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May 13, 2005

Via Overnight Mail

Public Utility Commission of Oregon
Attn: Filing Center
550 Capitol St. NE #215
PO Box 2148
Salem, OR 97308-2148

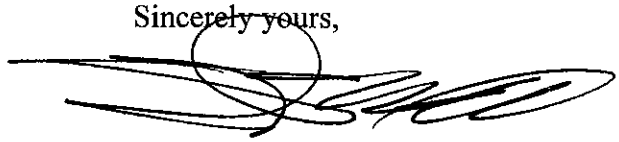
Re: ARB 584

Dear Sir or Madam:

Enclosed for filing are the original and five copies of Covad Communications Company's Reply Brief. Electronic copies were also filed and served on the parties on May 13, 2005.

Please call me if there are any questions regarding this filing. Thank you.

Sincerely yours,



Andrew R. Newell
Counsel for Covad
Communications Company

ARN/jk

Enclosures

cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 584

In the Matter of	)	
	)	
COVAD COMMUNICATIONS COMPANY	)	
	)	**COVAD COMMUNICATIONS COMPANY'S REPLY BRIEF**
	)	
Petition for Arbitration of an Interconnection Agreement with Qwest Corporation	)	

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Introduction

DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") provides the following arguments in response to the initial brief filed by Qwest Corporation ("Qwest") in this proceeding.

By way of summary, Covad believes that Qwest has greatly underestimated the policymaking authority retained by this Commission to promote competition and the efficient investment in advanced telecommunications, even after the FCC's recent decisions to contract federal unbundling requirements.[1] This restrictive view of the Commission's authority underpins each and every argument against Covad's proposals for Issue 1 (Copper Retirement) and Issue 2 (271 and State Law Unbundling Authority).

The parties have reached an agreement regarding the discreet issue of line splitting. Through separate negotiations, the parties have agreed that line splitting will be provided to Covad regardless of the outcome of Issue 2 in this arbitration. This agreement does not alter the open issues in this proceeding regarding Qwest's obligations to unbundle network elements as outlined in Covad's proposals for Issue 2.

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[1] *See generally, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147, (rel. September 17, 2003) ("Triennial Review Order"); and *In the Matters of Petition for Forbearance of Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order (rel. October 27, 2004) ("271 Forbearance Order"). WC Docket No. 04-313; CC Docket No. 01-338, *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand (Rel. February 4, 2005) ("TRO Remand Order").

With respect to Issue 3 (Commingling), Covad responds to the arguments promoted by Qwest, which counsel an untenable reading of the FCC's *Triennial Review Order*. Covad believes the FCC intended to draw clear distinctions between elements unbundled pursuant to section 252(c)(3) of the Act[2] on the one hand, and elements that must be made available by Regional Bell Operating Companies (RBOCs) pursuant to section 271 of the Act on the other, and has offered proposed commingling language that captures this distinction. Qwest, on the other hand, proposes placing 271 elements in a category separate not only from elements available pursuant to section 251, but also separate from, and inferior to, all other wholesale services. In addition to being unsupported by the *Triennial Review Order*, Qwest's reading would render it difficult, if not impossible, to make use of the remaining unbundling obligations set forth in section 271 of the Act.

Qwest's arguments with respect to Issue 5 (Regeneration of Central Office Cross-Connects) are inconsistent with the FCC's treatment of this issue in establishing the minimum standards for collocation, and implementing the non-discrimination requirements of section 251(c)(6) of the Act. Because Qwest's offering of self-provisioned cross-connection is an impractical, discriminatory, and largely illusory solution in most circumstances, it does not meet FCC standards, and Qwest must continue to provision connections requiring central office regeneration under established collocation pricing standards.

Qwest's arguments regarding Issue 9 (Billing Issues) are offered to support a *status quo* that Covad clearly established, through evidence introduced in other proceedings, is not working. At least until Qwest can generate industry-compliant wholesale bills, it should not be allowed to

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act").

cut short efforts to review its invoices. Covad should be allowed an adequate amount of time to both review and pay Qwest's invoices, as well as respond to any refusal by Qwest to recognize legitimate disputes. Covad's proposals strike a workable balance between Qwest's right to receive payment and exercise remedies for nonpayment, and Covad's right to pay only amounts it actually owes Qwest, and avoid potential attempts to extort payments from Covad.

Argument

ISSUE 1 – COPPER RETIREMENT (Sections 9.2.1.2.3, 9.2.1.2.3.1, and 9.2.1.2.3.2)

Qwest argues generally that the FCC has not acted to require the unbundling of fiber feeder plant, nor has it required the provision of an alternative service when copper feeder is retired by incumbent carriers. While this is strictly true, it misses the point: this Commission is charged with the interpretation and enforcement of Oregon law, as well as Qwest's compliance with section 271 of the Act. In order to do so effectively, it must act to preserve competitive access to customers affected by the retirement of copper feeder plant.

It is also important to note that Covad seeks limited relief through its proposals on copper retirement, narrowly calculated to preserve the *status quo* in the event that copper feeder plant is retired by Qwest in a manner that impairs Covad's investment in next generation facilities. Covad's proposals are far from the "unlimited" unbundling request Qwest portrays them to be.

Qwest's conflicting statements regarding when and how it will retire copper plant underscore the importance of resolving this issue. On the one hand, it argues that it will act to preserve copper plant where feasible, while on the other it claims that its proposals are supported by the economic necessity of retiring obsolete copper facilities when fiber is deployed. Qwest's

attempts to provide economic justification for its positions, as well as illusory solutions to the problems created by them, must be rejected by this Commission if the consumer benefits of competition and choice are to be preserved, not to mention the protection of Covad's investments in the Oregon telecommunications market.

A. The FCC's Copper Retirement Rules and Limitations on 251 Unbundling Authority are Irrelevant to Covad's Proposals

Qwest's arguments against Covad's copper retirement proposals center on the FCC's application of the section 251 impairment standard, and the resulting decision not to require incumbent LECs to unbundle certain fiber facilities pursuant to section 251. This argument completely misunderstands the legal basis of Covad's proposals, as well as the continued existence of the authority possessed by this Commission to make the correct policy decision.

The FCC made clear that, while refusing to find impairment with respect to fiber facilities pursuant to section 251, Regional Bell Operating Companies (RBOCs) continue to be bound by the requirements of the section 271 checklist, including the obligation to unbundle loops, notwithstanding any impairment determination under section 251.[3] To the extent the FCC had left any doubt about an RBOC's obligation to unbundle fiber feeder plant under section 271, that doubt was removed by the FCC's recent *271 Forbearance Order*. The FCC elected to forbear from enforcement of RBOCs' 271 obligations to unbundle Fiber to the Home (FTTH) loops, Fiber to the Curb (FTTC) loops,[4] and the packet switching. *271 Forbearance Order*, ¶ 1.

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[3] *Triennial Review Order*, ¶ 653.

[4] The FCC had recently defined FTTC loops as loops comprised of fiber optic components extending to within 500 feet of a mass market customer. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability;* CC Docket Nos. 01-338, 96-98 and 98-147, Order on Reconsideration (rel. October 18, 2004), ¶ 10 ("FTTC Reconsideration Order").

The FCC declined to forbear from the enforcement of any unbundling requirements inconsistent with its newly restrictive interpretation of section 251 embodied by the *Triennial Review Order*, specifically the relief requested by Qwest and SBC.[5] As a result, Qwest's argument that section 251 acts as a "real upper bound" to an RBOC's unbundling obligations has not been adopted by the FCC. The clear implication is that RBOCs must continue to unbundle fiber feeder pursuant to section 271.

Even so, Covad's copper retirement proposal does not seek the unbundling of fiber feeder elements. It merely requires that Qwest's fiber feeder deployments not disrupt service to Covad's customers by requiring that an *alternative service* be provisioned to those customers to avoid their disconnection. Covad thus is not asking for access to fiber feeder, but rather for the provision of an alternative service over any available compatible facility – whatever Qwest believes is the best option – in order to provide service to a customer that has selected Covad as its service provider, until the *customer* chooses to cancel its Covad service. Nothing in the *Triennial Review Order* or the *271 Forbearance Order* prohibits such a solution.

B. This Commission Retains the Authority to Adopt Covad's Proposals, Because they Further State Statutory Goals that are Not Preempted by Federal Law

The FCC has clearly permitted state utilities commissions to enforce their own copper retirement rules,[6] and despite the clear opportunity to do so in any number of recent proceedings, the FCC has done nothing to reverse its long-standing determination that section 251 unbundling requirements act as a national "floor" on unbundling, rather than an "upper bound." In the *Local*

[5] *271 Forbearance Order*, ¶ 12.
[6] *Triennial Review Order*, ¶ 284.

Competition First Report and Order,[7] the FCC established the overall context for its application of section 251's unbundling requirements:

> ...[W]e adopt our tentative conclusion that states may impose additional unbundling requirements pursuant to section 252(e)(3), as long as such requirements are consistent with the 1996 Act and our regulations. This conclusion is consistent with the statement in section 252(e)(3) that 'nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement.'

Local Competition First Report and Order, ¶ 244.

Despite the dizzying number of controversies, court challenges, remands and complete confusion surrounding the FCC's "impairment" standard and the scope of section 251 (and now section 271) unbundling, nothing has disturbed this original decision on the meaning of national unbundling rules, and the remaining authority of state utilities commissions to add additional requirements grounded in state law. In 2003, the Sixth Circuit confirmed the continued right of state commissions to enforce state regulations. In confirming the Michigan Public Service Commission's right to enforce state tariff requirements related to unbundled elements, the court stated:

> ...[the Act] allows room for state regulation. The Act does not impliedly preempt Michigan's tariff regime. The [Michigan Public Service] Commission can enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services.

