

XO MISSOURI'S UNRESOLVED ISSUES MATRIX
(Includes XO and SBC Arbitration Issues as Noted)
XO v. SBC

Issue No.	Issue	Relevant Section(s) of Proposed Amendment	XO's Preliminary Position	XO's Proposed Language	SBC MISSOURI'S Preliminary Position	SBC MISSOURI'S Proposed Language
1 (SBC)	(a) Whether based upon the FCC's directive in the TRO SBC may modify the Interconnection Agreement to modify the changes of law provision to make it self effectuating or automatically effective without any need to negotiate or arbitrate, if necessary, those modifications as required by the current limited "change of law" provisions in the M2A?	1.1, 1.4, 2.2, 2.16, 2.17, 2.18, 3.1, 3.1.2.1, 3.1.2.2, 3.1.2.3, 3.1.2.4, 3.1.3 <i>et seq.</i> , 3.1.4.1, 3.1.4.3, 3.1.4.4, 3.5.1, 3.5.2 <i>et seq.</i> , 3.5.3.7, and Cover Amendment	<p>There is nothing in the current agreement that would make changes of law automatic or self-effectuating.</p> <p>XO objects to SBC's revisions to XO's amendment because SBC's proposed language effectively modifies the M2A to make changes of law self-effectuating. Nothing in the TRO orders or requires modifications to the parties' change of law provisions under the guise of implementing the TRO.</p> <p>Moreover, nothing in the TRO makes changes in law self-effectuating. Indeed, the FCC specifically rejected the request of several BOCs, including SBC, to override the Section 252 process</p>	<p>1.1 Notwithstanding any other provision of the Agreement, this Amendment, <u>or any SBC-MISSOURI tariff or SGAT</u>, SBC-MISSOURI shall be obligated to provide access to unbundled Network Elements ("UNEs"), combinations of unbundled Network Elements ("Combinations"), UNEs commingled with wholesale services ("Commingling"), and/or related services to CLEC under the terms of this Amended Agreement to the extent required by <u>(a) 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51, (b) 47 U.S.C. § 271(c) and 47 C.F.R. Part 51, and/or (c) other Applicable Law (including, but not limited to, orders and rules of the "State Commission")</u>.</p> <p>1.4 Notwithstanding any other provision of the Agreement, this Amendment, <u>or any SBC-MISSOURI tariff or SGAT</u>, to the extent SBC-MISSOURI is required, by a change in Applicable Law, to provide to CLEC <u>pursuant to (a) 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51, (b) 47 U.S.C. § 271(c) and 47 C.F.R. Part 51, and/or (c) other Applicable Law</u>, a UNE, Combination, or Commingling that is not</p>	<p>This dispute involves several different contract provisions, all of which concern the same issue: whether or not the ICA should obligate SBC MISSOURI to offer declassified UNEs at the same rates, terms and conditions as they were offered before they were declassified. XO proposes language, for example, stating that, pursuant to 47 U.S.C. § 271, SBC MISSOURI is obligated, under the ICA, to continue to offer declassified network elements at the UNE rates, terms and conditions set forth in the ICA. The TRO explicitly rejects the idea that Section 271 network elements must be offered at the same rates, terms and conditions as Section 251 UNEs. Paragraph 656 of the TRO states that "TELRIC pricing for [Section 271] checklist network elements that have been removed from the list of section 251 UNEs is neither mandated by statute nor necessary to protect the public interest." (see ¶656 - 659). SBC</p>	<p>1.1 This Amended Agreement sets forth the terms and conditions pursuant to which SBC-MISSOURI will provide CLEC with access to Lawful Unbundled Network Elements under Section 251(c)(3) of the Act in SBC-MISSOURI's incumbent local exchange areas for the provision of Telecommunications Service by CLEC; provided, however, that Notwithstanding any other provision of the Agreement, this Amendment SBC-MISSOURI shall be obligated to provide access to unbundled Network Elements ("UNEs"), combinations of unbundled Network Elements as combinations are more fully defined herein ("Combinations"), UNEs commingled with wholesale services as commingling is more fully defined herein ("Commingling"), and/or related services to CLEC under the terms of this Amended Agreement only to the extent required by Section 251(c)(3) of the Act, as determined by lawful and effective</p>

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			and "unilaterally change all interconnection agreements to avoid any delay associated with renegotiations of contract provisions." See Paragraph 701 of the TRO. Further, the FCC notes that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252." <i>Id.</i> Thus, it is improper for SBC, under the guise of implementing substantive changes in the TRO, to modify the change of law language so that it may automatically implement any changes of law regarding UNE, including any <i>USTA II</i> changes.	<p>offered under the Amended Agreement, the Parties shall negotiate an appropriate amendment to the Agreement that will contain the rates, terms and conditions for such UNE, Combination, or Commingling. <u>During the pendency of the negotiations, CLEC may access such UNE, Combination, or Commingling pursuant to an applicable SBC-MISSOURI tariff, SBC-MISSOURI's generally available terms and conditions, or any other available terms.</u></p> <p>2.2 <u>Applicable Law.</u> <u>All laws, rules and regulations, including, but not limited to, the Act, effective rules, regulations, decisions and orders of the FCC and the "State Commission", and all orders and decisions of courts of competent jurisdiction.</u></p> <p>2.16 <u>Fiber-to-the-Home (FTTH) Loop.</u> A local loop consisting entirely of fiber optic cable, whether dark or lit, and serving an end user's customer premises.</p> <p>2.17 <u>Hybrid Loop.</u> A local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the</p>	<p>MISSOURI opposes inclusion of XO's language and proposes instead that the ICA clearly define "Lawful UNEs" to be those UNEs that <u>SBC-MISSOURI</u> is required to provide pursuant to Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders or lawful and effective orders and rules of the "State Commission" that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the FTA or the FCC's regulations to implement the FTA shall be referred to in this Amended Agreement as "Lawful UNEs."</p> <p>SBC MISSOURI also opposes XO's "nonimpairment" language (see e.g. 3.1.2.3, 3.5.2.3) because it seeks to require SBC MISSOURI to continue to provide UNEs that have been declassified by a state commission until there is a "final and nonappealable" ruling. XO seeks to have a double standard: it wants to stick to the normal change of law language (which does not require a final and nonappealable order) for all</p>	<p>FCC and rules and associated lawful and effective FCC and judicial orders or lawful and effective orders and rules of the "State Commission" that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the FTA or the FCC's regulations to implement the FTA. SBC may decline to provide UNEs to the extent that provision of the UNE(s) is not required by Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders. UNEs that <u>SBC-MISSOURI</u> is required to provide pursuant to Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders or lawful and effective orders and rules of the "State Commission" that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the FTA or the FCC's regulations to implement the FTA shall be referred to in this Amended Agreement as "Lawful</p>

