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<sup>1</sup>(“TRRO”).” SBC IB at 2. SBC urges the Commission to “not permit CLECs to interfere with implementation of clear federal unbundling policy.” SBC also cites as support for its position “a consensus among state commissions and federal courts that the TRO Remand Order – by its own terms – becomes effective March 11, 2005 and does not require change of law amendments before it can be implemented.” *Id.*

The CLEC complainants, on the other hand, essentially argue that SBC’s announced intentions to unilaterally implement the TRRO rule changes, regardless of the terms and conditions of existing Interconnection Agreements (“ICAs”) and prior to negotiating conforming amendments to the ICAs, violates the terms of the ICAs, and certain provisions of both federal and state law. See McLeod IB at 2-3; XO IB at 2-3; and Cbeyond IB at 2-3.

This Commission is confronted with difficult issues to decide in this proceeding. First, of course, the Commission is confronted with the daunting task of determining how the Federal Communications Commission (“FCC”) intended to implement the rule changes contained in its TRRO Order. As Staff noted in its Initial Brief (at 16), certain requirements in the TRRO, at least upon cursory review, would appear “less lucid than either side to this debate would allow.” In other words, the TRRO may not be a model of clarity.<sup>2</sup> Staff, however, recommends that the Commission look for guidance to the federal court

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<sup>1</sup> *Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, (Feb 4, 2003) (“TRO Remand Order” or “TRRO”).

<sup>2</sup> The Commission is also faced with the task of making certain determinations based upon language in the ICAs that in certain regards also lack a degree of what would be advantageous clarity.

decisions from the Seventh Circuit<sup>3</sup> that have consistently demonstrated a preference for Section 252 negotiations, as has the FCC itself,<sup>4</sup> as the appropriate method for incorporating rule changes into the terms of existing ICAs, at least to the extent that the language of the ICA itself does not preclude negotiations when implementing such changes. Regarding the “consensus” SBC claims in support of its position, Staff points out that not one of those decisions addressed complaints brought under the Illinois Public Utilities Act (“PUA”).

## **II. THE FCC DID NOT, IN ITS TRRO, UNILATERALLY MODIFY INTERCONNECTION AGREEMENTS**

After reviewing the parties’ respective Initial Briefs, Staff remains convinced that the FCC would not abandon the fundamental principle that “[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and 252” for all the reasons Staff argued in its Initial Brief. Staff IB at 18-22. Staff, consequently, will not re-articulate all of the arguments it made in its Initial Brief. A few points, however, such as the TRRO’s implementation requirements, require reemphasizing.

SBC points to numerous examples of the FCC’s clear language relieving ILECs’ of the FCC’s prior requirement to provide unbundled access to mass

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<sup>3</sup> See *Wisconsin Bell v. Bie*, 340 F.3d 441, 445-46 (7<sup>th</sup> Cir. 2003); *Indiana Bell Tel. Co. v. Indiana util. Reg. Comm’n*, 359 F.3d 493, 497-98 (7<sup>th</sup> Cir. 2004); *Illinois Bell Tel. Co. v. Hurley, et al.*, Cause No. 5-C-1149, Memorandum and Opinion Order, March 29, 2005 at 11-12.

<sup>4</sup> *Triennial Review Order*. See *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 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*, FCC No. 03-36, CC Docket Nos. 01-338 / 96-98 / 98-147 (Adopted: February 20, 2003 Released: August 21, 2003) (hereafter “Triennial Review Order” or “TRO”).

market switching and the UNE-P (“ULS/UNE-P”). The issue, however, is not whether the FCC found no impairment for ULS/UNE-P but, rather, how to *implement* the FCC rule changes contained in the TRRO. As Staff, and the CLEC complainants all noted in their Initial Briefs, the FCC, in ¶ 233 of the TRRO, provided directives on how to implement its rule changes. Staff IB at 19; McLeod IB at 41-49; XO IB at 8-14; Joint CLECs (Cbeyond, et al) IB at 16-20. The FCC concluded, in ¶ 233, which is pointedly titled “Implementation of Unbundling Determinations,” that: “Thus, the incumbent LEC *must* negotiate in good faith regarding *any* rates, terms, and conditions necessary to implement our rule changes” (emphasis added). The FCC’s usage of the word “must” neither means nor implies “may”; nor does the word “any” imply limitations. It is, thus, difficult to accept SBC’s position that ¶ 233 of the TRRO does not require negotiation for rule changes related to new ULS/UNE-P. According to SBC, these rule changes are self-effectuating. SBC IB at 17. SBC ultimately maintains that it need only negotiate the TRRO’s rule changes for network elements covered by the 12 month transition plan.

Further, in response to the complaining CLECs’ ¶233 argument, SBC appears to argue both sides of the issue contemporaneously. See *also* McLeod IB at 47 (“SBC’s position with respect to . . . the TRRO is somewhat schizophrenic.”). On the one hand, SBC acknowledges that “[t]he FCC’s order specifically requires negotiation and amendment of agreements to deal with the *whole* range of new rules [emphasis added], while also maintaining that “the TRO Remand Order contains no such amendment requirement [referring to

amendments for embedded customers] for its rule that competitive LECs may not order *new* unbundled switching (and, where appropriate, loops and transport)” [emphasis in original]. SBC IB at 22.<sup>5</sup> In Staff’s view, the “whole range of new rules” includes the FCC’s no-impairment finding for new UNE-P/ULS.

The FCC, again in ¶ 233, also requires that "the parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order." SBC's argument assumes that this admonishment is directed *only* towards negotiating the rule changes for the embedded class of customers, which are explicitly provided a 12 month transition period. In Staff's view, however, the more logical interpretation is that the FCC's admonishment to not unreasonably delay the implementation of its rule changes is directed towards both the negotiations for “embedded” customers as well as negotiations for "new" customers, which the FCC does not provide a twelve month transition. *See also* Judge Gottshall's order in *Illinois Bell Telephone Company v. Hurley et al.*, Cause No. 5-C-1149, Memorandum and Opinion Order, March 29, 2005 at 12 ("Paragraph 233 of the TRO Remand Order mandates that 'the parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order,' strongly implying that the FCC envisioned

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<sup>5</sup> Curiously, SBC also points out in their Initial Brief that the FCC based its conclusion in the TRRO that CLECs were no longer impaired without access to ULS/UNE-P on inconsistent reasons. Regarding the FCC’s rationale, SBC explains that it reached its ULS/UNE-P impairment conclusions for two reasons. First, SBC explains the FCC “reviewed extensive evidence showing that ‘competitive LECs . . . have deployed a significant, growing number of their own switches,’” and second because “UNE-P has been a disincentive to competitive LECs’ infrastructure investment.” See SBC IB at 9, citing to respectively, TRRO ¶¶ 199, 218. Of course, this is not inconsistent, at least on SBC’s part, because SBC accurately quoted and characterized the FCC’s reasoning.

negotiations as a predicate to implementation of the TRO Remand Order's requirements.").