Michigan Bell Telephone Company v. MCI Metro Access Transmission Services, Inc., 323 F.3d 348, 359 (6th Cir. 2003).

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[7] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd. 15499 (rel. August 8, 1996) ("Local Competition First Report and Order").

This Commission has acted in the past to enforce its statutory authority to order unbundling of telecommunications services, stating that, "we find that the authority to require the unbundling of telecommunications services into building block services is intrinsically related to our basic regulatory function. The interpretation of law advanced by the LECs is extremely narrow and would severely limit the Commission's power to regulate telecommunications services in the best interests of ratepayers and the public."[8] This Commission subsequently issued specific orders regarding access to loop facilities in Docket Nos. UT 138/UT 139.

These orders clearly establish the Commission's finding that the access to loop facilities, which include feeder facilities and digital subscriber line facilities, is essential to promoting the policies of competition and consumer choice. Qwest must, therefore, provide unbundled access to these facilities regardless of the medium or technology used.

The Commission must continue to use its authority, clearly established by Commission orders, to protect competitors and consumers alike. Adopting Covad's copper retirement proposals is a critical component of this effort.

Precisely the same policy objectives would be served by adopting Covad's copper retirement proposals. The proposals would ensure the continued existence of competition by allowing customers to continue to choose Covad as their provider of high speed telecommunications services at reasonable prices. Furthermore, the proposal would promote the efficient investment in higher speed telecommunication services. Given the fact that Covad has already invested millions in providing these services in Oregon, nothing could be more

[8] Docket No. UM 351, *In the Matter of the Investigation into the Cost of Providing Telecommunications Services,* Order No. 96-188 entered July 19, 1996 at 13.

*in*efficient than permitting Qwest to destroy this investment by replacing some copper cable with fiber cable. The inefficiency of Qwest's proposals are only underscored by the fact that, with the exception of a failed market trial,[9] *not a single inch* of fiber optic cable deployed by Qwest in Oregon has led to the provision of broadband services to Oregon consumers.[10]

C. Qwest's Criticisms of Covad's Alternative Service Proposal are Misleading

Qwest makes two self-contradictory arguments regarding the financial ruin it alleges it would suffer if Covad's alternative service proposal is adopted. First, it argues that the Covad proposal would require it to maintain large copper feeder facilities to serve only a handful of Covad's customers, which would discourage Qwest from deploying fiber facilities. Even a cursory reading of Covad's proposal reveals that it would require no such thing. In fact, the proposal in no way restricts Qwest's right to retire copper feeder facilities. Maintaining copper facilities is merely an option available to Qwest, should Qwest deem it the most desirable way in which to avoid disrupting the service being provided by Covad to its customers. In fact, Qwest itself has argued that it is willing, in many cases, to maintain copper.[11] Qwest's argument in its Initial Brief that the retirement of copper is "standard practice" when fiber is deployed[12] is flatly

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[9] See Catherine Yang, Cable vs. Fiber: In the Titanic Battle to Control the Flow of Data to U.S. Households, the Bells Fight Back by Offering Video via Phone Lines, Businessweek, November 1, 2004 ("After failing to generate adequate returns by offering TV over fiber-to-copper networks in Colorado and Arizona, the No. 4 Bell, Denver-based Qwest Communications International, Inc. is sitting out the current [fiber deployment] craze. CEO Richard C. Notebaert says he's willing to install fiber only in new housing developments. 'When you go in to do a tear up or an overlay, the economics don't work,' he says.")

[10] Qwest's Responses to Covad's Data Requests 01-001, 01-002 and 01-003.

[11] AZ Tr. Vol. I, 82:19 through 83:11 (Attachment 2).

[12] Qwest's Initial Brief at 4.

contradicted by the Agreement, Qwest's own witness, and Qwest's prior statements to the FCC.[13]

Qwest also attacks Covad's alternative service proposal, essentially on three grounds: First, it has no legal basis (this issue is addressed above); second, it is so vague that it gives no direction to Qwest as to how to comply with its terms; and third, that it would deny Qwest the right to recover its costs, as required by 252(d)(1). These arguments do not survive serious analysis.

Qwest's second point, that the proposal is not properly defined, fails to take into account that the two critical characteristics of any alternative service, service quality and price stability, are clearly defined. Contrary to Qwest's protestations otherwise, clear and obvious metrics exist to determine whether a given customer's service is "degraded" by the move to an alternative service: availability of the connection, and the speed of that connection, measured in kilobits per second (kbps). Qwest's professed ignorance as to what Covad's proposal means is questionable at best, especially given the multitude of situations in which language in interconnection agreements has obvious, though not precisely explained implications. One need not look far to find an example- Qwest's own proposal regarding copper retirement contains equally general language when it states that "Qwest and CLEC will jointly coordinate the transition of current working facilities to the new working facilities so that service interruption is held to a minimum." This language can be read to mean that Qwest will provide access to fiber feeder and distribution facilities, even FTTH loops, or it can be read to mean that Qwest will provide

[13] The FCC noted Qwest's stated policy to maintain existing copper even after fiber facilities are deployed in the *Triennial Review Order*. *Triennial Review Order*, ¶ 296 ("Qwest explains that it 'does not proactively remove copper facilities in the case of an overlay...'")

something less. It is open to a certain level of interpretation, perhaps even a greater level than Covad's proposed language.

Qwest's third point is that Covad's proposal fails to provide Qwest with a means of recovering its costs for providing an alternative service. Implicit in this argument is an assumption that whatever means Qwest uses to provide the service will be more expensive than the current method of providing service to Covad. As an example of this, Qwest compares the rate it is permitted to charge for line sharing in Oregon ($4.55) to the more expensive (yet somehow still undefined) alternative service. This is nothing more than a collateral attack on this Commission's rate for line sharing.

Qwest's argument also ignores the fact that all of the rates for its wholesale services are set on the basis of *average* costs. To the extent certain alternative arrangements raise Qwest's actual costs, this is best addressed in a review of Qwest's wholesale rates. Some specific arrangements may be more expensive, some less expensive. Qwest's overly literal interpretation of section 252(d)(1) would logically lead to the conclusion that every wholesale arrangement that, for whatever reason, falls below the average cost of providing that element would violate the Act. Such an analysis would make it impossible for this Commission to set wholesale rates at all.

More logical is Covad's proposal, which fundamentally stands for the proposition that Qwest cannot unilaterally change its wholesale rates, or eliminate competitors and customer choice, by re-configuring its network. If Qwest believes there are benefits to such a reconfiguration, it should be able to perform it, but allowing Qwest to shift all costs of

reconfiguration onto its competitors will distort its decisions, and replace marketplace thinking with regulatory calculations.

D. Qwest's Arguments Regarding Economic Disincentives for Fiber Deployment are not Based in Reality, and Covad's Proposal Strikes a More Appropriate Balance Between Customer Choice and the Development of Next Generation Facilities

Qwest's arguments for the unlimited right to retire copper are based upon the FCC's statements in the *Triennial Review Order* that impairment determinations must be balanced against the Act's clear policy objective of promoting the deployment of advanced telecommunications capability and infrastructure. Essentially, Qwest argues that any restrictions on the right to retire older copper technology, and replace it with newer fiber optic technology, would be an impermissible disincentive for investment in advanced services. Qwest claims, therefore, that its right to retire copper facilities, and deny access to successor facilities, is vital to its decision to invest in Oregon.[14]

The misleading nature of Qwest's arguments is exposed by the following hypothetical: Suppose Qwest elected to replace all copper feeder cables in its Oregon network with fiber feeder, but left significant distances of copper distribution loops in place and did not deploy DSLAMs at the resulting remote terminals.[15] Under Qwest's proposal, Covad would be unable to serve any of its Oregon customers without deploying parallel loop facilities.[16] Oregon

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[14] This argument might be more persuasive if Qwest actually intended to deploy facilities capable of providing advanced services, such as the FTTH or FTTC loops envisioned by the FCC. Far from doing so, Qwest is merely attempting to parlay some routine maintenance activity into an anti-competitive closure of its existing copper plant to competition.

[15] Far from being an unrealistic hypothetical, this appears to follow the precise pattern of fiber deployment Qwest has followed in Oregon to date.

[16] The deployment of remote DSLAMs would not be technically feasible under this scenario, nor would Qwest be obligated to allow Covad to connect a remote DSLAM to the resulting hybrid loop, because Qwest's proposals are

customers would receive no new services from Qwest, while at the same time Covad's entire Oregon investment would be lost.

The outcome of this hypothetical explains why Covad believes this Commission's decision to adopt Covad's copper retirement proposals is so critical. The fact of the matter is that Qwest's proposal would offer every incentive to Qwest to follow the deployment pattern described above, because it would allow Qwest to game the unbundling regime by making only incremental network modifications, driving Covad out of business, without offering customers a single new product or service.

Far from being merely a hypothetical concern, the possibility of the retirement scenario above is supported by Qwest's own statements and current retirement activity. While Covad routinely receives notices regarding Qwest's retirement of copper facilities (and their resulting unavailability), none of these retirements appears to be resulting in the deployment of additional advanced services to customers, and Qwest has made no pretense at proving otherwise, because it absolutely cannot. This is because Qwest has made a conscious decision not to upgrade its existing facilities for increased broadband capability, and instead is simply retiring copper for maintenance cost savings.

Maintenance decisions should not trump this Commission's directive to promote competition and efficient investment in advanced telecommunications services. Even the FCC's copper retirement policies are narrowly tailored to promote the deployment of FTTH and FTTC

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a condition to Covad's right to remote collocation and Field Connection Point (FCP) upon Qwest's placement of a remote DSLAM.

loops that carry with them the actual ability to provide enhanced broadband services to mass market customers, not to reward Qwest for making routine network modifications.[17]

On the other hand, Covad's proposal allows both Qwest and Covad to continue to *compete* for customers. If Qwest is willing to invest in FTTH or FTTC loops with significantly increased broadband capabilities, Covad's proposal is inapplicable and raises no investment disincentive issues. Furthermore, Covad's proposal does not require Qwest to offer any increased capabilities to Covad via any form of fiber access, and therefore preserves the value of any investment made by Qwest. In other words, Covad's proposal allows market forces to drive investment, rather than attempts to re-establish monopolies through regulatory gaming. For these reasons, Covad's proposal is not only more consistent with the goals of the Act, but also this Commission's directives under state law.