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	(b) What are the appropriate definitions of the UNEs and services that SBC must provide to XO and what are the appropriate terms and conditions?		<p>As with issue 1(a) changes in law are not self- effectuating and SBC must comply with the mandates of both state and federal law.</p> <p>In addition, SBC is required to provide access to UNEs, services, and facilities consistent with the requirements of Section 251 (c)(3) of the Act, Sections 51.319(a)(1) through 51.319 (a)(9) of the FCC's rules, and applicable law (including but not limited to 47 U.S.C §271 and state law).</p>	<p>distribution plant.</p> <p>2.18 <u>Line Conditioning</u>.</p> <p>The removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders.</p> <p>3.1 <u>Local Loops</u>. SBC-MISSOURI shall provide CLEC with nondiscriminatory access to the local loop <u>on an unbundled basis, in accordance with Section 251(c)(3) of the Act, sections 51.319(a)(1) through 51.319(a)(9) of the FCC's rules, and Applicable Law (including, but not limited to, 47 U.S.C. §271 and State Law)</u>.</p> <p>3.1.2.1 <u>DS1 Loops</u>. SBC-MISSOURI shall provide CLEC with nondiscriminatory access to DS1 loop <u>on an unbundled basis in accordance with Applicable Law (including, but not limited to, 47 U.S.C. §271 and State Law)</u>, except as otherwise provided in Section 3.1.2.3 below.</p> <p>3.1.2.2 <u>DS3 Loops</u>. Subject to the cap set forth in 47 C.F.R. section 51.319(a)(5)(iii)</p>	<p>changes other than declassification (in other words, all changes that benefit them), but require a "final and nonappealable" standard for <i>only</i> the declassification of UNEs. SBC MISSOURI opposes application of a final and nonappealable standard for the declassification of UNEs because it is fundamentally unfair to SBC MISSOURI as it allows the CLEC to get the benefit of the parts of the TRO that benefit the CLEC, while preventing SBC MISSOURI from receiving the benefit of a declassification determination for possibly several years. There is no support in the TRO for the "final and nonappealable" standard.</p>	<p>UNEs."</p> <p>1.4 Notwithstanding any other provision of the Agreement, this Amendment, to the extent SBC-MISSOURI is required, by a change in Applicable Law, to provide to CLEC a Lawful UNE, Combination, or Commingling that is not offered under the Amended Agreement, the Parties shall negotiate an appropriate amendment to the Agreement that will contain the rates, terms and conditions for such Lawful UNE, Combination, or Commingling.</p> <p>2.2 <u>Applicable Law</u>. The Act, lawful and effective rules, regulations, decisions and orders of the FCC and all lawful and effective orders and decisions of courts of competent jurisdiction.</p> <p>2.16 Lawful UNE <u>Fiber-to-the-Home (FTTH) Loop</u>.</p> <p>A local loop consisting entirely of fiber optic cable, whether dark or lit, and serving an end user's customer premises as defined by the lawful and effective FCC rule, 47 CFR 51.319(a)(3), as such rule may be modified from time to time, as more specifically addressed in</p>

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				<p>of the FCC's rules, SBC-MISSOURI shall provide CLEC with nondiscriminatory access to a DS3 loop <u>on an unbundled basis in accordance with Applicable Law (including, but not limited to, 47 U.S.C. §271 and State Law)</u>, except as otherwise provided in Section 3.1.2.3 below.</p> <p><u>3.1.2.3 Nonimpairment. Subject to the provisions of Section 3.16, SBC-MISSOURI shall be relieved of its obligation under Section 251(c)(3) of the Act only to provide CLEC with access to DS1 Loops or DS3 Loops under the Amended Agreement at a specific customer location upon a finding, in a final and non-appealable order by the ["State Commission"] or the FCC, that requesting telecommunications carriers are not impaired without access to such DS1 Loops or DS3 Loops at such customer location.</u></p> <p><u>3.1.2.4 Notwithstanding anything to the contrary, SBC-MISSOURI shall provide or continue to provide CLEC with nondiscriminatory access to DS1 loops and/or DS3 loops as required pursuant to Applicable Law, including, but not limited to, Section 271 of the Act and State-specific requirements, which loops shall not be considered Nonconforming Facilities.</u></p>		<p>Section 3.1.3 below.</p> <p>2.17 <u>Lawful UNE Hybrid Loop.</u></p> <p>A local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant as defined by the lawful and effective FCC Rule, 47 CFR 51.319(a)(2), as such rule may be modified from time to time, as more specifically addressed in Section 3.1.4 below.</p> <p>2.18 <u>Line Conditioning.</u></p> <p>The removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders, as defined by the lawful and effective FCC Rule, 47 C.F.R. 51.319(a)(1)(iii), as such rule may be modified from time to time, as more specifically addressed in Section 3.2 below.</p>

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				<p><u>3.1.3 FTTH Loops</u></p> <p><u>3.1.3.1 New Builds.</u> SBC-MISSOURI shall not be required to provide nondiscriminatory access to an FTTH loop on an unbundled basis <u>pursuant to Section 251(c)(3)</u> when SBC-MISSOURI deploys such a loop to an end-user customer premises that previously has not been served by any loop facility.</p> <p><u>3.1.3.2 Overbuilds.</u> SBC-MISSOURI shall not be required to provide nondiscriminatory access to an FTTH loop on an unbundled basis <u>pursuant to Section 251(c)(3)</u> when SBC-MISSOURI has deployed such a loop parallel to, or in replacement of, an existing copper loop facility, except that:</p> <p>3.1.3.2.1 SBC-MISSOURI shall maintain the existing copper loop connected to the particular customer premises after deploying the FTTH loop and provide nondiscriminatory access to that copper loop on an unbundled basis unless SBC-MISSOURI retires the copper loop pursuant to Section 3.1.3.3 of this Amendment and in accordance with <u>Applicable Law (including, but not limited to, Section 51.319(a)(3)(iii) of the FCC's</u> rules.</p> <p>3.1.3.2.2 In the event that SBC-MISSOURI maintains the existing copper loop</p>		<p><u>3.1 Lawful UNE Local Loops.</u> SBC-MISSOURI shall provide CLEC with nondiscriminatory access to the <u>Lawful UNE</u> local loop.</p> <p><u>3.1.2.1 Lawful UNE DS1 Loops.</u> Subject to the provisions of this Attachment, SBC-MISSOURI shall provide CLEC with nondiscriminatory access to a <u>Lawful UNE</u> DS1 loop except as otherwise provided in Section 3.1.2.3 below.</p> <p><u>3.1.2.2 Lawful UNE DS3 Loops.</u> Subject to the cap set forth in 47 C.F.R. section 51.319(a)(5)(iii) of the FCC's rules, SBC-MISSOURI shall provide CLEC with nondiscriminatory access to a DS3 loop, except as otherwise provided in Section 3.1.2.3 below.</p> <p><u>3.1.3 FTTH Loops</u></p> <p><u>3.1.3.1 New Builds.</u> SBC-MISSOURI shall not be required to provide nondiscriminatory access to an FTTH loop on an unbundled when SBC-MISSOURI deploys such a loop to an end-user customer premises that previously has not been served by any loop facility.</p> <p><u>3.1.3.2 Overbuilds.</u> SBC-MISSOURI</p>

