedicated Transport Dark Fiber, illustrating why its language must be rejected. The language provides that 'Lawful UNE Dedicated Transport Dark Fiber does not include transmission facilities between the SBC-12STATE network and the CLEC network *or the location of CLEC equipment*." XO should certainly be entitled to order Dedicated Transport Dark Fiber from SBC which connects to XO's collocations. Yet, an XO collocation is certainly a "location of CLEC equipment." Indeed, Dedicated Transport Dark Fiber would be useless if it did not connect at some point to a "location of CLEC equipment." Yet, SBC's proposed language improperly attempts to impose precisely that limitation.

SBC objects to XO's proposed language requiring that SBC provide dark fiber on an unbundled basis until a "final and nonappealable" order is issued. However, XO's proposed language is consistent with the terms of the underlying change in law provisions in the XO/SBC ICA – as discussed above in SBC Issue 2. SBC is improperly attempting to short-cut the existing change in law procedures and allow any changes favorable to SBC to be enacted without delay.

c.) Staff

(SBC-5a). SBC alleges that XO's proposed definition of a dark fiber loop is not the definition of a dark fiber loop, but rather the definition of dark fiber contained in ¶ 311 of the TRO. SBC also claims that using the defintion of dark fiber instead of a specific definition of a dark fiber loop "is illogical and potentially confusing." Joint Issues Matrix, at 77.

SBC's proposed language defines "Loop Dark Fiber" as "Loop dark fiber is an existing dedicated transmission facility between a distribution frame (or its equivalent) in a SBC State Central Office and the loop demarcation point at an End User customer premise that has not yet been activated through optronics to render it capable of carrying communications services." See SBC's proposed section 2.6 (Loop Dark Fiber). Furthermore, SBC's proposed language would limit its provisioning of dark fiber loops to a "CLEC when CLEC has collocation space in each SBC-12STATE CO where the requested dark fibers terminate." See SBC proposed section 3.1.6.

Staff finds no support for SBC's proposed limitations on dark fiber loops in the TRO. Although the FCC has defined dark fiber and dark fiber loops essentially the same (compare ¶ 311 of the TRO with 47 CFR § 51.319(a)(6)(i)), XO's proposed definition of a dark fiber loop closely tracks the FCC's definition of a dark fiber loop in 47 CFR § 51.319(a)(6)(i) ("Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services."). Moreover, in ¶ 202 of the TRO, n. 632, the FCC found no reason to distinguish dark fiber from its general unbundling analysis for loops. In light of the FCC's determination that there is no reason in its unbundling analysis to treat dark fiber loops differently from copper loops, Staff recommends that XO's proposed definition of a dark fiber *loop* be adopted.

SBC's proposed language would define dark fiber *transport* as "unactivated fiber optic interoffice transmission facilities are dedicated to a particular CLEC that are within SBC-Illinois' network, connecting SBC-Illinois switches or wire centers within a LATA." See SBC's proposed section 2.7 (Dark Fiber Transport). Paragraph 365 of the TRO provides support for SBC's definition of dark fiber transport. See TRO, ¶ 365 ("We limit our definition of dedicated transport under section 251(c)(3) to those transmission facilities connecting incumbent LEC switches and wire centers within a LATA."). Furthermore, SBC's proposed language would limit its provisioning of dark fiber *transport* to a "CLEC when CLEC has collocation space in each SBC-12STATE CO where the requested dark fibers terminate." See SBC proposed section 2.7.

(SBC-5b): SBC also objects that "even after a state commission finds that a carrier is not impaired without access to it", that under XO's proposed language SBC must continue to provide dark fiber on an unbundled basis until there is a "final and non-appealable" order issued. Joint Issue Matrix, at 78-79. As noted above under SBC Issue No. 1, the Staff recommends replacing any such "final and non-appealable order" language with a "lawful order."

2. Analysis and Conclusions

SBC-5a. The parties have settled this sub-issue.

SBC-5b. This sub-issue is not properly framed as an open issue. It is an invitation to the Commission to discourse on the subject of dark fiber, and to devise rules from the ground up, rather than the presentation of a dispute. We will nonetheless

address those apparent disputes that we perceive to be impediments to amending the parties' ICA.

The court of appeals vacated and remanded the TRO's national impairment finding with respect to dedicated transport elements, including dark fiber. USTA II, 359 F.3d at 594. However, as we noted above, the FCC's subsequent *Status Quo* Order requires an ILEC to continue providing unbundled access to dedicated transport on "the same rates, terms and conditions that applied under their [ICAs] as of June 15, 2004" for a six-month period. *Status Quo* Order, ¶¶ 1 & 16. That directive also applies to enterprise loops, including dark fiber loops[53].

XO says that its "primary concern" with SBC's proposed text is that SBC's collocation requirement (in the SBC central office(s) where the pertinent fiber terminates) would prevent XO from obtaining dark fiber EELs[54]. XO Reply Br. at 44. XO acknowledges that a collocation requirement is generally valid, but avers that collocation need not be at every SBC central office where a dark fiber EEL terminates. *Id.*, 44-45. We agree, and find SBC's rationale for its proposed provisions unpersuasive. The TRO passage on which it relies (¶ 382) does refer to "necessary...collocations" but does not address - much less establish a rule about - where EEL collocation must occur.

We agree with XO that the FCC concluded that EELs facilitate competition, innovation and efficient deployment of resources. TRO ¶ 576. Accordingly, the Commission holds that, with respect to EELs, collocation within the pertinent LATA can constitute the "necessary collocations" referred to in the TRO. We note that XO will still be subject to the eligibility criteria promulgated by the FCC in the TRO, as incorporated into the parties' ICA.

The *Status Quo* Order requires a caveat to that directive, however. Since the *Status Quo* Order states that ILECs must provide dedicated transport and enterprise market loops under the rates, terms and conditions contained in an applicable ICA as of June 15, 2004, the Commission concludes that it cannot alter any existing terms and conditions in the SBC/XO ICA pertaining to collocation. We do not know if such terms in fact exist, because the parties did not offer their present ICA for the record. Therefore, all we can require now is that the EEL collocation directive in the preceding

[53] The Commission does not agree with SBC and Staff that USTA II had overturned the TRO's loop unbundling requirements. When the Court of Appeals vacated the FCC's subdelegation to state commissions, the rationale of that ruling applied generally to subdelegation concerning any UNE, including loops. However, the rejection of subdelegation did not, by itself, overturn the FCC's national impairment findings. (Indeed, the purpose of subdelegation was to locate exceptions to those findings.) Thus, in a separate ruling, the USTA II court vacated the FCC's national impairment determinations regarding mass market switching and dedicated transport. It did not vacate the FCC's loop impairment findings.

[54] We disagree with SBC's assertion that dark fiber EELs were not "contemplate[d]" in the TRO. SBC Reply Br. at 49. A dark fiber EEL is simply a combination of separate elements, as described by the FCC. TRO ¶575. DS1 and DS3 are merely capacity designations for the same facilities that can be "lit" or left "dark."

paragraph should be incorporated in the ICA unless it is inconsistent with existing ICA provisions. In the event of such inconsistency, the preceding directive is inapplicable and the existing ICA terms shall continue in force.

Regarding state law, XO is correct that this Commission held in Docket 01-0614 that Section 13-801 of the PUA does not countenance a collocation requirement for termination of EELs. It certainly follows that state law does not require collocation *at a specific central office* for dark fiber EELs. Additionally, although SBC charges that XO presented no "evidence" that SBC's proposed collocation requirements would fail to implement the maximum development of competitive service offerings, as Section 13-801 mandates[55], the FCC has concluded that EELs reduce a CLEC's collocation costs, thereby (as noted above) "facilitat[ing] the growth of facilities-based competition in the local market." TRO ¶ 576. That is sufficient refutation of the competition-enhancing potential in SBC's collocation requirement. Therefore, we conclude that SBC's dark fiber EEL collocation requirement should be modified so that collocation at an SBC central office *within the LATA* satisfies the requirement[56].

