

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Access One, Inc.; ACN Communications)	
Services, Inc.; Ascendtel, LLC; AT&T)	
Communications of Illinois, Inc.;)	
Broadview Networks, Inc.; BullsEye Telecom,)	
Inc.; Cbeyond Communications, LLC; US)	
Xchange of Illinois, LLC, d/b/a Choice One)	
Communications; CIMCO Communications,)	
Inc.; CityNet Illinois, LLC; DSLnet)	
Communications, LLC; First Communications,)	
LLC; Forte Communications, Inc.;)	
Globalcom, Inc.; ICG Telecom Group, Inc.;)	Docket No. 05-0442
King City Telephone, LLC, d/b/a Southern)	
Illinois Communications; KMC Telecom V,)	
Inc.; Looking Glass Networks, Inc.;)	
McLeodUSA Telecommunications Services,)	
Inc.; Mpower Communications Corporation,)	
d/b/a Mpower Communications of Illinois;)	
Neutral Tandem-Illinois, LLC; New Edge)	
Network, Inc.; nii communications, Ltd.;)	
Novacon Holdings LLC; Nuvox)	
Communications of Illinois, Inc.; OnFiber)	
Carrier Services, Inc.; RCN Telecom Services of)	
Illinois, LLC; TCG Chicago; TCG Illinois; TDS)	
Metrocom, LLC; and Trinsic)	
Communications, Inc.)	
)	
Petition for Arbitration Pursuant to)	
Section 252(b) of the Telecommunications Act of)	
1996 with Illinois Bell Telephone Company d/b/a)	
SBC Illinois to Amend Existing Interconnection)	
Agreements to Incorporate The <i>Triennial Review</i>)	
<i>Order And the Triennial Review Remand Order</i>)	

BRIEF ON EXCEPTIONS OF SBC ILLINOIS

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUE ANALYSIS.....7

ISSUE 2.....7

A. ISSUE 2(A): SCOPE OF FCC RULES FOR FTTH, FTTC AND HYBRID LOOPS8

B. DEFINITION OF “MASS MARKET CUSTOMER”12

ISSUE 5.....14

ISSUE 721

**A. THE COMMISSION SHOULD REJECT THE PROPOSED DECISION ON
“COMMINGLING” OF SECTION 271 ITEMS.....22**

**B. THE PROPOSED LANGUAGE ON “COMBINATIONS” IS CONTRARY TO SECTION
271.....26**

ISSUE 8.....29

ISSUE 17a.....30

ISSUE 20.....30

ISSUE 18.....34

ISSUE 21.....38

ISSUE 23.....43

ISSUE 25.....45

ISSUE 29.....46

ISSUE 30a.....49

ISSUE 30b.....49

ISSUE 30c.....49

ISSUE 31.....52

ISSUE 32a.....55

A.	TERMINATION CHARGES.....	56
B.	NONRECURRING CHARGES	57
ISSUE 37		61
III.	CONCLUSION	63

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BRIEF ON EXCEPTIONS OF SBC ILLINOIS

I. INTRODUCTION

The purpose of this proceeding is to conform the Petitioners' current interconnection agreements with SBC Illinois to reflect the rules promulgated by the Federal Communications Commission ("FCC") in the August 2003 *Triennial Review Order* ("TRO") and the February

2005 *Triennial Review Remand Order* (“*TRO Remand Order*” or “*TRRO*”). Those rules govern the extent to which competing local exchange carriers (“CLECs”) like the Petitioners may – or may not – obtain unbundled access to elements of SBC Illinois’ network, as well as the terms and conditions of such access. Together, the *TRO* and *TRO Remand Order* effect dramatic and comprehensive changes in the unbundling landscape. Prior to the *TRO*, the FCC required unbundled access on a nearly uniform basis – to nearly all elements in nearly all markets. The FCC’s first two attempts to impose a “more unbundling is better” regime were vacated by the federal courts – first by the Supreme Court, and then by the D.C. Circuit – which made clear that the Telecommunications Act of 1996 requires a *limiting* standard that strikes a careful and detailed *balance* between the costs and benefits of unbundling.

The FCC achieved some of that balance in the *TRO*, holding that there was no “impairment” – and thus no requirement for unbundled access – in several circumstances. These FCC holdings were left intact on appeal. In three other contexts – “mass market” local circuit switching, “enterprise market” loops, and dedicated transport – the FCC still attempted to impose blanket requirements for unbundling, and sought to delegate to the states the responsibility for analyzing “impairment” at a more detailed level. The D.C. Circuit – the appellate court vested with exclusive jurisdiction to review the *TRO* under the Hobbs Act – held (i) that the FCC’s attempted delegation was unlawful because the 1996 Act entrusts the FCC with the responsibility of reaching the balance that unbundling entails, and (ii) that the FCC’s provisional findings of impairment were unfounded. Accordingly, it vacated the *TRO*’s unbundling rules for those three network elements.

After extensive additional proceedings on remand, the FCC issued the *TRO Remand Order*. In that order, the FCC squarely held that “[i]ncumbent LECs have no obligation to

provide competitive LECs with unbundled access to mass market local circuit switching.” *TRO Remand Order* ¶ 5. The accompanying rule unconditionally states that “[r]equesting carriers may not obtain new local switching as an unbundled network element.” 47 C.F.R. § 51.319(d)(2)(iii) (App. B to *TRO Remand Order*). In the FCC’s words, its rule establishes a “nationwide bar” on unbundled switching and the UNE Platform (“UNE-P”), a combination of unbundled network elements that consists of switching, a loop, and shared transport. *TRO Remand Order* ¶ 204.

The FCC adopted a similar nationwide bar for dark fiber loops, and it also barred unbundling for DS1 and DS3 loops and DS1, DS3, and dark fiber dedicated transport arrangements in certain contexts. As a result, many of the blanket FCC unbundling rules that were in place prior to the *TRO* are gone.

SBC Illinois has entered into interconnection agreements with the CLECs here to “fulfill the duties described” in Section 251(c)(2) and (c)(3) and to “meet the requirements” of Section 251. *See* 47 U.S.C. §§ 251(c)(1), 252(c)(1). Those interconnection agreements, however, still reflect the old “more unbundling is better” rules that federal law has repudiated. As a result, those agreements no longer “meet the requirements” of the Act. The parties have negotiated an Amendment accompanied by a “*TRO/TRRO* Attachment” to revise their agreements in accordance with the FCC’s orders, a process contemplated both by the agreements (which contain “change of law” provisions calling for such amendments) and by the FCC’s orders. They have agreed on much of the language of that Attachment. The purpose of this consolidated arbitration is to resolve the remaining open issues pursuant to Section 252 of the 1996 Act.

On September 15, 2004, the ALJs issued a Proposed Arbitration Decision (“Proposed Decision”) on those open issues. To the ALJs’ credit, the Proposed Decision resolves a number

of issues in a short time frame, and on many issues it follows the FCC's rules and reaches the correct result. On some other issues, SBC Illinois disagrees with the Proposed Decision but has chosen not to take exception, in the interest of compromise.

There are several issues, however, on which the Proposed Decision deviates from – or even nullifies outright – the FCC orders that it is supposed to carry out. SBC Illinois takes exception to the Proposed Decision for the reasons set forth below. Each exception is founded on a single common principle: SBC Illinois seeks an amendment that faithfully and fully “meets the requirements” of sections 251 and 252 of the 1996 Act and the FCC's implementing regulations – exactly as Section 252(c)(1) says that the Commission is to do in resolving open issues.

1. The principal error of the Proposed Decision is that, in some circumstances, it permits CLECs to circumvent the FCC rules and to do by misdirection what the FCC – and this Commission – have held they cannot do. Consider first the proposed result on “entrance facilities,” the subject of Issue 5. The FCC has held – twice – that CLECs may not obtain unbundled access to entrance facilities. In an attempt to evade the FCC's holding, the CLECs contended that they could obtain the very same facilities, at the very same price, simply by relabelling them “interconnection facilities.” This Commission, however, has squarely rejected that tactic – twice: once in the “change of law” arbitration between XO and SBC Illinois (Docket No. 04-0371), and once in the arbitration between MCI and SBC Illinois (Docket No.04-0469). Nevertheless, the Proposed Decision recommends that the CLECs' proposal be adopted the third time around – without even attempting to address, much less justify, its departure from the Commission's previous decisions.

2. The Proposed Decision makes a similar error in endorsing the CLECs' attempt to revivify the UNE-P, which is addressed under Issue 7. It is difficult to conceive a federal rule that is as emphatic and clear as the FCC's "nationwide bar" on the UNE-P and its key component, local switching. The FCC rule commands that "[r]equesting carriers may not obtain new local switching as an unbundled network element" and the accompanying order states that "[i]ncumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching." Nevertheless, the CLECs contended that they *may* obtain new unbundled local switching and the UNE-P, even though the FCC has barred such unbundling as harmful to national policy.

The CLECs attempted to use Section 271 of the 1996 Act as a side door to escape the FCC's bar. But the FCC has already barricaded that hatch, and has squarely *rejected* CLEC attempts to require UNE combinations under Section 271. That led the CLECs to call their proposal "commingling," and to argue that they can "commingle" Section 271 checklist items (like switching) with Section 251 UNEs (like loops). That exit, too, has been barred, as the FCC *scratched* Section 271 items from the roster of services that may be commingled with UNEs, in the Errata to the *TRO*. Accordingly, in the XO arbitration this Commission correctly rejected the CLECs' commingling theory as "insupportable" and held that "SBC is not required to commingle UNEs and UNE combinations with network elements unbundled pursuant to Section 271." Oct. 28, 2004 Amendatory Arbitration Decision, Docket No. 04-0371, at 18. In the MCI arbitration, the Commission reached the opposite result, without explaining why it changed course. The Proposed Decision once again tries to permit commingling of Section 271 items – and once again fails to confront, much less reconcile, the Commission's conflicting decisions in those prior arbitrations.

3. On several issues, the Proposed Decision attempts to *rewrite* the FCC's rules, adding qualifiers that appear nowhere in the rules in a manner that would limit their scope or effectiveness. For example, in Issue 2 the Proposed Decision limits the FCC's fiber loop unbundling rules to "mass market" customers, leaving enterprise customers subject to the full panoply of unbundling obligations and thereby leaving them outside the scope of unbundling relief that was designed to "stimulate facilities deployment" so that consumers will benefit from the "race to build next generation networks". *TRO* ¶ 272. The *ad hoc* compromise reached by the Proposed Decision thus rewrites the FCC rules and interferes with the implementation of federal law.

4. Next, the Proposed Decision completely overlooks certain issues raised by SBC Illinois and, as a result, reaches decisions that are not only at odds with the evidence and established precedent, but are also internally inconsistent with other decisions in the Proposed Decision. On Issue 32(a), for example, SBC Illinois repeatedly pointed out that the CLECs' proposed language is unlawful to the extent that it purports to prohibit SBC Illinois from assessing termination charges on any conversions of wholesale services to UNEs, including termination charges that apply pursuant to the Illinois or FCC Special Access tariffs. Without acknowledging SBC Illinois' arguments, the Proposed Decision (at 186) summarily adopts the CLEC's proposed language, *even though the CLECs never contradicted SBC Illinois' arguments or otherwise attempted to defend their proposed language as it relates to termination charges*. This decision flies in the face of a long line of precedents, including the *TRO* and the Illinois Appellate Court's decision in *Globalcom, Inc. v. ICC*, 806 N.E. 2d 1194, 1205-06 (Ill. App. 2004), which have consistently held that local exchange carriers should not be prohibited from

assessing early termination charges, such as those provided for by SBC Illinois' tariffs, upon the conversion of special access services to UNEs.

Under each Issue below, SBC Illinois demonstrates how its proposed language meets the requirements of federal law, and how the Proposed Decision fails to meet those requirements. At the conclusion of each Issue, SBC Illinois sets forth its suggested revisions to the Proposed Decision.

II. ISSUE ANALYSIS

ISSUE 2: Sections 0.1.2, 0.1.3, 0.1.4, 0.1.5, 11.0 – (a) Is SBC required to provide FTTH, FTTC and Hybrid Loops on an unbundled basis for customers that are not defined as “mass market” customers, or, in the case of multiple-dwelling units (“MDUs”), MDUs that are not “predominantly residential”? (b) If so, then how should the Amendment define “mass market”? (c) If so, then how should the Amendment define “predominantly residential” MDUs?

Amendment Reference: Sections 0.1.2, 0.1.3, 0.1.4, 0.1.5, 11.0

Issue 2 concerns the scope of SBC Illinois' unbundling obligations with respect to Fiber-to-the-Home (“FTTH”), Fiber-to-the-Curb (“FTTC”) and Hybrid Loops. As defined by the FCC, an FTTH Loop is either (i) “a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end user’s customer premises,” or (ii) “in the case of a predominantly residential multiple dwelling unit (MDUs), a fiber optic cable, whether dark or lit, that extends to the multiunit premises’ minimum point of entry (MPOE).” 47 C.F.R. § 51.319(a)(3)(i)(A). An FTTC Loop is a “local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer’s premises or, in the case of predominately residential MDUs, not more than 500 feet from the MDU’s MPOE.” 47 C.F.R. § 51.319(a)(3)(i)(B). Finally, a Hybrid Loop is a “local loop composed of both fiber optic cable,

usually in a feeder plant, and cooper wire or cable, usually in the distribution plant.” 47 C.F.R. § 51.319(a)(2).

SBC Illinois proposed defining FTTH, FTTC, and Hybrid loops exactly as they are defined in the FCC’s rules. The Proposed Decision erroneously attempts to *change* the definition, by adding a limitation that appears nowhere in the FCC’s rules: namely, the CLEC-proposed language that would limit the rules to FTTH, FTTC, and Hybrid loops that serve mass market customers. To compound that error, the Proposed Decision defines “mass market” customers in a manner that is also contrary to the FCC’s orders.

A. ISSUE 2(A): SCOPE OF FCC RULES FOR FTTH, FTTC AND HYBRID LOOPS

The FCC has determined that CLECs are not impaired without access to FTTH or FTTC Loops except in very limited circumstances. *TRO* ¶ 273; Order on Reconsideration, 19 F.C.C. Rcd. 20,293, ¶¶ 1, 20 (rel. Oct. 18, 2004) (“*FTTC Reconsideration Order*”). With respect to Hybrid Loops, the FCC has held that incumbents need only provide unbundled access for the provision of voice grade (or narrowband) service. 47 C.F.R. § 51.319(a)(2)(iii).

Under Issue 2(a), the Proposed Decision attempts to erroneously restrict the FCC’s rules, by defining them to apply only to loops “serving Mass Market Customers.” The Commission should reject that limitation because it is contrary to – and would nullify – the FCC’s rules.