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				<p>pursuant to Section 3.1.3.3 of this Amendment and Section 51.319(a)(3)(ii)(A) of the FCC's rules, SBC-MISSOURI need not incur any expenses to ensure that the existing copper loop remains capable of transmitting signals prior to receiving a request for access pursuant to section 51.319(a)(3)(ii)(A) of the FCC's rules, in which case SBC-MISSOURI shall restore the copper loop to serviceable condition upon CLEC's request.</p> <p>3.1.3.2.3 If SBC-MISSOURI retires the copper loop pursuant to <u>Section 3.1.3.3</u> of this Amendment and Section 51.319(a)(3)(iii) of the FCC's rules, SBC-MISSOURI shall provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the FTTH loop on an unbundled basis.</p> <p><u>3.1.4.1 Hybrid Loops: SBC-MISSOURI shall be required to provided nondiscriminatory access to hybrid loops on an unbundled basis, including narrowband and/or broadband transmission capabilities, pursuant to Applicable Law, including, but not limited to, Section 271 of the Act and state law.</u></p> <p>3.1.4.3 <u>Broadband Services, Pursuant to Section 251(c)(3)</u>, when CLEC seeks</p>		<p>shall not be required to provide nondiscriminatory access to an FTTH loop on an unbundled basis when SBC-MISSOURI has deployed such a loop parallel to, or in replacement of, an existing copper loop facility, except that:</p> <p>3.1.3.2.1 SBC-MISSOURI shall maintain the existing copper loop connected to the particular customer premises after deploying the FTTH loop and provide nondiscriminatory access to that copper loop on an unbundled basis unless SBC-MISSOURI retires the copper loop pursuant to Section 3.1.3.3 of this Amendment and in accordance with Section 47 C.F.R. Section 51.319(a)(3)(iii) of the lawful and effective FCC's rules, as such rules may be modified from time to time.</p> <p>3.1.3.2.2 In the event that SBC-MISSOURI maintains the existing copper loop pursuant to Section 3.1.3.3 of this Attachment to Amendment in accordance with Section 51.319(a)(3)(ii)(A) of the FCC's lawful and effective rules as such rules may be modified from time to time, SBC-MISSOURI need not incur any expenses to ensure that the existing copper loop</p>

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				<p>access to a Hybrid Loop for the provision of "broadband services," <u>as such term is defined by the FCC</u>, SBC-13STATE shall provide CLEC with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that Hybrid Loop, including DS1 or DS3 capacity (where impairment has been found to exist), on an unbundled basis, to establish a complete transmission path between SBC-13STATE's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the Hybrid Loop that are not used to transmit packetized information.</p> <p>3.1.4.4 <u>Narrowband Services</u>. Pursuant to <u>Section 251(c)(3)</u>, when CLEC seeks access to a Hybrid Loop for the provision of "narrowband services," <u>as such term is defined by the FCC</u>, SBC-13STATE <u>may shall</u> either (a) provide nondiscriminatory access, on an unbundled basis, to a spare home-run copper Loop serving that customer, or (b) provide nondiscriminatory access, on an unbundled basis, to an entire hybrid loop capable of voice-grade service (i.e., equivalent to DS0 capacity), using time division multiplexing technology.</p> <p>3.5.1 <u>General Requirements</u>. SBC-MISSOURI shall provide Dedicated Transport and Dark Fiber Transport under the Agreement <u>in accordance with and to</u></p>		<p>remains capable of transmitting signals prior to receiving a request for access pursuant to section 51.319(a)(3)(ii)(A) of the FCC's rules, in which case SBC-MISSOURI shall restore the copper loop to serviceable condition upon CLEC's request.</p> <p>3.1.3.2.3 If SBC-MISSOURI retires the copper loop pursuant to Section 3.1.3.3 of this Attachment to and Section 51.319(a)(3)(iii) of the FCC's rules, SBC-MISSOURI shall provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the FTTH loop on an unbundled basis.</p> <p>3.1.4.3 <u>Broadband Services</u>, when CLEC seeks access to a Hybrid Loop for the provision of "broadband services," SBC-MISSOURI shall provide CLEC with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that Hybrid Loop, including DS1 or DS3 capacity (where impairment has been found to exist), on an unbundled basis, to establish a complete transmission path between</p>