SBC cites several utility commission decisions and two District Court Decisions in arguing that there is consensus regarding the addition of new customers. SBC Initial Brief, p. 20-22. However, these interpretations of the TRRO are based, in large part, upon a rationale that the bargained-for positions of the parties to the interconnection agreements in question are somehow not “real” obligations, that the obligations are diminished by virtue of the regulatory framework under which they were negotiated. Those jurisdictions holding that the TRRO is “self-effectuating” with regard to the addition of new UNEs arrive at that conclusion by further denigrating the negotiation process long held sacrosanct – reasoning that the agreements within the contracts may be disregarded because they were not “freely negotiated.”<sup>6</sup> Staff disagrees with this rationale, in large part because it disregards important realities of the negotiation process. Arguments that there is now, after the TRRO, “nothing to negotiate” ignore the give-and-take that is the essence of the process.<sup>7</sup> Excising one section of a contract (which may have served as a bargaining chip for another) because the obligations in that section arise *in part* as a “creation of

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<sup>6</sup> In *Bell South v. Mississippi Public Service Commission*, 3:05CV173LN (April 13, 2005), the court found that it need not fully address whether the FCC had jurisdiction to override the contractual provisions in an ICA “given the court’s conclusion that the interconnection agreements are not ordinary private contracts that were freely negotiated between the parties.” FN 9 and pp.13-15.

<sup>7</sup> The Rhode Island Public Utilities Commission adopted a similar “common sense”/pragmatic approach to the issue: “As a practical matter, it is not obvious to us what issues would remain to be negotiated concerning the section 251 UNEs de-listed by the FCC; the FCC has been clear that these UNEs are no longer required to be unbundled under section 251. The end result after going through the step of amending the interconnection agreements will be the same as enforcing the March 11<sup>th</sup> deadline immediately, albeit with some delay.” *Adopting Verizon’s Proposed RI Tariff Filing*, Dkt. 3662 (R.I. PUC March 8, 2005), *cited by Bell South v. Mississippi Public Service Commission*, 3:05CV173LN (April 13, 2005) . Staff submits that this Commission should refrain from imposing its own idea of “practicality” upon parties entirely capable of negotiating the obvious.

federal law” is needlessly disruptive to the negotiation and change of law provisions that the parties voluntarily negotiated and, Staff believes, contrary to the intent of the FCC in its TRRO.

Finally, returning to the issue of whether the FCC would abandon its formerly held preference for “voluntary negotiations,” Staff notes that if the FCC were to abandon its former policy it would be bound to address the change in the TRRO and explain why it was abandoning a prior policy. See *Miner v. FCC*, 663 F.2d 152, 157 (D.C. Cir 1980)(“while agencies may not be bound under the doctrine of *stare decisis* to the same degree as courts, . . . it is at least incumbent upon the agency carefully to spell out the bases of its decisions when departing from prior norms.”); *Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1392 (D.C. Cir. 1976) (“ the Rule of Law requires that agencies apply the same basic standard of conduct to all parties appearing before them” and “thus, if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”).

In the TRRO, the FCC did not *abandon* its preference for voluntary negotiations; rather, it included language that clearly and repeatedly reinforced its preference. In fact, SBC is forced to acknowledge the requirement to negotiate the “whole range” of TRRO rule changes, but then ignores it when reaching its conclusions on how to implementation the new rules for ULS/UNE-P.

### **III. SBC ILLINOIS’ ICAS WITH THE COMPLAINING CLECS**

As Staff noted in its Initial Brief, the question before the Commission is: What effect does the TRRO have on the CLEC complainant’s ability to operate

under the terms of their various ICAs? This question requires the Commission, unlike courts and commissions in the so called “consensus” decisions SBC cites for support, to look to both the terms of the TRRO and the terms of the complaining CLEC’s ICAs with SBC Illinois. See Staff IB at 16, 22. Staff, accordingly turns to the complaining CLEC’s respective ICAs with SBC-Illinois.

**A. SBC Illinois’ ICA with McLeodUSA**

McLeod argues that the ICAs are “binding agreements” between SBC and each CLEC. McLeod IB at 34. Thus, McLeod contends that “the rights and obligations embodied in the ICAs can only be amended according to their terms.” *Id.* Staff agrees.

Staff, however, disagrees with McLeod’s conclusion regarding its interpretation of the specific language contained in the relevant contractual provisions. As McLeod notes in its Initial Brief, Sections 21.1, Intervening Law of Appendix GT&C of the ICA and Section 20.1 of Appendix UNE of the ICA contain “essentially the same text.” See McLeod IB at 36. McLeod also notes that the Fourth Amendment to the ICA, entitled “Amendment Superseding Certain Intervening Law, Compensation, Interconnection and Trunking Provisions contains a “slight modification to the procedures for negotiating amendments to reflect a change of law.” *Id.* at 37. That Fourth Amendment provides, in relevant part, the following:

Except as otherwise set for in Sections 2.2 and 2.3 below[39], if any reconsideration, agency order, appeal, court order or opinion, stay, injunction or other action by any state or federal regulatory or legislative body or court of competent jurisdiction stays, modifies, or otherwise affects any of the rates, terms and/or conditions

("Provisions") in this amendment or the current ICAs or any future interconnection agreement(s), specifically including, but not limited to, those arising with respect to [certain listed court decisions], the affected Provision(s) **will be immediately invalidated, modified or stayed as required to effectuate the subject order, but only after the subject order becomes effective, upon the written request of either Party ("Written Notice")**. In such event, the Parties shall have sixty (60) days from the Written Notice to attempt to negotiate and arrive at an agreement for the appropriate conforming modifications. If the Parties are unable to agree upon the required conforming modifications within sixty (60) days from the Written Notice, any disputes between the parties concerning the interpretation of the actions required or the provisions affected by such order shall be resolved pursuant to the dispute resolution process provided for in the current ICAs or any future interconnection agreement(s).