Simply put, the FCC did not limit the scope of its rules on FTTH, FTTC and Hybrid Loops to those loops serving “mass market customers.” Rather, as explained above, the FCC defined FTTH, FTTC and Hybrid Loops based on the physical characteristics of the *loops* – what and where they are – not by the customers they serve. SBC Ex. 2.0 (Chapman Direct) at 24. In fact, the FCC expressly rejected the limitation that the Proposed Decision recommends here: while the *TRO* initially defined a FTTH loop as a fiber loop “serving a residential end user’s

customer premises” (*TRO*, Attach. B, 47 C.F.R. § 51.319(a)(3) (no longer effective)), the FCC quickly issued an Errata that expressly deleted the words “residential” and “residential unit” from the definition of a FTTH Loop. Errata, *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 19020, ¶¶ 37-38 (2003).

The Proposed Decision asserts (at 22) that the FCC’s orders “clearly” indicate an intent to provide unbundling relief with respect to the mass market. It thus rests on the unsupportable premise that, after “clearly” spelling out its intent in the orders, the FCC did not know how to write a *rule* that would carry out that intent – even after several attempts – and that the Commission has to step in and rewrite the rule. That premise cannot stand. The FCC knew how to say “mass market” customers when it meant to: as it did in the rules for “mass market” switching, which were adopted in the same *TRO* as the rules for FTTH loops. *TRO* App. B, 47 C.F.R. § 51.319(d)(2). The FCC did not say “mass market” customers here. To the contrary, the FCC’s Rule 51.319(a)(3) currently states that a “fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, and serving *an* end-user’s customer premises” – without any mention whatsoever of the *type* of end user. The *original* rule, issued as part of the *TRO*, defined such a loop as one “serving a *residential* end user’s customer premises,” and in the case of new builds, it said that such a loop was one deployed to a “residential unit.” 47 C.F.R. § 51.319(a)(3) and (a)(3)(i) (prior to Errata). But the FCC issued an Errata that specifically removed the words “residential” and “residential unit” from its FTTH rule. SBC Ex. 2.0 (Chapman Direct) at 24, 26.¹ Similarly, the FCC’s hybrid loop rule expressly *includes* loops like DS1 and DS3 loops, which belies the CLECs’ contention that the FCC’s Hybrid Loop rule

¹ The Proposed Decision adopts the CLECs’ view that the FCC deleted the term “residential” so that the rule would still apply to “very small” business customers. Had that been the case, though, the FCC would have either inserted the term “very small business customers,” or it would have replaced the reference to “residential” customers with “mass market customers.” It did neither.

applies only to those serving “mass market customers.” Therefore, the CLECs’ attempt to limit the application of the FCC’s Hybrid Loops rule to customers with a four-DS0 threshold or less is clearly contrary to the express language in the FCC’s Hybrid Loops rule. *Id.* at 24-25.

The Rule, as written, is perfectly consistent with the asserted FCC intent of promoting the deployment of fiber to mass market users. As SBC Illinois’ witness Ms. Chapman explained, the FCC defined FTTH and FTTC loops in terms of location in a way that would provide relief primarily to mass market customers, rather than trying to define those loops in terms of customer or providing relief exclusively to mass market customers. The rule applies to (i) loops that serve multiple-dwelling units (“MDUs”) that are “predominantly residential” (a provision that, by automatically leans toward the mass market); and (ii) all FTTH, FTTC, and Hybrid Loops at locations other than MDUs (a provision that also favors the mass market as a practical matter, because users in a non-MDU environment are typically mass market customers). SBC Ex. 2.1 (Chapman Rebuttal) at 13. Simply put, the FCC decided that this approach would be good enough to carry out its intent, and chose not to establish a limitation based on the type of customer.

Indeed, adding a customer-based limitation would render meaningless the location-based approach that the FCC took in the fiber loop rules. There would have been no reason for the FCC to provide unbundling relief for “predominantly residential MDUs” if the FCC’s real intent had been to provide relief only for mass market customers. The FCC would have instead defined the rule in terms of mass market customers, so as to provide relief for FTTH and FTTC loops serving mass market customers in any location – single occupancy, predominantly residential MDUs, or predominantly commercial MDUs. Instead, however, the FCC’s rules provide unbundling relief for the entire fiber loop facility based on the location of the deployment. The

FCC sought to promote deployment at certain *locations* (single-user premises and “predominantly residential” MDUs). Deployment at those locations would benefit the mass market without need for an investigation of the particular *customer* (and without having to precisely define what a “mass market” customer is or resolve disputes about particular customers).

The Proposed Decision also fails to take into account the fact that: (1) In the *TRO* and its rules, the FCC did not order the unbundling of any fiber loops specific to “enterprise customers” other than dark fiber loops (and in the *TRO Remand Order* the FCC concluded that dark fiber loops are not subject to unbundling); (2) neither the FCC’s Fiber Loops rule nor the Hybrid Loops rule make mention of “mass market” and therefore, are not so limited in application²; (3) the *TRO* makes clear that the FCC’s loop unbundling rules “do not vary based upon the customer to be served”, but rather, the FCC’s “mass market” and “enterprise market” classifications were only for purposes of conducting a more granular impairment analyses³; (4) it would make no sense for the FCC to afford ILECs unbundling relief for Fiber Loops and Hybrid Loops for the *less* competitive “mass market”, but not the *more* competitive “enterprise market;” and (5) DS1 and DS3 loops are explicitly subject to the FCC’s Hybrid Loops rule, so the Commission’s holding that the Hybrid Loop Rules apply only to mass market customers (see Section 0.1.4) must be wrong.⁴ Simply put, the Commission is bound to carry out the FCC’s rules, and has no authority to rewrite such rules or second-guess the FCC’s judgment as it has done here.

Accordingly, SBC Illinois proposes that the Commission replace the “Commission Analysis and Conclusion” for Issues 2(a) and 2(b), which appears on page 22 of the Proposed Decision, with the following language:

² 47 C.F.R. §§51.319(a)(2) and (3).

³ *TRO* ¶210.

Issue 2(a)

SBC Illinois proposes that the Amendment define FTTH, FTTC, and hybrid loops as they are defined in the FCC’s rules. The CLECs propose that the Commission add language to each definition that would limit the rules to “mass market” customers. We reject the CLECs’ proposal for the simple reason that no such limitation appears in the FCC’s rules. Rather than defining these loops by the customer they serve, the FCC chose to define them by the physical characteristics and location of the loops themselves. In this regard, we note that the FCC specifically deleted a reference to “residential” end users and “residential unit” that had appeared in the FCC’s original TRO FTTH rule. We also note that the FCC’s Hybrid Loops rule explicitly lists DS1 and DS3 loops as examples of Hybrid loops. While the CLECs contend that the FCC intended to promote deployment in the mass market, SBC Illinois has shown that the existing rules do so, but at the same time, were not limited to the “mass market.” We will not rewrite the rule, nor will we make it apply exclusively to mass market customers where the FCC has rejected such a limitation.

Issue 2(b)

As described under Issue 2(a), the Commission rejects the CLECs’ proposed “mass market” limitation on FTTH, FTTC, and hybrid loops. As such, we need not, and do not, reach the parties’ dispute regarding the definition of “mass market” customers.

B. DEFINITION OF “MASS MARKET CUSTOMER”

Issue 2(b) addresses the proposed definition of the term “Mass Market Customer.” As demonstrated under Issue 2(a), the term “mass market customer” is irrelevant to the current unbundling rules for FTTH, FTTC, and hybrid loops, so there is no need to define “mass market customers” at all, particularly in light of the fact that the FCC itself has not established a specific definition for such customers outside of the context of local circuit switching. However, if this Commission does reach that issue, it should reject the Proposed Decision’s suggested definition.

The Proposed Decision recommends that a “mass market customer” be defined in Section 0.1.5 of the Attachment as an end-user customer who is either a residential customer, or a very small business customer served by less than four DS0s. That definition, based on a 4-DS0 “cutoff,” is obsolete and inconsistent with the FCC’s *TRO Remand Order*. In the *TRO*, the FCC

⁴ 47 C.F.R. §51.319(a)(2)(ii).

held there was no impairment (and no unbundling) for switching used to serve “enterprise market” customers, but made a provisional finding of impairment for “mass market” switching. It then attempted to delegate to the states the authority to decide the cutoff between “mass market” and “enterprise market” customers. At that time, the FCC said that four DS0s would serve as the default “cutoff” point until the states had made their determinations: hence, the 4-DS0 proposal here. *TRO*, Attach. B, 47 C.F.R. § 51.319(a)(2)-(3) (vacated by *USTA II* and replaced in *TRRO*).

But the D.C. Circuit vacated the FCC’s attempted delegation scheme and its rules for mass market switching. And in the *TRO Remand Order*, the FCC eliminated unbundled access to local circuit switching for mass market customers, so that “[r]equesting carriers may not obtain new local switching” *period*: for mass market customers or enterprise market customers. In so doing, the FCC held that the transition plan for mass market switching “applies to *all* unbundled local circuit switching *arrangements* used to serve customers *at less than the DS1 capacity level.*” *TRO Remand Order* ¶ 226 n.625. Thus, the FCC’s current cutoff for “mass market” switching is a single DS1, which is equivalent to 24 DS0s.

SBC Illinois’ proposed 24-DS0 cutoff tracks the FCC’s current determination of “mass market” and should be adopted. The Proposed Decision on this issue, which reflects the *tentative* view of the FCC’s now-vacated *TRO* findings, should be rejected.⁵

For the reasons described above, *if* the Commission does not resolve Issue 2(b) in the manner indicated under the Exception on Issue 2(a) above (that is, by not reaching Issue 2(b) at

⁵ The Proposed Decision states that SBC Illinois advocated a four-DS0 cutoff in the state proceedings under the *TRO*. SBC Illinois could just as easily point out that at that time the CLECs advocated the same 24-DS0 cutoff they oppose here. But the FCC’s delegation to the states was vacated and the state *TRO* proceedings were terminated. What matters now is the FCC’s *current* controlling order, which sets the bar at less than 24 DS0s.

all), it should replace the “Commission Analysis and Conclusion” that appear under Issue 2(b) on page 22, and insert the following:

Issue 2(b)

We reject the CLECs’ proposed definition of “mass market customer,” which would limit that term to customers with 4 or fewer DS0 lines. That proposal is based on a tentative conclusion the FCC made in the TRO, which has since been vacated and replaced with a new cutoff of 24 DS0s. SBC Illinois’ proposal reflects the FCC’s current order, and is adopted.

ISSUE 5: Sections 15.2, 15.3, 15.4 – (a) Is SBC required to provide entrance facilities to CLECs for use in interconnection pursuant to Section 251(c)(2)? (b) If so, what rate should apply? (c) What rate, if any, should apply if SBC is requested to reclassify an Entrance Facility as an Interconnection facility?

Amendment Reference: Sections 15.2, 15.3, 15.4

The Proposed Decision commits a critical error of law by holding that SBC Illinois has an interconnection obligation under federal law (47 U.S.C. §251(c)(2)) to provide transport facilities that connect its office to CLEC offices at TELRIC rates. The proof that it is wrong are two recent Commission decisions that are directly on point – each of which holds that there is *no* interconnection obligation under § 251(c)(2) to provide such transport at TELRIC. The Proposed Decision cannot simply walk away from this controlling Illinois precedent.

The Commission decisions are the *XO Arbitration Order* (Docket No. 04-0371) and the *MCI Arbitration Order* (Docket No. 04-0469). In the *XO Arbitration Order*, XO made the same argument that CLECs make here; i.e., that there is an independent right to obtain entrance facilities at TELRIC rates by calling them “interconnection facilities” under Section 251(c)(2) - even though the FCC has held, twice, that CLECs may not obtain entrance facilities at TELRIC rates under Section 251(c)(3). *TRO* ¶ 366 and n. 1116, *TRO Remand Order* ¶ 138 and n. 384.

The language in Section 251(c)(2) that allegedly required SBC Illinois to offer the transport in question is this:

(2) INTERCONNECTION - The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network. 47 U.S.C. § 251(c)(2).

The Commission carefully considered the CLEC argument, but decisively rejected it, specifically finding that the interconnection obligations in section 251(c)(2) do not require SBC Illinois to provide the facility that connects the CLEC wire center with the SBC Illinois wire center. *XO Arbitration Order* at 78.

The Commission recognized that nothing in Section 251(c)(2) mentions ILEC facilities, much less creates an obligation to provide them. Rather, it only requires SBC Illinois to be “ready to receive” those facilities from CLEC. The following lengthy quote is provided in full because it shows how carefully the Commission's analyzed this issue:

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).

XO Arbitration Order at 78.

The issue was presented to the Commission a second time in the MCI Arbitration. There, MCI re-asserted the argument that CLECs may obtain transport facilities that interconnect the CLEC network with the ILEC network as “interconnection facilities”, and may do so at TELRIC rates. Once again, the Commission rejected that argument:

SBC is not obligated to provide interconnection facilities (as dedicated transport UNEs) at TELRIC-based rates under Sections 251(c)(3) and 252(d). *Nor is SBC required to provide interconnection facilities under Section 251(c)(2) at TELRIC prices.* Now, therefore, we reject MCI’s proposed language. (emphasis added).

MCI Arbitration Order at 97.

Staff supported SBC Illinois on this issue and argued in its brief that “SBC is not required, under Section 251(c)(2), to provide MCI *interconnection facilities*.” (emphasis in original). Staff Brief in 04-0469 at 23 (filed Sept 20, 2004). Here, however, Staff takes the opposite position, without explaining why its prior position was wrong (it was not) and without explaining why the Commission’s prior decisions in the XO and MCI Arbitrations were wrong (they were not).

The Commission should not abandon its well-reasoned and carefully thought-out decisions in the *XO Arbitration Order* and the *MCI Arbitration Order*. Those decisions determined SBC Illinois’ legal obligations under the Telecommunication Act of 1996, and that

law has not changed. The legal reasoning supporting those holdings is valid today as it was on the day those orders were issued and it should be followed here.

The Proposed Decision, quite properly, does not rely on paragraph 140 of the *TRO Remand Order* to justify its decision. Such reliance would be wrong because that paragraph, by its own terms, says that it does nothing to change a CLEC's rights with respect to interconnection under Section 251(c)(2), whatever they may be:

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

TRO Remand Order ¶ 140 (emphasis added and footnote omitted). Since it is abundantly clear that paragraph 140 does "not alter" any interconnection rights under Section 251(c)(2), there has been no change in interconnection obligations and there is no basis for this Commission to reconsider its prior decisions.