The Commission rejects the requirement, in XO proposed Section 3.1.6, of a "final and non-appealable" non-impairment order before SBC can be relieved of an unbundling obligation. As we have said elsewhere in this Decision, a judicial or administrative order is effective from the time it is issued unless and until it is rendered otherwise by the authority that issued it or by a superior authority.

6. (a) Does dedicated transport include transmission facilities that connect SBC's switches or wire centers to those of another ILEC?

(b) Does dedicated transport include transmission facilities that connect SBC's switches or wire centers to the CLEC's premises or POP?

(c) Is SBC obligated to provide TELRIC-based transmission facilities for interconnection and the exchange of traffic pursuant to Section 251(c)(2)?

(d) What terms and conditions should apply to the DS3 dedicated transport caps?

(e) Should the pricing schedule include pricing for and entrance facilities, OC3, OC12 and OC48 dedicated transport, cross connects and multiplexing?

XO re-characterizes this issue as follows:

Did the FCC distinguish between interconnection facilities and other types of entrance facilities or dedicated transport such that interconnection facilities must be provided at cost?

1. Parties' Positions and Proposals

[55] For that matter, SBC has not presented "evidence" that its collocation provisions would meet the statutory standard. The simple fact is that both parties waived evidentiary hearings and adduced no evidence.

[56] As requested by SBC, SBC BOE at 27, this collocation requirement does not apply to stand-alone dark fiber loops. We exempt stand-alone loops for the technical reasons explained by Staff, Staff BOE at 6-7.

a). <u>SBC</u>

SBC Illinois' proposed dedicated transport language appropriately limits the provision of dedicated transport to instances where dedicated transport is a lawful UNE. XO's proposed language, on the other hand, would require SBC Illinois to provide dedicated transport on an unbundled basis whether it is lawfully a UNE or not. XO's proposed language must be rejected, and SBC Illinois' adopted, for the same reasons discussed above under Issue SBC-1.

XO also proposes to continue to require SBC Illinois to provide entrance facilities at TELRIC rates. That proposal is unlawful. In the *TRO*, the FCC redefined dedicated transport to *exclude* facilities outside the ILEC's network, which the FCC held include entrance facilities. *TRO*, ¶ 366. Thus, the *TRO* "eliminates 'entrance facilities' as UNEs." *Id.* n. 1116. SBC Illinois' proposed definition of dedicated transport is necessary to implement this new law. While the FCC's rule requiring the unbundling of dedicated transport has been vacated, the D.C. Circuit did not vacate the FCC's determination that entrance facilities are no longer UNEs, and are no longer within the definition of "dedicated transport." Thus, SBC Illinois' proposed language is appropriate, in the event that the FCC adopts new rules requiring the unbundling of dedicated transport.

The Commission should also reject XO's attempt to turn the section 251(c)(2) duty to interconnect into some kind of duty on the part of ILECs to transport traffic for a CLEC from the CLEC's network to the point of interconnection, at TELRIC-based rates. Section 251(c)(2), by its plain terms, requires an ILEC to interconnect with a CLEC at a point *within* the ILEC's network. It does not require an ILEC to provide a transmission facility from that point within the ILEC's network to the CLEC's premises (*e.g.*, an entrance facility). Indeed, in the *TRO* the FCC explicitly contrasted "transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic" with "the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection." *TRO*, ¶ 365. In short, XO itself is responsible for delivering its traffic from its premises to the point of interconnection within SBC Illinois' network. Moreover, because entrance facility terms and conditions are outside section 251(b) and (c), and because SBC Illinois refused to negotiate the entrance facility issue, that issue is not subject to state commission arbitration. <u>Coserv LLC v. SWBT</u>, 350 F.3d 482 (5th Cir. 2003).

Finally, the Commission should approve SBC Illinois' proposed language regarding the cap on DS3 dedicated transport, required by FCC Rule 319(e)(2)(iii), and reject XO's proposed language. The FCC's rules requiring the unbundling of dedicated transport have been vacated, so the DS3 dedicated transport cap language would come into play only if the FCC were to re-institute such an unbundling requirement. Nevertheless, it is reasonable to adopt SBC Illinois' language, because that language clearly defines how the DS3 dedicated transport cap would be calculated and applied in a commercial environment if the FCC were to require DS3 dedicated transport

unbundling at some point in the future. XO's language finds no support anywhere in the FCC's Rule or its discussion of the cap, and thus must be rejected.

5 b.) XO

(SBC-6a). XO's position is that it may obtain interconnection facilities from SBC at cost-based TELRIC rates. The FCC specifically distinguished in the *TRO* between interconnection facilities that ILECs "explicitly must make available for section 251(c)(2) interconnection" (which are required) and those transmission facilities connecting ILEC networks to CLEC networks for the purpose of backhauling traffic, which the FCC stated were not required to be unbundled. *See TRO* at ¶ 365. The FCC explicitly re-emphasized that "to the extent that requesting carriers *need facilities* in order to 'interconnect[] with the [incumbent LEC's] network,' section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." *TRO* at ¶ 366 (emphasis added).

Moreover, SBC incorrectly contends that XO may not arbitrate the issue of whether it is required to provide interconnection trunk entrance facilities; this issue is explicitly within the scope of Section 251(c) as discussed above; the FCC has held that ILECs are *required to provide such interconnection trunk entrance facilities*; and thus, this issue falls squarely within the scope of this arbitration.

(SBC-6b). Section 251(c)(2) of the Act requires ILECs to provide interconnection to requesting carriers at just and reasonable rates in accordance with Section 252. Section 252(d), moreover, provides that state commissions shall determine the just and reasonable rates for *interconnection* of facilities and equipment for purposes of Section 251(c)(2), based on cost. 47 U.S.C. Section 252(d)(1). The FCC has established that cost-based rates are to be set on TELRIC standards. Accordingly, SBC is incorrect that interconnection facilities do not need to be provided at TELRIC.

(SBC-6c). XO disagrees with the manner in which SBC proposed to implement the caps on DS3 transport as inconsistent with the *TRO* and unreasonable. XO's language is consistent with the *TRO*.

(SBC-6d). SBC should not delete all prices for entrance facilities, because SBC is required to provide interconnection trunk entrance facilities at cost-based rates, as discussed above. Only non-interconnection trunk entrance facility rates should be deleted from SBC's pricing sheet.

c.) Staff

(SBC-6a-c). The outcome of sub-issues (a), (b), and (c) found in SBC Issue 6 are dependant upon determining whether the FCC distinguished between (i) dedicated transport and (ii) interconnection facilities and other types of entrance facilities. As Staff pointed out above in SBC Issue 5, in light of the FCC's determinations in ¶¶ 365 and 366 of the TRO, it is clear that the dedicated transport UNE is "only those transmission facilities *within* an incumbent LEC's transport network." TRO, ¶ 366. XO does not

appear to dispute this conclusion. XO, however, proposes language referencing the "incumbent LEC's" facilities. SBC proposes that the phrase "incumbent LEC" be replaced with "SBC ILLINOIS" facilities to avoid any confusion that SBC Illinois needs to unbundled transmission facilities outside of its network, including those facilities that may be owned by SBC affiliate LECs. It is the Staff's position that SBC's proposal to replace the term "incumbent LEC's" facilities with "SBC ILLINOIS" facilities is reasonable and a failure to clarify "incumbent LEC" could result in some confusion. Staff, accordingly, recommends that SBC's proposal to replace "incumbent LEC" with "SBC ILLINOIS" be adopted by the Commission.

Replacing "incumbent LEC" with "SBC ILLINOIS", however, does not answer the question whether the FCC distinguished between (i) dedicated transport and (ii) interconnection facilities and other types of entrance facilities. In this regard, the FCC stated:

> We find that transmission facilities connecting incumbent LEC switches and wire centers are an inherent part of the incumbent LECs' local network Congress intended to make available to competitors under section 251(c)(3). On the other hand, we find that transmission links that simply connect a competing carrier's network to the incumbent LEC's network are not inherently a part of the incumbent LEC's local network. Rather, they are transmission facilities that exist *outside* the incumbent LEC's local network.