See McLeod Initial Brief at 37-38; and Ex. D to McLeod Complaint (emphasis added).

In support of its position that the above quoted language, and the similar provisions found elsewhere in the ICA, require that all amendments to the ICA be negotiated prior to implementation, McLeod argues:

The foregoing contractual provisions set forth a procedure for amending the ICA that is structured and rigorous. At the outset, the process must be initiated by a written request from one of the parties stating that there has been a legislative, regulatory or judicial action that has changed a law or regulations that were the basis for any of the prices, terms and conditions in the ICA, and requesting that the purportedly affected provisions of the ICA be invalidated, modified or stayed and that the parties "expend diligent efforts" to arrive at an agreement regarding the appropriate conforming modifications to the ICA.

McLeod Initial Brief at 39.

McLeod's interpretation, however, is founded upon the presumption that the parties did not agree that some changes of laws could be incorporated into the ICA by the very terms of the Change of Law provision itself. In Staff's view, however, the phrase "immediately invalidated, modified or stayed as required to

effectuate the subject order," is clear evidence that the parties had agreed to language that effectively implemented the Change of Law provision itself. The McLeod interpretation would read the phrase "immediately invalidated, modified or stayed" entirely out of the provision. Although Staff agrees that the change of law provision requires notice from one party to the other before the change is then "immediately" implemented, this provision does not require any additional process beyond notice.

The word immediately, moreover, means "without delay" or without intervening steps.<sup>8</sup> The "structured and rigorous" processes that McLeod envisions contains multiple intervening events that could conceivably take up to a year or even more to accomplish. McLeod Initial Brief at 39-40 (e.g., negotiation, informal dispute resolution, formal dispute resolution, informal complaint procedures at the state or federal regulatory agency, formal complaint procedures at the state or federal agency, and state approval of the conforming amendment). Such a process can hardly be reconciled with the directive "immediately invalidated, modified or stayed to effectuate the subject order." Clearly, McLeod's interpretation would render the word "immediately" absolutely void of meaning. See also SBC IB at 28.

In Staff's view, the better interpretation is that SBC had the right, under the terms of the ICA, to "immediately invalidate, modify or stay" the provisions under which McLeod took certain UNEs pursuant to § 251(c)(3) in order to effectuate the TRRO's new rules upon notice to McLeod. Staff IB at 25. The parties would

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<sup>8</sup> For example, Webster's New World Dictionary, Second College Ed., defines "immediately" as "in an immediate manner; specif., a) without intervening agency or cause; directly b) without delay; at once; instantly."

then be obligated, after written notice had been given, to enter into negotiations (invoking the dispute resolution process if necessary) to implement a conforming amendment. *Id.* at 26-27. Staff does not believe that the phrase "immediately, modified or stayed to effectuate the subject order" can be entirely ignored to allow the parties to enter into the "structured and rigorous" process that McLeod envisions. Staff, accordingly, continues to conclude, as it did in its Initial Brief, that SBC has the right under the SBC Illinois – McLeodUSA ICA "to seek 'invalidation' of any provision not in conformance with the TRRO, and the right to have such invalidation take effect 'immediately', with the parties having the subsequent obligation to draft a conforming amendment." *Id.*

Regarding the requirement to provide written notice, SBC argues that its issuing "the Accessible Letters challenged by McLeodUSA constitute just such a request." SBC IB at 29. McLeod would appear to agree with SBC on this point. See McLeod IB at 47 ("Obviously, SBC understands and believes that amendments to its ICAs with CLECs are necessary in order to implement the unbundling rules changes – or else SBC would not have issued Accessible Letters with proposed ICA amendments relating to Mass Market ULS/UNE-P and unbundled high-capacity loops and dedicated interoffice transport shortly after issuance of the TRRO."). McLeod, however, points to "SBC's one-sided view of the negotiation and amendment processes" as evidence that "SBC does not really want to have to 'negotiate' conforming amendments." *Id.*, at 49. Clearly, SBC's "take it or leave it" attitude, characterized in portions of its Accessible Letters, subsequent letter communications, and direct testimony is not

overwhelming evidence of an intent to engage in good faith negotiations. While SBC's accessible letter may be construed under some circumstances as a refusal to negotiate in good faith, in Staff's view, this is not the case here where the change of law provision permits immediate implementation after notice. For example, see the SBC-Illinois ICA with Cbeyond, § 1.35. To the Extent XO/Allegiance believes SBC's interpretation of the change in federal law is inaccurate (e.g., SBC's interpretation that new customers means new lines for existing customers), XO/Allegiance remedy is to pursue the issue in this complaint if permitted pursuant to dispute resolution procedures of its interconnection agreement.

### **C. SBC Illinois' ICAs With XO/Allegiance**

The SBC Illinois ICAs with XO and Allegiance contain "identical" change of law provisions. See XO IB at 18. Moreover, the SBC Illinois – XO/Allegiance change of law provisions are very similar to McLeod's change of law provisions. Staff, accordingly, continues to conclude, consistent with its conclusion regarding McLeod's ICA and in its Initial Brief, that SBC has the right under the SBC Illinois – XO/Allegiance ICA "to seek 'invalidation' of any provision not in conformance with the TRRO, and the right to have such invalidation take effect 'immediately', with the parties having the subsequent obligation to draft a conforming amendment." Staff IB at 26-27.

XO/Allegiance also argues that SBC's actions in issuing certain of the SBC Accessible Letters is inconsistent with the Commission's recent Arbitration Decision in the recent XO-SBC arbitration. XO IB at 16-17. The change of law

language SBC proposed in the XO-SBC arbitration, however, is not the provision before the Commission, because, as XO points out, the Commission rejected SBC's proposed language. The effective change of law provision in the XO/Allegiance ICA, contains the provision, similar to McLeod's, that provides either party the right "to seek 'invalidation' of any provision not in conformance with the TRRO, and the right to have such invalidation take effect 'immediately', with the parties having the subsequent obligation to draft a conforming amendment." Staff IB at 26-27.