Any reliance on paragraph 140 would also be undercut by the fact that the FCC did not promulgate any new interconnection rules that require the ILEC to provide a transport link. To the contrary, all of its interconnection rules in Rule 51.305 remain the same, and none of those require SBC Illinois to provide the transport that connects the ILEC wire center to the CLEC wire center. (The FCC's interconnection rules are set forth below⁶). Moreover, as this

⁶ PART 51_INTERCONNECTION
Subpart D_Additional Obligations of Incumbent Local Exchange Carriers
Sec. 51.305 Interconnection.

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

- (1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;
- (2) At any technically feasible point within the incumbent LEC's network including, at a minimum:
 - (i) The line-side of a local switch;
 - (ii) The trunk-side of a local switch;
 - (iii) The trunk interconnection points for a tandem switch;

Commission found in the XO and MCI Arbitrations, federal law only requires SBC Illinois to *receive* the transport facility provided by the CLEC. Interconnection simply allows the CLEC to connect a hose (*i.e.*, the transport it self-provides, buys from SBC Illinois' access tariff, or gets from third party vendors) to the incumbent's spigot; it does not require the incumbent to provide the hose.

As further proof that paragraph 140 is benign, SBC Illinois provided a network diagram showing the physical facilities that SBC Illinois must supply in order to "provide interconnection" to CLECs under § 251(c)(2). SBC Ex. 4.0 (Albright Rebuttal) at 6. These facilities include entrance conduit from the manhole, cable racking and fiber distribution frames. *Id.* at 7. These are the facilities that the FCC refers to in paragraph 140. SBC Illinois has to

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- (iv) Central office cross-connect points;
 - (v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and
 - (vi) The points of access to unbundled network elements as described in Sec. 51.319;
- (3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier; and
- (4) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.
- (b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act.
- (c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.
- (d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.
- (e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.
- (f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.
- (g) An incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of this section.

perform substantial work to provide interconnection, but none of the work includes providing the physical dedicated transport facility between the CLEC wire center and the SBC Illinois wire center.

Finally, at least three state commissions agree that paragraph 140 of the *TRO Remand Order* has changed nothing with respect to interconnection obligations. On February 23, 2005, the Texas Commission refused the CLEC request to simply recharacterize entrance facilities as “interconnection facilities” and concluded that “whether for interconnection or for unbundled access to network elements, entrance facilities are not subject to TELRIC rates.”⁷ Likewise, the Kansas Commission upheld SBC’s position on this issue.⁸ The Massachusetts DTE reads paragraph 140 the same way, holding that “[t]he FCC made no findings, clarifications or statements in the [*TRO* or *TRRO*] Order that changed the parties’ pre-existing rights and responsibilities concerning interconnection facilities,” and that “it is unnecessary for the parties to amend agreements” to address this issue.⁹

The Commission should correct this unjustified break with its established precedent by changing the Commission Analysis and Conclusion as follows:

Issue 5(a)

The Commission sees the principal question here as whether entrance facilities, no longer available as a leased UNE, can be simply reclassified as interconnection facilities if used solely for the purpose of interconnecting ILEC/CLEC networks for the mutual exchange of traffic. CLECs make the very simple point that entrance facilities when used for interconnection become interconnection facilities that should be made available to CLECs under Section 251(c)(2). ~~SBC appears to labor under the notion that because entrance facilities can no longer be leased as a UNE, they are no longer available at all. Nowhere in our review of CLECs' position, however, can we find where they advocate~~

[61 FR 45619, Aug. 29, 1996, as amended at 61 FR 47351, Sept. 6, 1996; 68 FR 52294, Sept. 2, 2003].

⁷ *Texas Mega Arbitration*, Docket No. 28821, Final Arbitration Award, February 23, 2005 at 16.

⁸ *Order No. 15: Commission Order on Phase II UNE Issues*, Docket No. 05-BTKT-365-ARB, July 18, 2005, at 16.

⁹ *Arbitration Order, Petition of Verizon, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements*, DTE 04-33 at 224 (Mass. D.T.E. July 14, 2005).

~~leasing unbundled elements under section 251(c)(3). An entrance facility should be regarded as an interconnection facility if it is used for interconnection. Staff agrees with CLECs. Thus, the question has shifted from a discussion of unbundling obligations under section 251(c)(3) to a discussion of interconnection obligations under section 251(c)(2). Neither CLECs or Staff, however, come to grips with the clear precedent from this Commission that the interconnection obligations in Section 251(c)(2) do not require SBC Illinois to provide the facility that connects the CLEC wire center with the SBC Illinois wire center. We addressed this precise question two times within the past 14 months. *XO Arbitration Order* (Docket No. 04-0371); *MCI Arbitration Order* (Docket No. 04-0469). In each case, we made a very careful and detailed analysis of the CLEC position (Staff supported SBC Illinois in the MCI case) and we found that the terms of the underlying statute – section 251(c)(2) – do not create any “interconnection” obligation to provide transport facilities to connect networks at TELRIC rates. Thus, in the *XO Arbitration Order* we reasoned that:~~

~~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.~~

~~*XO Arbitration Order* at 78. We find no reason to depart from our established precedent and we accordingly reject the CLEC position on Issue 5(a) and we reject the CLEC language for sections 15.2, 15.3 and 15.4.~~

~~Staff considers interconnection facilities to be a subset of entrance facilities. CLECs advocate including entrance facilities within the definition of interconnection facilities. Regardless of how one fits into the other, we agree with CLECs and Staff that entrance facilities should be available to CLECs if used for the sole purpose of interconnection.~~

Issue 5(b)

~~Staff effectively makes the point that the language advocated by CLECs in Sections 15.2 and 15.3 is unnecessary. Adding “including Entrance Facilities” to Section 15.2 does enhance the clarity of this Section and we regard the addition to be largely superfluous. Concerning the rate for the use of entrance facilities, Section 15.2 directly addresses “...the requirements of Section 251(c)(2) of the Act”. Section 251(c)(2)(D) requires each ILEC to provide interconnection with the its network~~

~~...on rates, term, and conditions that are just, reasonable and non-discriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.~~

~~Since Section 252(c)(2)(D) contains all of the language necessary to establish the pricing standards for interconnection services, there is no need to restate it in Section 15.3. Given the ruling on Issue 5(a), Issues 5(b) and 5(c) are moot.~~

Issue 5(c)

~~We further agree with Staff that a mere reclassification of facilities from entrance to interconnection does not, according to this record, entail any change in price or provisioning. Consequently, the proposed language contained in Section 15.4 should be adopted.~~

ISSUE 7: Sections 0.1.17, 1.5, 2.3, 3.3, 5.8, 13.0 – (a) Should the Amendment refer to, and include rates and terms for, network elements that SBC is obligated to provide pursuant to Section 271 of the federal Act? (b) If so, what should those rates and terms be?

Amendment Reference: Sections 0.1.17, 1.5, 2.3, 3.3, 5.8, 13.0

The purpose of an interconnection agreement arbitration like this one is to “meet the requirements of Section 251 . . . , including the regulations prescribed by the [FCC] pursuant to Section 251.” 47 U.S.C. § 252(c)(1). The purpose of this arbitration in particular is to implement the regulations prescribed by the FCC in the *TRO* and *TRO Remand Order*. The CLECs, however, proposed several provisions that were not designed to implement the FCC’s regulations under Section 251, but to implement Section 271 – in a manner that was designed to circumvent Section 251. The Proposed Decision correctly rejects much of the CLECs’ proposed language on the ground that it has no authority to interpret or enforce Section 271, a conclusion that is supported by the decision of every federal court to address the matter and by the majority of state commissions. However, the Proposed Decision then incorrectly adopts the CLECs’ proposed Section 13.4 (on “reclassifying” Section 251 combinations to Section 271 combinations) and their proposed language on “commingling,” for those CLECs whose interconnection agreements address Section 271.

The CLECs' ultimate goal is an effort to put back together again, a la Humpty Dumpty, the UNE Platform that the FCC unequivocally barred. In Section 13.4 they seek to take network element combinations (as well as individual network elements) they obtained under Section 251 and "reclassif[y] those combinations as "a corresponding 271 Element or Elements." Similarly, in Sections 0.1.17 and 5.8, they seek to "commingle" network elements obtained under 271 with the UNEs they obtain under Section 251. The FCC rejected these CLEC strategies in the same *TRO* that this arbitration is designed to implement. The Commission should do the same, and it should accordingly revise the Proposed Decision. Section 271 does not support the barred UNE-P, whether it is labeled a combination or a commingling.

A. THE COMMISSION SHOULD REJECT THE PROPOSED DECISION ON "COMMINGLING" OF SECTION 271 ITEMS

"Commingling" refers to the connection of a UNE or combination of UNEs to an SBC Illinois wholesale service. The CLECs attempted to use it as their last-ditch effort to evade the FCC's "nationwide bar" on the UNE-P combination. They contended that they could "commingle" Section 271 items (like switching) with Section 251 UNEs (like loops) – a tactic that would permit them to covertly reassemble the very same UNE-P that the FCC barred as contrary to law and harmful to national policy.

The FCC has rejected that CLEC theory, and it has made clear that ILECs are not required to commingle Section 271 items. After initially including Section 271 checklist items among the things that are subject to commingling, the FCC later amended the *TRO* to remove Section 271 checklist items from that group. Specifically, paragraph 584 of the *TRO* originally defined an incumbent's commingling duty to "include any network elements unbundled pursuant to Section 271." *TRO* ¶ 584. In its September 17, 2003 *Errata* to the *TRO*, however, the FCC

removed that language from paragraph 584, clearly indicating that Section 271 checklist items are *not* subject to commingling. The *Errata* amended paragraph 584 as follows:

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

TRO ¶ 584 (as amended).

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

The CLECs claim that the *Errata*’s deletion of the language on Section 271 means nothing, for the remaining language generically refers to “other wholesale facilities and services,” which they say includes Section 271 offerings. But that makes no sense. If the FCC had meant to require commingling of Section 271 offerings, why would it have deleted language that expressly required such commingling? The FCC would not have gone to the bother of issuing an *Errata* that has no effect. Certainly, the FCC would not issue an *Errata* to make its decision more vague.

Furthermore, the *TRO*, as amended by the *Errata*, also makes clear throughout the discussion of commingling that the “wholesale services” with which UNEs may be commingled are “switched and special access services offered pursuant to tariff,” as well as Section 251(c)(4) resale services. *TRO* ¶¶ 579, 584. Indeed, the amended *TRO* refers to tariffed access services repeatedly throughout its discussion of commingling, but not once to Section 271 checklist

items. *Id.* ¶¶ 579-84. If the FCC had intended to include Section 271 items among the things that must be commingled, it easily could have said so. Instead, however, the FCC specifically removed the Section 271 commingling language. Accordingly, the *TRO* does *not* permit the commingling of Section 271 items with Section 251 UNEs. Several state commissions have already rejected CLEC attempts to incorporate a requirement that SBC commingle UNEs with Section 271 checklist items. *In re Level 3 Communications*, Docket No. 04-L3CT-1046-ARB, 2005 WL 562645, at 146 Kan. Corp. Comm’n, Feb. 7, 2005); *In re DIECA Comms., Inc.*, 2005 WL 578197, at 13 (Utah Pub. Serv. Comm’n, Feb. 8, 2005).

This Commission has entered two conflicting decisions on the issue. In the *XO* arbitration, the Commission correctly held that “SBC is not required to commingle UNEs and UNE combinations with network elements unbundled pursuant to Section 271.” Oct. 28, 2004 Amendatory Arbitration Decision, Docket No. 04-0371, at 18. As the Commission recognized, “[t]he FCC specifically removed that requirement from *TRO* ¶ 584 when it issued its *TRO* Errata.” *Id.* Thus, *XO*’s position was “insupportable.” *Id.* In the *MCI* arbitration, though, the Commission stated that “the *TRO* no longer contains specific guidance as to SBC’s duty to allow commingling of Section 271 UNEs,” and directed the parties to include language specifying that SBC is required to permit such commingling. Nov. 30, 2004 Arbitration Decision, Docket No. 04-0469, at 262-263. The Commission did not, however, distinguish or discuss its contrary result in the *XO* arbitration. As shown above, the Commission should resolve that conflict here in this industrywide proceeding, and it should follow the result in the *XO* arbitration, which accords with decisions of other states and most importantly with the FCC’s Errata in holding that commingling of Section 271 UNEs cannot be required.

The Proposed Decision simply fails to address the FCC’s Errata or the Commission’s conflicting past decisions on commingling. Instead, it concludes, without any supporting analysis, that SBC Illinois must “commingl[e] Section 251 elements with Section 271 elements pursuant to FCC rules” under Section 251, and it asserts that those rules “should be included in a Section 252 Agreement.”¹⁰ But the Proposed Decision is *contrary* to the FCC’s rules under Section 251, because the FCC expressly *removed* Section 271 elements from the roster of items that can be commingled with Section 251 UNEs.

The Proposed Decision notes that SBC Illinois has voluntarily agreed to permit commingling of Section 251 UNEs with Section 271 loop and transport elements. All that means, however, is that SBC Illinois has offered to *give* the CLECs something it was not required to offer by law, in an effort to resolve the issue amicably. It does not mean that the Commission can transplant the voluntary offer to other Section 271 items like switching (the critical component of the barred UNE-P). Whatever concessions SBC Illinois might make voluntarily, the Commission is still bound to follow the rules. A settlement offer of \$1,000 does not entitle a court to award \$1 million on a meritless claim, and an offering of loop-transport commingling does not entitle this Commission to require commingling of other items like switching.

For these reasons, SBC Illinois respectfully requests that the Commission modify the proposed Commission Analysis and Conclusion on Issues 7(a) and 7(b), as follows:

Issue 7(a)

~~We disagree with SBC that CLECs are attempting to reconstruct the barred Section 251 UNE P by commingling these elements with elements under Section 271. Commingling is not prohibited. Where Section 271 agreements are in place, Section 271 elements~~

¹⁰ While the Proposed Decision does not specifically identify the contract language it is adopting, it endorses the position of Staff, which supported the CLECs’ proposed language in Section 5.8 and opposed the CLECs’ commingling proposals in Sections 0.1.17 and 13.3 of the Amendment.

~~should be allowed to be commingled with Section 251 elements.~~ We note that the Commission has no jurisdiction to enforce the provisions of Section 271 absent an agreement. General jurisdiction would lie only with the FCC. Lacking the jurisdiction conferred by a Section 252 agreement would leave the Commission unable to enforce the Section 271 requirements not contained in the contract. For this reason, we agree with Staff that ~~SBC's~~ the CLECs' proposal for commingling Section 251 and Section 271 elements outside of Section 252 agreements is inappropriate. We also reject the CLECs' proposal within the context of a Section 252 agreement. SBC is not required to commingle ~~commingling~~ Section 251 elements with Section 271 elements pursuant to FCC rules implementing Section ~~252(e)(3)~~ 251(c)(3) of the Act, and accordingly the Commission cannot insert which specifically references Section 252. All of the rates, terms, and conditions pertaining to such commingling ~~those elements should be included~~ in a Section 252 agreement.