TRO, ¶ 366 (emphasis in original).

Accordingly, it would appear that entrance facilities "that simply connect a competing carrier's network to the incumbent LEC's network" are not required to be unbundled by SBC and provided (at TELRIC rates) under section 251(c)(3). The FCC, however, continued to note that:

> In reaching this determination we note that, to the extent that requesting carriers need facilities in order to "interconnect[] with the [incumbent LEC's] network," section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation. *Id*.
>
> * * *
>
> However, all telecommunications carriers . . . will have the ability to access transport *within* the incumbent LEC's network, pursuant to section 251(c)(3), and *to interconnect for the transmission and routing of telephone exchange service and exchange access, pursuant to section 251(c)(2).*

TRO, ¶ 368 (emphasis added; internal citations omitted).

It is Staff's position, accordingly, that transmission facilities that connect SBC switches or wire centers to XO's premises or point of presence ("POP") are not required to be unbundled and provided by SBC to XO at TELRIC rates under section 251(c)(3), but, rather, SBC is required to provide XO such facilities under its obligations to provide interconnection under 251(c)(2), at cost-based rates.

(SBC-6d). It does not appear that XO has any dispute with SBC'S proposed language regarding the DS3 cap, with the following two exceptions: (1) XO's proposal includes the additional clarifying phrase "or DS3-equivalents (e.g., 336 DS1s)"; and (2) XO's proposed language labels any circuit capacity above the 12 circuit cap a "Nonconforming Facility" in lieu of SBC's proposal language clarifying what would happen should XO exceeded the 12 circuit DS3 cap. Regarding XO's proposed "DS3 equivalent" phrase, it is unclear to Staff at this time whether SBC objects to this seemingly innocuous additional phrase.

Regarding which parties' proposed language on what happens if XO should exceed the 12 circuit DS3 cap, the Staff recommends that the Commission adopt XO's proposal to label any circuit capacity above the DS3 Cap a "Nonconforming Facility" as it appears to be both more reasonable and appropriate than SBC's proposed language.

(SBC-6e): SBC's requests a determination of whether the pricing schedule should include pricing for an entrance facilities, OC3, OC12, and OC48 dedicated transport, cross connects and multiplexing. Joint Issues Matrix, at 80. XO "agrees that TELRIC rates for OCn loops and transport should be deleted" from the pricing schedule. *Id.* Which leaves open the issues of whether SBC should provide XO entrance facilities, cross connects, and multiplexing at TELRIC or cost based rates. As noted above in sub-issue (a), it is Staff's position that transmission facilities that connect SBC switches or wire centers to XO's premises or its POP are not required to be unbundled and provided by SBC to XO at *TELRIC rates* under section 251(c)(3), but, rather, SBC is required to provide XO such facilities under its obligations to provide interconnection under 251(c)(2), at *cost-based* rates. The Staff, accordingly, recommends that the Commission find that any XO requested entrance facilities, cross connects, and multiplexing are to be provided by SBC, under its interconnection obligations under 251(c)(2), at cost-based rates.

2. Analysis and Conclusions

SBC 6a-c. Initially, the Commission rejects SBC's argument that the USTA II decision effectively mooted this issue by overturning the FCC's dedicated transport rules. SBC Reply Br. at 50-51. SBC Issue 6 presents disputes concerning what *constitutes* unbundled dedicated transport. USTA II did not address that question. Rather, it vacated the FCC's *impairment* finding.

Staff correctly observes that the fundamental question posed by sub-issues (a) through (c) arises from the FCC's distinction, in the TRO, between an ILEC's obligations

under, respectively, subsections 251(c)(2) and 251(c)(3) of the Federal Act. Staff Init. Br. at 88. The arbitrating parties agree that the latter subsection does not require an ILEC to unbundle, and offer at TELRIC prices, any ILEC facilities beyond the ILEC's own network. However, XO maintains that subsection 251(c)(2), as viewed by the FCC, imposes a separate obligation on the ILEC to provide "transport facilities" for the purpose of interconnection, including ILEC facilities residing on the CLEC side of the parties' interconnection point. Staff initially agreed with XO, but retreated to a neutral position in its Reply Brief, on the ground that there is no record evidence identifying the facilities at issue. SBC strongly disagrees with XO's contentions.

The Commission concludes that SBC's position is correct. First, nothing in subsection 251(c)(2) itself mentions ILEC facilities, much less creates an obligation to provide them. Second, the FCC's analysis of ILEC duties under that subsection does not create such an obligation either. The TRO language on which XO relies (in ¶¶ 365, 366 and 368) simply does not support XO's claims to the contrary.

TRO ¶ 365 refers to "the facilities that [ILECs] explicitly must make available for section 251(c)(2) interconnection." Since the only facilities explicitly mentioned in 251(c)(2) are *CLEC* facilities, we must infer that the FCC is alluding to the facilities that an ILEC must have ready to receive those CLEC facilities. We cannot infer more, given the definition of "interconnection" in FCC rules as "the linking of two networks for the mutual exchange of traffic," and the specific exclusion of "the transport and termination of that traffic" from that definition. 47 CFR 51.5.

TRO ¶ 366 refers to the facilities needed by CLECs to interconnect with an LECs network. Once more, we construe this reference to pertain to the facilities an LEC must have ready to accommodate the CLEC's own facilities used in interconnection. Again, the only facilities identified in 251(c)(2) are CLEC facilities, and the above-cited FCC rule excludes transport and termination from the definition of interconnection. Thus, the ILEC's obligation is to provide connection to the *CLEC facilities*, including transport and termination facilities, that the CLEC employs to interconnect with the ILEC's network.

TRO ¶ 368 says this: "all telecommunications carriers...will have the ability to access transport facilities *within* the incumbent LEC's network, pursuant to section 251(c)(3), and to interconnect for the transmission and routing of telephone exchange service and exchange access, pursuant to section 251(c)(2)." (Emphasis in original.) The FCC thus uses the term "facilities" only in connection with 251(c)(3), not in connection with 251(c)(2). That is entirely consistent with the language and titles of the respective statutory provisions. As SBC states, 251(c)(2) obliges an ILEC to accommodate interconnection, but not to "provide the 'facilities and equipment' *for* the requesting telecommunications carrier." SBC Reply Br. at 51 (emphasis by SBC).

SBC 6-d. This is another improperly framed general question, rather than an appropriate open disputed issue. Nevertheless, the Commission will furnish essentially the same resolution we provided for SBC-3c, for essentially the same reasons. Thus, SBC's proposed language should be modified to provide written or electronic notice to

XO, and a fair and specific time interval in which XO can object or select alternative treatment for an excessive circuit request. Objections should be resolved through the ICA dispute resolution mechanism, and the status quo should not be altered pending such resolution.

As for the parties' quarrel regarding "DS3 equivalents," the Commission notes that the cap will limit XO to the same number of circuits in either case. Nonetheless, since the TRO did not mention "DS3 equivalents," we will not speculate on what the FCC would have said about them. XO's proposal is rejected.

SBC 6-e. XO agrees that pricing for OC facilities (of any capacity) can be deleted. Given our conclusions regarding SBC 6a-c, we hold that entrance facility prices can also be deleted.

7. Should the ICA include the TRO's modifications to the rules regarding the provision of unbundled local switching and transport?

1. Parties' Positions and Proposals

a). SBC

The *TRO* created a new regime to govern the provision of unbundled switching. Most fundamentally, pursuant to the D.C. Circuit's direction in *USTA I* to take specific markets into account, the FCC defined two classes of switching, (1) switching used to serve enterprise customers (enterprise switching) and (2) switching used to serve mass market customers (mass market switching). The FCC defined enterprise customers to include all customers served by DS1 or higher capacity facilities, as well as customers served at a single location by multiple DS0s higher than the "DS0 cutoff," and defined mass market customers as customers served by a number of DS0s below the DS0 cutoff. *TRO*, ¶¶ 451, 497. XO's proposed language, however, unlike SBC Illinois', fails to reflect even this basic definitional distinction created by the FCC.