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				<p><u>the extent required by Applicable Law, including, but not limited to, 47 U.S.C. §§ 251(c)(3) and 271, 47 C.F.R. Part 51 and State Law. In ordering Dedicated Transport and Dark Fiber Transport, CLEC represents that it is obtaining access to the subject facility in order to provide a Qualifying Service or a combination of Qualifying and Non-qualifying services. SBC-MISSOURI will provide TELRIC-based transmission facilities for interconnection and the exchange of traffic pursuant to Applicable Law, including, but not limited to, 47 U.S.C. §§ 251(c)(2) and 271. CLEC may thus obtain from SBC-MISSOURI, at TELRIC rates, Unbundled Interoffice Facilities (Dedicated Transport and/or Dark Fiber Transport) to connect the CLEC premises or Point of Presence (POP) with the SBC-MISSOURI network. Should the CLEC premises or POP be located within the area served by the SBC-MISSOURI serving wire center with which it is interconnected, the facility connecting the two locations will be priced as a UNE Loop.</u></p> <p>3.5.2 <u>Dedicated Transport.</u></p> <p>3.5.2.1 SBC-MISSOURI shall provide CLEC with nondiscriminatory access to DS1 Dedicated Transport and DS3 Dedicated Transport on an unbundled</p>		<p>SBC-MISSOURI's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the Hybrid Loop that are not used to transmit packetized information.</p> <p>3.1.4.4 <u>Narrowband Services.</u> When CLEC seeks access to a Hybrid Loop for the provision of "narrowband services," SBC-MISSOURI may either (a) provide nondiscriminatory access, on an unbundled basis, to a spare home-run copper Loop serving that customer, or (b) provide nondiscriminatory access, on an unbundled basis, to an entire hybrid loop capable of voice-grade service (i.e., equivalent to DS0 capacity), using time division multiplexing technology.</p> <p><u>Cover Amendment</u></p> <p>WHEREAS, pursuant to the terms of the Parties' Agreement, the Parties wish to amend the Agreement in order to give contractual effect to the provisions of the TRO and to ensure that the Agreement's terms and conditions may be subsequently updated to provide only for lawful</p>

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				<p>basis. The Parties acknowledge that, notwithstanding SBC-MISSOURI's obligation to provide TELRIC-based transmission facilities for interconnection and the exchange of traffic pursuant to Section 251(c)(2) of the Act, the FCC redefined Dedicated Transport in the <i>Triennial Review Order</i> to include the transmission facility or service between a SBC-MISSOURI switch or wire center and another SBC-MISSOURI switch or wire center.</p> <p>3.5.2.3 Nonimpairment. Subject to the provisions of Section 3.16 and the requirements of Applicable Law, SBC-MISSOURI shall be relieved of its obligation under Section 251(c)(3) of the Act to provide or continue providing CLEC with access to DS1 Dedicated Transport or DS3 Dedicated Transport on an unbundled basis under the Amended Agreement on a particular Route upon a finding in a final and non-appealable order by the "State Commission" or the FCC that requesting telecommunications carriers are not impaired without access to DS1 Dedicated Transport or DS3 Dedicated Transport, respectively, on the subject Route(s). Notwithstanding anything to the contrary, DS1 and DS3 Transport that are required to be unbundled pursuant to Applicable Law, including, but not limited to, an order of the "State</p>		<p>access to unbundled network elements; and</p> <p>6. Notwithstanding anything in this Agreement or in any Amendment, or any SBC-MISSOURI tariff, SBC-MISSOURI shall have no obligation to provide access to unbundled network elements under the terms of the Amended Agreement beyond those required by the Act, including lawful and effective FCC rules and associated FCC and judicial orders, or where Lawful UNEs are not requested for permissible purposes.</p>

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				<p><u>Commission", a court of competent jurisdiction, and/or Section 271 of the Act, shall not be considered Nonconforming Facilities.</u></p> <p>3.5.3.7 <u>Nonimpairment. Subject to the provisions of Section 3.16 below, SBC-MISSOURI shall be relieved of its obligation under Section 251(c)(3) of the Act to provide CLEC with access to Dark Fiber Transport on an unbundled basis under the Amended Agreement on a particular Route upon a finding in a final and non-appealable order by the "State Commission" or the FCC that requesting telecommunications carriers are not impaired without access to Dark Fiber Transport, respectively, on the subject Route(s). Notwithstanding anything to the contrary, Dark Fiber Transport required to be unbundled pursuant to Applicable Law, including, but not limited to, an order of the "State Commission", a court of competent jurisdiction, and/or Section 271 of the Act, shall not be considered Nonconforming Facilities.</u></p> <p><u>Cover Amendment</u></p> <p>WHEREAS, pursuant to the terms of the Parties' Agreement, the Parties wish to amend the Agreement in order to give</p>		

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				contractual effect to the provisions of the TRO and to ensure that the Agreement's terms and conditions may be subsequently updated to provide only for lawful access to unbundled network elements; and		
2 (SBC)	<p>What is the appropriate transition and notification process for declassified UNEs?</p> <p>XO Statement:</p> <p>(a) Whether SBC may attempt to modify the "change of law" provisions of the agreement in order to implement automatically any future changes in law to the agreement?</p> <p>(b) What are the circumstances under which SBC may no longer be required to make</p>	Sections 1.3 <i>et seq.</i> , 1.5, 1.6, 2.20, and 3.13 <i>et seq.</i>	<p>For the same reasons discussed in Issue 1, SBC's attempt to modify or alter Interconnection Agreement to make changes in law self-effectuating is improper and unsupported by the TRO.</p> <p>Similarly, it is inconsistent with the TRO to allow SBC unilaterally to discontinue the provision of certain elements, whether provided alone or in combination with any other UNEs upon an event occurring that could constitute a change of law. It is also inappropriate for SBC to ignore the requirements and mandates of the Missouri Commission</p>	<p><u>2.20 Nonconforming Facility.</u></p> <p>Any facility that SBC-MISSOURI was providing to CLEC on an unbundled basis pursuant to the Agreement or a SBC-MISSOURI tariff or SGAT, but which SBC-MISSOURI is no longer obligated to provide on an unbundled basis under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. Nonconforming Facility does not include facilities that <u>SBC-MISSOURI is required to provide pursuant to Applicable Law, including, but not limited to, Section 271 of the Act and State-specific regulatory requirements.</u></p> <p style="text-align: center;">*****</p> <p>3.13 <u>Transitional Issues.</u></p> <p><u>3.13.1 With respect to those network elements that are Nonconforming Facilities as of the effective date of this Amendment ("Existing Nonconforming Facilities") (e.g., OCn loops and transport), the Parties agree that SBC-MISSOURI shall continue to provide unbundled access to such</u></p>	<p>XO generally resists including any clarity in this Agreement around what should happen with elements that are either already declassified as UNEs by the TRO, or may be declassified based upon state commission impairment proceedings. This is irresponsible.</p> <p>SBC MISSOURI's Missouri Declassification language provides clarity around the following important implementation issues:</p> <ol style="list-style-type: none"> 1) What does "declassification" mean? (Sec. 1.3.1) 2) What are the items that have already been declassified and are no longer required to be provided? (Sec. 1.3.1.1) any UDT (or dark fiber loop or transport) facility that no longer fits the description of UDT or unbundled dark fiber after TRO (e.g. entrance facilities) 3) What will happen if an item has 	<p><u>2.20 Declassified Facility</u></p> <p>Any facility that SBC-MISSOURI was providing to CLEC on an unbundled basis pursuant to the Agreement or a SBC-MISSOURI tariff or SGAT, if any, but which SBC-MISSOURI is no longer obligated to provide on an unbundled basis under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. <u>Declassified Facility</u> does not include facilities that are <u>Lawful UNEs</u>, as defined in this Attachment. Without limitation, a network element, including a network element referred to as a Lawful UNE under this Amended Agreement, is Declassified, upon or by (a) the issuance of the mandate in <i>United States Telecom Association v. FCC</i>, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I"); or (b) operation of the <i>Triennial Review Order</i> released by the FCC on August 21, 2003 in CC Docket Nos. 01-338, 96-98 and 98-147 (the</p>