Issue 7(b)

CLECs' proposal to obligate SBC to commingle Section 251 UNEs with Section 271 elements beyond loops and transport is rejected for the reasons set forth under Issue 7(b). ~~should be granted, but again, only within the context of a Section 252 agreement.~~ The Commission rejects CLECs' proposal to update underlying agreements requiring SBC to provide new rates and terms for Section 271 elements, apart from any terms agreed to in the underlying agreement. CLECs' Section 13.1 language should be rejected. Transitions from Section 251 UNEs to Section 271 elements should be conducted without charge, absent any governing rates, terms, or conditions.

B. THE PROPOSED LANGUAGE ON "COMBINATIONS" IS CONTRARY TO SECTION 271.

The FCC has held that access under Section 271 differs markedly from that under Section 251. For example, Section 271 does not address combinations of network elements, only standalone items. *TRO* ¶ 655 n.1989. The checklist item for switching is expressly limited to switching that is uncoupled from transport, loops, or other services. 47 U.S.C. § 271(c)(2)(B)(6).

Of course, the CLECs' principal goal is not to obtain access to standalone network elements, but to combinations like the UNE-P. Thus, their proposed Section 13.4 would permit them to "request that any Section 251 unbundled network element *or combination of network elements*" be relabeled or in their word "reclassified as a corresponding 271 Element or

Elements” – even if the unbundled access to the constituent elements or combinations has been barred (or, to use the CLEC euphemism “Affected”) by the *TRO* or *TRO Remand Order*.

The Proposed Decision errs in recommending adoption of that language. The FCC barred the UNE-P by any other name. The FCC established a “nationwide bar” on the UNE-P because “UNE-P has been a disincentive to competitive LECs’ infrastructure investment” and because further “unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition.” *TRO Remand Order* ¶ 218. Genuine competition is a goal of the *Act*, not just Section 251. *Id.* ¶ 1; S. Conf. Rep. No. 104-230, at 148 (1996).

The CLECs’ attempt to shift gears to Section 271 is thus unavailing. Congress did not take the schizophrenic approach of promoting facilities-based competition in Section 251 and then licensing the states to hinder its development in Section 271. Quite the contrary. The FCC, which has exclusive authority to enforce Section 271, has found a combinations requirement to be precluded by the plain language of Section 271 and it has accordingly rejected carrier proposals to impose one. In the *TRO*, the FCC has already held that Section 271 does not support a requirement for any combinations – let alone the UNE-P that the FCC has barred as contrary to law and harmful to national policy – that include unbundled network elements “that no longer are required to be unbundled under Section 251.” *TRO* ¶ 655 n.1989. When competing carriers asked the FCC to impose such a requirement, the FCC – which is the agency with exclusive authority to implement Section 271 – rejected their position on the ground that the statute’s plain language did not support it. “Unlike section 251(c)(3), . . . section 271’s competitive checklist contain[s] no mention of combining.” *Id.*

Even though the CLECs' language seeks to require combinations under Section 271 – a result that is squarely barred by the FCC – the Proposed Decision does not even come to grips with the FCC's holding. It looks at the CLECs' proposal as if it merely requires “reclassifications” of combinations from Section 251 to Section 271, without acknowledging the FCC's determination that Section 271 does not address combinations at all (whether or not those combinations are “reclassified” from Section 251). This Commission is here to enforce the *TRO*, not to ignore it. Moreover, given the Proposed Decision's correct conclusion that this Commission does not have authority to enforce Section 271, because that authority belongs exclusively to the FCC, it would clearly be improper for the Commission to *modify* Section 271 and nullify the FCC's holding on combinations.

While the Proposed Decision's requirement is limited to those CLECs that already have some Section 271 language in their agreements, that limitation is not a cure. If a CLEC's existing agreement addresses Section 271 in some fashion, but does not require *combinations* under Section 271, then the Commission cannot modify the agreement or insert a combinations requirement here. Such a result would be directly contrary to the *TRO* that this proceeding is supposed to implement. Conversely, if a CLEC's agreement does require combinations under Section 271, the CLECs' proposed contract language here is unnecessary – and improper, because this proceeding is designed to modify agreements in accordance with the *TRO*, not to add provisions that are contrary to the *TRO*.

For these reasons, the Commission should modify the second paragraph of the proposed Commission Analysis and Conclusions on Issue 7(b) as follows:

Reclassification of standalone network elements should be performed at no charge and the language of Section 13.4 should be adopted, but only with respect to reclassification of standalone network elements. We reject those portions of the CLECs' proposed language in Section 13.4 that call for “reclassifications” of Section 251 UNE

combinations to section 271 combinations, for the simple reason that the FCC has held that Section 271 does not require combinations. Similarly, we reject the CLECs' proposed language on combinations in Section 15.2. As for individual network elements, our adoption of Section 13.4 would obviate the need for the CLECs' proposed language in Section 15.2.

ISSUE 8: Sections 2.1.1 and 2.1.1.1– Should Section 2.1.1 and 2.1.1.1 state that SBC Illinois' entitlement not to provide new ULS/UNE-P beginning March 11, 2005, applies only to non-Embedded Base Customers?

Amendment Reference: Sections 2.1.1 and 2.1.1

Under Issue 8, the first two paragraphs of the proposed “Commission Analysis and Conclusions” address Issue 8. While SBC Illinois does not agree with the Proposed Decision on that issue, it does not take exception on that issue. SBC Illinois *does*, however, take exception to the third and final paragraph of the proposed Commission Analysis and Conclusions – which does not address Issue 8 at all. Instead, that paragraph attempts to address Issue 9, which the parties have settled.

This portion of the Proposed Decision begins (at 65) by stating that “[n]either party, in its testimony or briefs, addressed its respective proposed language in Section 2.1.1 regarding the prices to be charged for the provision of ULS/UNE-Ps to Embedded Base customers.” It then recommends adoption of the CLECs’ proposal. But the reason why neither party addressed Section 2.1.1 is because: that contract language was the subject of Issue 9. The issues list clearly states that Issue 9 addresses “Section 2.1.1” and the questions “(a) How should the transition rates for ULS/UNE-P be stated in the Amendment?” and “(b) What DS0 loop rates should be used to calculate the ULS/UNE-P transition rates?” As the Proposed Decision notes (at 65), Issue 9 has been settled. As a result, the Commission should delete the Proposed Decision’s attempted resolution of Issue 9, which consists of the entire paragraph preceding “Issue 9” on page 65 (beginning “Neither party”).

ISSUE 17a: **Section 4.1 – Where SBC has, before March 11, 2005, designated wire centers as non-impaired and where CLEC has not disputed SBC’s designation within 12 months (for DS1/DS3) and 18 months (for dark fiber) of March 11, 2005, may CLEC thereafter self-certify for those wire centers.**

Amendment Reference: Section 4.1

ISSUE 20: **Sections 4.1.1.4, 4.1.1.6, 4.1.5 – Where a CLEC did not dispute SBC’s designation of an additional wire center as non-impaired within 60 days after SBC issues the Accessible Letter making the designation, and the ICC has not issued an order determining the wire center to be non-impaired, can CLEC thereafter self-certify for the wire center solely for the purpose of ordering a new Section 251 loop or transport UNE at that wire center?**

Amendment Reference: Sections 4.1.1.4, 4.1.1.6 and 4.1.5

SBC Illinois takes exception to the Proposed Decision’s resolution of these issues in favor of CLECs. The central failing of the Proposed Decision is that the “non-impairment” status of a wire center can be held hostage to a single CLEC’s unknown and uncertain business plans - plans that do not, and may never, exist. The Proposed Decision rejects SBC Illinois’ request that any disputes over a “non-impairment” designation be litigated promptly. Instead, it accepts the CLEC/Staff argument that a CLEC with no interest in contesting the “non-impairment” designation now should be able to do so years later because its business plans may change. This rationale does not hold water. The only wire centers that qualify for “non-impairment” designation in the first place are the large, highly-concentrated wire centers that have already attracted CLEC entry. If the facts support a CLEC self-certification, there will inevitably be CLECs active within that wire center that will make the self-certification. SBC Ex. 2.1 (Chapman Rebuttal) at 37. There are over 40 CLECs actively participating in this proceeding, so whether a single CLEC would have current business plans at a particular wire center is not the right question. Instead, the Commission should ask whether the community of

CLECs, as a whole, has an adequate interest in making any appropriate self-certifications at wire centers that may meet the FCC's thresholds in the future, and the answer to that question is surely "yes."

Rather than repeat all of the additional arguments in support of its position, SBC Illinois hereby adopts the arguments made in its Initial Brief (SBC Br. at 89-95) and Reply Brief (SBC Reply Br. at 74-80) and requests that the Proposed Decision be revised to adopt SBC Illinois' language in its entirety.

Even if the Commission does not adopt SBC Illinois' position, at the very least it should revise the Proposed Decision to establish some reasonable time limit on the CLECs' ability to file self-certifications. It is well-recognized under Illinois law that statutes of limitations are based on the public policy of the state of Illinois that there should be some fixed time within which rights may be asserted. *Illinois Law And Practice, Limitations of Actions*, §2. Broadly speaking, these statutes of limitations ensure a level of fairness in litigation:

Statutes of limitations are designed to afford security from stale demands when, from the lapse of time, the death of witnesses, the failure of memory, and other causes, the true state of the underlying transaction may be incapable of explanation and the rights of the parties cannot be satisfactorily investigated.

* * *

[T]he purpose of a statute of limitations is not to shield a wrongdoer, but to provide a defendant with a reasonable and fair opportunity to investigate a claim against it and to provide a defense within a time when the facts are still accessible and witnesses are still available, inasmuch as the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Illinois Law And Practice, Limitations of Actions, § 1. As Ms. Chapman explained, fresh evidence is especially important on the issue of whether collocations meet the requirements of a "Fiber-Based Collocator" under Rule 51.5, because there are a variety of factors in that rule which are more easily determined by visual observation than by written record. SBC Ex. 2.0

(Chapman) at 67-68. For example, a qualifying collocation must have an “active electrical power supply” and must operate a “fiber-optic cable or comparable transmission facility that terminates at a collocation arrangement within the wire center” and “leaves the incumbent LEC wire center premises.” FCC Rule 51.1. Thus, at the very least, visual inspection is required to determine whether the collocation arrangement has the right kind of transmission facility, whether that transmission facility terminates at the collocation facility, and whether it leaves the wire center. These are not facts that can be readily established by the ILEC’s documentation years after the fact.

Moreover, SBC Illinois cannot anticipate what creative arguments CLECs may raise in the future to argue that collocation arrangements do not satisfy the FCC’s rule. SBC Illinois should not be required to anticipate every future potential CLEC argument and develop detailed evidence refuting each potential argument in advance. Because the physical make-up of the collocation arrangements in question will change over time, this is precisely what the Proposed Decision would require SBC Illinois to do.

To prevent the prejudice that would flow from defending these self-certification issues years after the relevant evidence has grown stale, the Commission should establish a two year window within which all CLEC self-certification must be made.

In sum, if the Commission does not adopt SBC Illinois’ position, then at the very least it should rule that any self-certifications made by a CLEC must be made within two (2) years from the date of the non-impairment designation by SBC Illinois. The third paragraph of the Commission Analysis and Conclusion should be revised to read as follows:

We generally agree with CLECs that ~~there should be no limit on the timing of self-certifications~~ may be submitted after expiration of the transition period for a wire center. If a CLEC has no present interest in doing business in areas served by a wire center, it should not have to self-certify simply to protect their ability to challenge SBC's

designation of the wire center at some point in the future should a business need arise. Also, new information may later come to light that would warrant a CLEC self-certification. ~~Moreover, the TRRO puts no time frame on when self-certifications must be submitted. Although SBC argues that it will be difficult to defend its non-impairment designations as time goes by, SBC must be able to produce documentation at any time in the future. As CLECs point out, if SBC cannot produce, after the fact, documentation showing the basis on which it concluded that the wire center met the non-impairment criteria, then the entire ILEC self-declaration process is suspect.~~

We do not agree with CLECs, however, that there should be no limit whatsoever on the timing of self-certifications. It is well-recognized under Illinois law that statutes of limitations are based on the public policy of the state of Illinois that there should be some fixed time within which rights may be asserted in order to afford some security from stale demands when, from the lapse of time, the death of witnesses, the failure of memory, and other causes, the true state of the underlying transaction may be incapable of explanation and the rights of the parties cannot be satisfactorily investigated. Illinois Law And Practice, Limitations of Actions, §§ 1, 2. This policy applies here and we cannot reasonably expect that SBC Illinois will be able to produce the same quality of documentary and testimonial evidence four or five years after the relevant date that it could produce within two or three years. CLECs argue that SBC Illinois should be able to produce the relevant documentation at any time in the future, but the analysis will not hinge just on documents. As SBC Illinois explains, it will also be relevant to have testimony concerning visual inspection of the wire center to ascertain whether the CLEC collocations satisfy the FCC's specific requirements relating to those collocations. For this reason, we are persuaded that there should be some reasonable limitation on the timing of self-certifications, and we direct the parties to include in the Amendment a requirement that any self-certification for a particular wire center be made by a CLEC within two years from the date of SBC Illinois' designation that a wire center meets the FCC's non-impairment thresholds. Specifically, the following sentence shall be included in Section 4.1: "CLEC may not submit a self-certification for a wire center after two (2) years have elapsed from the date that SBC Illinois designated that wire center as non-impaired"

In addition, the second paragraph of the Commission Analysis and Conclusion should be revised to read as follows:

Therefore, we do not adopt SBC's proposed language for the end of Section 4.1. We adopt CLECs' proposed language for Section 4.1.1.4, 4.1.1.6, and 4.1.5, modified to include the two year time limitation we discuss above.

ISSUE 18: **Section 4.1.1.5 – (a) What should be the applicable transition period to transition Section 251 high capacity loop and transport UNEs at wire centers that are designated as non-impaired after March 11, 2005? (b) Can a CLEC continue to order high capacity loop and transport UNEs pursuant to Section 251 at the wire center during the transition period for such wire centers?**

Amendment Reference: Section 4.1.1.5

Issue 18(b) of the Proposed Decision should be revised to state that CLECs may not obtain new UNE loops for existing customers during the transition period.