E. Qwest's Proposals Will Likely Lead to Significant Customer Disruption in the Near Future

In its post-hearing brief, Qwest argues that Covad's proposals should not be adopted because no customers have yet lost service due to a copper retirement, and future retirements are only likely to impact a handful of customers. While a single, specific retirement may only impact a handful of customers, Covad believes it is likely that Qwest retirements will become a significant disruption threat during the term of this agreement. On this point, Mr. Zulevic has stated:

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[17] *See generally, Triennial Review Order,* ¶¶ 273-284 (discussing the capabilities of FTTH loops and the scope of incumbent LEC retirement obligations when FTTH loops are deployed); and *FTTC Reconsideration Order,* ¶¶ 1-14 (extending the FCC's reasoning to FTTC loops serving mass market customers). Notably, Qwest has made no effort whatsoever to limit its proposal or to provide evidence that it is deploying fiber for the purpose of providing advanced services to mass market customers, as opposed to enterprise customers.

> I would agree that it's never happened. But, then again, the reason we are arbitrating this is in anticipation of Qwest starting to modify and build its fiber network. And the potential for that type of thing to happen is definitely in the future.

NM Tr. Vol. 3 at 85, ll.11-16.

F. Under Any Analysis of Qwest's Right to Retire Copper, its Proposed Notice of Such Retirement is Deficient

While the parties have agreed to the fact that Qwest will provide notice of all copper retirement activity, including feeder retirements, Covad has proposed changes to the content of these notices in order to make them useful to competitors that must evaluate the impact of these retirements on their operations. Qwest opposes these changes, arguing that its current notice complies with FCC rules.

47 C.F.R. § 51.327 prescribes the "minimum" standards for notices of network changes. Contrary to Qwest's assertions in its Initial Brief, its current notifications do not even meet these "minimum" standards. For instance, notices must, according to the rule, include the "location(s) at which the changes will occur"[18] as well as the "reasonably foreseeable impact of the planned changes."[19]

Qwest chooses to read these requirements in an unreasonably narrow fashion, and has declined to provide such vital information as to what Covad customers, if any, will be impacted by the retirement project. The vague notices proposed by Qwest would be useful only as a starting point for a major research project to determine whether a given retirement will impact Covad's customers. In response to each and every notice of a copper retirement project, Covad would have to determine whether any of its customers would actually be affected.

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[18] 47 C.F.R. § 51.327(a)(4).
[19] 47 C.F.R. § 51.327(a)(6).

Covad submits that any notice that can be read to comply with the FCC's rules must specifically inform it whether the retirement threatens service to existing customers. The FCC rule clearly places the burden on ILECs to determine the "reasonably foreseeable impact" of its retirements. Qwest's interpretation of this language, which would not require specific notice of the customers affected, is so devoid of substance that it must be rejected as an unreasonable interpretation of the rule.

Furthermore, the FCC's rules regarding network modifications clearly require

> A description of the type of changes planned (Information provided to satisfy this requirement must include, as applicable, but is not limited to, references to technical specifications, protocols, and standards regarding transmission, signaling, routing, and facility assignment as well as references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection)...

47 C.F.R. § 51.327(a)(5).

Covad's notice proposals embody this requirement, by specifying that notices contain information regarding "old and new cable media, including transmission characteristics; circuit identification information; and cable and pair information."[20] Covad believes the information it seeks, and which Qwest refuses to provide, is clearly within the scope of the FCC rule. Not only is it within the scope of the rule, it is necessary to lend any meaning whatsoever to the notice requirement.[21]

Furthermore, Qwest's notice procedures are clearly inferior to those implemented by a similarly situated RBOC, namely BellSouth. BellSouth's Update for Fiber to Copper

[20] Covad Proposed Section 9.1.15.

[21] While Qwest appears to argue in its Initial Brief that it has committed to go beyond FCC requirements in providing notice of copper feeder retirements, this is clearly not the case. FCC rules require notice of all network changes that impact the ability of competitors to provide service. *See* 47 C.F.R. § 51.325(a)(1).

Migrations, Attachment 6 to Covad's Initial Brief, clearly establishes that BellSouth provides CLECs a complete listing of customer addresses impacted by a retirement project, and provides specific notice to carriers that are providing DSL. Qwest is simply mistaken when it states that that information has not been provided to both Qwest and this Commission.

Even if this Commission does not believe the FCC has required the information Covad requests, the FCC has undoubtedly recognized this Commission's authority to add, or otherwise specify, the notice requirements requested by Covad in order to afford meaningful notice of Qwest retirement projects. In addition to the minimum requirements of 47 C.F.R. § 51.327, the FCC directs ILECs to comply with "any applicable state requirements" related to the retirement of copper loops and copper subloops.[22] While 47 C.F.R. § 51.327 should be read broadly enough to require what Covad seeks, additional state requirements are also clearly authorized.

ISSUE 2 – UNIFIED AGREEMENT – 271 ELEMENTS INCLUDED
(Section 4 Definitions of "Unbundled Network Element"; Sections 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, and 9.21.2)

Qwest opposes the inclusion of terms in the Agreement describing its unbundling obligations under both section 271 of the Act and Oregon law, making four primary arguments against Covad's proposals to include these elements: (1) Section 251 of the Act, as now interpreted by the FCC and *USTA II*,[23] describes the "real upper bound" of Qwest's unbundling obligations, and this Commission has no authority to question these impairment determinations; (2) The Act's state savings clauses do not preserve state utility commission authority to order further unbundling; (3) This Commission lacks the authority to enforce section 271 of the Act by enforcing the competitive checklist; and (4) Any access that is afforded to non-251 elements

[22] 47 C.F.R. § 51.319(a)(3)(iii)(B).
[23] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

cannot lawfully be priced at forward-looking TELRIC rates. All four of Qwest's arguments are hindered by the fact that they have been considered and rejected by the FCC and/or federal courts, as detailed below.

Furthermore, Qwest cites the decisions of other state commissions made in parallel arbitrations between the parties. Qwest improperly characterizes those decisions in an effort to convince this Commission that there has been a uniformity in analysis with respect to this issue, which is simply not the case.

A. Access Obligations Consistent with the Section 271 Competitive Checklist Cannot, as a Logical Matter, Conflict with the Act

Qwest attempts to over-read the *Triennial Review Order*, as well as the more recent *BellSouth Declaratory Order*,[24] to stand for the proposition that any unbundling requirement not meeting the FCC's impairment standard is necessarily in conflict with the FCC's impairment determinations and the Act itself. This position ignores, however, the statements made by the FCC, and left undisturbed by the D.C. Circuit in its *USTA II* decision, that network elements contained in the section 271 Competitive Checklist[25] must be available notwithstanding any finding of non-impairment. The FCC specifically rejected the analysis proposed by Qwest in this proceeding:

> Verizon asserts that an interpretation of the Act that recognizes the independence of sections 271 and 251(d)(2) places these sections in conflict with each other. We disagree. Verizon's reading of section 271 would provide no reason for Congress to have enacted items 4, 5, 6, and 10 [loop, transport, switching and signaling] of

[24] Memorandum Opinion and Order and Notice of Inquiry, *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, FCC 05-78 (rel. March 25, 2005) (*"BellSouth Declaratory Order"*).
[25] *See* 47 U.S.C. § 271(c)(2)(B) ("Competitive Checklist").

> the checklist because item 2 [compliance with section 251] would have sufficed.

Triennial Review Order, ¶ 654.

If the additional unbundling requirements contained in the Competitive Checklist do not conflict with section 251, it is a logical impossibility that identical state access obligations could conflict with section 251. Therefore, any access obligation limited by the scope of the competitive checklist (such as those proposed by Covad), whether grounded in section 271 or Oregon law, cannot conflict with the Act and cannot be preempted.

Nothing in the *BellSouth Declaratory Order* changes this fundamental ruling. In fact, the FCC specifically notes in its order that it had previously rejected the argument that "states are preempted from [issuing unbundling requirements] as a matter of law."[26] The FCC merely determined that Incumbent LECs were not required to unbundle the Low Frequency Portion of the Loop (LFPL). The LFPL is fundamentally different than the elements at issue in this proceeding. First, the LFPL has never been subject to unbundling. Even prior to the *Triennial Review Order*, the FCC had declined to place it on the national list of UNEs.[27] Even more significantly, this decision was not driven by impairment analysis, but the fact that the FCC did not consider the LFPL a UNE at all.[28]

Furthermore, no one has ever argued that unbundling of the LFPL is required to meet the requirements of the 271 checklist. In fact, the FCC had specifically determined that the LFPL need not be unbundled to comply with checklist item four (loops), even prior to issuance of the

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[26] BellSouth Declaratory Order, ¶23, n. 71.

[27] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, Third Report and Order on Reconsideration, 16 FCC Rcd. 2101 at 2114, ¶ 26 (rel. January 19, 2001) (*"Line Sharing Reconsideration Order"*).

[28] *BellSouth Declaratory Order*, ¶ 5, n. 12.