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	<p>certain UNEs available?</p> <p>(c) Also, may SBC unilaterally discontinue providing a UNE after a 30-day transitional period if the parties have not mutually agreed to negotiate terms and conditions regarding such UNE?</p>		<p>Further, SBC is required to provide access to UNEs, services and facilities consistent with the requirements <u>Section 251(c)(3) of the Act, sections 51.319(a)(1) through 51.319(a)(9) of the FCC's rules, and Applicable Law (including, but not limited to, 47 U.S.C. §271).</u></p>	<p><u>Nonconforming Facilities in accordance with this Section. Notwithstanding anything to the contrary, elements and facilities that are required to be unbundled pursuant to Applicable Law, including, but not limited to, an order of the "State Commission", a court of competent jurisdiction, and Section 271 of the Act, shall not be considered Nonconforming Facilities.</u></p> <p><u>3.13.1.1 Transition from Existing Nonconforming Facilities will be handled on a project basis. The Parties agree to establish a transition schedule within the longer of (a) the period dictated by the terms of the Agreement, or (b) 90 days of the Effective Date of this Amendment. Should the Parties be unable to agree on a schedule within such period, then either Party may utilize the dispute resolution procedures set forth in the Amended Agreement. At the end of the transition period (established by agreement or via dispute resolution), unless CLEC has submitted an LSR or ASR (as appropriate) to SBC-MISSOURI requesting disconnection or migration of the Existing Nonconforming Facility, SBC-MISSOURI shall convert the subject Existing Nonconforming Facilities to the most closely analogous access service available, or if no analogous access service is available,</u></p>	<p>been declassified? (Section 1.4.3)</p> <p>SBC MISSOURI will provide XO reasonable notice (30 days) that an item or category of items has been declassified. Upon that notice, XO has a choice – it can request that it discontinue the item, in which case SBC MISSOURI will do so. Or, if it doesn't request discontinuance, SBC MISSOURI will simply replace and/or reprice the item accordingly. This process will minimize disruption and disputes. SBC MISSOURI will continue to provide the item as a "UNE" during the 30-day period between the notice and the discontinuance or re-pricing and/or replacement of the product. If for some reason, there is no analogous product available, SBC MISSOURI's language provides for the parties to negotiate and incorporate terms and conditions for a replacement product. SBC MISSOURI's approach is reasonable and orderly, and should help avoid disputes at the Commission.</p>	<p>"Triennial Review Order" or "TRO"), which became effective as of October 2, 2003, including rules promulgated thereby; or (c) the issuance of a legally effective finding by a court or regulatory agency acting within its lawful authority that requesting Telecommunications Carriers are not impaired without access to a particular network element on an unbundled basis; or (d) the issuance of the mandate in the D.C. Circuit Court of Appeals' decision, <i>United States Telecom Association v. FCC</i>, Case No. 00-1012 (D.C. Cir. 2004) ("USTA II"); or (e) the issuance of any valid law, order or rule by the Congress, FCC or a judicial body stating that <u>SBC-MISSOURI</u> is not required, or is no longer required, to provide a network element on an unbundled basis pursuant to Section 251(c)(3) of the Act.</p> <p>*****</p> <p>1.3 A network element, including a network element referred to as a Lawful UNE under this Amended Agreement, will cease to be a Lawful UNE under this Amended Agreement if it is no longer</p>

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				<p>to such other service arrangement as SBC-MISSOURI and CLEC may agree upon (<i>e.g.</i>, by separate agreement); provided, however, that where there is no analogous access service, and CLEC and SBC-MISSOURI have failed to reach agreement as to a substitute service, then SBC-MISSOURI may, upon 30 days' written notice, institute the market-based rates set forth in such notice for the Existing Nonconforming Facilities. Where the Existing Nonconforming Facilities are converted to an analogous access service, SBC-MISSOURI shall provide such access services in accordance with the rates, terms and conditions of SBC-MISSOURI's applicable access tariff.</p> <p>3.13.2 As to those network elements that the "State Commission" determines, after the Effective Date of this Amendment, to be Nonconforming Facilities, the Parties agree to amend the Agreement promptly to reflect the change and establish a mutually acceptable transitional mechanism if no transitional mechanism has been previously agreed upon or specifically dictated by the "State Commission". Notwithstanding anything to the contrary, elements and facilities that are required to be unbundled pursuant to Applicable Law, including, but not limited to, an order of the "State</p>		<p>required by Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders. Without limitation, a Lawful UNE that has ceased to be a Lawful UNE may also be referred to as "Declassified."</p> <p>1.3.1 Without limitation, a network element, including a network element referred to as a Lawful UNE under this Amended Agreement, is Declassified, upon or by (a) the issuance of the mandate in <i>United States Telecom Association v. FCC</i>, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I"); or (b) operation of the <i>Triennial Review Order</i> released by the FCC on August 21, 2003 in CC Docket Nos. 01-338, 96-98 and 98-147 (the "Triennial Review Order" or "TRO"), which became effective as of October 2, 2003, including rules promulgated thereby; or (c) the issuance of a legally effective finding by a court or regulatory agency acting within its lawful authority that requesting Telecommunications Carriers are not impaired without access to a particular network element on an unbundled basis; or (d) the</p>