XO's proposed language also fails to reflect the law regarding enterprise switching – in particular the FCC's holding that enterprise switching is not a UNE. The FCC held, and promulgated a rule stating, that an ILEC is required to provide unbundled access to enterprise switching only where the FCC grants a waiver of its finding of non-impairment. XO's proposed language, unlike SBC Illinois' language, fails to clearly reflect this holding, but instead refers to section 271 and other "applicable law." But the applicable law is clear: pursuant to the *TRO*, (and *USTA II*, which upheld the FCC's rules regarding enterprise switching and its conclusions regarding section 271), SBC Illinois is not required to provide unbundled access to enterprise switching, and is not required by section 271 to provide such access on section 251 UNE rates, terms, and conditions. This law must be reflected in the parties' *TRO* contract amendment, as SBC Illinois' proposed language does.

XO's proposed language also violates federal law regarding a waiver of the FCC's non-impairment finding with respect to enterprise switching. The FCC held that, while state commissions may investigate impairment with respect to enterprise switching and petition the FCC for a waiver of its non-impairment finding, an ILEC is not required to provide unbundled access to enterprise switching unless "the [FCC] grants such waiver." FCC Rule 319(d)(3). XO's proposal that the state commission investigation itself, and the FCC's consideration of any state commission petition, act as a waiver of the FCC's non-impairment finding is unlawful, and must be rejected. (XO's proposed language regarding the transition for enterprise switching arrangements where enterprise switching is no longer required to be unbundled should be rejected for the same reasons discussed above under Issue SBC-2.) SBC Illinois' proposed contract language, on the other hand, properly tracks and implements the FCC's waiver rule, and thus should be adopted.

XO's proposed mass market switching contract language should also be rejected, because that language is unsupported by the FCC's rules. XO's proposed language fails to recognize that the FCC's rules requiring the unbundling of mass market switching have been vacated. SBC Illinois' proposed mass market switching language appropriate accounts for this fact, and would come into play only if the FCC were to re-institute such an unbundling requirement. Thus, SBC Illinois' proposed mass market switching language should be adopted. Moreover, as explained above, the Commission should reject XO's unlawful suggestion that the Commission should require SBC Illinois to continue providing non-UNEs at the same rates, terms, and conditions as UNEs pursuant to section 271.

XO's proposed definition of tandem switching also violates federal law, by failing to recognize that SBC Illinois is required to provide unbundled tandem switching only where it is required to provide unbundled switching. SBC Illinois' proposed language, on the other hand, properly reflect this federal law.

Finally, the Commission should adopt SBC Illinois' proposed language regarding the provision of unbundled shared transport. That language properly implements FCC Rule 319(d)(4) by providing, like FCC Rule 319(d)(4), that SBC Illinois is required to provide unbundled shared transport only where it is required to provide unbundled switching.

b.) <u>XO</u>

While XO is predominately a facilities based carrier in Illinois and generally does not use unbundled switching and shared transport, it does not object to including language that reflects changes made by the *TRO* to the provision of unbundled switching and shared transport. XO's proposed language has several advantages over SBC's proposed language. First, XO's proposed language explicitly recognizes that unbundling obligations for these elements may exist under Section 271 of the Act or state law provisions, not just Section 251 of the Act, and that these obligations continue even when unbundling is no longer available under Section 251. Second, XO's proposed language would ensure that customers that could not be migrated from UNE-

P to a UNE loop serving arrangement for technical reasons would continue to have competitive options.

In addition, XO's proposed language, consistent with existing change of law procedures, starts the clock for the time period for the transition away from Section 251 unbundled switching upon a final and non-appealable finding of non-impairment. Further, XO's proposed language would allow the parties to mutually agree on whether the interconnection agreement should be modified to reflect the implementation plan to transition away from Section 251 unbundled local switching or shared transport. In contrast, SBC's proposed language would bar amending the interconnection agreement to reflect the implementation plan.

Finally, SBC's proposed language has a number of provisions that are unnecessary and objectionable. For instance Section 3.7.3.4 and 3.7.3.5.2 would obligate XO to "disclose information, including customer account information sufficient for SBC to make determinations under, and apply, the Enterprise Market Customer provisions." It is not clear why such a provision is necessary. SBC would be providing the switching and loops, so it should have all the information it needs to determine whether the CLEC's customer is an enterprise customer and subject to the enterprise market provisions.

c.) Staff

XO finds SBC's proposed language regarding when ULS becomes unavailable for mass market switching to be "confusing." XO has failed to identify specifically which SBC proposed language it finds confusing. Thus, not knowing exactly what SBC proposed language XO finds objectionable, Staff nonetheless offers the following comments. First, the Staff finds all of SBC's proposed language regarding "Lawful UNEs" objectionable for all of the reasons articulated above in XO Issue 2 and SBC's Issues 1 and 2. Second, SBC's proposed language seems to be entirely based upon TRO related determinations, ignoring any independent obligations SBC may have under Section 271 (at cost-based rates) or under Illinois law. The Staff hopes that this issue is further fleshed out in the parties' respective Initial Briefs; in which case Staff will respond with further comments.

2. Analysis and Conclusions

The purpose of this arbitration is to incorporate the viable provisions of the TRO into the parties' ICA. Regarding mass market local switching and dedicated transport, the *Status Quo* Order directs the ILECs to continue supplying those UNEs under the rates, terms and conditions in their existing ICAs. Accordingly, TRO modifications concerning mass market local switching and dedicated transport should not be included in the ICA.

Regarding enterprise switching and shared local transport, which are not addressed by the *Status Quo* Order, XO identified four areas of dispute in the

"Summary XO Illinois, Inc., Arbitration Positions[57]" ("Position Summary") filed in conjunction with XO's Initial Brief as Attachment 1, pursuant to a directive of the ALJ. The ALJ had advised the parties that only positions included in their Position Summaries would be considered in this proceeding. Accordingly, we will consider only the matters raised in XO's Position Summary regarding SBC Issue 7[58].

First, we agree with XO that the amended ICA should recognize any unbundling obligation imposed by Section 271 of the Federal Act. As we held previously in this decision, the TRO declares that Section 271 creates an unbundling requirement that is distinct from the Section 251 requirement, TRO ¶ 653, although 271 UNEs need not be TELRIC priced. TRO ¶ 659. Any state-required unbundling should also be accounted for in the ICA.

Second, XO's concern for customers that cannot be migrated from UNE-P due to "technical reasons," XO Init. Br. at 45, must be balanced against SBC's concern that XO might take advantage of the general term "impediment" (the term in XO proposed Section 3.7.2.3) to improperly retain TELRIC pricing. SBC Reply Br. at 55. "Impediment" should either be replaced with specifically identified "technical difficulties" or deleted altogether. We observe that this issue concerns circumstances that will arise only after this Commission has made a non-impairment finding regarding mass market switching under Section 251 of the Federal Act. To the extent that it would be inconsistent with the Status Quo Order (whether during the Interim Period or the Transition Period described in that order) we cannot make such a finding

Third, regarding enterprise switching, we reject XO's proposal to begin the transition from Section 251 unbundled switching only after a final, non-appealable finding of non-impairment. As SBC states, its obligation to unbundle such switching arises only after a finding of *impairment*. 47 CFR 51.319(d)(3). Furthermore, the "final, non-appealable" requirement is unsupportable in its own right, for reasons articulated previously in this Decision.

Fourth, the Commission rejects SBC's demand for "customer account information" for the purpose of identifying enterprise market customers. That would compromise customer privacy and cause XO to disclose competitively sensitive information. The parties are free to agree on another means for assuring that enterprise market customers are being lawfully served.

8. What terms and conditions should apply to call related databases, LIDB and CNAM?

[57] This document was subsequently revised, with the ALJ's permission. With respect to SBC Issue 7, the versions are identical.

[58] The parties, in fact, adopted opposing stances on several other matters generally related to SBC Issue 7, in most instances on a gradual basis as briefing proceeded. We will not address those disputes, which were neither properly framed as open issues in the Petition or Response, nor even necessarily implied by SBC Issue 7 as framed.