Triennial Review Order.[29] This is in stark contrast to the elements at issue in this proceeding. It is now settled law that RBOCs must provide access to the elements Covad requests pursuant to section 271, notwithstanding any finding of non-impairment under section 251 of the Act.[30]

Because the FCC has already ruled that the elements Covad seeks remain subject to federal unbundling requirements, any state action to unbundle them cannot possibly conflict with section 251(d) of the Act. Not only is Qwest well aware of this, but had originally sought forbearance from its section 271 unbundling obligations for the elements at issue in order to avoid these obligations. That petition was withdrawn, presumably because Qwest no longer wished to avoid these obligations, or realized that the FCC would only confirm its prior ruling and reject its petition.[31]

B. The Act Grants this Commission Clear Authority to Order Unbundling in Addition to the Minimum Requirements of Section 251

Qwest makes three separate arguments regarding the lack of Commission authority to order unbundling beyond the FCC's current interpretation of section 251 of the Act: First, the Commission lacks any authority to perform the impairment analysis required by section 251; second, that the Act does not preserve state commission authority to impose additional unbundling obligations; and third, that the Commission lacks any authority to require unbundling consistent with section 271 of the Act.

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[29] *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd. 18,354 (rel. June 30, 2000) and *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* CC Docket No. 02-35, Memorandum Opinion and Order, 17 FCC Rcd. 9018 (rel. May 15, 2002).

[30] *Triennial Review Order*, ¶¶ 653-655, *affirmed by USTA II* at 52-54.

[31] *See* Qwest's notice of withdrawal of its Forbearance Petition, Attachment 4 to Covad's Initial Brief.

Qwest's first argument, regarding the ability of this Commission to make impairment determinations, is misplaced. First of all, Covad has not proposed that this Commission perform an impairment analysis under section 251. Instead, Covad has asked this Commission to recognize its authority under section 271 of the Act, Oregon law, or both, to order unbundling consistent with the Competitive Checklist and the statutory directives of this Commission.

Qwest relies heavily on an Administrative Law Judge's decision in Docket UM 1100, in which it was determined that blanket access to network elements removed from the national list of section 251(c)(3) UNEs could not be ordered absent a "separate impairment analysis" for those UNEs.[32] What Qwest neglects to mention, however, is the explicit invalidation of that rationale by the D.C. Circuit in its *USTA II* decision, when that court ruled that the FCC may not delegate impairment determinations to state utilities commissions. This Commission explicitly acknowledged that ruling in its subsequent order closing Docket UM 1100.[33] In other words, the original rationale offered for *declining* to unbundle those elements is now invalid. It should be noted, however, that the *USTA II* decision did not disturb the FCC's determination that state utilities commissions could adopt additional unbundling requirements pursuant to state law, or that section 271 required continued access to UNEs notwithstanding the FCC's impairment analysis.

Qwest's second argument, that this Commission lacks the authority to impose additional unbundling obligations, has been repudiated not only by the FCC in the *Local Competition First*

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[32] *In the Matter of the Investigation to Determine, Pursuant to Order of the Federal Communications Commission, Whether Impairment Exists in Particular Markets if Local Circuit Switching for Mass Market Customers is No Longer Available as an Unbundled Network Element*, Docket UM 1100, Ruling Denying Motion issued June 11, 2004 at 7.

[33] Docket UM 1100, Order Closing Docket entered June 23, 2004 at 1.

Report and Order,[34] but also by every federal court passing judgment on the meaning of section 252(e)(3) of the Act.[35] Contrary to Qwest's assertions that the Act's savings clauses designed to preserve state authority are ineffective in providing authority for state unbundling rules, federal courts have routinely confirmed that these savings clauses, especially 47 U.S.C. § 252(e)(3), provide state commissions with the requisite authority to enforce their own access obligations. They have likewise determined that for state requirements to be preempted, they must actually conflict with federal law, or thoroughly occupy the legislative field. *Cippillone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992). Congress effectively eliminated any argument supporting implied preemption by including the following language in the Act:

> (c) Federal, State, and Local Law.--
>
> (1) **No implied effect**.--This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Pub. L. 104-104, title VI, Sec. 601(c), Feb. 8, 1996, 110 Stat. 143. [emphasis added]

As discussed above, the FCC has, as recently as the *Triennial Review Order*, rejected the premise that access obligations exceeding those required by section 251's "impair" standard

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[34] *See Local Competition First Report and Order*, ¶ 244, as well as the discussion of Issue 1, subsection B, above.
[35] *See Southwestern Bell Telephone Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 481 (5th Cir. 2000) ("The Act obviously allows a state commission to consider requirements of state law when approving or rejecting interconnection agreements."); *AT&T Communications v. BellSouth Telecommunications Inc.*, 238 F.3d 636, 642 (5th Cir. 2001) ("Subject to § 253, the state commission may also establish or enforce other requirements of state law in its review of an agreement." [citing § 252(e)(3)]); *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 301-302 (4th Cir. 2001) ("Determinations made [by state commissions] pursuant to authority other than that conferred by § 252 are, by operation of § 601(c) of the 1996 Act, left for review by State courts. [citing 47 U.S.C. § 152 note]...Section 252(e) also permits State commissions to impose State-law requirements in its review of interconnection agreements.")

directly conflict with section 251,[36] and the Act itself prohibits implicit preemption determinations. As a result, Qwest's conflict preemption arguments are without merit.

Neither does the FCC's recent ruling in its *BellSouth Declaratory Order* save Qwest's argument. As discussed above, that order preempted state commission orders that required a unique form of leaseback unbundling associated with the LFPL that had never been considered a UNE by the FCC. The FCC had explicitly denied access to the LFPL at issue in that order on more than one occasion, and no provision of the Act requires access to the LFPL.[37] On the other hand, access to the elements sought by this proceeding is required by the Act, a requirement that has been confirmed by the FCC and the D.C. Circuit.

C. The Commission has Authority to Enforce Section 271 by Requiring Compliance with the Competitive Checklist

Qwest argues that even if section 271 can be read to create additional unbundling obligations, this Commission possesses no authority to enforce those obligations. For this premise, it cites *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003). Qwest also claims that the role for state commissions envisioned by the Act with respect to section 271 is markedly different than that envisioned by

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[36] *Triennial Review Order*, ¶ 654. It should also be noted that the FCC exercised its *forbearance authority* in the *271 Forbearance Order* to refrain from requiring the unbundling of certain fiber facilities under section 271 of the Act. Inherent in this determination was the realization that notwithstanding their recent determination that competitors are not impaired without access to the broadband capabilities of FTTH and FTTC loops, section 271 required the unbundling of *all* loops. Only by electing to forbear from enforcement of these section 271 unbundling requirements could they relieve RBOCs of their obligation to unbundle these elements. Most notably, the FCC did not elect to forbear from enforcement of the unbundling obligations proposed by Covad in this arbitration, such as access to Feeder subloops, DS3 Loops, and DS3 Transport elements.

[37] Despite these specific facts related to the LFPL, it should be noted that the FCC's decision does appear to conflict with the Sixth Circuit's Decision in *Michigan Bell Telephone Company v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 359 (6th Cir. 2003). Because the state commission orders the FCC preempted in the *BellSouth Declaratory Order* are currently being appealed to the Sixth Circuit, that court will have the opportunity to examine the FCC's preemption analysis. *See BellSouth Declaratory Order*, ¶ 12, n. 35. While the FCC correctly points out that it possesses the authority to make preemption determinations, federal courts possess the ultimate authority to determine whether the FCC has acted properly in doing so. 5 U.S.C. § 706.

sections 251 and 252, and that this Commission has no real power to enforce compliance with the Competitive Checklist.

Qwest's reliance on *Indiana Bell* misconstrues the court's holding in that case. The *Indiana Bell* court held that the Indiana Utility Regulatory Commission (IURC) did not have authority to order a specific performance and remedy plan as a condition of interLATA authority, because the FCC, not the IURC, had the ultimate authority to grant Indiana Bell's application. By ordering compliance with the remedy plan, the court ruled that the IURC "*imposes additional* obligations on Ameritech, beyond what is contemplated by Section 271 of the Act." (emphasis added) *Id.* at 6.

Notably, however, the court went to great lengths to explain that the IURC *did* have the authority to implement its performance and penalty plan *through the 252 interconnection process*. The court stated: "It is precisely because enforcement mechanisms are contemplated by Section 252 that they cannot be developed through the 271 Application process alone." In other words, the IURC had no need to require certain access standards as a condition of 271 approval, because it was free to require the same terms in its review of 252 interconnection agreements.

A proper reading of *Indiana Bell* affirms that this Commission may interpret and enforce the Competitive Checklist in its review of an interconnection agreement. In the current proceeding, Covad does not propose additional obligations and penalties under the aegis of section 271, making the court's holding in *Indiana Bell* inapplicable.

Recently, the Maine Public Utilities Commission issued an order requiring Verizon to continue to provide elements on the Competitive Checklist through tariffs approved by that commission.[38] The Maine PUC also specifically found they possessed the authority to require compliance with the Competitive Checklist in the context of 252 arbitration proceedings. *Maine 271 Unbundling Order* at 19.

The Illinois Commerce Commission recently entered a similar order, in which they required SBC to continue to fulfill its contractual obligations to provide the elements Covad seeks here, on the theory that SBC remained obligated to provide them pursuant to section 271 of the Act. In addition, the Commission ordered SBC to provide the elements as required by Illinois law, notwithstanding the particular language in specific interconnection agreements that may or may not have required compliance with section 271 in the context of those agreements. *See* Illinois Commerce Commission Docket Nos. 05-154, 05-156, 05-174, *Verified Complaint*[s] *Pursuant to 220 ILCS 5/13-515(e)*, Administrative Law Judge's Decision (May 9, 2005) at 23-28. A copy of this decision has been attached hereto as Attachment 1.

All of this is consistent with the clear direction provided by the FCC in approving RBOC 271 applications, which firmly support the enforcement authority of state utilities commissions with respect to the competitive checklist. In approving Qwest's 271 application for Oregon, the FCC stated:

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[38] *See* Maine PUC Docket No. 2002-682, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Order – Part II (September 3, 2004) ("Maine 271 Unbundling Order"). This order can be found at http://www.maine.gov/mpuc/orders/orders.htm.