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				<p><u>Commission", a court of competent jurisdiction, and Section 271 of the Act, shall not be considered Nonconforming Facilities.</u></p> <p>1.5 SBC-MISSOURI reserves the <u>right to argue in any proceeding before the "State Commission", the FCC or another governmental body of competent jurisdiction that an item identified in the Agreement or this Amendment as a Network Element (a) is not a Network Element under 47 U.S.C. § 251(c)(3), (b) is not a Network Element SBC-MISSOURI is required by 47 U.S.C. § 251(c)(3) to provide to CLEC, or (c) is an item that SBC-MISSOURI is not required to offer to CLEC at the rates set forth in the Amended Agreement.</u></p> <p>1.6 CLEC reserves the right to <u>argue in any proceeding before the "State Commission", the FCC or another governmental body of competent jurisdiction that an item not identified in the Agreement or this Amendment as a Network Element (a) is a Network Element under 47 U.S.C. § 251(c)(3), (b) is a Network Element SBC-MISSOURI is required by 47 U.S.C. § 251(c)(3) to provide to CLEC, *, (c) is a Network Element under, or an item SBC-</u></p>		<p>issuance of the mandate in the D.C. Circuit Court of Appeals' decision, <i>United States Telecom Association v. FCC</i>, Case No. 00-1012 (D.C. Cir. 2004) ("USTA II"); or (e) the issuance of any valid law, order or rule by the Congress, FCC or a judicial body stating that <u>SBC-MISSOURI</u> is not required, or is no longer required, to provide a network element on an unbundled basis pursuant to Section 251(c)(3) of the Act. By way of example only, a network element can cease to be a Lawful UNE or be Declassified on an element-specific, route-specific or geographically-specific basis or a class of elements basis. Under any scenario, Section 1.3.4 "Transition Procedure" shall apply.</p> <p>1.3.1.1 By way of example only, and without limitation, network elements that are Declassified include at least the following: (i) any unbundled dedicated transport or dark fiber facility that is no longer encompassed within the definition of unbundled dedicated transport or dark fiber set forth in the FCC's lawful and applicable rules (including, but</p>

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				<p><u>MISSOURI must otherwise provide pursuant to, 47 U.S.C. 271, (d) is a Network Element under, or an item SBC-MISSOURI must otherwise provide pursuant to, Applicable Law, or (e) is an item that SBC-MISSOURI is required to offer to CLEC at the rates set forth in the Amended Agreement..</u></p>		<p>not limited to entrance facilities and Dedicated Transport at any level other than DS1 and DS3); (ii) DS1 Dedicated Transport, DS3 Dedicated Transport, DS1 Loop, DS3 Loop, or Dark Fiber Transport on a route(s) or in an area as to which it is determined that requesting Telecommunications Carriers are not impaired without access to such elements; (iii) Local Switching for Enterprise Customers (as defined in Section 3.7.3 of this Attachment); (iv) Local Switching for Mass Market Customers (as defined in Section 3.7.2 of this Attachment) in any market in which it is determined that requesting Telecommunications Carriers are not impaired without access to such element; (v) to the extent it constitutes a Lawful UNE, Local Switching subject to the FCC's four-line carve-out rule as described in <i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</i>, CC Docket No. 96-98, 15 FCC Rcd 3822-31 (1999), per 47 CFR § 51.319(d)(3)(ii); (vi) OCn Loops and OCn Dedicated Transport; (vii) the Feeder portion of the Loop; (viii) Line Sharing;</p>

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						(ix) an EEL that does not meet the Mandatory Eligibility Criteria set forth in Section 3.14.3 of this Attachment; (x) any Call-Related Database, other than the 911 and E911 databases, that is not provisioned in connection with CLEC's use of <u>SBC-MISSOURI's</u> Lawful ULS for Mass Market Customers (as defined in Section 3.7.2 of this Attachment); (xi) SS7 signaling that is not provisioned in connection with CLEC's use of <u>SBC-MISSOURI's</u> Lawful UNE Local Switching for Mass Market Customers (as defined in Section 3.7.2 of this Attachment), to the extent Local Switching for Mass Market Customers constitutes a Lawful UNE; (xii) Packet switching, including routers and DSLAMs; (xiii) the packetized bandwidth, features, functions, capabilities, electronics and other equipment used to transmit packetized information over Hybrid Loops (as defined in 47 CFR 51.319 (a)(2)), including without limitation, xDSL-capable line cards installed in digital loop carrier ("DLC") systems or equipment used to provide passive optical networking ("PON") capabilities; (xiv) Fiber-to-the-Home Loops (as defined in

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						<p>47 CFR 51.319(a)(3)) ("FTTH Loops"), except to the extent that <u>SBC-MISSOURI</u> has deployed such fiber in parallel to, or in replacement of, an existing copper loop facility and elects to retire the copper loop, in which case <u>SBC-MISSOURI</u> will provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the FTTH loop on an unbundled basis; or (xv) any element or class of elements as to which a general determination is made that requesting Telecommunications Carriers are not impaired without access to such element or class of elements; and</p> <p>1.3.1.2 Pursuant to <i>USTA II</i>, at least the following elements are <i>also</i> Declassified, as of the issuance of the USTA II mandate: (i) DS1 and DS3 dedicated transport; (ii) DS1 and DS3 loops; (iii) dedicated transport and loop dark fiber; and (iv) Local Switching for Mass Market Customers as defined in Section 3.7.2.</p> <p>1.3.1.3 At a minimum, at least the items set forth in this Section 1.3 shall not constitute Lawful UNEs under this Amended Agreement.</p>

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						<p>1.3.2 It is the Parties' intent that only Lawful UNEs shall be available under this Amended Agreement; accordingly, if the Amended Agreement requires or appears to require Lawful UNE(s) or unbundling without specifically noting that the UNE(s) or unbundling must be "Lawful," the reference shall be deemed to be a reference to Lawful UNE(s) or Lawful unbundling, as defined in Section 1.1.</p> <p>1.3.3 Notwithstanding any other provision of this Amended Agreement or any Amendment to this Amended Agreement, including but not limited to intervening law, change in law or other substantively similar provision in the Amended Agreement or any Amendment, if an element described as an unbundled network element or Lawful UNE in this Amended Agreement is Declassified or is otherwise no longer a Lawful UNE, then the Transition Procedure defined in Section 1.3.4, below, shall govern.</p> <p><u>1.3.4 Transition Procedure.</u> SBC-MISSOURI shall only be obligated to provide Lawful UNEs under this</p>