1. The *TRO Remand Order* directly addresses this issue and unquestionably resolves it in favor of SBC Illinois by holding that ILECs have no obligation to offer *new* UNE DS1/DS3 loop and transport at non-impaired wire centers (and on non-impaired routes) after March 11, 2005. As explained in SBC Illinois’ Initial and Reply Briefs, the plain language of the FCC’s rules and the text of the *TRO Remand Order* make this clear. SBC Br. 87-88; SBC Reply Br. 83-87; SBC Ex. 2.1 (Chapman Rebuttal) at 30-34. One only need read paragraph 144 to see this is so. It says that “these transition plans shall apply only to the embedded customer base, *and do not permit competitive LECs to add new dedicated transport UNEs pursuant to Section 251(c)(3)* where the Commission determines that no Section 251(c) unbundling requirement exists.” *TRO Remand Order* ¶ 142 (emphasis added). Identical language exists for UNE loops in ¶ 144.

The FCC’s rules say the same thing. The rules for DS1/DS3/dark fiber loops provide that “where incumbent LECs are not required to provide unbundled [DS1/DS3/dark fiber] loops pursuant to [the FCC’s non-impairment criteria], requesting carriers may not obtain new [DS1/DS3/dark fiber] loops as unbundled network elements.” 47 C.F.R. § 51.319(a)(4)(iii) (DS1 loops), (a)(5)(iii) (DS3 loops), (a)(6)(ii) (dark fiber loops). Similarly, the rules for DS1/DS3/dark fiber dedicated transport provide that “where incumbent LECs are not required to provide unbundled [DS1/DS3/dark fiber] transport pursuant to [the FCC’s non-impairment

criteria], requesting carriers may not obtain new [DS1/DS3/dark fiber] transport as unbundled network elements.” 47 C.F.R. § 51.319 (e)(2)(ii)(C). (DS1 transport), (e)(2)(iii)(C) (DS3 transport); (e)(2)(iv)(B) (dark fiber transport). The Proposed Decision overlooks this controlling federal law and therefore must be modified to resolve this issue in SBC Illinois’ favor.

2. The Proposed Decision relies, in part, on the Commission’s decision in Docket 05-0154, et al. (the “*Complaint Order*”), but that decision offers no analysis of what the *TRO Remand Order* says about obtaining new UNE loops and transport during the transition period and is poor precedent for the finding in the Proposed Decision. To the extent the *Complaint Order* creates any precedent at all, it should be re-examined and reversed in this proceeding.

The only statement on Issue 18(b) in the *Complaint Order* is that “the ruling made earlier in the order regarding ULS/UNE-P applies to transport [and loops] as well.” *Complaint Order* at 20, 23. The *Complaint Order* did not separately analyze the question whether SBC Illinois must provide new DS1/DS3 loop and transport to CLECs at non-impaired wire centers. Instead, it only analyzed the question as it applied to UNE-P, *Complaint Order* at 14-17, and then applied that conclusion to loops and transport. That approach is faulty for the simple reason that the language in *TRO Remand Order* on this issue is different for UNE-P, on the one hand, and loop/transport, on the other.

As to UNE-P, the Commission acknowledged in the *Complaint Order* that the language in the *TRO Remand Order* supports each side of the question whether embedded base *customers* are entitled to new UNE-P or not. *Complaint Order* at 15. It ultimately decided to go along with the FCC’s references to the “embedded base of end-user customers” in the switching rule. 47 C.F.R. § 51.319(d)(2)(iii). The same cannot be said for the *TRO Remand Order*’s rules on loops and transport, which (as described above) contains no ambiguity at all. Each transition rule

applies only to UNEs that a CLEC “leases from the incumbent LEC” as of the effective date of the *TRO Remand Order*. 47 C.F.R. § 51.319(a)(4)(iii) (DS1 loops), (a)(5)(iii) (DS3 loops), (e)(2)(ii)(C) (DS1 transport), (e)(2)(iii)(C) (DS3 transport); (e)(2)(iv)(B) (dark fiber transport). Each rule then reiterates that a CLEC “may not obtain new [DS1/DS3/dark fiber] loops as unbundled network elements” and “may not obtain new [DS1/DS3/dark fiber] transport as unbundled network elements.” *Id.*

The *Complaint Order* nowhere acknowledges these rules. Nor does it analyze the language in the text of the *TRO Remand Order*. No doubt, the absence of any meaningful analysis was due to the short time frames of the proceeding, coupled with the focus on UNE-P and switching. Under these circumstances, the *Complaint Order* cannot be a bar to the proper application of the clear federal law on Issue 18(b). The Proposed Decision should revisit this decision and make it clear that SBC Illinois is not obligated to provide new UNE loops to embedded base customers.

SBC Illinois’ interpretation of the *TRO Remand Order* as prohibiting new orders for declassified UNE loops and transport during the transition period is supported by numerous decisions and orders from other jurisdictions. The *BellSouth Georgia Decision*,¹¹ for example, squarely supports that interpretation:

The FCC also created transition periods for the “embedded base” of customers that were currently being served using these facilities. Under the FCC transition plan, competitive LECs may use facilities *that have already been provided* to serve their existing customers for only 12 months and at higher rates than they were paying previously. See [*TRO Remand Order*] ¶¶ 142, 195, 199, 227. The FCC made plain that these transition plans applied *only* to the embedded base and that competitors were “not permit[ed] to place new orders.” *Id.* ¶¶ 142, 195, 199. The FCC’s decision to create a limited transition that applied only to the *embedded base* and required higher payments *even for those existing facilities* cannot be squared with the PSC’s conclusion that the FCC permitted an

¹¹ *BellSouth Telecommunications, Inc. v MCI Metro Access Transmission Services, LLC*, 1:05-CV-0674-CC (N.D. Ga. Apr. 5, 2005) (“*BellSouth Georgia Decision*”).

indefinite transition during which competitive LECS could order new facilities and did not specify a rate that competitors would pay to serve them.

BellSouth Georgia Decision at 4 (emphasis added). Here, the court clearly equated the “embedded base” covered by the FCC transition period with “those existing facilities” that “have already been provided to serve” the CLEC’s existing customers and recognized that the FCC did not permit CLECs to “order new facilities” for any purpose. This decision was recently affirmed by the 11th Circuit, so the only U.S. Court of Appeals to consider the issue has rejected the position adopted by the Commission. *BellSouth Telecommunications, Inc. v MCI Metro Access Transmission Services, LLC*, ___ F.3d ___, 2005 WL 2230394, 11th Cir. (Ga.) Sept. 15, 2005. See also *Bellsouth Mississippi Decision*¹² at 7, 20 (stating that “the FCC’s intent in the *TRRO* is an unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of change of law provisions in the parties’ interconnection agreements” and precluding, without reservation, the Mississippi PSC from “enforcing that part of its order requiring BellSouth to continue to process new orders for UNE-P switching”); *Maine Order*¹³ at 5 (holding, without reservation, that ILEC’s have “no obligation to provide CLECs with access to the delisted UNEs and that the transition plan does not permit CLECs to add new de-listed UNEs”).

For all these reasons, the last paragraph of the Commission Analysis and Conclusion should be changed as follows:

~~With respect to Issue 18(b), Staff cites the Commission's Order in Dockets 05-0154/05-0156/05-0174 and asserts that although SBC can deny requests for new loop or transport requests for new customers during any post non-impairment finding transition period, it may not deny such requests during the transition period for requests for new loops being used to provide service to a requesting carrier's embedded customers. We agree with Staff that there is no reason that this decision should be modified or differentiated. The decision in Dockets 05-0154/05-0156/05-0174 is currently on appeal after the~~

¹² *BellSouth Telecommunication, Inc v. Mississippi Public Service Commission*, 368 F. Supp.2d 557 (S.D. Miss. 2005). (“*BellSouth Mississippi Decision*”).

¹³ Order, *Verizon-Maine Proposed Schedules, Terms Conditions and Rates for Unbundled Network Elements*, Docket No. 2002-682 (Me. PUC Mar. 17, 2005).

~~Commission denied SBC's Petition for Rehearing. Accordingly, we adopt CLECs' language, pending the outcome of the appeal and the Commission's change of law provisions.~~

With respect to Issue 18(b), Staff properly notes that the Commission's Order in Dockets 05-0154/05-0156/05-0174 touches on the question of whether CLECs may obtain new UNE loops for embedded base customers during the transition period. While we resolved this issue in favor of CLECs, our analysis of the matter was unduly abbreviated by the extraordinarily short time for resolution of complaints under Section 13-515 of the Public Utilities Act. Upon further review, we agree with SBC Illinois that the question whether CLECs may obtain new UNE DS1/DS3 loops during the transition period is different from the question whether CLECs may obtain new UNE-P during the transition period, and it was not appropriate for us to simply apply our finding for UNE-P to UNE DS1/DS3 loops. We are persuaded that the transition language in the TRRO for DS1/DS3 loops does not permit CLECs to establish any new UNE loops during the transition period. The only U.S Court of Appeals to consider the issue ruled that the TRRO does not allow for new declassified UNEs during the transition period, and we follow that reasoning here. *BellSouth Telecommunications, Inc. v MCI Metro Access Transmission Services, LLC*, ___ F.3d ___, 2005 WL 2230394, 11th Cir. (Ga.) Sept. 15, 2005. Accordingly, we reject CLECs' proposed language at the end of Section 4.1.1.5 that would have required SBC Illinois to provide new UNE DS1/DS3 loops to embedded base customers during the transition period.

ISSUE 21: Section 4.1.3 – If CLEC self-certifies for a wire center that SBC has designated as non-impaired, and CLEC's self-certification is withdrawn or ruled to be in error by the ICC, (a) on what timing should CLEC's Section 251 high capacity loop and transport UNEs at that wire center be transitioned and (b) what true-up should CLEC be obligated to make?

Amendment Reference: Section 4.1.3

SBC Illinois' exceptions on Issue 21 are limited to matters of clarification. SBC Illinois supported Staff's recommendation to insert language to address eight separate scenarios that can occur when a CLEC's self-certification request is withdrawn or denied by the Commission. The Proposed Decision adopted Staff's language. SBC Illinois went on, however, to suggest relatively benign changes that would allow the language to more accurately describe what happens in each scenario. SBC Ex. 2.1 (Chapman Rebuttal) at 46. The Proposed Decision did not accept or reject SBC Illinois' changes. These changes should be adopted now.

The changes to Staff's language clarify several matters. First, in no scenario would the CLEC's order be "accompanied by" a self-certification because the parties have agreed in Section 4.1 that self-certification is done on a wire center basis by a written notification that covers all subsequent orders submitted by that CLEC at that wire center. For that reason, SBC Illinois proposes to strike the words "accompanied by" and replace them with the words "pursuant to." Second, scenarios (i) through (iv) involve SBC Illinois wire centers that were non-impaired as of March 11, 2005. These wire centers have already been designated as non-impaired, so it is not entirely accurate to say "when SBC issues an Accessible Letter" because the designation has already taken place. SBC Illinois proposes to delete those references to issuing an Accessible Letter. Third, in scenarios (i) through (vi), the loop or transport is ordered by the CLEC, so SBC Illinois proposes to insert the words "by CLEC" to specify that. All these changes to Staff's language are shown below in underlined text:

- 4.1.3 The Dispute Resolution process set forth in the General Terms and Conditions of the Agreement shall not apply to a dispute of a CLEC self-certification. In the state of Illinois, if it desires to do so by filing a complaint at the ICC, SBC may dispute the self-certification and associated CLEC orders for DS1/DS3 Loops, DS1/DS3 Dedicated Transport, and Dark Fiber Dedicated Transport pursuant to the following procedures: SBC shall notify the CLEC of its intent to dispute the CLEC's self-certification within 30 days of the CLEC's self-certification or within 30 days of the effective date of this amendment, whichever is later. SBC will file the dispute for resolution with the state Commission within 60 days of the CLEC's self-certification or within 60 days of the effective date of this Attachment, whichever is later. SBC shall include with the filing its direct case testimony and exhibits which may reasonably be supplemented. To the extent this filing contains confidential information, SBC may file that information under seal. SBC shall offer to enter into a protective agreement under which SBC would provide such confidential information to CLEC. SBC shall have no obligation to provide such confidential information to any Party in the absence of an executed protective agreement. SBC will notify CLECs of the filing of such a dispute via Accessible Letter issued within 5 business days following the filing of a dispute. If the self-certification dispute is filed with the state Commission for resolution, the Parties will not oppose requests for intervention by other CLECs if such request is related to the disputed wire center designation(s). The parties agree to urge the ICC to adopt a case schedule resulting in the prompt resolution

of the dispute. During the pendency of any dispute resolution proceeding, SBC shall continue to provide the loop or transport facility in question to CLEC at the rates in the Pricing Schedule to the Agreement. If the CLEC withdraws its self-certification, or the state Commission determines through arbitration or otherwise that CLEC was not entitled to the provisioned DS1/DS3 Loops or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport under Section 251, then (with rates paid by CLEC for the affected loop or transport subject to true-up):

- i. When SBC ~~issues an Accessible Letter~~ designating relevant wire centers to be non-impaired ~~on or~~ before March 11, 2005, and a DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport is ordered by CLEC pursuant to Section 251(c)(3) of the 1996 Act ~~accompanied by~~ pursuant to a self-certification on or after March 11, 2005, and where the self-certification is reversed before the transition period specified in Section 4.1 has expired, then CLEC shall transition the DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport according to the process in Section 4.1. Rates between the date that the circuit is provisioned and the date the circuit is transitioned shall be the equivalent special access rate or, where no such equivalent exists, the rates established in Section 3.2.1.
- ii. When SBC ~~issues an Accessible Letter~~ designating relevant wire centers to be non-impaired ~~on or~~ before March 11, 2005, and a DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport is ordered by CLEC pursuant to Section 251(c)(3) of the 1996 Act ~~accompanied by~~ pursuant to a self-certification on or after March 11, 2005, and where the self-certification is reversed after the transition period specified in Section 4.1 has expired then CLEC shall transition the DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport within 30 days of the date on which the CLEC self-certification is reversed. Rates between the date the circuit is provisioned and the date the circuit is actually transitioned shall be the equivalent special access rate or, where no such equivalent exists, the rates established in Section 3.2.1. If the CLEC has not submitted an LSR or ASR, as applicable, to SBC within 30 days of the date on which the CLEC self-certification is reversed, then SBC shall be entitled to convert the loop to an analogous SBC wholesale service of its choice or in the absence of any analogous wholesale service to disconnect the arrangement.
- iii. When SBC ~~issues an Accessible Letter~~ designating relevant wire centers to be non-impaired ~~on or~~ before March 11, 2005, and a DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport is ordered by CLEC pursuant to Section 251(c)(3) of the 1996 Act ~~accompanied by a self-certification~~ before March 11, 2005, and where the self-certification is reversed before the transition period specified in Section 4.1 has expired then CLEC shall transition the DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport according to the process in Section 4.1. Rates between the date that

SBC issued the Accessible Letter and the date the circuit is transitioned shall be those in Section 3.2.1.