> We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into these three states.

In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota, WC Docket No. 03-11, Memorandum Opinion and Order, 18 FCC Rcd. 7325 (Rel. April 15, 2003), ¶151.

Logically attendant to this enforcement authority is the authority to interpret the requirements of section 271. A Commission determination in the context of a section 252 arbitration proceeding is the most obvious, expedient, and legally defensible method available to this Commission.

By incorporating its decisions in its order in this arbitration proceeding, the Commission would establish its own authority, separate from section 271, to enforce the requirements imposed. If Qwest were to refuse to comply with the Commission's order in this case, citing this Commission's lack of authority to interpret section 271, the Commission could enforce its order as it enforces any Commission order, as well as advise the FCC of Qwest's non-compliance with section 271 of the Act. Ultimately, only the FCC may judge whether non-compliance with the Competitive Checklist requires enforcement under section 271 of the Act, but this is clearly distinguishable from this Commission's authority to interpret and enforce interconnection agreements.

D. TELRIC is a Permissible, Though Not Required, Pricing Methodology to Determine Fair, Just and Reasonable Rates in Compliance with 47 U.S.C. §§ 201 and 202 and Oregon Law

Qwest argues that any application of TELRIC to establish rates for elements available pursuant to section 271 of the Act is *per se* unlawful. For this proposition, it cites a brief

prepared by the FCC in connection with the appeal of the *USTA II* decision, in which the counsel for the FCC argues that section 252(d)(1) of the Act does not establish a state role in setting the rates for 271 elements, but only elements governed by section 251(c)(3).

First of all, statements made in a legal brief cannot be equated to an actual FCC decision. The FCC discussed the issue of pricing for 271 elements at length in the *Triennial Review Order*, and never once did it act to preempt state commission authority to set rates for elements that must be made available pursuant to section 271. To the contrary, the FCC noted that BOCs that had already obtained section 271 approval would be required to continue to comply with any conditions of approval.[39] In the context of elements for which wholesale rates were established, and relied upon, by the FCC in granting Qwest's 271 application, the FCC has required continued access at current prices (TELRIC), absent a request made by Qwest to alter the conditions of its interLATA entry.[40]

To the extent the Commission approves Covad's proposals for Issue 2 based upon its state law authority, it should apply TELRIC, which clearly results in the setting of fair, just and reasonable rates as required by federal law. While forward-looking cost methodologies other than TELRIC are available, this Commission has already set TELRIC rates for the elements at issue, and those rates already comply with state and federal law. Covad proposes that they remain in place, while recognizing that the Commission is not required to keep them in place.

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[39] *Triennial Review Order,* ¶ 665.
[40] *Id.*

E. Existing Decisions from Other Commissions Considering Issue 2 Provide No Consistent Guidance

While no state commission has yet adopted Covad's proposed language regarding Issue 2, Qwest has grossly mischaracterized the conclusions reached by those commissions in an effort to paint them as fully supportive of its position. A careful reading of those decisions is in order.

The Minnesota ALJ Decision cited by Qwest (and recently upheld by the Minnesota Commission) rejected *both* parties' language regarding this issue. In fact, the Commission ordered the parties to adopt language consistent with its determination that it is premature to remove any section 251 elements from the Agreement. The practical effect of this decision is that the parties will be required to re-insert language into the agreement providing access to all of the elements Covad seeks, only pursuant to section 251 of the Act. While Qwest may seek changes to this language under the change in law provisions of the Agreement, the Commission has certainly not pre-determined any outcome on that issue.

The Decision in the Utah arbitration has likewise been mischaracterized by Qwest. Qwest selectively cites language from that decision for the proposition that section 271 and state law unbundling issues are inappropriate subjects of an interconnection agreement as a matter of law, when in fact the Utah decision states precisely the opposite. While the Commission ultimately declined to adopt Covad's language, it saw no legal impediment to doing so:

> We agree with Covad's general proposition that states are not preempted as a matter of law from regulating in the field of access to network elements...we reject Qwest's apparent view that we are totally preempted by the federal system from enforcing Utah law requiring unbundled access to certain network elements.
>
> ...

> The fact that **under a careful reading of the law the Commission may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration** does not lead us to conclude it would be reasonable in this case to do so.

Utah PSC Docket No. 04-2277-02, *In the Matter of the Petition of DIECA Communications, Inc. D/B/A Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation,* Arbitration Report and Order (February 8, 2005) at 19-21. [emphasis added]

Covad was certainly disappointed by the conclusion reached by the administrative law judge, but the legal analysis preceding that conclusion supports Covad's position, not Qwest's.

The Washington Commission reached its decision on entirely different grounds than the Utah and Minnesota commissions. They engaged in a self-preemption analysis, and determined that any effort to enforce state unbundling laws would be preempted by federal law. This decision comes closest to supporting Qwest's position, but is legally flawed for reasons Covad has stated previously: state access requirements consistent with section 271 of the Act cannot be preempted as a logical matter, and in any event, administrative agencies lack the authority to engage in preemption analysis, and should instead enforce existing state law and administrative rules.

ISSUE 3 – COMMINGLING
(Section 4 Definitions of "Commingling" and "251(c)(3) UNE," 9.1.1 and 9.1.1.4.2)

A. The FCC Has Drawn Clear Distinctions Between Commingling and Combination Requirements

Qwest has argued that there is no legal distinction between commingling and combining network elements or other wholesale services, and therefore Covad's commingling proposals violate the limitations placed upon UNE combinations in the *Triennial Review Order*, later

upheld by the *USTA II* decision. This is nothing more than a collateral attack on the FCC's commingling rules established by the *Triennial Review Order*. Compounding the illogic of this argument is the fact that, central to Qwest's arguments with respect to Issues 1 and 2, Qwest believes that only the FCC possesses the authority to address unbundling matters. If that is so, how does Qwest propose this Commission can overrule the commingling rules for 251 UNEs established by the FCC?[41]

With respect to Qwest's attack on the *Triennial Review Order,* the FCC made clear distinctions between UNE combinations and commingling. In addition to using the separate terms "combine" and "commingle," the FCC delineates the scope of its UNE Combination Rules,[42] then goes on to describe the very different requirements of incumbent LECs to commingle both UNEs obtained pursuant to section 251(c)(3) and combinations of such UNEs with one or more facilities or services "obtained at wholesale pursuant to a method other than unbundling under section 251(c)(3) of the Act."[43] Thus, Qwest's argument that the FCC has made a distinction without a difference is directly refuted by the *Triennial Review Order* itself.[44]

Qwest's position is all the more curious given the fact that even its own commingling proposals contemplate the commingling of 251(c)(3) UNEs with non-UNE telecommunications

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[41] The FCC specifically cited 47 U.S.C. § 251(c)(3) as its authority to adopt rules permitting the commingling of UNEs and combinations of UNEs with wholesale services.

[42] *Triennial Review Order,* ¶¶ 573-578.

[43] *Triennial Review Order,* ¶¶ 579.

[44] Ultimately, Qwest's belief that there is no functional or network difference between combinations and commingling arrangements does not support any kind of argument that there is no legal distinction. In addition to the compelling argument presented by Covad above, there is a key distinction between the two arrangements that can never be ignored. That distinction is the jurisdictional nature of the traffic (local traffic v. interstate traffic) moving over a combination versus a commingled arrangement. And it is this key jurisdictional distinction that underlies the legal distinction that the FCC very clearly made between commingled arrangements and UNE combinations.

services.[45] It is hard to square this proposal with Qwest's argument that commingling is essentially a synonym for combining, given the fact that all parties agree that only 251(c)(3) UNEs are subject to the FCC's combination rules. If Qwest truly believed its own argument, it would have proposed the deletion of its commingling obligations altogether.

B. A Reasonable Reading of the Triennial Review Order Requires the Adoption of Covad's Limited Commingling Proposal

At the heart of the parties' dispute is whether network elements obtained pursuant to section 271 of the Act are "wholesale services" obtained "pursuant to a method other than unbundling under section 251(c)(3) of the Act," or whether the FCC intended to place 271 elements in a special category as neither a UNE nor a wholesale service, ineligible for either combination or commingling. Qwest argues for the latter, and claims that ¶ 655, footnote 1990 of the *Triennial Review Order* confirms its interpretation.

To accept Qwest's argument, one must assume that footnote 1990 of the *Triennial Review Order* was intended to carve out 271 elements from the definition of "wholesale service," as that term was used seventy-six paragraphs earlier by the FCC in discussing commingling obligations in ¶ 579, despite the fact that no such comment or suggestion was made in ¶ 579 reflecting such a restrictive reading. The alternative reading, proposed by Covad, is that footnote 1990 was intended to clarify that elements available pursuant to section 271 would not be treated the same as elements available pursuant to section 251(c)(3) of the Act. In other words, while

[45] *See Qwest's proposed Section 9.1.1.2 ("CLEC may commingle UNEs and combinations of UNEs with wholesale services and facilities...")*

section 271 elements can be commingled with section 251(c)(3) UNEs,[46] a section 271 element may not be commingled or combined with another section 271 element.

This is a far more plausible interpretation, given that this meaning is consistent with the FCC's discussion at ¶ 655, which is entirely focused on the independence of the unbundling obligations contained in section 271 from section 251 (rather than the distinctions between 271 elements and other wholesale services). Furthermore, footnote 1990 clearly intends to deny section 271 elements a status equivalent to section 251(c)(3) elements when it states "[w]e decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[47] Therefore, 271 elements are not to be treated as 251(c)(3) UNEs, and cannot be substituted as the "lynchpin" of a commingling arrangement. This interpretation, supported by Covad, lends the most logical meaning to the FCC's statement that it declines to apply its commingling rule to 271 UNEs.[48] This is by far the most logical interpretation of footnote 1990, and the most consistent with the FCC's commingling rules established in ¶ 579 of the *Triennial Review Order.*

This is a simple matter of interpreting the *Triennial Review Order* and resulting FCC rules. As mentioned in Covad's Initial Brief, each and every Commission considering this issue has adopted Covad's interpretation and proposed language.