1. Parties' Positions and Proposals

a). SBC

Issue SBC-8 concerns the provision of call-related databases. The language to which XO objects is this: "Access to call-related databases LIDB [line information database] and CNAM [Caller Name with ID database], for SBC-Illinois will be provided as described in the following Appendices: LIDB and CNAM-AS, LIDB, and CNAM Queries." SBC Ill. Section 3.9.1. XO has not articulated any objection to this language, which merely specifies that SBC Illinois will provide access to LIDB and CNAM as provided for in the relevant appendices of the agreement, and SBC Illinois can discern none. SBC Illinois' language is reasonable and appropriate, and should be adopted.

Further, while XO did not originally designate this issue for arbitration, XO subsequently presented its own competing language for arbitration (in its response to SBC Illinois' response to the arbitration petition). XO's language should be rejected. XO proposes that SBC Illinois be required to continue providing call-related databases at sections 251 UNE rates, terms, and conditions as an obligation under section 271 of the Act. XO Sections 3.9.2.1, 3.9.2.2. As SBC Illinois explained previously, that proposal violates the FCC's holding that section 271 checklist items do *not* have to be provided on such terms, and, in any event, this Commission lacks jurisdiction to address the issue of section 271 rates, terms, and conditions.

b.) XO

XO does not use SBC's call related databases in conjunction with the provision of facilities-based services. However, XO does not object to including the *TRO* requirements regarding the ILEC provision of access to its call related databases in connection with the provision of UNE-P. As such, XO proposes language consistent with the *TRO* for access to call related databases for UNE-P.

c.) Staff

The Staff offers no opinion or comment on this issue, as it appears that XO does not object to SBC's proposed language. Joint Issues Matrix, at 94.

2. Analysis and Conclusions

This is another improperly framed issue. Again, the Commission is not presented with an open and two-sided dispute, but, instead, SBC's request to consider the general subjects of call-related data bases, LIDB and CNAM.

Additionally, XO's Position Summary merely refers the Commission to its proposed text, and identifies no disputed questions and stakes out no positions. This presumably reflects the fact that XO does not use SBC's call-related databases in connection with its facilities-based operations. In any event, XO's proposed text does not "speak for itself" with respect to identifying disputes or supporting arguments, and it

is not the Commission's responsibility to cull that text to discern what the disputed language might be. Therefore, pursuant to the directions of the ALJ regarding Position Summaries, there are no XO arguments for us to consider.

Accordingly, the Commission will make no ruling with respect to SBC Issue 8, except to hold, for the sake of consistency, that principles and conclusions articulated elsewhere in this Decision are applicable here as well. Specifically, Section 271 obligations should be accounted for in any amended ICA provisions pertaining to call-related data bases, LIDB and CNAM, with the understanding that TELRIC prices are not associated with Section 271 under federal law.

9. What terms and conditions should apply to SS7?

1. Parties' Positions and Proposals

a). <u>SBC</u>

Issue SBC-9 concerns implementation of the *TRO*'s new requirements with respect to unbundled access to signaling networks. While in the *UNE Remand Order* the FCC had concluded that CLECs are entitled to unbundled access to signaling networks, it modified that conclusion in the *TRO*. The FCC found that "competitive LECs are no longer impaired without access to such networks," except where the ILEC must "provide access to switching as a UNE," because "there are sufficient alternatives in the market." *TRO*, ¶ 544. Thus, except for where an ILEC must provide switching as a UNE, the FCC "reject[ed] the claims of competitive carriers that signaling networks should remain available as UNEs," and held that "we are no longer requiring incumbent LECs, pursuant to section 251(c)(3), to provide unbundled access to their switching networks." *Id.*, ¶¶ 546, 548. The FCC codified its new requirements in FCC Rule 319(d)(4)(i).

To implement this new FCC rule, SBC Illinois proposes language stating that it "will provide SS7 signaling on interswitch calls originating from a Lawful UNE ULS port," but that "[a]ll other use of SS7 signaling is pursuant to the applicable Access tariff." SBC Ill. Section 3.11.1. XO has not articulated its objection to this language, which is clearly necessary to implement the new requirements of the *TRO*, and thus SBC Illinois' proposed language should be adopted. The FCC held that CLECs are entitled to access signaling networks as a UNE only where an ILEC is required to provide switching as a UNE, and this holding must be reflected in the parties' *TRO* contract amendment.

While XO did not originally identify this as an issue for arbitration, XO subsequently presented competing contract language to govern the provision of unbundled access to signaling networks. XO's language is unlawful, and must be rejected. In particular, XO proposes that SBC Illinois be required to continue providing signaling networks at sections 251 UNE rates, terms, and conditions as an obligation under section 271 of the Act. XO Section 3.11.2.1. As SBC Illinois explained previously, that proposal violates the FCC's holding that section 271 checklist items do

not have to be provided on such terms, and, in any event, this Commission lacks jurisdiction to address the issue of section 271 rates, terms, and conditions.

b.) XO

XO does not use SBC's SS7 in conjunction with its provision of facilities-based services. However, XO does not object to including the *TRO* requirements regarding the ILEC provision of access to SS7 in connection with its provision of UNE-P. As such, XO proposes language consistent with the *TRO* for access to SS7 for UNE-P.

c.) Staff

SBC contends that its proposed language for SS7 signaling for interswitch calls originating from a lawful UNE ULS port tracks the TRO requirements. Again, as noted repeatedly above, Staff objects to SBC's entire "Lawful" theory and SBC's proposed accompanying language implementing the SBC "Lawful" theory. Staff, however, does acknowledge that the TRO, as SBC contends, found that CLECs are no longer impaired without unbundled access to an ILEC's signaling networks, unless they are purchasing switching as a UNE.

XO, apparently, does not take specific issue with SBC's proposed language as it is primarily a facilities-based carrier and, thus, does not use SBC's call-related databases. XO, nonetheless, offers its own proposed language, which it contends is consistent with the TRO requirements. In addition to the language XO proposes its section 3.11.2.1 (Signaling Networks), which would obligate SBC to provide access to signaling under its switching unbundling obligations (if any), the Staff points out that SBC is also required "to provide for interconnection between their signaling networks and the signaling networks of alternative providers" under its obligations "pursuant to Sections 251(a), 251(c)(2) and our [FCC] rules implementing these requirements." TRO, ¶ 548.

2. Analysis and Conclusions

The Commission's comments and conclusions regarding SBC Issue 8 are fully applicable here. Therefore, they will constitute our comments and conclusions respecting SBC Issue 9 as well.

10. What terms and conditions should apply to the Advanced Intelligent Network (AIN)?

1. Parties' Positions and Proposals

a). SBC

Issue SBC-10 concerns implementation of the *TRO*'s new requirements with respect to unbundled access to the Advanced Intelligent Network ("AIN"). In the *TRO*,

the FCC modified its rules regarding unbundled access to AIN. In the *UNE Remand Order*, the FCC had found that ILECs "were required to provide unbundled access to AIN platform and architecture," but not "AIN service software." *TRO*, ¶ 556. In the *TRO*, however, the FCC "conclude[d] that the market for AIN platform and architecture has matured since the [FCC] adopted the *UNE Remand Order* and we no longer find that competitive LECs are impaired without unbundled access to those databases." *Id.* Thus, the FCC "no longer require[s] incumbent LECs to unbundle access b the AIN databases for carriers not using the incumbent LEC's switching capabilities." *Id.* n.1724. The FCC codified this holding in FCC Rule 319(d)(4)(i).