- iv. When SBC ~~issues an Accessible Letter~~ designating relevant wire centers to be non-impaired ~~on or before March 11, 2005, and~~ a DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport is ordered by CLEC pursuant to Section 251(c)(3) of the 1996 Act ~~accompanied by a self-certification~~ before March 11, 2005, and where the self-certification is reversed after the transition period specified in Section 4.1 has expired then CLEC shall transition the DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport within 30 days of the date on which the CLEC self-certification is reversed. Rates between the date SBC issued the Accessible Letter and the end of the transition period specified in Section 4.1 shall be those in Section 3.2.1. Rates during the period between the expiration of the transition period in Section 4.1 and date the circuit is actually transitioned shall be the equivalent special access rate or, where no such equivalent exists, the rates established in Section 3.2.1. If the CLEC has not submitted an LSR or ASR, as applicable, to SBC within 30 days of the date on which the CLEC self-certification is reversed, then SBC shall be entitled to convert the loop to an analogous SBC wholesale service of its choice or in the absence of any analogous wholesale service to disconnect the arrangement.
- v. When SBC issues an Accessible Letter designating relevant wire centers to be non-impaired after March 11, 2005, and a DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport is ordered by CLEC pursuant to Section 251(c)(3) of the 1996 Act ~~accompanied by~~ pursuant to a self-certification after SBC issued the Accessible Letter, and where the self-certification is reversed before the transition period specified in Section 4.1.1.5 has expired, then CLEC shall transition the DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport according to the process in Section 4.1.1.5. Rates between the date that the circuit is provisioned or the date 30 days following the date SBC issued the Accessible Letter, whichever is later, and the date the circuit is transitioned shall be the equivalent special access rate or, where no such equivalent exists, the rates established in Section 4.1.1.7.
- vi. When SBC issues an Accessible Letter designating relevant wire centers to be non-impaired after March 11, 2005, and a DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport is ordered by CLEC pursuant to Section 251(c)(3) of the 1996 Act ~~accompanied by~~ pursuant to a self-certification after SBC issued the Accessible Letter, and where the self-certification is reversed after the transition period specified in Section 4.1.1.5 has expired then CLEC shall transition the DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport within 30 days of the date on which the CLEC self-certification is reversed. Rates between the date the circuit is provisioned or the date 30 days following the date SBC issued the Accessible Letter, whichever is later, and date the circuit is actually transitioned shall be the equivalent special

access rate or, where no such equivalent exists, the rates established in Section 4.1.1.7. If the CLEC has not submitted an LSR or ASR, as applicable, to SBC within 30 days of the date on which the CLEC self-certification is reversed, then SBC shall be entitled to convert the loop to an analogous SBC wholesale service of its choice or in the absence of any analogous wholesale service to disconnect the arrangement.

- vii. When SBC issues an Accessible Letter designating relevant wire centers to be non-impaired after March 11, 2005, a DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport is ordered pursuant to Section 251(c)(3) of the 1996 Act ~~accompanied by a self-certification~~ before SBC issued the Accessible Letter, and where the self-certification is reversed before the transition period specified in Section 4.1 has expired then CLEC shall transition the DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport according to the process in Section 4.1. Rates during the period between the date that is 30 days following the date that SBC issued the Accessible Letter and the date the circuit is transitioned shall be those in Section 4.1.1.7.
- viii. When SBC issues an Accessible Letter designating relevant wire centers to be non-impaired after March 11, 2005, a DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport is ordered pursuant to Section 251(c)(3) of the 1996 Act ~~accompanied by a self-certification~~ before SBC issued the Accessible Letter, and where the self-certification is reversed after the transition period specified in Section 4.1.1.5 has expired then CLEC shall transition the DS1/DS3 Loop or DS1/DS3 Dedicated Transport or Dark Fiber Dedicated Transport within 30 days of the date on which the CLEC self-certification is reversed. Rates between the date 30 days after the date SBC issued the Accessible Letter and the end of the transition period specified in Section 4.1.1.5 shall be those in Section 4.1.1.7. Rates during the period between the expiration of the transition period in Section 4.1.1.5 and date the circuit is actually transitioned shall be the equivalent special access rate or, where no such equivalent exists, the rates established in Section 4.1.1.7. If the CLEC has not submitted an LSR or ASR, as applicable, to SBC within 30 days of the date on which the CLEC self-certification is reversed, then SBC shall be entitled to convert the loop to an analogous SBC wholesale service of its choice or in the absence of any analogous wholesale service to disconnect the arrangement.

To incorporate these changes, the last paragraph of the Commission Analysis and

Conclusion should be changed as follows:

As CLECs point out, SBC is not prejudiced by any delay in the conversion because SBC will be entitled to receive the rates that SBC would have received regardless of whether the CLEC self-certified. Therefore, we will adopt Staff's proposal, but we will change it to the extent to allow CLECs 90 days to transition circuits in those circumstances where the time periods in 4.1 or 4.1.1.5 have expired (scenarios ii, iv, vi, and viii). In addition, we will change Staff's language to conform to the edits proposed by SBC Illinois. These

edits are for purposes of clarification and do not change the fundamental meaning of Staff’s language; they merely make it more accurate. Accordingly, the parties are instructed to incorporate as Section 4.3 of their TRO/TRRO Amendment, the language that appears in SBC Illinois’ Reply Brief at pages 88-91.

ISSUE 23: **Section 4.6 – Should SBC be required, on a quarterly basis, to post on its website information advising when it believes a wire center has reached 90% of the number of business lines needed for the wire center to be classified as a Tier 1 or a Tier 2 wire center, and to specify which wire centers it considers to have 2 or 3 fiber collocators?**

Amendment Reference: Section 4.6

The Proposed Decision should be modified to reject any requirement that SBC Illinois provide “early warning” reports on the business line counts and number of qualifying collocations in its wire centers. Neither CLECs nor Staff have demonstrated that “early warning” will facilitate CLEC transition and the Proposed Decision does not identify any specific way that CLECs will be able to transition away from UNEs more efficiently or more promptly.¹⁴ Indeed, the Proposed Decision fails altogether to link the early warning it imposes with any reduction in the transition intervals in Issue 18, as it logically should if any such benefit were actually expected. Since the Proposed Decision grants CLECs a 12 month/18 month transition period for UNE loops and transport at non-impaired wire centers identified in the future (see Issue 18), there can be no justification for the extra notification provided by the early warning requirement. Conversely, if the Commission insists on an “early warning” system, there is no longer any reason to grant CLECs 12/18 additional months to complete a transition, as it proposes to do in Issue 18. In short, the CLECs cannot have it both ways.

Nor does the Proposed Decision address the very real concern that the “early warning” mechanism will reveal confidential business information of SBC Illinois. The FCC’s rules

¹⁴ CLECs can begin transition planning activities at strategic wire centers *without* any “early warning” from SBC Illinois. Indeed, the transition activities discussed in the *TRO Remand Order* can (and should) prudently be

establish thresholds at 24,000, 38,000 and 60,000 business lines for different UNEs.¹⁵ SBC Illinois would have to post a list of its individual wire centers that have at least 90% of 24,000, 90% of 38,000 and 90% of 60,000 business lines. SBC Illinois' competitors could certainly develop from this information an accurate view of how many business lines SBC Illinois had at each wire center and could develop "trend" information that would allow them to track where SBC Illinois' business was increasing and decreasing over time. SBC Reply Br. at 96-97. Competitors could accordingly target attractive locations with their own competitive offerings. By the same token, the number of fiber-based collocators in a wire center is also competitively-sensitive confidential information.

While it is SBC Illinois' position that Section 4.6 should be eliminated in its entirety, if the Commission does not adopt that position, then at the very least it must revise Staff's proposal to address the confidentiality concerns discussed above. Two changes are called for. First, there should be no obligation to make the confidential information widely available by posting it on CLEC online. Rather, SBC Illinois should be able to make the information available to the individual CLECs that adopt the subject Amendment and should be permitted to designate the information as confidential. Second, the provision should explicitly state that the information provided by SBC Illinois shall only be used by CLEC for planning its transition off of the UNE loops and transport it purchases from SBC Illinois. This reasonable limitation will at least provide some protection against improper use of the data to target SBC Illinois' services and will do so without impacting the CLECs ability to use the information for the purpose they have requested.

undertaken by CLECs, such as "completing any change of law processes" (*TRO Remand Order* ¶ 143) and negotiating arrangements with alternative suppliers.

¹⁵ See, e.g., 51.319(a)(4) and 51.319(e)(3).

For these reasons, if Section 4.6 is not rejected in its entirety, then the Commission

Analysis and Conclusion should at the very least be changed as follows:

When a wire center is designated as non-impaired, it may have ~~has~~ a large impact on a CLEC's business. Unfortunately, in the TRRO, the FCC did not require that ILECs provide any advance notice of a wire center designation. The Commission has the power, as noted by Staff, to impose reasonable conditions on the approval of Section 252 Agreements. We agree with Staff's position on this issue. CLECs have a legitimate business need for this information, but Staff also raises valid concerns with SBC's ability to comply with the CLECs' proposal. Staff offers a reasonable compromise. However, we also believe that the information in question is confidential business information of SBC Illinois that should not be revealed to its competitors without at least some reasonable restrictions. Accordingly, we adopt the following language for Section 4.6:

Whenever SBC updates its wire center list pursuant to Section 4.1.1.1 and in the course of that analysis gathers and/or reviews information upon which said updates are based, SBC shall ~~post, on CLEC Online~~ make available to CLEC, on a confidential basis, information advising when it believes a wire center has reached 90% of the number of Business Lines needed for the wire center to be classified as a Tier 1 or a Tier 2 Wire Center. In addition, SBC will specify which wire centers it considers to have 2 Fiber-Based Collocators and 3 Fiber -Based Collocators. This information shall only be used by CLEC for planning its transition off of the UNE loops and transport it purchases from SBC Illinois.

ISSUE 25: **Section 5.4 – If SBC denies a Commingling request and the denial is challenged, what showing does SBC have to make to justify the denial?**

Amendment Reference: Section 5.4

The Proposed Decision's reluctance to include a direct reference to the relevant FCC rules – rules that CLECs, Staff and the Commission all recognize as controlling – is surprising. There is no dispute that Rules 51.315(e) and (f) apply when SBC Illinois denies a commingling request. Indeed, that is why, in the *MCI Arbitration Order*, the Commission required the MCI interconnection agreement to include language stating that SBC Illinois has the burden of proving that its denial of a commingling request is appropriate. *MCI Arbitration Order*, Docket No 04-0469, at 270. All that SBC Illinois asks for in this case is that the Amendment include a direct reference to those rules to make it abundantly clear that the obligations that SBC Illinois

must bear in the event of such a denial are the obligations in those rules and nothing else. Staff recognizes that it is reasonable to refer to Rules 51.315(e) and (f) in the Amendment, that is why Staff's compromise language does just that. CLECs do not seriously object to Staff's proposal; to the contrary, their Reply Brief states that, in the alternative, the Commission "should adopt the Staff's proposed compromise language." CLEC Reply Br at 108. SBC Illinois said the same thing in its Reply Brief, (SBC Reply Br. at 103), so there is universal agreement that Staff's compromise language would be acceptable to all. For this reason, SBC Illinois requests that the Proposed Decision be modified to adopt Staff's compromise language.

To this end, the last paragraph of the Commission Analysis and Conclusion should be changed as follows:

~~The CLECs' Staff's proposed language is consistent with our decision in the MCI/SBC Arbitration. It correctly states that SBC Illinois will have the burden of proving that its denial of a commingling request is appropriate. Moreover, it accurately recites that this obligation is set forth in FCC Rules 51.315(e) and (f) and that these rules apply to any denial of a commingling request. Both the CLECs and SBC Illinois state that, if their own proposals are not accepted, Staff's compromise proposal is acceptable to them. The above language merely notes that the decision to require SBC to bear the burden of proof was consistent with 47 C.F.R. Sec. 51.315(e) and (f). SBC's reference to 47 C.F.R. Sec. 51.315(e) and (f) is unnecessary and merely adds confusion. Accordingly, we adopt CLECs' Staff's proposed language.~~

ISSUE 29: Section 6.3.7.4 – Under what circumstances and to what extent should CLEC be required to reimburse SBC, in whole or in part, for the costs of an independent audit of CLEC's compliance with the Eligibility Criteria for High-Cap EELs?

Amendment Reference: Section 6.3.7.4

Issue 29 is wrongly decided for one simple reason: it departs from the unambiguous language in paragraph 627 of the *TRO* that resolves the issue of who pays for an audit. SBC Illinois crafted its language for Section 6.3.7.4 with the sole objective of faithfully tracking the FCC's words on this issue. SBC Illinois reasoned that if it accurately followed the FCC

language on audits, its proposed language would be unobjectionable and would naturally be accepted by the Commission. The FCC’s language on the issue of “who pays for the audit” appears in paragraph 627 of the TRO and reads as follows:

[T]o the extent the independent auditor’s report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor. We expect that this requirement should provide an incentive for competitive LECs to request EELs only to the extent permitted by the rules we adopt herein. (citations omitted).

This language plainly states that the CLEC must reimburse SBC Illinois for the “cost of the audit” – not a portion of the cost. In accordance with the language established by the FCC, SBC Illinois proposed the following language:

If the auditor’s report concludes that CLEC failed to comply in all material respects with the EELs Eligibility Criteria, CLEC will reimburse SBC for 100% of the cost of the independent auditor.

This language does nothing more than implement the FCC’s language in the *TRO*. Since the purpose of this proceeding is to accurately implement the FCC’s order in the *TRO* (and *TRRO*), the Proposed Decision should be revised to adopt SBC Illinois’ language.

By failing to adopt SBC Illinois’ language, the Proposed Decision upsets the overall balancing the FCC has performed on the subject of auditing. In paragraphs 625-629 of the *TRO*, the FCC sets forth the basic principles that govern carriers’ rights to undertake and defend against audits. For example, the *TRO* adopts the standard of “materiality” established by the American Institute for Certified Public Accountants and directs the auditor to conclude whether the CLEC has complied in all material respects with the applicable service eligibility criteria. *TRO* ¶ 626. The ILEC must reimburse the CLEC if the audit establishes that the CLEC complied in all material respects with the eligibility criteria. *TRO* ¶ 628. By the same token, however, the CLEC must pay the entire cost of the audit if audit establishes that the CLEC *failed*

to comply in all material respects with the eligibility criteria. *TRO* ¶ 627. In short, the FCC has crafted a comprehensive approach to the entire audit process, making some aspects of the process more favorable for the CLEC, and others more favorable for the ILEC. Given the compromises and the balancing inherent in this process, the Commission is not free to substitute its judgment for the FCC's judgment on one aspect of the overall audit regime. Instead, it should do as SBC Illinois urges, i.e., direct that the language in Amendment track the language in the *TRO*.