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[46] This distinction is the source of Covad's proposed definition of "251(c)(3) UNE." The definition is necessary to draw the same distinction drawn by the FCC in the *Triennial Review Order.*
[47] *Triennial Review Order,* ¶ 655, fn. 1990.
[48] *Id.*

ISSUE 5 – REGENERATION REQUIREMENTS
(Sections 8.2.1.23.1.4, 8.3.1.9, and 9.1.10)

Qwest's argument that it is entitled to charge whatever it wishes for regenerated central office cross-connections is premised upon the claim that it designs, and allows CLECs to construct, their own cross-connects within Qwest central offices, and that 47 C.F.R. 51.323(h)(1) creates a specific exception to any cross-connection requirements if it does so. The scope of the FCC's cross-connection rule must be viewed in light of the FCC's written decision in its *Fourth Report and Order*[49] adopting the rule, which reveals the FCC's intent to protect competitive LECs from any discrimination related to incumbent LEC collocation restrictions. Furthermore, the standard for evaluating Qwest's claim that self-provisioned cross-connects are available should be the *practical* availability of this option, not simply its *theoretical* availability. Qwest's attack on this argument, that nowhere in the FCC's rules did it establish an "economic feasibility" test, ignores the plain language of section 251(c)(6) of the Act, which requires access to collocation elements on the same terms that access is offered to network elements. The economic infeasibility, as well as technical infeasibility, of Covad's options under Qwest's proposal plainly establish that collocation is not offered on terms that are just, reasonable and non-discriminatory.

In requiring incumbent LECs to provision cross-connections between CLECs, the FCC stated: "our action reflects our overriding concern than an incumbent LEC would be acting in an unreasonable and discriminatory manner if it refused to provide cross-connects between

[49] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, 16 FCC Rcd. 15435, Fourth Report and Order (rel. August 8, 2001) ("Fourth Report and Order").

collocators,"[50] and that "an incumbent LEC's refusal to provide a cross-connect between two collocated carriers would violate the incumbent's duties under section 251(c)(6) to provide collocation on ... terms and conditions that are just, reasonable, and nondiscriminatory."[51] The FCC went on to find that an incumbent LEC's provisioning of cross-connects to two collocated carriers was required by section 251(c)(6) of the Act.[52]

Based on this analysis, it is clear that the FCC's goal in adopting its cross-connection rule was to ensure compliance with the non-discrimination requirements of section 251 of the Act, and that necessary cross-connections between competitive LECs were part of an incumbent LEC's obligations to provide collocation pursuant to section 251(c)(6). The exception contained in 47 C.F.R. § 51.323(h)(1) assumes that competitive LECs could self-provision the desired connection under conditions that did not violate section 251(c)(6).

In many circumstances, it is possible for a competitive LEC to self-provision a cross-connect. However, in circumstances requiring regeneration, Qwest has read the "self-provisioning" exception in a way that clearly results in discrimination. While Qwest will make a technically feasible route available between collocators, it maintains that repeater equipment should be placed at both ends of the connection, rather than mid-span, if it is required to make the connection operable.[53] Qwest, on the other hand, regenerates its own signals at or near mid-span using equipment located near its distribution frame.

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[50] *Fourth Report and Order*, ¶ 79.
[51] *Id.*, ¶ 80.
[52] *Id.*, ¶ 82.
[53] AZ Tr. Vol. I, 195:8-16 (Attachment 2).

Not only are the conditions offered by Qwest discriminatory, Qwest has not established that its self-provisioning option is available in practical terms. At the Arizona hearing, it was established that Qwest's suggestion that competitive LECs could regenerate their own signals at both ends of the cross-connection was, *at best*, an inefficient engineering technique. Should the Commission believe that such an arrangement somehow meets the non-discrimination requirements of section 251(c)(6) (Covad believes it clearly does not), it must recognize the lack of evidence in the record regarding whether, as a practical matter, such a solution is workable. Covad believes that, at least in some situations, it will be practically impossible.

ISSUE 9 – BILLING ISSUES (Sections 5.4.1, 5.4.2, and 5.4.3)

A. Qwest's Reliance on a Stale "Consensus" in Prior 271 Proceedings and "Industry Standards" Does Not Override the Significant, Unrefuted Evidence of Wholesale Billing Difficulties Presented in This Proceeding

Qwest continues to argue that the fact it reached consensus on billing issues in its 271 proceedings makes that resolution impervious to questioning and challenge in this proceeding. To the extent that consensus was reached in a prior proceeding, or that 30 days is, in most cases, a commercially reasonable time frame for the payment of invoices, Qwest's language may enjoy a presumption of reasonableness. That is precisely why Covad introduced such detailed and extensive evidence, through Ms. Elizabeth Balvin, that there are compelling reasons to set aside that presumption. The evidence, left unrefuted by Qwest, demonstrated that Qwest's current wholesale invoices do not meet industry standards and these systemic problems make review within Qwest's proposed interval impossible. The evidence presented by Covad in this proceeding overcomes any presumption that might have been afforded to Qwest's proposed language, rendering any agreements reached in prior 271 proceedings irrelevant.

In addition to pointing to the consensus reached in prior 271 proceedings, Qwest points to its 30-day interval as "the wholesale industry standard." This is somewhat hypocritical, given the fact that Qwest cannot seem to follow other wholesale industry standards regarding billing, such as including circuit identification numbers on its bills to Covad. It should also be noted that the actual time Covad has to review Qwest's invoices is significantly less than thirty days. Qwest's bills typically arrive five to eight days after the invoice date printed on them.[54] The invoice date, not the date Covad receives the bill, starts the clock on Qwest's proposed payment interval.

Qwest's argument that it was the first ILEC to implement line sharing, and therefore established the industry norm,[55] is equally specious. As the record in this case clearly indicates, no other ILECs have chosen to follow Qwest's lead in ordering, provisioning and billing for line sharing. Perhaps the other ILECs learned from Qwest's mistakes, but they have all recognized that Qwest's process is inferior, at least implicitly, by adopting alternate procedures. Billing procedures, in particular, are uniform among the other ILECs. Only Qwest clings to its inefficient line sharing process, primarily because its customers bear the entire burden of its inefficiency.

B. The Technical Difficulties Alleged by Qwest in Providing for a 45-Day Payment Interval Must be Weighed Against the Technical Impossibility of Reviewing Deficient Qwest Invoices

Qwest argues that it will suffer technical hardship if it is forced to alter its systems to accommodate both thirty (30) and forty-five (45) day payment intervals, as proposed by the Department and agreed to by Covad (Covad originally sought a uniform forty-five (45) day

[54] Direct Testimony of Elizabeth Balvin, Covad/200, Balvin/7:12-15.
[55] *See* Qwest Initial Brief at 46.

interval). Covad acknowledges that there may be some work involved on the part of Qwest to resolve the systems issues that will arise. This difficulty, however, must be weighed against the difficulties Covad experiences as a result of deficient Qwest wholesale invoices. Those difficulties make it completely impossible to review Qwest invoices in the time provided to Covad. In light of this fact, the Commission should not hesitate in extending the payment deadline, as proposed by Covad, even if it complicates certain Qwest back-office systems. After all, Qwest would not be faced with this situation if it had been willing to fix its systemic billing problems and comply with industry standards.

C. Covad's Proposal is Unambiguous and Can Be Easily Implemented

Qwest's argument that Covad's proposals are vague and subject to multiple interpretations is a red herring, designed to shift attention away from Qwest's inability to produce an invoice that can be reconciled using the industry standard methodology of tracking circuit identification numbers. First of all, whether the 45-day interval is invoice specific or product specific (the ambiguity Qwest points to) is irrelevant because in nearly every case, Qwest bills for each product on separate invoices, separated by Billing Account Number (BAN).[56] Therefore, even if the language were ambiguous, which it is not, any reading would lead to the same result. Qwest's feigned confusion is therefore unconvincing.

Second, the language is unambiguous on its face. Covad's proposal reads:

> 5.4.1 Amounts payable *for any invoice* containing (1) line splitting or loop splitting products, (2) a missing circuit ID, (3) a missing USOC, or (4) new rate elements, new services, or new features not previously ordered by CLEC (collectively "New Products") (hereinafter collectively referred to as "Exceptions") *are due and payable within forty-five (45) calendar Days after the date of*

[56] AZ Tr. Vol. II, 266:13-22 (Attachment 2).

invoice, or within twenty (20) calendar Days after receipt of the invoice, whichever is later...

This language could not be clearer in applying the 45-day interval to invoices that meet the criteria described in the proposal. While with great fanfare Qwest points to allegedly conflicting explanations offered by Ms. Balvin at the Arizona arbitration hearing on this issue, her testimony is better explained by the confusing structure of the questions posed by opposing counsel. The first time the question was asked, Ms. Balvin apparently thought the question was whether the interval would apply to all invoices sent at the same time (Qwest typically sends several invoices, separated by product, in the same transmission). Her answer was the interval would only apply to specific products meeting one of the exceptions. This response is the equivalent of responding that the interval would apply to specific invoices, which is what Covad has proposed. To the extent any confusion was created on cross examination, it was resolved on redirect examination, when Ms. Balvin confirmed that Covad receives separate billing files, or invoices, for each product.[57]

One of the primary purposes of the Act was to ensure that ILECs did not treat new entrants in the telecommunications industry as captive customers of an obstinate monopoly, hence the requirement that unbundled network elements (such as line sharing) be provided on just, reasonable and non-discriminatory terms, and subject to state commission review in interconnection arbitrations. This Commission has a prime opportunity to fulfill the goals of the Act by rejecting Qwest's behavior and positions on this billing issue.