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						Amended Agreement. To the extent an element described as a Lawful UNE or an unbundled network element in this Amended Agreement is Declassified or is otherwise no longer a Lawful UNE, <u>SBC-MISSOURI</u> may discontinue the provision of such element, whether previously provided alone or in combination with or as part of any other arrangement with other Lawful UNEs or other elements or services. Accordingly, in the event one or more elements described as Lawful UNEs or as unbundled network elements in this Amended Agreement is Declassified or is otherwise no longer a Lawful UNE, <u>SBC-MISSOURI</u> will provide written notice to CLEC of its discontinuance of the element(s) and/or the combination or other arrangement in which the element(s) has been previously provided. During a transitional period of thirty (30) days from the date of such notice, <u>SBC-MISSOURI</u> agrees to continue providing such element(s) under the terms of this Amended Agreement. Upon receipt of such written notice, CLEC will cease ordering new elements that are

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						<p>identified as Declassified or as otherwise no longer being a Lawful UNE in the <u>SBC-MISSOURI</u> notice letter referenced in this Section 1.3.4. <u>SBC-MISSOURI</u> reserves the right to audit the CLEC orders transmitted to <u>SBC-MISSOURI</u> and to the extent that the CLEC has processed orders and such orders are provisioned after this 30-day transitional period, such elements are still subject to this Section 1.3.4, including the options set forth in (a) and (b) below, and <u>SBC-MISSOURI</u>'s rights of discontinuance or conversion in the event the options are not accomplished. During such 30-day transitional period, the following options are available to CLEC with regard to the element(s) identified in the <u>SBC-MISSOURI</u> notice, including the combination or other arrangement in which the element(s) were previously provided:</p> <p>(a) CLEC may issue an LSR or ASR, as applicable, to seek disconnection or other discontinuance of the element(s) and/or the combination or other arrangement in which the element(s) were previously</p>

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						<p>provided; or</p> <p>(b) <u>SBC-MISSOURI</u> and CLEC may agree upon another service arrangement or element (e.g. via a separate agreement at market-based rates or resale), or may agree that an analogous access product or service may be substituted, if available.</p> <p>i. in the case of UNE-P, the substitute product or service shall be Resale; and</p> <p>ii. In the case of loops and transport, the substitute product or service shall be the analogous access product, if available.</p> <p>Notwithstanding anything to the contrary in this Amended Agreement, including any amendments to this Amended Agreement, at the end of that thirty (30) day transitional period, unless CLEC has submitted a disconnect/discontinuance LSR or ASR, as applicable, under (a), above, and if CLEC and <u>SBC-MISSOURI</u> have failed to reach agreement, under (b), above, as to a substitute service arrangement or element, then <u>SBC-MISSOURI</u> may, at its sole option, disconnect the element(s), whether previously provided alone or in combination with or as part of any</p>

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						<p>other arrangement, or convert the subject element(s), whether alone or in combination with or as part of any other arrangement to an analogous resale or access service, if available.</p> <p>1.3.4.1 The provisions set forth in this Section 1.3.4 "Transition Period" are self-effectuating, and the Parties understand and agree that no amendment shall be required to this Amended Agreement in order for the provisions of this Section 1.3.4 "Transition Period" to be implemented or effective as provided above. Further, Section 1.3.4 "Transition Period" governs the situation where an unbundled network element or Lawful UNE under this Amended Agreement is Declassified or is otherwise no longer a Lawful UNE, even where the Amended Agreement may already include an intervening law, change in law or other substantively similar provision. The rights and obligations set forth in Section 1.3.4, above, apply in addition to any other rights and obligations that may be created by such intervening law, change in law or other substantively similar provision.</p>

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						<p>1.3.4.2 Notwithstanding anything in this Amended Agreement or in any Amendment, <u>SBC-MISSOURI</u> shall have no obligation to provide, and CLEC is not entitled to obtain (or continue with) access to any network element on an unbundled basis at rates set under Section 252(d)(1), whether provided alone, or in combination with other UNEs or otherwise, once such network element has been or is Declassified or is otherwise no longer a Lawful UNE. The preceding includes without limitation that <u>SBC-MISSOURI</u> shall not be obligated to provide combinations (whether considered new, pre-existing or existing) involving <u>SBC-MISSOURI</u> network elements that do not constitute Lawful UNEs, or where Lawful UNEs are not requested for permissible purposes.</p> <p>1.3.4.2.1 By way of example only, if terms and conditions of this Amended Agreement state that <u>SBC-MISSOURI</u> is required to provide a Lawful UNE or Lawful UNE combination or other arrangement including a "Lawful UNE Dedicated Transport," and Dedicated Transport is</p>

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						<p>Declassified or is otherwise no longer a Lawful UNE, then SBC-MISSOURI shall not be obligated to provide the item under this Amended Agreement as an unbundled network element, whether alone or in combination with or as part of any other arrangement under the Amended Agreement.</p> <p>1.5 Nothing contained in the Amended Agreement shall be deemed to constitute consent by SBC-MISSOURI that any item identified in this Amended Agreement is a UNE, network element or Lawful UNE is a network element or UNE under Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders, that SBC-MISSOURI is required to provide to CLEC alone, or in combination with other network elements or UNES (Lawful or otherwise), or commingled with other network elements, UNES (Lawful or otherwise) or other services or facilities.</p>

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3 (XO)	<p><u>Routine Network Modifications</u></p> <p>SBC MISSOURI Issues:</p> <p>(a) Must SBC make routine network modifications "at no additional cost" to XO?</p> <p>(b) Should network modification projects be subject to the standard performance measurement provisioning intervals?</p> <p>XO Issue: Should SBC be required to make routine network modifications to unbundled network elements, including loops and transport (including dark fiber), consistent</p>	Sections 2.24 and 3.16 <i>et seq.</i> and Cover Amendment, Section 7	<p>Yes, the FCC's rules require SBC to make routine network modifications to UNEs, including loops and transport (to include dark fiber).</p> <p>The costs of these modifications are captured in the current NRCs. Indeed, SBC normally performed these functions for CLECs until an internal SBC policy change halted such work. In addition, SBC regularly performs this work, without additional charge, on special access circuits. If SBC seeks to recover additional charges for routine network modifications, it should seek to do so through the proper UNE costing proceeding at the Commission and not through this arbitration. The TRO explicitly states that "[s]tate commissions have discretion as to whether these costs should be recovered through non-recurring</p>	<p><u>2.24 Routine Network Modification.</u></p> <p>An activity that the incumbent LEC regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer. They also include activities needed to enable a requesting telecommunications carrier to obtain access to a dark fiber loop. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the construction of a new loop, or the installation of new aerial or buried cable for a requesting telecommunications carrier.</p> <p>*****</p> <p><u>3.16 Routine Network Modifications.</u></p> <p><u>3.16.1 General Conditions. SBC-MISSOURI shall make routine network modifications to unbundled facilities, at no additional cost or charge, where the</u></p>	<p>XO's position statement is misleading because it suggests that SBC MISSOURI will not agree to make routine network modifications. To the contrary, SBC MISSOURI has proposed routine network modifications. The parties simply disagree about some of the terms and conditions related to routine network modifications.</p> <p>(a) SBC MISSOURI has the right to recover costs for routine network modifications so long as there is no double recovery of the cost. The type of required modification is determined by Engineering on an individual case basis. In Section 3.16.1 XO suggests that SBC MISSOURI is compensated for routine modifications through UNE rates. This suggestion is not accurate. SBC MISSOURI' UNE Loop rates do not take into consideration any additions or modifications to the existing UNE Loop. The existing UNE Loop is already established to capacity. Any modifications to increase capacity, pursuant to the TRO rules, have not been cared for in the existing UNE Loop rates. Therefore, SBC MISSOURI is entitled to recover its</p>	<p><u>2.24 Routine Network Modification.</u></p> <p>An activity that the incumbent LEC regularly undertakes for its own customers. Routine network modifications include, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer. They also include activities needed to enable a requesting telecommunications carrier to obtain access to a dark fiber loop. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the construction of a new loop, or the installation of new aerial or buried cable for a requesting telecommunications carrier, and SBC-MISSOURI is not obligated to perform those activities for a requesting telecommunications carrier.</p>