For these reasons, the Commission Analysis and Conclusion should be changed as follows:

~~The Commission agrees with Staff that the language proposed by CLECs should be adopted. SBC's proposal if adopted would provide an incentive for undertaking unnecessary audits, because a single non-compliant EEL would shift the entire cost of an audit to the CLEC. This is unfair and unreasonable. The Commission agrees with SBC Illinois that this issue is directly controlled by clear and unambiguous language in ¶ 627 of the TRO that requires CLEC to pay the full cost of the audit if the CLEC has failed to comply in all material respects with the service eligibility criteria. This standard is just one part of the overall balancing the FCC has done in the area of auditing. For example, the TRO adopts the standard of "materiality" established by the American Institute for Certified Public Accountants and directs the auditor to conclude whether the CLEC has complied in all material respects with the applicable service eligibility criteria. The TRO also requires the ILEC to reimburse the CLEC if the audit establishes that the CLEC complied in all material respects with the eligibility criteria. In light of the fact that the FCC has crafted a comprehensive approach to the entire audit process, we are not free to substitute our judgment for the FCC's judgment on this particular aspect of the audit regime and we therefore adopt SBC Illinois' proposed language which faithfully tracks the relevant FCC language. Furthermore, as Staff suggests, the agreement should also include language mandating that CLECs promptly share compliance records to avoid audits. We direct the parties to include language mandating the sharing of compliance records.~~

ISSUE 30a: Should SBC be permitted to apply charges for routine network modifications where it is not recovering those costs in other charges and it expressly certifies that to CLECS?

ISSUE 30b: Should SBC be required to have a stated price for any routine network modifications in the pricing schedule in order to be able to impose a separate charge?

ISSUE 30c: Should the amendment state that SBC may not impose separate charges for the following routine network modifications: (i) adding an equipment case, (ii) adding a doubler or repeater including associated line cards, (iii) installing a repeater shelf and other necessary work and parts associated with a repeater shelf to the extent such equipment is not present in the loop or transport facility when ordered, and (iv) splicing of dark fiber?

Agreement Reference: Section 8.1.5

In general, SBC Illinois agrees with the Proposed Decision’s resolution of Issue 30, which concerns SBC Illinois’ right to obtain compensation for “routine network modifications” (“RNM”) that it performs on behalf of CLECs. The FCC’s “pricing rules provide incumbent LECs with the opportunity to recover the cost of the routine network modifications we require here.” *TRO* ¶ 640. The FCC’s rules also “make clear that there may not be any double recovery of these costs.” *Id.* SBC Illinois’ proposed language for Section 8.1.5 tracks the FCC’s rule, allowing SBC Illinois to “impose charges for Routine Network Modifications” but only “in instances where such charges are not included in any costs already recovered.”

In its resolution of Issues 30(a) and 30(c), the Proposed Decision correctly adopts SBC Illinois’ proposal, which would require it to “expressly certify” that RNM costs are not being recovered through existing rates in order to assess individual case basis (“ICB”) charges for the recovery of such costs. *Prop. Dec.* at 160. As the Proposed Decision correctly recognizes, this approach is the same as that proposed by SBC Illinois, and approved by the Commission, in previous cases, including the recent MCI-SBC Illinois arbitration. *MCI Arbitration Decision*,

Docket No. 04-0469, at 156 (Nov. 24, 2004). Consistent with that ruling, the Proposed Decision also correctly rejects the CLECs' proposal to require Commission pre-approval before SBC Illinois even issues a bill for the cost of an RNM, while forcing SBC Illinois to do the work in the meantime, stating that "subject to a true-up, agreement by the parties or a further directive from the ICC, SBC should be allowed to recover additional expenses associated with the specific routine network modification at issue." *Prop. Dec.* at 161. Finally, the Proposed Decision correctly rejects the CLECs' proposal to deny recovery of the costs of installing repeater and repeater related equipment, as well as the costs of all dark fiber splicing, finding that "SBC may charge for these specific RNMs as the need arises." *Id.* The Proposed Decision's findings are fully supported by the evidence and the law and should be affirmed.

SBC Illinois, however, believes that the Proposed Decision's finding for Issue 30(b) should be revised to avoid being misinterpreted in a way that is inconsistent with the Proposed Decision's findings for Issues 30(a) and 30(c). As the Proposed Decision (p. 160) states, SBC Illinois agrees that, "where the prices for certain work is set forth in a pricing schedule that has been agreed to or adopted by the Commission, CLECs will pay those prices." In addition, SBC Illinois agrees that, to the extent that the prices for certain work is set forth in the pricing schedule, those rates will be the only rates assessed by SBC Illinois for that work. However, the Proposed Decision's finding for Issue 30(b) could be misconstrued to limit the prices that SBC Illinois may charge a CLEC for *any* RNM work to the rates "specifically identified on the pricing schedule". Such a construction would be inconsistent with the remainder of the Proposed Decision's conclusions, and it could effectively nullify SBC Illinois' right under the *TRO*, as recognized by the Proposed Decision's findings for Issues 30(a) and 30(b), to recover the costs of RNM activities, such as the installation of repeater and related equipment, which are *not*

accounted for by the existing “rates specifically identified on pricing schedules.” Given the remainder of the Proposed Decision’s ruling on this issue, that outcome seems clearly inconsistent with the Commission’s intent.

The language for Section 8.1.5 proposed by SBC Illinois, and approved by the Proposed Decision, provides that, upon certification that the costs of a particular RNM are not being recovered through any other rates, SBC Illinois will be permitted to recover such costs through “ICB rates”, i.e., rates determined on an individual case basis to cover the actual time and materials cost associated with the particular RNM. This approach is the same as the approach proposed by SBC Illinois and approved in Docket 04-0469. *MCI Arbitration Decision*, Docket 04-0469 at 156. Even the CLECs agreed that SBC Illinois should be permitted to “impose ICB rates” for the recovery of RNM costs not already accounted for in SBC Illinois’ TELRIC rates. CLEC Init.Br. 114-15. Thus, there is no basis to hold that the rates that SBC Illinois is allowed to charge for all RNMs should be limited to the “rates specifically identified on pricing schedules.”

Accordingly, to avoid any possible misunderstanding, SBC Illinois requests that the finding under Issue 30(b), at page 160 of the Proposed Decision, be modified to read as follows:

CLECs represent that CLECs and SBC have agreed that, where the prices for certain work is set forth on a pricing schedule that has been agreed to or adopted by the Commission, CLECs will pay those prices. However, where prices for work are set forth on a pricing schedules, only the TELRIC – based rates specifically identified on those pricing schedules may be assessed by SBC. Under SBC Illinois’s proposed language for Section 8.1.5, which the Commission adopts, SBC Illinois will also be allowed to charge ICB rates to recover the RNM costs that SBC certifies are not recovered through any other rate or charge. ~~The Commission finds that this agreement should be incorporated in the Amendment.~~

ISSUE 31: Section 9.0 – (a) Should prices, terms and conditions for batch hot cuts (and All-Day Cuts) be included in the Amendment or incorporated into the Agreement in connection with the Amendment? (b) If so, what prices, terms and conditions should be included or adopted?

Amendment Reference: Section 9.0

Although SBC Illinois continues to have an ongoing dispute regarding whether it is appropriate for the Commission to require the inclusion of batch hot cut provisions in this amendment, SBC Illinois will not repeat its argument on that position here. Instead, the comments below focus on SBC Illinois' practical concerns with the Proposed Decision. SBC Illinois' Exceptions on Issue 31 are, in essence, a request for more specificity in order to minimize (or avoid) post-order negotiations that would inevitably delay the amendment process. It is of paramount importance that the Amendment be executed and approved as soon as possible because the transition period for affected section 251 UNEs must be completed by March 10, 2006. The Commission recognized this urgency when it stated, in open session, that the proceeding should be conducted on an expedited basis so that the TRO/TRRO Amendments could be executed by October 21, 2005. While that timetable will apparently not be achieved, it is nonetheless imperative that the parties complete the conforming process quickly so that the amendments can be promptly executed and submitted to the Commission for approval. In order to get this done without delay, it is critical to avoid protracted negotiations in the conforming process. The Proposed Decision, as currently written, permits just such delays by instructing the parties to "draft language that specifies the ordering and billing process where the wholesale provider (using its own OCN) submits orders for batch hot cuts". *Prop. Dec.* at 181. To cut out this step in the process, SBC Illinois submits the following language that complies with this instruction; that language should be approved in the final order.

9.0 BATCH HOT CUT PROCESS: The “Batch Hot Cut Process Offerings” are new hot cut processes developed after multi-state collaboration between SBC and interested CLECs. The Batch Hot Cut Process Offerings are available to CLECs in addition to any hot cut processes available pursuant to CLEC’s underlying interconnection agreement. The Batch Hot Cut Process Offerings are designed to provide additional hot cut options for CLECs providing voice service using CLEC-provided analog, circuit switching or CLECs acting as a wholesale switching provider to another provider. Detailed information and documentation regarding each of the Batch Hot Cut Process Offerings (including order guidelines, supported ordering scenarios, volume limitations (where applicable), and available due date intervals/cut times) is contained on SBC’s CLEC Online website (or successor website). Any future enhancements or modifications to SBC’s Batch Hot Cut Process Offerings will be made in accordance with SBC’s Change Management Process. SBC will ensure that its Batch Hot Cut Process Offerings comply with all applicable ICC batch cut rulings.

9.1 General:

9.1.1 Enhanced Daily Process: The “Enhanced Daily Process” option is designed to support hot cuts associated with new customer acquisitions. The Enhanced Daily Process may be used whether CLEC is providing its own retail voice service or is acting as a wholesale switching provider. If the CLEC is acting as a wholesale switching provider to the end user’s retail voice provider, the CLEC will submit Enhanced Daily Hot Cut Process orders using the CLEC’s OCN and the end user’s retail voice provider will not issue orders to SBC. SBC places no limitations on the number of Enhanced Daily Process orders CLEC may place per day.

9.1.2 Defined Batch Hot Cut Process – The “Defined Batch Hot Cut Process” is designed to support hot cuts associated with the conversion of CLEC’s embedded base customers from service provisioned using SBC -provided switching to service provisioned using CLEC-provided switching. For purposes of the Defined Batch Hot Cut, in instances where CLEC is acting as a wholesale switching provider, and the end user’s retail voice provider will remain unchanged by Defined Batch Hot cut, the Defined Batch Hot cut will be considered an embedded base conversion. The Defined Batch Process may be used whether CLEC is providing its own retail voice service or is acting as a wholesale switching provider. If the CLEC is acting as a wholesale switching provider to the end user’s retail voice provider, the CLEC will submit Defined Batch Hot Cut Process orders using the CLEC’s OCN and the end user’s retail voice provider will not issue orders to SBC. CLEC may request up to one hundred hot cuts per day per central office using the Defined Batch Hot Cut Process. The maximum number of Defined Batch Hot Cut Process requests that SBC must accept for a single day in a single central office for all CLECs combined is two hundred lines.

9.1.3 Bulk Project Offering – The “Bulk Project Offering” is designed to support large volumes of hot cuts associated with the conversion of CLEC’s embedded base customers from service provisioned using SBC -provided switching to service provisioned using CLEC -provided switching. For purposes of the Bulk Project Offering, in instances where CLEC is acting as a wholesale switching provider, and the end user’s retail voice provider will remain unchanged by Bulk Project Offering cut, the Bulk Project Offering cut will be considered an embedded base conversion. The Bulk Project Offering may be used whether CLEC is providing its own retail voice service or is acting as a wholesale switching provider. If the CLEC is acting as a wholesale switching provider to the end user’s retail voice provider, the CLEC will submit Bulk Project Offering orders using the CLEC’s OCN and the end user’s retail voice provider will not issue orders to SBC.

9.2 PRICING FOR BATCH HOT CUT PROCESS OFFERINGS

9.2.1 The per line rates applicable for each available Batch Hot Cut Process Offering option are set forth on the attached Batch Hot Cut Process Offerings Pricing Schedule, which is incorporated herein by this reference. The rates contained in the Batch Hot Cut Process Offering Pricing Schedule only apply to Batch Hot Cut Process Offering hot cut requests. To the extent that the rate application and/or rate structure for the Batch Hot Cut Process Offerings conflicts with provisions contained in CLEC’s underlying interconnection agreement, the rate structure and/or rate application contained in the Batch Hot Cut Process Offering Pricing Schedule prevails for Batch Hot Cut Process Offering requests only. This amendment does not modify the rate structure or rates applicable for any hot cuts requested using other hot cut processes supported by CLEC’s underlying interconnection Agreement. If CLEC requests Batch Hot Cuts while acting as a wholesale switching provider, SBC will assess the applicable charges for the Batch Hot Cut to CLEC, not to the retail voice provider.

With this additional language, there is no need to instruct the parties to engage in post-order negotiations. Of course, the parties must still conform Section 9.0 to the other aspects of the final order (e.g., including Local Wholesale Complete), but that should be a more straightforward process that can be addressed in the conforming process.

Accordingly, the Commission Analysis and Conclusion should be changed in to revise the seventh (7th) paragraph to read as follows:

Pursuant to Staff’s proposal the ~~parties are hereby directed to draft~~ Amendment should include language that specifies the ordering and billing process where the wholesale

provider (using its own OCN) submits orders for batch hot cuts. We direct the parties to include the language set forth in SBC Illinois' Brief on Exceptions to address this concern.

ISSUE 32a: What charges should apply to conversion of wholesale services to UNEs?

Amendment Reference: Section 10.1.3.1

The Proposed Decision improperly adopts the CLECs' language for Section 10.1.3.1, which would prohibit SBC Illinois from assessing any "termination charges" as well as any "non-recurring charges, except for an Electronic Service Order (Flow Through) Record charge", on "any conversions" of wholesale services to UNEs or combinations of UNEs. *Prop. Dec.* at 186. In doing so, the Proposed Decision fails to even address (much less correct) the significant problems with the CLEC language that SBC Illinois pointed out in its testimony and briefs. Those problems as follows: (i) there is no lawful basis to prohibit SBC Illinois from imposing tariffed termination charges applicable to the conversion of special access services to UNEs; and (ii) the CLEC language does not unambiguously allow SBC Illinois to charge the Project Administration Charge approved by the Commission in Docket 02-0864, even though the CLECs agreed that SBC Illinois should be allowed to. SBC Ex. 1.0 (Silver Direct) at 55-58; SBC Ex. 1.1 (Silver Rebuttal) at 15-17; SBC Br. at 144-47; SBC Reply Br. at 131-133. The Proposed Decision also completely fails to acknowledge, much less address, SBC Illinois' alternative language for Section 10.1.3.1 (SBC Ex. 1.0 (Silver Direct) at 56) - - language that should have been unobjectionable and, in fact, to which the CLECs did not object.