Moreover, there is nothing inconsistent with Staff's positions, and the Commission's conclusions, in the XO arbitration and Staff's position in this proceeding. As XO/Allegiance points out, the Commission stated in the XO arbitration, that the change of law provisions "contemplate bilateral negotiations." Staff's position in this proceeding also contemplates bilateral negotiations, to negotiate a conforming amendment. Under Staff's interpretation of the XO/Allegiance change of law provisions, SBC and XO/Allegiance have already entered into an ICA that allows the affected provision to be invalidated immediately, with a conforming amendment to be negotiated subsequently. Rather than SBC's unilateral judgment or assessment, Staff's interpretation is founded upon the specific language of the change of law provision that grants either party the right to "immediately" invalidate or modify affected provisions and then negotiate conforming amendments. The XO/Allegiance interpretation, like McLeod's, would render the word "immediately" absolutely void of meaning. See also SBC IB at 28.

Finally, regarding the written request issue, XO/Allegiance first state that they “are not aware of any [such] notices sent by SBC” but then reverse course and acknowledge that, “[w]hile SBC initially resisted negotiations, SBC changed its position and started the process to negotiate amendments to the parties’ interconnection agreements after the filing of this Complaint.” XO IB at 14-15. Presumably, the remaining issue for XO is one of the timing of the written request. Nonetheless, Staff, as in the case of McLeod, remains convinced that SBC provided sufficient notice of the change of law and that it required immediate implementation. While SBC’s accessible letter may be construed under some circumstances as a refusal to negotiate in good faith, in Staff’s view, this is not the case here where the change of law provision permits immediate implementation after notice. To the extent XO/Allegiance believes SBC’s interpretation of the change in federal law is inaccurate (e.g., SBC’s interpretation that new customers means new lines for existing customers).

**D. SBC Illinois -- Cbeyond ICA**

SBC’s efforts at addressing its obligations under its Interconnection Agreement with Cbeyond can be found in one paragraph of its initial brief. See SBC Brief, p. 30. SBC states that the relevant provision of that ICA “...expressly commands that ‘[n]otwithstanding anything to the contrary in this MFN agreement . . . , SBC Illinois shall have no obligation to provide UNEs, combinations of UNEs, [or] commingled arrangements beyond those required by the Act, including the lawful and effective FCC rules and associated FCC and judicial orders,’” and adds that arrangements beyond those required by law are to be

“immediately invalidated.” *Id.*, citing the recitals section of the ICA. However, the recitals that are not expressly incorporated into the ICA do not form a part of the obligations of the ICA. Moreover, the section of the ICA relied upon by SBC in its argument is far from an “express command” -- rather, this “whereas” clause recital, without more, sets forth SBC’s position on the issue and does not impose a contractual obligation on either party to the ICA. See, e.g., *McMahon v. Hines*, 298 Ill.App.3d 231, 237, 697 N.E.2d 1199, 1204 (2<sup>nd</sup> Dist. 1998)(explaining that recitals and “whereas” clauses are merely explanations of the circumstances surrounding the contract). Further, the sections cited by SBC, when read in their entirety, clearly illustrate that the language in question constitutes *SBC’s position* that a “Separate Agreement” – which is the result of the change of law – is what should be “immediately incorporated”:

If any action by any state or federal regulatory or legislative body or court of competent jurisdiction invalidates, modifies, or stays the enforcement of laws or regulations that were the basis or rationale for any rate(s), term(s) and/or condition(s) (“Provisions”) of the MFN Agreement and/or otherwise affects the rights or obligations of either Party that are addressed by the MFN Agreement, specifically including but not limited to those arising with respect to the Government Actions, the affected Provision(s) shall be immediately invalidated, modified or stayed consistent with the action of the regulatory or legislative body or court of competent jurisdiction upon the written request of either Party (“Written Notice”). In such event, it is SBC Illinois’ position and intent that the Parties immediately incorporate changes from the Separate Agreement, made as a result of any such action into this MFN agreement.

See Exhibit 3 to SBC Illinois Response, p. 2.

Therefore, even if it could be said that the recitals section cited by SBC articulated the true rights and obligations of SBC and Cbeyond under the ICA, then the clear language of the clause in question provides Cbeyond with further

support for its argument that a “change of law” *negotiation* will effectuate the intent of the parties.

Cbeyond’s argument regarding the impact of its ICA refers to the body of the agreement, Section 1.3. See Cbeyond Initial Brief, p. 15; Staff Initial Brief, p. 23. The relevant provision from the change of law languages requires that upon a change in law, the parties “are to renegotiate the affected provisions.” *Id.* If it is determined that the FCC did not intend to override the considered negotiations of the parties in this case, it is then clear that SBC and Cbeyond must negotiate and come to an agreement regarding the affect of the *TRRO*.

**E. The SBC – Illinois ICAs With Global Teldata, Nuvox, and Talk America**

In its initial brief, Staff noted that the clear language of the SBC’s agreement with Global TelData requires the parties to renegotiate the effect of the *TRRO*. Staff Initial Brief, p. 23-24. SBC argues in its brief that the contractual provision which reads “[i]n the event of a conflict between the provision of this Agreement and the Act, the provisions of the Act shall govern,” provides support its argument that the *TRRO* allows it to disregard those provisions of the negotiated agreement that it finds to be invalidated by the decision. This sentence can be found in Section 1.3(c) of the SBC-Global TelData ICA. SBC does not elaborate on why this particular phrase supports its position. Staff submits that no party to this consolidated proceeding has argued that the Telecommunications Act of 1996 is inapplicable to the present case. Further, the cited passage does not, in any way, prohibit negotiation (or renegotiation) of the agreement to conform to the Act. The cited passage does

not act to negate the change of law provisions included in the contract. As SBC states, change of law provisions “are designed to *conform* interconnection agreement to FCC orders, not to flout those orders.” (SBC Initial Brief, p. 30). The Global TelData ICA provides a mechanism by which SBC and Global TelData are to conform their ICA to FCC orders, and that mechanism can be found in the change of law provision.