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[57] *Id.*

D. The Intervals for Discontinuance and Disconnection Must Allow Covad Sufficient Time to Organize Requests for Commission Relief

The sole issue regarding sections 5.4.2 (discontinuance of order processing) and 5.4.3 (disconnection) is whether the intervals proposed by Qwest provide Covad sufficient time after identifying a dispute to ensure that Qwest acknowledges that dispute, and if not, prepare to request injunctive relief from appropriate tribunal. If Covad's request is ultimately meritless, there is only a minimal increase in financial exposure for Qwest. This must be weighed against the potential that Qwest can use the short time frames and refusals to acknowledge disputes to extort payments of disputed amounts from Covad. Covad believes its slightly longer intervals allow these sections to function as they should, as a clear deterrent to non-payment of invoices, but not as a tool to extort disputed amounts from competitors.

Qwest has claimed that it has, on several occasions, been left with large unpaid wholesale bills, and its language will provide it protection from this eventuality in the future. This argument ignores the fact that those losses sustained by Qwest occurred *under its own proposed intervals*, and furthermore, were not a result of the waiting periods established by the sections at issue here. Instead, those losses were a result of Qwest's inattention to the unpaid balances and/or voluntary agreements to extend disconnection deadlines. The proper place to deal with payment risks is in the provisions of the Agreement addressing deposits, not provisions that could have extremely negative impact on innocent end-user customers.

E. The Parties' Commercial Line Sharing Agreement is Not Indicative of Appropriate Billing and Payment Practices

Qwest appears to make two separate arguments surrounding the billing and payment terms contained in the parties commercial line sharing agreement: First, that Covad's agreement

to those terms indicates their general acceptance of them, and second, that it makes little sense to apply a different interval to an ever-shrinking group of grandfathered line sharing customers. Both of these contentions should be rejected.

Covad did not agree to the commercial line sharing agreement's terms in a traditional arms-length negotiation. When line sharing was de-listed as a UNE in the *Triennial Review Order*, Covad was left with no ability to arbitrate these terms, and with virtually no commercial leverage. Despite the fact that Covad is one of Qwest's largest customers, Qwest did not (and still does not) feel the need to engage in give and take negotiations with Covad because it still holds a monopoly on certain wholesale service inputs, including the High Frequency Portion of the Loop (HFPL) essential for line sharing. As a result, Covad was forced to agree to these terms despite the fact that they would never have resulted from negotiations taking place in an open market.

Qwest's second argument, that any changes to the payment interval will only apply to grandfathered customers, ignores the fact that these invoices still make up a significant portion of the billing sent to Covad. Unfortunately, Covad cannot seek the extended interval for invoices subject to the commercial line sharing agreement, though a universal 45-day interval for all line sharing customers would be preferable. However, adopting Covad's proposal in this arbitration would provide significant relief.

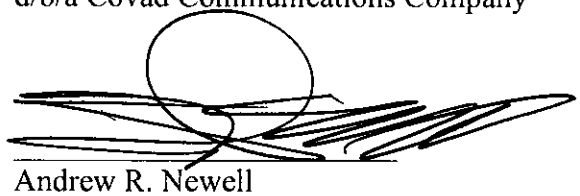
Conclusion

For the reasons set forth above, Covad respectfully requests that this Commission adopt Covad's proposed language to resolve the issues set forth above, and enter an order consistent with this resolution.

Dated this 13th day of May, 2005.

Respectfully submitted,

DIECA COMMUNICATIONS, INC.,
d/b/a Covad Communications Company

By: 

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CERTIFICATE OF SERVICE

I hereby certify that the original and 5 copies of Covad Communications Company's Initial Brief in ARB 584 were sent by overnight mail and e-mail this 13th day of May, 2005, to the following:

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and copies of the foregoing were sent by e-mail and U.S. Mail this 13th day of May, 2005, to the following addressees:

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Janet Keller

May 9, 2005

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

TO ALL PARTIES OF INTEREST:

Enclosed please find the Administrative Law Judge's Decision in the above captioned docket. Because Section 10-45 of the Administrative Procedures Act does not apply to hearings, proceedings or investigations under Section 13-515 of the Public Utilities Act, no Briefs on Exceptions or Replies will be accepted.

Sincerely,

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Chief Clerk

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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

ADMINISTRATIVE LAW JUDGE'S DECISION

I. PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

[4] 47 USC 252.

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

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

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

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

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

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

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

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

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

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

II. JURISDICTION

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

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

III. THE NATURE OF THE DISPUTE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[10] CLECALL05-039.

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

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

IV. ANALYSIS AND CONCLUSIONS

A. ULS/UNE-P

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

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

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

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

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

1. Must Bilateral ICA Amendment Precede TRRO Implementation?

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

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

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

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

[18] TRRO ¶227.
[19] *Id.*, fn. 627.

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

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

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

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

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

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

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

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

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

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

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[21] "Thus, the [ILEC] and [CLEC] must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rules changes [footnote omitted]." TRRO ¶233.

[22] Moreover, even if SBC were empowered to decide the customers-versus-lines issue unilaterally, its unilateral interpretation has been rejected by the overwhelming majority of commissions considering that question, as will be discussed in greater detail below.

[23] Insofar as the parties in this proceeding are also parties to Docket 04-0606, they can, but are not required to, use the collaborative sessions in the latter case to conduct their negotiations.

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

2. Improper Unilateral Implementation of the TRRO

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

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

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

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

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

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

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

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

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

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

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[27] TRRO ¶228.

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

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

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

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

[32] McLeod Init. Br. at 19.

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

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

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

3. Embedded Base: Lines or Customers?

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

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

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

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

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

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

The Michigan Public Service Commission also adopted this position:

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

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

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

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

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

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

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

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

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

B. DEDICATED TRANSPORT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. HIGH CAPACITY LOOPS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. UNBUNDLING UNDER SECTION 271 OF THE FEDERAL ACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. STATE UNBUNDLING UNDER SECTION 13-801

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

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[92] TRO ¶663.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. SBC'S MERGER AGREEMENT

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

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

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

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

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

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

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

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

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

G. SPECIFIC 13-514 PROVISIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

H. REMEDIES

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

1. Declaration of Violation/Cease and Desist

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

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

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

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

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

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

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

2. Attorney's Fees/Litigation Costs and the Commission's Costs

"[I]t is well established that fee-shifting statutes are to be strictly construed and that the amount of fees to be awarded lies within the Commission's 'broad discretionary powers.'"[127] Because the complaining CLECs have established that violations of Section 13-514 have occurred, they are entitled to an award of attorney's fees and costs under subsection 13-516(a)(3) of the PUA[128]. The question is how much. In Globalcom, Inc., v. Illinois Bell Telephone[129], the Commission tied the award of fees and costs under 13-516 to a party's litigation success. It did so to reflect the fact that Commission complaint proceedings often result, as does this one, in a "split decision" for the parties.

Here, each of the Complaining CLECs obtained emergency relief regarding loops and transport in this proceeding (but McLeod and Joint CLECs were denied such relief on ULS/UNE-P), then prevailed on several issues addressed in this Decision. On the other hand, Joint CLECs and McLeod asserted the unsupportable claim that SBC must provide ULS/UNE-P until amendments to their respective ICAs are approved. Those parties also pursued an unsuccessful claim based on the SBC/Ameritech Merger Order. Additionally, certain Joint CLECs asserted rights under Section 271 of the Federal Act or Section 13-801 of the PUA that they had not incorporated into their ICAs.

Because XO did not present ULS/UNE-P claims, it prevailed on most of its claims. However, XO asserted unsuccessful claims under subsections of Section 13-514, claims for which it offered scant support, but which caused SBC to mount a defense. It would not be fair for SBC to subsidize those claims. XO is awarded recovery of 90% of its attorney's fees and costs.

Having achieved a more mixed success, McLeod will be awarded 75% of its fees and costs. McLeod does emphasize that it "asked SBC if it would apply the Emergency

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[127] Globalcom, Inc. v. Illinois Commerce Commission, 347 Ill.App.3d 592, 618 (1st Dist. 2004).
[128] 220 ILCS 5/13-516(a)(3) (the Commission "shall award" such fees and costs).
[129] Docket 02-0365, Order on Rehearing, Dec. 11, 2002. The Commission's treatment of fees and costs was upheld in Globalcom, Inc. v. Illinois Commerce Commission.

Relief Orders issued in Dockets 05-0154 and 05-0156 to McLeodUSA as well, but SBC refused...Because of SBC's refusal...it was necessary for McLeodUSA...to prepare and file its own Complaint and incur the costs of participating in this proceeding."[130] However, when McLeod requested relief from SBC, the emergency relief granted by the ALJ in the then-existing dockets included UNE-P. Since the Commission's Amendatory Orders subsequently deleted that portion of the emergency relief, SBC's refusal to satisfy McLeod's request was not, in hindsight, unreasonable.

Joint CLECs were not as successful as McLeod in this case, given their failed 271 and 13-801 claims regarding certain CLECs. On the other hand, unlike the other complaining CLECs, Joint CLECs did not press certain claims under subsections of 13-514 that had little likelihood of success and received little or no attention in the other CLECs' filings. Joint CLECs are awarded 70% of fees and costs. The Commission has no apparent authority to apportion such recovery among the Joint CLECs, so that matter is left to those parties.

All fees and costs presented to SBC by the Complaining CLECs should be reasonable and properly associated with this proceeding. In any dispute concerning such fees and costs, the CLEC shall bear the burden of demonstrating reasonableness and propriety. SBC shall pay the required portion of each CLEC's fees and costs within 60 days of the day on which this Decision becomes final and unappealable, or within 60 days of receipt of a billing for such fees and cost from the CLEC, whichever is later.