To implement this new FCC rule, SBC Illinois proposes new contract language that states that the provisions of the agreement relating to the provision of AIN apply only when the CLEC is providing service using unbundled switching. SBC Ill. Section 3.12.1. XO has not articulated any objection to SBC Illinois' proposed language, which is clearly necessary to implement the new requirements of the *TRO*, and thus SBC Illinois' proposed language should be adopted.[59]

b.) XO

XO does not use SBC's call related databases including its AIN databases in conjunction with its provision of facilities based services. XO does not object to including the *TRO* requirements regarding the ILEC provision of access to AIN provided in connection with its provision of UNE-P. As such, XO proposes language consistent with the *TRO* for access to AIN for UNE-P.

c.) Staff

Again, because XO is primarily a facilities-based carrier, it has not objected specifically to SBC's proposed language for AIN services, but instead proposes the same language that it proposes for SBC Issue 9 that it contends is consistent with the TRO. The Staff, again not knowing exactly what SBC proposed language XO takes issue with, offers just a few comments. First, Staff, notes that the TRO, as SBC contends, found that CLECs are no longer impaired without unbundled access to its AIN platform. TRO, ¶ 566. Second, as noted repeatedly above, Staff objects to SBC's entire "Lawful" theory and SBC's proposed language implementing the SBC "Lawful" theory. Finally, the Staff would agree with XO that SBC could have independent obligations (*e.g.*, under section 271) to provide access to its AIN platform.

2. Analysis and Conclusions

[59] XO proposes language under SBC Issue-9 to the effect that SBC Illinois is required to provide unbundled access to all call-related databases (including AIN) on section 251 rates, terms, and conditions pursuant to section 271. XO Section 3.9.2.1. As SBC Illinois has explained, that proposal is both unlawful and beyond this Commission's jurisdiction.

The Commission's comments and conclusions regarding SBC Issue 8 are fully applicable here. Therefore, they will constitute our comments and conclusions respecting SBC Issue 10 as well.

11. (a) Does the TRO provide that a CLEC may pick and choose between its ICA and any SBC tariff?

(b) Should the ICA terms and conditions, including those of the TRO Amendment, prevail over SBC's tariffs?

1. Parties' Positions and Proposals

a). SBC

XO inappropriately proposes to give itself a unilateral right to pick and choose between provisions of the parties' interconnection agreement and any SBC Illinois tariffs, at its sole option. SBC Illinois does not have the right to unilaterally decide that it will ignore the parties' interconnection agreement and instead provide service pursuant to the terms of a tariff, and XO should not have such a right either. The Federal Act provides that interconnection agreements are to be the "binding" statement of the parties' respective rights and obligations, and both parties should be held to the terms of their binding interconnection agreement. Moreover, the Seventh Circuit (and other courts) has held that state commissions may not "create an alternative method by which a competitor can obtain interconnection rights" through tariffs outside the section 252 process. Wisconsin Bell, Inc. v. Bie, 340 F.3d 441, 442-45 (7th Cir. 2003). *See also* Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n, 359 F.3d 493, 496-98 (7th Cir. 2004). The Commission should reject XO's proposal to bypass the detailed, comprehensive interconnection agreement scheme created by Congress by establishing a right to unilaterally evade its interconnection agreement rights and obligations.

b.) XO

(SBC-11a). In general, it is well established that, to the extent that a CLEC orders from a tariff or SGAT, the terms and conditions of that tariff or SGAT apply. SBC proposes here to prohibit a CLEC from its right to order from a tariff or SGAT, where the CLEC has an interconnection agreement with SBC.

Nothing in the law restricts a CLEC from ordering out of a tariff if a CLEC has an agreement with the ILEC. Although courts have held that a state commission may not ignore the detailed process for negotiation and arbitration of interconnection agreements in the Act by requiring ILECs to offer network elements and services through published tariffs, the courts have *not* prohibited CLECs from, at their option, ordering services or elements out of tariffs, which would effectively "amend" existing interconnection agreements. *See* US West Communications, Inc. v. Sprint Communications Co., 275 F.3d 1241 (10th Cir. 2002). Moreover, to the extent that a provision in an interconnection agreement allows a CLEC to purchase services out of a tariff, courts have recognized that the "challenged provision does not eliminate

interconnection agreements, but rather is part of one. A decision by [the competitor] to purchase services at the rates and terms set forth in one or more of [the ILEC's] tariffs does not result in abandonment of the interconnection agreement between itself and [the incumbent]." *Id.* at 1251. Thus, where a provision in an agreement allows a CLEC to opt-into tariff services or elements in addition to the agreement, such provision is not unlawful; nor inconsistent with the Act. *Id.* at 1252.

(SBC 11-b). As discussed above, XO's position is that the terms and conditions of its interconnection agreement with SBC should govern – unless XO orders a facility or service out of the tariff, in which case the tariff governs. SBC's proposed language would have the tariff terms and conditions take precedence over the Parties' Agreement, even with respect to terms and conditions that are not specific to tariffed services. Such a proposal would undermine the effectiveness of Commission-approved interconnection agreements and is wholly improper.

c.) Staff

This issue appears to have been overtaken by a recent FCC order which abolishes the FCC's pick and choose" rule.

While the change to the so-called "pick and choose" rule applies specifically to a carrier's right to opt into some or all of another carrier's interconnection agreement with an ILEC, the same essential logic holds. A carrier may not "pick and choose" individual provisions out of another carrier's interconnection agreement.

XO claims that it "is not asserting that it can pick and choose between an ICA or a tariff, but simply asserting that if it orders from a tariff or SGAT, the terms and conditions of the tariff or SGAT apply." XO further "does not agree that SBC may restrict or prohibit a CLEC from ordering out of any SBC tariff." The XO proposal appears to permit XO to "at [its] option, order from a [sic] SBC-13STATE tariff or SGAT."

The Staff does not endorse XO's argument. It is true that several carriers have concluded interconnection agreements pursuant to which they may order certain UNEs at tariffed rates, but such provisions are incorporated into the interconnection agreements, not in derogation of them. XO's proposal would entitle XO to take services under its interconnection agreement, or from the tariff, at its election. This proposal cannot be reconciled with the existing law, and Staff recommends its rejection.

2. Analysis and Conclusions

In a June 3, 2004 Ruling, at page 7, the ALJ determined that the scope of this arbitration was limited by the scope of the parties' negotiations, per Coserv Limited v. Southwestern Bell Telephone, 350 F.3d 482 (5th Cir. 2003), and that their negotiations had been limited to amending the ICA "to incorporate changes necessitated by the TRO." The Commission concurs with SBC that the disputed language in XO's proposed Section 1 to the Cover Amendment "has nothing to do with the TRO." SBC Init. Br. at 84. XO is seizing an opportunity presented by the amendment process to seek a

contract provision that it presumably believes advantageous. That provision, however, is unrelated to the contents (much less the requirements) of the TRO. Moreover, XO's supporting arguments do not address the actual issue framed by SBC ("Does *the TRO provide*...[for a pick-and-choose regime]"). (Emphasis added.) Our ruling, therefore, is that because XO's proposed text is outside the boundaries of this arbitration, we can neither require nor preclude its inclusion in the ICA.

Similarly, some of SBC's proposed contract language is also outside the scope of this proceeding. Specifically, the reference to SBC tariffs and SGAT in the second sentence of SBC's proposed Section 1 neither addresses incorporation of the TRO into the ICA, nor the effect of that incorporation, through the TRO amendment, on the pre-existing provisions of the ICA. Rather, that language addresses the relationship between the ICA and SBC's public offerings to qualified buyers of its services. Accordingly, SBC's proposed language is approved, but without the words "SBC tariff or an SBC-13STATE Statement of Generally Available Terms and Conditions ('SGAT')" in the second sentence.

12. (a) Should the cover amendment clarify how the terms and conditions of the amendment replace the terms and conditions of the underlying agreement?

(b) Should the cover amendment reserve both parties' rights with respect to "remedies and arguments with respect to any orders, decisions, legislation or proceedings?"

1. Parties' Positions and Proposals

a). SBC

Sub-issue 12(a) concerns additional language proposed by SBC Illinois that provides examples of how particular conflicts between the parties' original contract and the *TRO* amendment should be resolved. XO claims that this language is "confusing." But this language is not confusing at all, and appropriately sets forth the proper resolution of conflicts between the original agreement and the *TRO* amendment. For instance, XO should not be able to nullify the parties' *TRO* amendment by asserting that conflicting provisions of the original contract still apply merely because they still physically appear in the parties' contract. Moreover, XO has raised no objection to the substance of SBC Illinois' proposed language, in that XO does not disagree with SBC Illinois' explanation of how various conflicts should be resolved. Thus, SBC Illinois' proposed language should be adopted.