SBC makes the same argument against the Nuvox complainant. (SBC Initial Brief, p. 30, citing §1.3(e) of the Nuvox ICA). As Staff noted in its initial brief, the SBC-Nuvox ICA requires a renegotiation of all “material obligations” affected by “any final and nonappealable” legal action. (Staff Initial Brief, p. 24-25). Again, the Telecommunications Act of 1996 does not prohibit negotiation of the mutual rights and obligations parties choose to incorporate into negotiated agreements. There is therefore no conflict between the Nuvox-SBC ICA and the Act, and the parties are obligated to renegotiate, at the request of either party, upon final and nonappealable legal action.

SBC cites the same provision with regard to Talk America (§ 2.6.1 of the Talk America-SBC ICA), and that argument merits the same reply. However, Staff has determined that the Talk America agreement provides for “immediate” invalidation or modification consistent with the action of the FCC. (Staff Initial Brief, p. 25). To the extent SBC has presented an argument that those interconnection agreements that provide for something other than “immediate” modification are somehow in violation of the Act, then the Talk America ICA does not contradict that position.

#### IV. SBC IS OBLIGATED TO CONTINUE TO PROVIDE NEW ULS/UNE-P TO SERVE EMBEDDED BASE CLEC CUSTOMERS DURING THE TRANSITION PERIOD

McLeod, and the other complaining CLECs, argue that SBC has a continuing obligation under the TRRO and its rule changes to provide “new” ULS/UNE-P to McLeod for use in serving its “embedded” base of customers (customers that McLeod served using ULS/UNE-P as of March 11, 2005). McLeod IB at 53. SBC, on the other hand, argues that that “CLECs are not permitted to add any new UNE-P arrangements after the effective date of the” TRRO. SBC IB at 10.

The FCC addressed the transition period for ULS/UNE-P in ¶ 227 of the TRRO. Paragraph 227 of the TRRO provides, in full, the following:

We require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of this Order. **This transition period shall apply only to the embedded customer base, and does not permit competitive LECs 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.** The transition we adopt is based on the incumbent LECs’ asserted ability to convert the embedded base of UNE-P customers to UNE-L on a timely basis while continuing to meet hot cut demand for new UNE-L customers. We believe it is appropriate to adopt a longer, twelve-month, transition period than was proposed in the *Interim Order and NPRM*. We believe that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversions. Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. By the end of the twelve month period, requesting carriers must transition the affected mass market local circuit switching UNEs to alternative facilities or arrangements.

TRRO, ¶ 227 (emphasis added; footnotes omitted).

The complaining CLECs point to the first half of the highlighted sentence quoted above for support for their position, while SBC points to the latter half for support for its position. Paragraph 227 provides both sides a degree of support.

At the same time, Staff does not believe that allowing existing end user customers to add an additional line or move an existing line to a different location will significantly increase the volume of lines to be transitioned at the end of the 12 month transition period. In addition, the FCC indicated what it expected to happen during this transitional period. It expected that ILECs and CLECs “perform the tasks necessary to an orderly transition, which could include cut overs deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversions.” TRRO, ¶ 227. Staff fails to see how adding an occasional additional line or moving a line to a different location will greatly impair the task for the 12 month transition period. Especially when the alternative involves the inconveniences to the customers as described in more detail by the CLECs. To be clear, this does not permit the CLECs to extend the transition period beyond March 11, 2006. In Staff’s view, the rate for additional lines should be the same as the one for existing customers.

**V. SBC’S SECTION 271 AND MERGER OBLIGATIONS UNDER THE COMPLAINING CLECS’ ICAS WITH SBC ILLINOIS**

As Staff noted in its Initial Brief, all of the complainants allege that, by issuing the Accessible Letters, SBC violated its obligations under its Section 271

Order, and its Merger Order. Staff IB at 33. Staff addresses the individual Section 271 allegations in the context of their respective ICAs.

**A. SBC's Section 271 Obligations Under the Complaining CLECs' ICAs With SBC Illinois**

After reviewing the parties' Initial Briefs, Staff recommends that the Commission enforce contractual language in ICAs that contain specific reference to Section 271 as the basis for which SBC is obligated to provide, and for the CLEC to take, certain UNEs. See Staff IB at 34. As McLeod points out in its Initial Brief, the FCC concluded 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." See McLeod initial Brief at 61, *citing* TRO, ¶653. Further, on review of the FCC's holdings in the TRO, the federal appeals court in the District of Columbia, agreed with the FCC in holding that:

[C]hecklist items four [unbundled local loops], five [unbundled dedicated transport], six [ULS] and ten [call related data bases] imposed 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.

*USTA II*, 359 F.3d 554, 588.

Finally, as the XO Complainants emphasize, this Commission has followed the directives of the FCC and the USTA II court in a recent arbitration decision and also found that SBC had an "independent" Section 271 unbundling obligation. XO IB at 19, *citing* Amendatory Arbitration Decision, *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, (October 28, 2004) ("XO-SBC Arbitration Decision") at 47-48.

SBC, in response to the CLECs' argument, contends that "this Commission simply has no authority to enforce SBC Illinois' obligations under section 271." SBC IB at 41. Under Staff's recommendation, however, the Commission would be enforcing the parties' respective ICAs, not enforcing SBC's 271 obligations. Staff takes no position on whether this Commission has independent authority to enforce SBC's Section 271 obligations. The Commission undoubtedly, however, does have the authority to resolve disputes brought to it regarding ICAs, and no party disputes this authority.

Further, Staff agrees with SBC that if an ICA references SBC's Section 271 obligations to provide certain UNEs, SBC is not required to provide UNE-P at TELRIC rates. See SBC IB at 39-41. As noted above, Staff agrees with SBC that its section 271 unbundling obligations are an independent obligation, not related to its Section 251(c)(3) obligations. Consequently, Staff agrees with SBC that it has no independent "combinations" requirement and should not be required "to combine network elements that no longer are required to be unbundled under Section 251." See SBC IB at 40-41, *citing* TRO, ¶ 657 n. 1990; *USTA II*, 359 F.3d at 589. Furthermore, Staff notes that if an ICA permits change of law to be negotiated, it may be possible for CLECs to seek an amendment that

would substitute a Section 251(c)(3) basis for SBC's obligations for a Section 271 basis.