Concerning the Commission's own costs, which it is obligated to recover under subsection 13-515(g)[131], the Commission, in Globalcom, Inc., v. Illinois Bell Telephone, linked such costs to the apportionment of attorney's fees and costs. Although that was a two-party proceeding, the CLECs here have, for the most part, presented identical claims, thereby creating two "sides" in this case. Therefore, SBC shall be assessed for its half of the Commission's costs, plus 78% (i.e., the average CLEC award here for attorney's fees and costs) of the CLEC's half.

All of the foregoing awards are "approximate quantifications" of the CLECs' litigation success in this proceeding, as the Commission stated in Globalcom, Inc., v. Illinois Bell Telephone. "Absolute precision regarding this quantification is simply not practicable."[132]

3. Damages and Penalties

SBC maintains that it "did not refuse to provision a single UNE-P circuit, or a single high capacity loop or dedicated transport circuit, based on the Accessible Letters complained of here. Indeed, CLECs do not even assert that they were denied access to

[130] McLeod Rep. Br. at 47.
[131] 220 ILCS 5/13-515(g).
[132] Docket 02-0365, Order on Rehearing, Dec. 11, 2002, at 51.

any such UNEs."[133] SBC is correct that the CLECs have presented no basis for monetary damages. Despite the contents of SBC's ALs, the complaining CLECs have apparently not been denied access to the pertinent UNEs, even under Section 251, because of the combined effect of emergency relief and SBC's forbearance. Nor have they provided evidence of any damage directly or indirectly associated with the *potential* for denied access contained in the ALs.

As for penalties, subsection 13-516(a)(2) of the PUA provides, *inter alia*, that:

> for a second and any subsequent violation of Section 13-514 committed by a telecommunications carrier after the effective date of this amendatory Act...the Commission may impose penalties of up to $30,000 or 0.00825% of the telecommunications carrier's gross intrastate annual telecommunications revenue, whichever is greater...Each day of a continuing offense shall be treated as a separate violation for purposes of levying any penalty under this section.

83 Ill.Adm.Code 766.400 *et seq.* sets out specific procedures governing the imposition of penalties. Under subsection 13-516(b), the Commission may waive penalties "if it makes a written finding as to its reasons for waiving the penalty."

Joint CLECs are the only proponents of penalties here, and they have offered, at best, minimal support for their proposition. Consequently, the record is devoid of meaningful argument on this subject. The Commission is thus given little reason to expend the time and resources (its own and the parties') necessary to comply with the procedures detailed in 83 Ill.Adm.Code 766[134]. Penalties will be waived in this proceeding.

4. SBC's Relief

SBC requests that the complaining CLECs be required to execute a TRRO-related amendment prepared by SBC for inclusion in their respective ICAs. In effect, SBC proposes unilateralism with Commission approval. As discussed in this Decision, the FCC, in the TRRO, expects bilateral negotiations to amend ICAs.

Alternatively, SBC asks the Commission impose a time limit (i.e., until June 11 2005) on the parties' ICA amendment negotiations (after which, absent agreement, SBC would return to unilateral implementation of the TRRO). In the TRRO, the FCC directed the parties to proceed promptly. It also reminded the parties of their duty to

[133] SBC Init. Br. at 55.

[134] For example, Ameritech would have a right to a hearing, in order to address the "factors to be considered by the Commission" under Section 766.415 when assessing penalties, as well as a right to a written order under Section 766.410.

negotiate in good faith. But the FCC imposed no deadlines, other than the duration of the transition periods, and the time limits under Section 252 of the Federal Act (assuming those limits establish the outer temporal boundaries of the parties' negotiations).

This Decision will not impose additional time limits. Regarding ULS/UNE-P, SBC's interest in expedition is addressed here through the 28-day negotiation mandated above. Moreover, SBC has pledged to continue to furnish UNE-P while state law obligations remain. With respect to loops and transport, nothing demonstrates a need to rush the negotiations concerning the interrelated unbundling requirements under Sections 251 and 271 of the Federal Act and Section 13-801 of the PUA, or the multistage processes required for Section 251 loops and transport. Also, given the date of the Instant Decision, June 11 is an utterly unrealistic deadline for approval of ICA amendments.

V. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Joint Complainants, XO and McLeod are entities that own or control, for public use in Illinois, property or equipment for the provision of telecommunications services in Illinois and, as such, are telecommunications carriers within the meaning of §13-202 of the PUA

(2) SBC is an Illinois corporation that owns or controls, for public use in Illinois, property or equipment for the provision of telecommunications services in Illinois and, as such, is a telecommunications carrier within the meaning of §13-202 of the PUA;

(3) the Commission has jurisdiction of the parties hereto and the subject matter hereof;

(4) the recitals of fact and conclusions and conclusions of law reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and conclusions of law;

(5) the remedies described in Section IV.H of this Decision should be adopted, and made mandatory, as specifically set forth above;

(6) the Amendatory Orders for Emergency Relief entered in each of these combined dockets should remain in effect;

(7) any objections, motions or petitions filed in this proceeding which remain undisposed of should be disposed of in a manner consistent with the ultimate conclusions herein contained.

IT IS THEREFORE ORDERED that pursuant to §13-514 of the PUA, the remedies described in Section IV.H of this Decision are adopted, and made mandatory, as specifically set forth in this Decision.

IT IS FURTHER ORDERED that the Amendatory Orders for Emergency Relief entered in each of these combined dockets shall remain in effect.

IT IS FURTHER ORDERED that any objections, motions or petitions not previously disposed of are hereby disposed of consistent with the findings of this Order.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, and unless reviewed by the Commission under Section 13-515(d)(8) of the Public Utilities Act, this Decision is final; it is not subject to the Administrative Review Law.

DATED: MAY 9, 2005
PETITIONS FOR REVIEW DUE: MAY 16, 2005, BY 12 NOON
RESPONSES TO PETITIONS FOR REVIEW DUE: MAY 18, 2005, BY 5PM

David Gilbert
Administrative Law Judge

ATTACHMENT 2

A. No, it is not.

Q. Okay. I would like you to turn to page 3 of your direct. Midway through line 7 you state that, and I am quoting, the ability to retire copper facilities is important from a cost perspective since, without that ability, carriers would be required to incur the costs of maintaining two networks, end quote. Is that correct?

A. I am sorry, I must have a slightly different pagination. Line 7 on page 3?

MR. DEVANEY: Your Honor, if it would help, I see the quote Mr. Newell just read on page 2 of Ms. Stewart's direct at line 18.

ARBITRATOR NODES: Thank you.

THE WITNESS: Yes, I see that.

BY MR. NEWELL:

Q. Excuse me for the bad citation there.

Now, on page 8, beginning at line 12 -- I suppose I better check.

Let's approach it this way: Your testimony was that Qwest routinely evaluates whether it is technically feasible to leave copper loops in place, is that correct?

A. Correct.

Q. And in the agreement being negotiated, Qwest -- there is a provision that states that Qwest will

leave copper loops or copper subloops serving CLEC end user customers in place when it is technically feasible to do so. Is that your understanding?

A. There is a portion of the ICA that has that statement, yes.

Q. So where it is technically feasible, Qwest would maintain two networks of redundant facilities, is that correct?

A. Correct. When it is technically feasible, that is, Qwest attempts to use, effectively use all the network it has in place.

Q. So let's suppose that Qwest deploys some fiber feeder facilities, or even some fiber to the home architecture in a given area. Would the cost of maintaining both the new and the old loop facilities be considered technically infeasible?

A. If Qwest made the decision to maintain both, then the maintenance costs would be feasible. It is only when it is determined that the maintenance cost is not feasible or whatever other technical feasible issues there may be that then one of the services is retired.

Q. So your belief is that the cost of a given solution plays into technical feasibility?

A. Yes.

Q. Your testimony was that adopting Covad's

A. I believe so.

Q. Now, in the proceedings in other states you testified that Covad could avoid the need for regeneration by increasing the power or boosting the signal as it leaves its collocation space. Do you still believe that's a viable solution to avoid the need to regenerate a cross-connection midspan?

A. Well, I think there is a lot of scenarios in the central office. And I think what I meant by that is if Covad partnered with another CLEC and regeneration was required and the distance was such that the volume controls on both ends of the equipment were set too short, that it could be feasible to place regeneration in your own space and reset the regeneration equipment on your end, plus the other CLEC would reset their DS-3 interface on their equipment to make the distance work.

Q. So was your thought limited to distances that were underneath the ANSI standard that Mr. Zulevic discussed, I believe 655 feet and 450 feet roughly?

A. I was thinking more around, you know, the ANSI standards were right at the breaking point, so it would either be 450 foot level on the DS-3, or 655 feet on the DS-1 level as Mr. Zulevic spoke to.

Q. So it is true that there are limits to the strengths that signals could be boosted under the ANSI

Q. Okay. Now, you had a discussion with Ms. Waxter about new products and whether they were new products to Qwest or new products to Covad that would be covered under the new products exception. Do you know whether Covad validates or in any way reviews the business rules for products that it doesn't order?

A. I think I understand what you are asking. Do we actually review Qwest's business rules for products that we are not ordering?

Q. Yes, that's my question.

A. We wouldn't, no, not until we intended to order them.

Q. You had spoken a little bit about there being various BANs, B-A-Ns, for various products that are ordered. Does Covad get separate bills for separate products, or do they just get one big bill from Qwest each month?

A. Qwest, their billing account numbers, and Qwest assigns billing account numbers based on a product. So we have files for the products. They come in on the same day and we have the ability to load them on the same day. But they are separated by BAN.

Q. Now, if I understood your discussion with Ms. Waxter about the subaccount number or the special billing number versus the circuit identification number,