Sub-issue 12(b) concerns certain reservation of rights language proposed by SBC Illinois. Non-waiver of rights clauses are common in interconnection agreements, and even XO has proposed such provisions for the parties' *TRO* amendment. XO has not explained its objection to SBC Ilinois' proposed language, which equally protects both parties. SBC Illinois' language is reasonable, and should be adopted.

b.) XO

(SBC-12a). XO's proposed language unambiguously provides how the terms and conditions of the amendment amend or replace the terms and conditions in the underlying Agreement. SBC's proposed language, however, is confusing, inappropriate, and in conflict with the *TRO*. As discussed above, to the extent that SBC proposes language in the Amendment that would replace or modify change in law provisions of the XO/SBC ICA and/or condition SBC's obligation to provide UNEs to those that it defines as "Lawful UNEs," or "declassified UNEs," it conflicts with the *TRO*.

(SBC-12b). There is no need for parties to reserve their rights with regard to remedies and arguments. As a matter of law, both parties have such rights and the proposed language by SBC is simply superfluous, as well as ambiguous.

c.) Staff

(SBC-12a). This sub-issue essentially boils down to a rehashing of SBC Issue No. 1. For the reasons articulated under SBC Issue 1, Staff recommends that the Commission reject SBC's proposed language that would override the section 252 process and allow SBC to unilaterally change the ICA to reflect its interpretation of any potential change of law regarding its obligations to provide requesting CLECs UNEs. Moreover, XO correctly perceives SBC's proposal to be an attempt to use a change of law to negotiate an alteration in the existing "change of law" provision, in a manner that would permit SBC to unilaterally abrogate UNE unbundling obligations. The *TRO* specifically contemplates the use of existing change of law provisions to negotiate conforming changes pursuant to the TRO. *See, e.g.,* TRO, ¶¶700, 704 (FCC recognizes existing cha nge of law provisions). In other words, the TRO is itself a change of law, but not one that has any effect upon change of law provisions. SBC's attempt to bootstrap a change in the change of law provision should be rejected. On balance, Staff favors XO's proposal.

(SBC-12b). Sub-issue (b) appears to be a non-issue as XO has not objected to it, at least in its Preliminary Position. Joint Issues Matrix, at 97-98. Because there appears to be no issue here, Staff will refrain from commenting but, rather, reserves its right to respond to the parties' respective Initial Briefs.

2. Analysis and Conclusions

SBC-12a. The Commission concurs with Staff and XO that all of the examples included in SBC's proposed Section 2 should be excluded from the Cover Amendment[60]. Staff Init. Br. at 103; XO Reply Br. at 65. We have already rejected SBC's proposed use of the term "lawful" with respect to UNEs, for the reasons previously explained. Moreover, we also find that the examples are superfluous, since

[60] So that there is no ambiguity about our ruling here, we note that the pricing example in the last sentence of Section 2 must be excluded with the other examples in the section.

the general - and undisputed - language that precedes them clearly states that the amendment supercedes provisions of the original ICA.

On exceptions, SBC requests that this decision "should be clarified to avoid any suggestion that the parties must continue to adhere" to pre-existing ICA provisions that no longer reflect the new requirements mandated by the modified TRO. SBC BOE at 2. The Commission does not perceive the need for such clarification. As we said in the preceding paragraph, SBC's proposed Section 2 unequivocally declares that the amendment both revises and trumps the present content of the ICA. SBC's proposed Section 1, discussed in connection with SBC Issue 11, above, similarly establishes the primacy of the amendment. Additionally, we have now approved, in connection with SBC Issue 2, a (properly modified) list of specific SBC services that the TRO has freed from a federal unbundling requirement. Nothing more is needed.

The penultimate sentence of SBC's proposed Section 3, which would obviate physical removal or replacement of portions of the original ICA, is reasonable and neutral. XO articulates no rationale for opposing it. It should be included in the Cover Amendment. We reach the same conclusion with respect to SBC's proposed Section 10, for the same reasons.

SBC-12b. Although the Commission shares XO's and Staff's doubts about the necessity of SBC's proposed non-waiver provision, we find the initial portion of the first sentence[61] in SBC's proposed Section 11 is an acceptable mechanism for emphasizing the absence of waiver. The remainder of Section 11 is disapproved. The lengthy list of "Government Actions" is unnecessary, and the declaration that those actions have not yet been fully incorporated into the ICA only creates contract ambiguity - in contradiction to SBC's purported intention to provide "commercial certainty" for the parties via the agreement. SBC Init. Br. at 82.

13. What will happen if the TRO is stayed, reversed or vacated?

1. Parties' Positions and Proposals

a). <u>SBC</u>

SBC Illinois' proposed language appropriately specifies what should occur upon a remand (but not a reversal) of portions of the *TRO*. Specifically, in the case of such an event, it is appropriate to maintain the affected portions of the parties' agreement in effect, unless those portions are otherwise rendered invalid or modified by a change of law or UNE declassification event. XO's contrary proposal to simply freeze the contract without regard to changes in law or UNE declassifications is improper, and should be rejected.

[61] That is, from the beginning of the first sentence ("In entering...) through the end of the first substantive parenthetical ("...this Amendment").

XO's proposed language regarding a stay, or reversal and vacatur, of the *TRO* should be rejected. XO's proposal would appear to give XO unilateral authority to determine the legal effect of such an event upon the parties' contract, and unilateral authority to determine which parts of the contract it will comply with, and which it will not. That proposal is unreasonable.

b.) XO

As a practical matter, it is premature to adopt any language related to USTA II. As XO noted in its Motion to Withdraw the Petition ("Withdrawal Motion"), the FCC recently announced that it would, within the next few weeks, promulgate interim rules in the wake of the issuance of the D.C. Circuit's decision in USTA II. It would be a waste of the parties and the Commission's resources to arbitrate this issue because the FCC's interim UNE rules will soon supersede the vacated *TRO*.

SBC's proposed language would maintain provisions of the Amendment in the event of a vacatur of the *TRO*, including its proposed Section 1.3, which provides that it will not provide UNEs that are not "Lawful UNEs" or "declassified UNEs." Thus, SBC could potentially argue that the issuance of USTA II allows it no longer to provide certain UNEs. Such a proposal would be improper and inconsistent with the Act, the FCC's rules and orders, the FCC's intention to issue interim rules soon, and this Commission's past decisions. As discussed above, SBC has the obligation as a matter of federal and state law to provide UNEs, and cannot unilaterally discharge itself of this obligation. Accordingly, XO believes that, in the event of a stay, reversal or vacatur of the *TRO*, consistent with the law and the FCC's intent to issue interim rules, SBC should continue to provide UNEs under the Agreement.

In addition, SBC's proposed language would authorize SBC to discontinue provisioning of UNEs upon vacatur of the *TRO*. As discussed in the context of other issues, such a proposal is wholly improper. The unavailability of any UNE should be the result only of negotiations and arbitration specific to that UNE, not a generic provision that automatically incorporates SBC's interpretation of future events. The *TRO* condemns unilateral action by any party, and holds that, "as contemplated in the Act, individual carriers will have the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment." *TRO* at ¶ 15. When rules are issued, as opposed to the opportunistic and self-effectuating provisions SBC seeks, both parties are entitled to negotiate to interpret the rules. "[M]odification of existing agreements...cannot be accomplished overnight" and future rules that affect the interconnection agreement must be negotiated or arbitrated prior to implementation. *Id.* at ¶ 700.

c.) Staff

There appears to be no real difference between the parties' positions. However, SBC's "Lawful UNEs" list, which it proposes it should be permitted to change unilaterally, might, if adopted, affect this issue. Moreover, SBC's proposed contract

provisions appears to result in changes of law as defined becoming effective without subsequent negotiation. For this reason, the Staff favors XO's proposal.