### **1. SBC's Section 271 Obligations Under the McLeod ICA**

Under its ICA with SBC, McLeod argues that it also takes certain UNEs pursuant to state law and federal law. McLeod argues that it should be allowed to access certain network elements under Section 271 of the federal act, independent of the requirements of Section 251(c)(3). McLeod IB at 56-64.

Staff agrees with McLeod that its ICA with SBC "expressly references Section 271 . . . as [a] source of SBC's obligation to provide McLeodUSA with access to" the following network elements: unbundled local loops (Section 271(c)(2)(B)(iv), to unbundled dedicated interoffice transport (Section 271(c)(2)(B)(v)), and to unbundled local switching (Section 271(c)(2)(B)(vi)." McLeod IB at 61; McLeod Ex. 5, App. UNE, Section 2.2. McLeod, thus, is able to access, and SBC is obligated to provide, under the specific language of the parties' ICA certain UNEs (loops, switching, and transport) under Section 271 at non-TELRIC cost-based rates. Further, for Section 271 purposes only, SBC is under no obligation to combine or commingle network elements that it provides McLeod under Section 271, if SBC is no longer required to provide those elements to McLeod under Section 251.

### **2. SBC's Section 271 Obligations Under the XO/Allegiance ICAs**

XO, like McLeod, argues that SBC must make available to it certain UNEs under its Section 271 obligations. XO/Allegiance Ex. J, § 5, provides that SBC must provide access to UNEs as “required by the [federal] Act, including effective FCC rules and associated FCC and judicial orders, or other Applicable Law.” In Staff’s view, the reference to the federal Act and FCC orders includes SBC’s Section 271 obligations. Further, as Staff noted in its Initial Brief, Section 29.20 references Section 271. Staff IB at 34.

Consequently, like in the McLeod case, Staff concludes that SBC is obligated to provide, under the specific language of the XO/Allegiance ICAs certain UNEs (loops, switching, and transport) under Section 271 at non-TELRIC cost-based rates. Further, for Section 271 purposes only, SBC is under no obligation to combine or commingle network elements that it provides XO/Allegiance under Section 271, if SBC is no longer required to provide those elements to McLeod under Section 251.

### **3. SBC’s Section 271 Obligations Under the Cbeyond, Nuvox and Talk America ICAs**

Cbeyond, Nuvox and Talk America argue that Section 271 provides an independent right to switching, loops, and transport, because Section 271(c)(1)(a) requires SBC to enter into “binding agreements” under Section 252. The alleged wrongs here are the “accessible letters” attempts at unilateral amendment of negotiated agreements, embodied in the “accessible letters.” Therefore, while it may be true that Section 271, with its “checklist” of elements and requirement that SBC enter into “binding agreement” with “just and

reasonable” rates, confers some rights upon Cbeyond to obtain the network elements it seeks, any such rights are both ill-defined and ill-suited for enforcement in the absence of an interconnection agreement which defines the parties rights and obligations as arising from Section 271. Unlike McLeod and XO/Allegiance, Cbeyond , Nuvox and Talk America have not provided the Commission any basis upon which it could be determined that SBC’s accessible letters have impinged upon any contractual right afforded by Section 271. If, however, Cbeyond, Nuvox and Talk America reference provisions in their respective ICAs in the Joint Complainants’ Reply Brief, under which it is entitled to purchase UNEs under Section 271, Staff would then recommend that Cbeyond, Nuvox and Talk America be treated like McLeod and XO/Allegiance complainants regarding SBC’s obligations under Section 271. Furthermore, Staff notes that if their ICA permits a change of law to be negotiated, it may be possible for these CLECs to seek an amendment that would substitute a Section 251(c)(3) basis for SBC’s obligations for a Section 271 basis.

#### **4. SBC’s Section 271 Obligations Under the Global TelData ICA**

Although The Joint Complainants did not reference, in its Initial Brief, any language in its ICA with SBC – Illinois under which it takes 271 network elements, as Staff noted in its Initial Brief, Global TelData appears to take Section 271 UNEs under the same language as XO and Allegiance. Staff IB at 34.

Consequently, for all of the same reasons in the McLeod and XO/Allegiance situations, Staff concludes that SBC is obligated to provide, under the specific language of the Global telData ICA certain UNEs (loops, switching, and transport) under Section 271 at non-TELRIC cost-based rates. Further, for Section 271 purposes only, SBC is under no obligation to combine or commingle network elements that it provides Global TelData under Section 271, if SBC is no longer required to provide those elements to McLeod under Section 251.

## **VI. SBC REMAINS OBLIGATED TO PROVIDE CERTAIN UNES PURSUANT TO MERGER CONDITIONS**

As Staff noted in its Initial Brief, several of the complainant CLECs appear to have incorporated merger provisions or appendices into their ICAs with SBC Illinois. See, e.g., McLeodUSA Ex. 3, Section 45.1, *et seq.*, and Exhibit 4 (Appendix UNE); Joint Complainants (Talk America) Ex. 3.3, Section 45.1, *et seq.*, Joint Complainants (Global Tel Data) 4.3, Section 25.7, XO / Allegiance Ex. E, Section 25.7. Staff IB at 34.

For example, McLeod argues that “SBC continues to have an obligation to provide ULS/UNE-P, unbundled DS1 and DS3 loops and unbundled DS1 and DS3 dedicated interoffice transport to McLeodUSA and other CLECs pursuant to one of the conditions imposed by the FCC in its 1999 SBC-Ameritech Merger Order.” McLeod IB at 64-66. SBC, on the other hand, argues essentially that the UNE Remand Order became “a final and non-appealable order” when the Supreme Court declined review of *USTA II*. SBC IB at 38-39.