Each of these errors is discussed in more detail below. SBC Illinois respectfully requests that, on review of the Proposed Decision, the Commission make an effort to actually address SBC Illinois' arguments and proposal on this issue and not simply ignore them, as the Proposed

Decision does. If the Commission fails to do so, the resulting decision will be subject to reversal on the grounds that it is arbitrary and capricious as well as unlawful.

A. TERMINATION CHARGES

To the extent that the CLECs' language would prohibit SBC Illinois from assessing tariffed termination charges on "any conversion", the Proposed Decision's decision to adopt that language flies in the face of the undisputed evidence and controlling legal precedent. SBC Illinois' interstate and intrastate special access tariffs contain identical language providing for the application of termination charges to the early termination of multiyear agreements for the purchase of special access services at discounted rates. SBC Ex. 1.0 (Silver Direct) at 58. The Illinois Appellate Court has expressly held that such termination charges are properly applicable to the conversion to UNEs of special access services purchased under the tariffs. *Globalcom, Inc. v. ICC*, 806 N.E. 2d 1194, 1205-06 (Ill. App. 2004). Moreover, the FCC has consistently rejected proposals that local exchange carriers be prohibited from assessing early termination charges, such as those provided for by SBC Illinois' tariffs, upon the conversion of special access services to EELs. See e.g., *UNE Remand Order*, ¶ 481 n. 985 ("[w]e note, however, that any substitution of unbundled network elements for special access would require the requesting carrier to pay any appropriate termination penalties under volume or term contracts"); *Joint Application of BellSouth, et al.*, 17 F.C.C. Rcd. 17595, ¶ 212 (2002) (stating that "early termination penalties" are not an obstacle to a CLEC's "ability to convert special access circuits to EELs" and do not violate FCC rules).

Neither the *TRO* nor the *TRO Remand Order* changed the law with respect to the applicability of termination charges to conversions of special access circuits to UNEs. To the contrary, in the *TRO*, the FCC expressly *reaffirmed* the rulings cited above, stating that "we

remain unconvinced by the general argument advanced by several commenters that converting a special access circuit to a UNE does not constitute a termination within the meaning of the termination provisions of incumbent LEC tariffs.” *TRO*, ¶ 695. The FCC refused to grant CLECs a “fresh look” with respect to the applicability of termination charges to special access to UNE conversions, holding that doing so “would neither be in the public interest nor represent a competitively neutral approach.” *Id.* ¶ 696. Thus, the FCC ruled, CLECs must comply with early termination provisions of any fixed term agreements. *Id.* ¶¶ 692-99.

In sum, as SBC Illinois has repeatedly pointed out, the CLECs’ proposal to bar the imposition of termination charges on “any conversion” is patently unlawful and must be rejected. SBC Ex. 1.0 (Silver Direct) at 57-58; SBC Ex. 1.1 (Silver Rebuttal) at 16-17; SBC Br. at 146-47; SBC Reply Br. at 132-33. *The CLECs did not refute this conclusion or otherwise make any attempt to defend their proposed language for Section 10.1.3.1 as it relates to termination charges.* The Proposed Decision’s decision to adopt that language is, therefore, inexplicable, particularly in light of the Proposed Decision’s correct finding on Issue 24 that it would be improper to adopt contract language governing the applicability of tariffed termination charges which is “*in conflict with the enforcement of the tariff*”. *Prop. Dec.* at 135.

B. NONRECURRING CHARGES

As even the CLECs acknowledged, SBC Illinois should be allowed to charge the “Project Administration Charge” approved by the Commission in Docket No. 02-0864 for conversions of special access and private line services to UNEs and UNE combinations. CLEC Br. 133. The CLECs’ proposed language for Section 10.1.3.1, however, would prohibit SBC Illinois from imposing any non-recurring charge for a conversion of wholesale services (including Special Access service) to UNEs other than “an Electronic Service Order (Flow Through) Record

charge.” The CLECs suggested that the Project Administration Charge is a type of “record charge” and, therefore, would be allowable under their proposed language. CLEC Br. at 133. The problem, however, is that a “record charge”, by the CLECs’ own definition, is a charge “relate[d] to changing the information on an existing customer’s billing records”. CLEC Ex. 3 (McComb Direct) at 19. In contrast to a “record charge”, as so defined, the Project Administration Charge recovers costs associated with activities, such as updating circuit information, which are broader in scope than the mere changing or editing of a customer’s billing record. SBC Ex. 3.0 (Barch Rebuttal) at 24, Attachment DJB-R4 (Confidential); *Order*, Docket 02-0864, at 214. As the Proposed Decision correctly finds on Issue 11, it is “unrealistic to assume” that “conversions involve only record orders, which are service orders necessitating only a name or number change on an account”. *Prop. Dec.* at 73.

Accordingly, although the CLECs agree the SBC Illinois should be allowed to impose the approved Project Administration Charge on special access to UNE conversions, the imprecise use of the phrase “Electronic Service Order (Flow Through) Record Charge” in Section 10.1.3.1 is, on its face, ambiguous and could potentially lead to unnecessary disputes over SBC Illinois’ right to bill the Project Administration Charge, as well as other Commission-approved nonrecurring charges that are not “record charges”, e.g., the nonrecurring service order charge approved in Docket 02-0864 for conversions of resale service to UNE-P (to the extent that the Commission allows such conversions for existing UNE-P customers during the transition period). SBC Ex. 1.0 (Silver Direct) at 58. The Proposed Decision fails to address this problem.

To eliminate the ambiguity created by the CLEC’s use of the term “record charge” in Section 10.1.3.1, SBC Illinois proposed the following alternative language:

When converting from a wholesale service to a UNE or combination of UNEs, the applicable non-recurring charges, if any, as governed by this Agreement and/or Tariff from which the UNE or UNE combination being converted to is ordered, shall apply.

SBC Ex. 1.0 (Silver Direct) at 57; SBC Init.Br. 144. As SBC Illinois explained in its Reply Brief (p.132), this language would allow SBC Illinois to assess the Project Administration Charge, which is included in SBC Illinois' EELs tariff and the price schedules of most CLECs' ICAs. At the same time, this language fully satisfies the CLECs' concerns because it would not entitle SBC Illinois to impose non-recurring service order or provisioning charges on wholesale service to UNE conversions that have not been approved by the Commission or FCC and/or agreed to by the parties.

The Proposed Decision does not provide a cogent explanation for adopting the CLECs' flawed language over SBC Illinois' proposed alternative. Indeed, the Proposed Decision fails to even acknowledge or discuss SBC Illinois' proposal. The Proposed Decision states only that the Order in Docket 02-0864 "determined that SBC was entitled to charge for administrative services for the conversion to UNEs but not for provisioning services including service orders because in a properly functioning network there should be no provisioning services to perform". *Prop. Dec.* at 186.¹⁶ This statement apparently refers to the Commission's decision in Docket 02-0864 to reject SBC Illinois's Design and Coordination NRC for special access to UNE conversions, which the Order characterized as a "provisioning charge". *Order*, Docket 02-0864 at 214. There is nothing in that Order, however, which limits the nonrecurring charges that SBC Illinois is allowed to charge for the recovery of "administrative" costs to "record charges". To the contrary, as discussed above, the Commission expressly approved a Project Administration Charge, which covers costs of activities other than changing information on a billing record.

In this case, SBC Illinois is not proposing to impose a Design and Coordination Charge, or any other “provisioning” charge, on the conversion of wholesale services to UNEs. Rather, as discussed above, SBC Illinois’ proposed alternative language is simply intended to preserve SBC Illinois’ right to assess the Project Administration Charge and any other charges agreed to be the parties and/or approved by the Commission for applicability to conversions of wholesale services to UNEs.

For all the reasons discussed above, the Proposed Decision’s decision to adopt the CLEC’s patently flawed proposal over SBC Illinois’ unobjectionable alternative is arbitrary and capricious and contrary to law. Accordingly, the “Commission Analysis and Conclusion” for Issue 32(a), at page 186 of the Proposed Decision, should be eliminated in its entirety and replaced with the following language:

The Commission agrees with SBC Illinois that the CLECs’ proposed language for this issue in Section 10.1.3.1 is flawed and should be rejected. First, the language is overbroad to the extent that it purports to prohibit SBC Illinois from assessing termination charges on any conversions of wholesale services to UNEs. It is undisputed that SBC Illinois’ FCC and Illinois special access tariffs provide for the application of termination charges to the early termination of multiyear agreements for the purchase of special access services at discounted rates and that a conversion of special access service to UNEs is a “termination” within the meaning of those provisions. As we stated above in connection with Issue 24, it would be improper to require contract language governing the applicability of tariffed termination charges which is in conflict with the enforcement of the tariffs. It is also undisputed that FCC has, on numerous occasions, including in the TRO, consistently rejected proposals that local exchange carriers be prohibited from assessing early termination charges, such as those provided for by SBC Illinois’ tariffs, upon the conversion of special access services to EELs.

Second, the CLECs’ proposed language is ambiguous and could lead to unnecessary disputes to the extent that it would prohibit SBC Illinois from applying to conversions any nonrecurring charges other than an “Electronic Service Order (Flow Through) Record Charge”. Although the CLECs agreed that SBC Illinois should be allowed to charge the Project Administration Charge approved in Docket 02-0864 for conversions of special access and private line services to UNEs and UNE combinations, that charge

¹⁶ The reference in this statement to “provisioning services including service orders” makes no sense because it confuses provisioning charges, which cover the costs of installing, or “provisioning”, UNEs, with service order charges, which cover the administrative cost of processing orders for UNEs.

relates to activities beyond the changing of information on a customer's existing bill and, therefore, does not fall within the CLECs' own definition of a "record charge".

To avoid future disputes over the charges that SBC Illinois will be allowed to assess on conversions of special access and other wholesale services to UNEs, the Commission rejects the CLECs' proposed language and adopts instead SBC Illinois alternative proposal for Section 10.1.3.1, which states that "[w]hen converting from a wholesale service to a UNE or combination of UNEs, the applicable non-recurring charges, if any, as governed by this Agreement and/or Tariff from which the UNE or UNE combination being converted to is ordered, shall apply". This proposal is reasonable because it would unambiguously allow SBC Illinois to assess the Project Administration Charge, which is included in SBC Illinois' EELs tariff and the price schedules of most CLECs' ICAs. On the other hand, this language fully satisfies the CLECs' concerns because it would not entitle SBC Illinois to impose non-recurring service order or provisioning charges on wholesale service to UNE conversions that have not been approved by the Commission or FCC and/or agreed to by the parties.

ISSUE 37: Should Section 11.2.1, which relates to Hybrid Loops, include language derived from footnote 956 of the *TRO*?

Amendment Reference: Section 11.2.1

The Proposed Decision correctly rejects the CLECs' proposed language for Section 11.2.1, but incorrectly recommends that the Commission adopt the following substitute language, to which SBC Illinois takes exception: "The unbundling obligation associated with DS1 loops is not limited by the Rules adopted in the *TRO* for hybrid loops." The issue statement characterizes the dispute as "Should Section 11.2.1, which relates to hybrid loops, include language derived from footnote 956 of the *TRO*?" Answering that question highlights the problems with the Proposed Decision.

In the *TRO*, the FCC concluded that with respect to Hybrid Loops, an ILEC's only obligation was to make available an unbundled, non-packetized TDM-based transmission path for the provision of narrowband services.¹⁷ The FCC found that ILECs remain obligated to provide unbundled access to copper loops, copper subloops and TDM-based loops such as DS1s

and DS3s for the deployment of broadband (and narrowband) services.¹⁸ In stating that ILECs remain obligated to provide unbundled access to TDM-based DS1s and DS3s for the deployment of “broadband” services, the FCC made clear that: (1) DS1s and DS3s fall under the FCC’s Hybrid Loops rule¹⁹; (2) an ILEC only has an obligation to make TDM-based DS1s and DS3s available on an unbundled basis where impairment is found to exist²⁰; and (3) ILECs are only obligated to make available on an unbundled basis the TDM features, functions, and capabilities of their hybrid loops for CLECs to provide narrowband services – so that CLECs could continue “providing both traditional narrowband services (e.g., voice, fax, dial-up Internet access) and high-capacity services like DS1 and DS3 circuits.”²¹

With this background, the FCC, in addressing DS1 loops in its *TRO* and footnote 956, concluded that DS1 loops should be available regardless of the technology used to provide such loops “e.g., two-wire and four-wire HDSL or SHDSL, fiber optics” and regardless of the customer to be served “unless otherwise specifically indicated”, and then referenced the section of the *TRO* that includes the discussion on FTTH loops. *Id.* The FCC concludes footnote 956 by stating that “the unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass market customers.” What the FCC meant by the last sentence in footnote 956 was that its Hybrid Loops findings limiting the unbundling obligation to only a TDM-based narrowband transmission path did not apply in the case of high capacity loops such as DS1s and DS3s (where impairment

¹⁷ *TRO* ¶ 296. *See also* 47 C.F.R. §51.319(a)(2)(iii)(A) and (B).

¹⁸ 47 C.F.R. § 51.319(a)(2)(ii).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See TRO* ¶ 200 and FN 627, in which the FCC made clear that an ILEC has no obligation to make available unbundled access to hybrid loops for the deployment of advanced services including, without limitation, the packetized capabilities of its hybrid loops. However, the FCC concluded in the *TRO* and Hybrid Loops rule that an ILEC must continue to make available unbundled access to DS1 and DS3 hybrid loops where impairment is

exists), given the FCC’s Hybrid Loops findings and rules specific to DS1s and DS3s which provide that such loops could be used to provision traditional narrowband services or high-capacity services. 47 C.F.R. §51.319(a)(2)(ii). The FCC’s DS1 and DS3 Hybrid Loop findings specifically allow for high-capacity “broadband” services to be provisioned by a CLEC over such loops regardless of the technology used to provision such services, while with respect to other Hybrid Loop types only be used for the provision of narrowband services.

For these reasons, the “Commission Analysis and Conclusion” for Issue 37, at pages 223-224 of the Proposed Decision, should be eliminated in its entirety and replaced with the following language:

We are not convinced that the CLECs’ proposed language for Section 11.2.1 adds anything to the Amendment and we find that the proposed language is cumbersome and raises more questions than it answers. For that reason, we reject the proposed addition to Section 11.2.1.

III. CONCLUSION

For all these reasons, SBC Illinois requests that the Proposed Decision be revised consistent with the proposed language set forth herein.

found to exist for the deployment of traditional narrowband services, in addition to high capacity services (regardless of the technology used to provide such services).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark R. Ortlieb, an attorney, certify that a copy of the foregoing **BRIEF ON EXCEPTIONS OF SBC ILLINOIS** was served on the parties on the attached service list by U.S. Mail and/or electronic transmission on September 23, 2005.

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