2. Analysis and Conclusions

The Commission finds that this issue, as worded, has been mooted by the termination of the stay of vacatur in USTA II, and by the FCC's choice to issue interim rules pertaining to specified UNEs in the *Status Quo* Order. Wherever it has been pertinent, our findings and conclusions in this Decision have incorporated the fact that portions of the TRO have been reversed or vacated. Accordingly, we have given effect to those elements of the TRO that have not been vacated, and not given effect to vacated elements. Thus, nothing in SBC's proposed Section 5.b needs to be included in the amended ICA.

XO's proposed text is similarly unnecessary. Its proposed "option" would arise only after vacatur, and vacatur has already been taken into account in our analysis and rulings here. With regard to the non-waiver language in XO's prefatory text (which, ironically, would be "superfluous" under XO's arguments respecting SBC Issue 12), having found SBC's similar provision acceptable (under SBC Issue 12), we reach the same conclusion here[62].

We note that the proposed texts of the arbitrating parties account for the possibility that U.S. Supreme Court action could affect USTA II and, by extension, the TRO. In our view, any such action by the Supreme Court would now constitute a change of law that would have to be incorporated into the ICA, as appropriate, through the existing change-of-law provisions.

14. Should SBC be required to report and pay performance measures when a UNE is declassified?

1. Parties' Positions and Proposals

a). SBC

SBC Illinois' performance measures plan and remedies, previously approved by the Commission, is intended to ensure that SBC Illinois satisfies its obligations regarding the provision of UNEs to competitors. To the extent a network element is no longer a section 251 UNE, that plan and those remedies no longer apply. SBC Illinois' proposed language, which makes this consequence of UNE declassification expressly clear, is thus reasonable and appropriate, and should be adopted. Moreover, as explained above, the Commission should reject XO's unlawful suggestion that the Commission should require SBC Illinois to continue providing non-UNEs at the same rates, terms, and conditions as UNEs pursuant to section 271.

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[62] If it chooses, XO is free to abandon this provision in the final text of the parties' amended ICA.

b.) XO

As an initial matter, for the same reasons discussed above, XO disagrees with SBC's definition of "declassified" UNEs and "lawful UNEs." Furthermore, nothing in the *TRO* relieves SBC of its obligation to meet performance measures and pay penalties, simply because a UNE is no longer required to be unbundled under Section 251. SBC still must provide nondiscriminatory service under the Act, and comply with its Section 271 requirements, which include performance measures and penalties. Accordingly, SBC's proposed language is inappropriate and XO's language should be incorporated into the Amendment.

c.) Staff

SBC's characterization of this issue is almost completely inaccurate. SBC is obliged, under the Commission's Section 271 Order, to continue to pay performance remedy penalties. The whole purpose of a performance remedy plan is to make certain that a regional Bell operating company (hereafter "RBOC") continues to keep its market open after it receives authority to provide interexchange service under Section 271 of the federal Telecommunications Act of 1996. SBC is obligated by its existing performance remedy plan, approved by the Commission in its Section 271 Orders.

2. Analysis and Conclusions

The Commission rejects SBC's proposed Section 7. It is an attempt to remove Section 271 network elements from the operation of the performance remedy plan adopted in connection with SBC's long distance approval under Section 271 (insofar as that plan is identified in the parties' ICA). As Staff aptly states, the performance remedy plan is a "Commission-approved bulwark against SBC's potential failure to honor its market-opening obligations after receiving Section 271 authority." Staff Reply Br. at 39.

SBC's contention, at SBC Reply Br. at 65, that network elements are fundamentally different under, respectively, Sections 251 and 271, is incorrect in the context of the performance remedy plan. That plan is intended to create disincentives to SBC failure to perform its pro-competitive obligations, irrespective of the specific statute, regulation or order that imposes any particular such obligation.

V. GENERAL APPLICATION OF THE STATUS QUO ORDER

In addition to its specific impact on certain issues in this arbitration, the Status Quo Order is also generally applicable to the parties and must be reflected in their ICA. Its salient provisions are associated with the Interim Period and Transition Period previously discussed here, and with a "Post-Transition Period" also defined in that order. The Interim Period will last for six months, unless the FCC issues final unbundling rules before that time. During that six-month period, existing ICA terms for mass market switching, dedicated transport and enterprise loops can only be superseded by voluntarily negotiated agreements, FCC orders specifically addressing

those UNEs, or state commission orders raising UNE rates. Either of the latter two events would constitute a change of law that should be addressed by the ICA's change-of-law processes.

The Transition Period covers the six months immediately following termination of the Interim Period. However, there will be no Transition Period for any of the aforementioned UNEs that the FCC determines should continue to be available under Section 251 of the Federal Act. But without such a determination, the following directives apply:

> First, in the absence of a Commission ruling that switching is subject to unbundling, an incumbent LEC shall only be required to lease the switching element to a requesting carrier in combination with shared transport and loops (*i.e.*, as a component of the "UNE platform") at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of this Order, for this combination of elements plus one dollar. Second, in the absence of a Commission ruling that enterprise market loops and/or dedicated transport are subject to section 251(c)(3) unbundling in any particular case, an incumbent LEC shall only be required to lease the element at issue to a requesting carrier at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for that element on June 15, 2004, or (2) 115% of the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of this Order, for that element. With respect to all elements at issue here, this transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates. As during the interim period, carriers shall remain free to negotiate alternative arrangements (including rates) superseding our rules (and state public utility commission rates) during the transition period. Subject to the comments requested in response to the above NPRM, we intend to incorporate this second phase of the plan into our final rules.

Status Quo Order, ¶ 29.

The foregoing transitional unbundling and pricing requirements should be incorporated into the SBC/XO ICA through the instant amendment. As a result, these requirements will not constitute changes of law when they occur. Similarly, it would not be a change of law if the FCC, in its final rules, determines that its unbundling requirements for a pertinent UNE will remain as they are presently. Any other future FCC or state requirement affecting the relevant switching, loop and transport UNEs may constitute a change of law to be addressed by ICA change-of-law mechanisms.

Additionally, we note that the transitional unbundling and pricing requirements apply only to a CLEC's "embedded customer base" and not to new customers. *Id.* Therefore, the law applicable to new customers may change before the law applicable to existing customers, and that change could trigger the ICA change-of-law provisions.

In the Post-Transition Period, the FCC's final rules will determine which UNEs must be unbundled and establish the terms and conditions for unbundling. "The specific process by which those rules shall take effect will be governed by each [ILEC's ICAs] and the applicable state commission's processes." *Id.* Presumably, if the substantive provisions of the ICA are inconsistent with the FCC's final rules, ICA change-of-law processes will apply.

VI. ARBITRATION STANDARDS

Under subsection 252(c) of the Federal Act, the Commission is required to resolve open issues, and impose conditions upon the parties, in a manner that comports with three standards. The Commission holds that the analysis in this arbitration decision satisfies that requirement.

First, subsection 252(c)(1) directs the state commissions to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." In this arbitration, the Commission has directed the parties to include provisions in their interconnection agreement that fully comport with Section 251 requirements and FCC regulations.

Second, subsection 252(c)(2) requires that we "establish any rates for interconnection, services or network elements according to subsection [252(d)]." Here, most of the pertinent rates were already established by the parties through mutual agreement. Insofar as the Commission's resolution of open issues will affect those or other rates in the parties' interconnection agreement, we require, and expect the parties to establish, rates that are in accord with subsection 252(d) of the Federal Act.

Third, pursuant to subsection 252(c)(3), the Commission must "provide a schedule for implementation of the terms and conditions by the parties to the agreement." Therefore, the Commission directs that the parties file, within 25 calendar days of the date of service of this arbitration decision, their complete interconnection agreement for Commission approval pursuant to subsection 252(e) of the Federal Act.

By Order of the Commission this 9th day of September, 2004.

(SIGNED) EDWARD C. HURLEY

Chairman