Staff agrees with McLeod. Although the Supreme Court did decline review of *USTA II*, the DC Circuit Court in its *USTA II* decision remanded the *TRO* back to the FCC, which in light of that remand then issued the *TRRO*. Thus, Staff agrees with McLeod that “the UNE Remand proceeding ‘and any subsequent proceeding’ has not been terminated by a final, non-appealable order.” McLeod IB at 65-66. Consequently, in Staff’s view, SBC remains obligated under the FCC’s Merger Conditions, merger conditions that SBC voluntarily agreed to abide by in exchange for Merger Approval, the terms of its ICA with McLeod (see Section 1.3 of Appendix Merger Conditions), Talk America -- Joint Complainants Ex. 3.3, Section 45.1, *et seq.*, Global TelData -- Joint Complainants Ex. 4.3 (Global TelData), Section 25.7, XO / Allegiance Ex. E, Section 25.7 to provide all UNEs or combinations of UNEs that were made available in Ameritech’s service territory in Illinois under its local interconnection agreements in effect on January 24, 1999, including ULS, unbundled DS1 and DS3 loops, and unbundled DS1 and DS3 dedicated interoffice transport.

Finally, if the Cbeyond and Nuvox complainants are able to direct the Commission to relevant ICA provisions that have incorporated merger provisions or appendices into their ICAs with SBC Illinois, SBC would also be obligated to under the FCC Merger Conditions to provide Cbeyond and Nuvox the Merger Conditions unbundled network elements.

## **VII. VIOLATIONS OF SECTION 13-801 / SECTION 13-801 ORDER / SECTION 13-514(11)**

As Staff noted in its Initial Brief, all of the complainants assert that SBC violated Section 13-801, the Commission’s *Section 13-801 Order*, and, by

extension, Section 13-514(11). Staff IB at 31. As an initial matter, and as Staff noted in Its Initial Brief, a carrier in conduct that impedes competition *per se*, in violation of Section 13-514, when it “violat[es] the obligations of Section 13-801[.]” 220 ILCS 5/13-514, 13-514(11). To the extent that SBC withdrew UNEs it was required to offer pursuant to Section 13-801, it would very clearly be in violation of Section 13-801, the Commission’s *Section 13-801 Order*, and Section 13-514(11) and 13-514(12). *Id.*

SBC appropriately points out that “whatever, the scope of unbundling obligations purportedly imposed by state law, the question whether federal law preempts such obligations is squarely before the federal court at this time.” SBC IB at 37. Staff agrees with SBC that ultimately either a federal district court or the FCC has the only authority to preempt Section 13-801.

Nonetheless, SBC argues, under the 01-0164 June 11, 2002 Section 13-801 Order, that Section 13-801 does not require it to provide unbundled access to high capacity loops and dedicated transport network elements. In support of its position, SBC explains that:

Contrary to the CLECs’ claims, the June 11, 2002 Order in Docket 01-0614 did not interpret Section 13-801 to require blanket unbundling of individual network elements, or network element combinations, without regard to the “necessary and impair” standard of federal law. Accordingly, unlike UNE-P, there is no current state law requirement that SBC Illinois provide CLECs with unbundled access to high capacity loops and dedicated transport network elements (either on a stand-alone basis or as part of an EEL combination) that have been “declassified” as UNEs by the FCC. Thus, there is no state law impediment to implementing the provisions of the *TRO Remand Order* related to loops and transport, including the requirement that CLECs “self-certify” that any requests for unbundled loops and transport meet the FCC’s impairment criteria.

SBC IB at 33.

SBC is apparently referencing language from the June 11, 2002, Order, to differentiate between Sections 13-801(d)(3) and 13-801(d)(4). See *Section 13-801 Order*, at 30-31, 56. However, subsequent to the parties filing their respective Initial Briefs, the Commission issued its *Order On Remand (Phase II)* on April 20, 2005. See *Order on Remand (Phase II)*, Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, ICC Docket No. 01-0614 (April 20, 2005) (“*Section 13-801 Remand Order*”). The Commission, in its *Section 13-801 Remand Order*, concluded, in relevant part, that:

We are thus unable to reinterpret Section 13-801 to conform it to federal law unless there is language in the statute that supports that reinterpretation. The Commission has very limited authority in the area of statutory interpretation. When interpreting a statute, our primary objective is to ascertain and give effect to the intent of the legislature. Where the statutory language is clear and unambiguous, the plain language as written must be given effect without reading into it exceptions, limitations or conditions that the legislature did not express and without resorting to other aids of statutory construction. On the other hand, where the statutory language is ambiguous or silent on an issue, we may look to the statute’s legislative history or other aids of statutory construction to ascertain the legislature’s intent. At the same time, we reject SBC’s thesis that the rules of construction allow us to reinterpret Section 13-801 at will to avoid preemption by a court.

\* \* \*

There are areas where the plain language of the statute conflicts with recent pronouncements of the TRO and USTA II. In those instances we have no ability to substitute language consistent with federal law to avoid a conflict. However, in those cases where Section 13-801 language in conflict with TA 96 is ambiguous or nonexistent, we have some latitude to make appropriate changes to achieve consistency with federal law.

\* \* \*

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. On the contrary, Section 13-801(d) requires *access to network elements on a bundled or unbundled basis*. Moreover, under Section 13-801 network elements are defined quite broadly.

\* \* \*

Given this context, we interpret the absence of “necessary and impair” or any other limiting language in Section 13-801 to imply that the General Assembly intended to *grant unrestricted access* to network elements from Alt-Reg companies.

*Section 13-801 Remand Order*, at 61-62 (emphasis added).

The Commission, thus, rejected SBC’s argument above, and found that “Section 13-801(d) requires *access to network elements on a bundled or unbundled basis*” and concluded that “we interpret the absence of “necessary and impair” or any other limiting language in Section 13-801 to imply that the General Assembly intended to *grant unrestricted access* to network elements from Alt-Reg companies.” *Id.*

More specifically, the Commission, then addressed the application of the Commission’s reinterpretation of Section 13-801, and developments in federal law, to specific disputed issues. Regarding OCn loops and transport facilities, the Commission concluded, “we view Illinois law to require SBC to provide OCn-level loops and transport facilities at non-TELRIC, just and reasonable, cost-based rates pursuant to Section 13-801(g).” *Id.* at 92. Regarding a cap on the number of DS3 loops and transport, the Commission concluded, “we will not require SBC to provide DS3 loops and transport facilities above the federal caps at TELRIC rates” and “instead we find that loops provided by SBC beyond the

federal requirement should be provided at non-TELRIC just and reasonable cost-based rates.” Id. at 93-94.

Regarding termination of EEs in a collocation arrangement and other eligibility criteria, the Commission concluded that:

The Commission agrees with SBC and Staff that the FCC’s eligibility criteria, and in particular the FCC’s collocation requirement, govern unbundled access to high-capacity EELS. Section 13-801 does not prohibit a reassessment of our earlier position. The current contours of federal law are not disputed. The Commission finds the CLECs’ citations to the *UNE Remand Order* to be obsolete, as the analysis in that order has been superseded by the *TRO*. We find that federal law requires collocation in *some* form, be it traditional, reverse, or indirect.

\* \* \*

While we agree with SBC that the FCC, in its *TRO*, ceased requiring that ILECs provide feeder subloops at TELRIC prices pursuant to Section 251, we find that feeder subloops are network elements under Section 13-801. Hence, adopting the same rationale we used in our discussion regarding enterprise switching, DS3 loops, entrance facilities, etc, we find that Section 13-801 requires SBC to provide feeder subloops at non TELRIC, just and reasonable cost-based rates.

Regarding limitations on an ILEC’s duty to combine network elements, the Commission concluded that,

In scenarios where a CLEC wants to combine network elements that are only being provided pursuant to Section 13-801, it seems logical that the ILEC is allowed to charge a cost-based combining fee that is not TELRIC-based. The FCC made it clear in its *TRO* that the combining requirement pursuant to Section 251 only applies to network elements that are being unbundled pursuant to Section 251, i.e., the ones that have passed the “necessary and impair” standard. As a result, the additional combining activities that SBC is undertaking pursuant to Section 13-801 should not be based on Section 251’s TELRIC-based pricing scheme. Instead, SBC will be allowed to charge a just and reasonable cost-based rate pursuant to Section 13-801(g). Similarly, combining a network

element that is unbundled pursuant to Section 251 with a network element that is unbundled pursuant to Section 13-801 should result in a non-TELRIC based combination fee because SBC would not be combining these elements if not for Section 13-801. In other words, we are adopting a combination requirement that is consistent with our unbundling requirement. In instances where Section 13-801 has more expansive combining obligations than the federal obligations, we find SBC may charge non-TELRIC just and reasonable cost-based rates for the combining activities that are more extensive than federal requirements. This is consistent with our position that Section 13-801 obligations can go beyond federal requirements without being inconsistent with the federal requirements.

*Id.* at 115.

The Commission, accordingly, would appear to have rejected the arguments that SBC advanced in its Initial Brief, regarding the characterization of the Commission's prior interpretation of Section 13-801, in its recent interpretation of Section 13-801. SBC IB at 33-34.

As Staff noted in its Initial Brief (at 31-32), to the extent that SBC withdrew UNEs it was required to offer pursuant to section 13-801, it would very clearly be in violation of Section 13-801, the Commission's *Section 13-801 Order* or the Commission's *Section 13-801 Remand Order*, and Section 13-514(11) and 13-514(12). However, it remains unclear, as nearly as Staff can determine, whether SBC has acted in violation of its obligations under Section 13-801.

#### **A. Violation of Intrastate Tariffs**

An issue related to the Section 13-801 issues, is whether SBC has refused to honor its intrastate tariffs. In its Initial Brief, Staff opined that McLeod appeared to be authorized under the terms of its ICA with SBC – Illinois to take certain services pursuant to tariffed rates. Staff IB at 33. Staff was also unclear

whether complainants were permitted to take services from an intrastate tariff in derogation of, or in addition to, their respective ICAs.

Subsequent to Staff filing its Initial Brief, however, another factor to the tariff analysis came to Staff's attention. The following language from the Section 13-801 Order and SBC tariff affect the recommendation Staff made in its Initial Brief:

Unless otherwise provided in an interconnection agreement or amendment thereto between the Company and a telecommunications carrier which is dated after June 30, 2001, telecommunications carriers that already have an interconnection agreement with the Company pursuant to Section 252 of the Telecommunications Act of 1996 shall be permitted to subscribe to Pre-Existing and New UNE-P under this tariff. If a telecommunications carrier with an interconnection agreement is permitted to purchase a combination of unbundled network elements under this Section 15, that telecommunications carrier shall submit written notice to the Company if it decides to purchase from this tariff, with the notice specifying this particular tariff. This tariff is non-severable and indivisible. Following the Company's receipt of such a written notice, this tariff (including its rates) shall apply on a prospective basis only, and apply in accordance with its terms to UNE-Ps already being purchased and those subsequently purchased by the telecommunications carrier, beginning 5 business days after the Company's receipt of the notice. An eligible telecommunications carrier that has previously provided notice of its decision to purchase under this Section 15 may change that direction upon subsequent written notice to the Company of that change, which notice shall be provided, and shall be subsequently and prospectively effective, in the same manner as described above.

ILL. C.C. 20 Section 19, Part 15.

Staff, accordingly, acknowledges that CLECs with ICAs dated after June 30, 2001, and that already have an ICA with SBC are allowed to subscribe to Pre-Existing and New UNE-P under this tariff, irrespective of whether their ICA references this tariff. This may require additional analysis with respect to the

date of each agreement, and whether an intervening amendment would give prevent a CLEC from invoking the pre- June 30, 2001 rights.

### **VIII. COMPLAINANT CLECS' DAMAGES**

The Staff notes that, should the Commission find that SBC Illinois has indeed committed one or more of the violations alleged by any of the complainants, it is authorized to award damages, and indeed "shall" do so. 220 ILCS 5/13-516(a)(3). Accordingly, in the event the Commission finds a violation, it must adopt some formula to calculate damages.

This exercise appears to be fairly straightforward. The UNEs in question are provided pursuant to contract, and at a contract price. To the extent that a complainant was compelled to procure such UNEs at a higher price, or use resold services at a higher price still, the measure of damages is the difference between those two prices, multiplied by the number of lines / facilities in question, multiplied by the time period (presumably an integer representing a number of months) which the aggrieved carrier was compelled to pay the higher price.

None of the complainants allege that they have, to date, lost customers or been compelled to reject customer orders, due to the accessible letters. Accordingly, at this point, it does not appear to the Staff that consequential damages are properly awarded.

### **IX. CONCLUSION**

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

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