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	<p>with FCC rules and at the current nonrecurring rates approved by the Commission?</p> <p>(b) Should UNEs that require routine network modifications be subject to the standard performance measure provisioning intervals of all UNEs?</p>		<p>charges or recurring charges." TRO, para. 640.</p> <p>The TRO requires ILECs to make the same routine modifications to dark fiber that they make for their own customers. SBC proposes to provide the dark fiber "as is," which is inconsistent with the requirements of the TRO. See TRO paras. 637-638.</p> <p>Installation or replacement of faulty facilities does not constitute construction or trenching. SBC should perform the same routine modifications for XO as they provide their customers.</p> <p>SBC also argues that there is no reason for performance plans to apply to routine network modifications. However, the TRO expressly noted that to the extent that certain routine network modifications to existing loop facilities affect loop provisioning intervals contained in Section 271</p>	<p>requested transmission facility has already been constructed. <u>A routine network modification is an activity that SBC-MISSOURI regularly undertakes for its own customers.</u> SBC-MISSOURI will perform <u>routine network modifications</u> to unbundled facilities in a nondiscriminatory fashion, without regard to whether the facility being accessed was constructed on behalf of, or in accordance with the specifications of, any particular carrier. <u>Where facilities are unavailable, SBC-MISSOURI will not be required to build a loop from scratch by trenching or pulling cable to provision an order of CLEC. SBC-MISSOURI will recover the costs of routine network modifications in its monthly recurring rates.</u></p> <p>3.16.2 Routine network modifications applicable to Loops or Transport include, <u>but are not limited to:</u> rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; <u>adding electronics to available wire or fiber facilities to fill an order for an unbundled DS1 circuit; cross-connecting the common equipment to the wire or fiber facility running to the end user; terminating a DS1 loop to the appropriate NID;</u></p>	<p>cost for any modifications to the UNE Loop as supported by the TRO in Paragraph 640. The TRO rule is clear that SBC MISSOURI is entitled to cost recovery.</p> <p>(b) SBC MISSOURI objects to XO's proposed language in Section 3.16.4 because it is not a change that is required by or even related to the TRO. Network Modifications are completed on a project basis and will not be completed in the same provisioning intervals as a product that does not require a modification. Each network modification is potentially different and it is impossible in advance to predict the provisioning interval that will be required. As noted by the FCC, modifications could "entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings." Network modification projects should be treated as other projects and should not be subject to standard performance criteria.</p>	<p>*****</p> <p><u>3.16 Routine Network Modifications.</u></p> <p><u>3.16.1 General Conditions.</u> SBC MISSOURI shall make Routine Network Modifications to Lawful UNE Local Loop, Lawful UNE Dedicated Transport, Lawful UNE Loop Dark Fiber and Lawful UNE Dedicated Transport Dark Fiber facilities used by requesting telecommunications carriers where the requested transmission facility has already been constructed. SBC-MISSOURI will perform Routine Network Modifications to Lawful unbundled facilities in a nondiscriminatory fashion, without regard to whether the facility being accessed was constructed on behalf of, or in accordance with the specifications of, any particular carrier. Routine network modifications do not include the construction of a new loop, or the installation of new aerial or buried cable for a requesting telecommunications carrier, and SBC-MISSOURI is not obligated to perform those activities for a requesting telecommunications carrier. Such</p>

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			performance metrics, "we expect that states will address the impact of these modifications as part of their recurring reviews of incumbent LEC performance." TRO, para. 639. Thus, the TRO implicitly assumes that these performance metrics apply to such UNEs as to other UNEs. XO's contract language merely states the same.	<p>accessing manholes, and deploying bucket trucks to reach aerial cable.</p> <p><u>3.16.3 Routine network modifications applicable to Dark Fiber Loops or Transport include routine activities needed to enable CLEC to have light continuity and functional signal carriage across both ends of a Dark Fiber Transport or Loop facility that it has obtained from SBC-MISSOURI under the Amended Agreement.</u> Routine network modifications include, <u>but are not limited to</u>, splicing of dark fiber; accessing manholes, and deploying bucket trucks to reach aerial cable.</p> <p><u>3.16.4 Performance Plans. SBC-MISSOURI's performance in connection with the provisioning of Loops or Transport (including Dark Fiber) for which routine network modifications are necessary shall be subject to standard provisioning intervals, included in the calculation of performance measurement results, and factored into the calculation of any remedies contained in the Amended Agreement or elsewhere.</u></p>		<p>Routine Network Modifications shall be provided at the rates, terms and conditions set out in this Attachment, and in Appendix Pricing.</p> <p>3.16.2 Routine network modifications applicable to Lawful UNE Local Loops or Lawful Unbundled Dedicated Transport include: rearranging or splicing of existing cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a loop to activate such loop for its own customers; accessing manholes, and deploying bucket trucks to reach aerial cable.</p> <p><u>3.16.3</u> Routine network modifications include, splicing of dark fiber, accessing manholes, and deploying bucket trucks to reach aerial cable. Routine Network Modifications applicable to Lawful UNE Dark Fiber Loops or Transport are available only where the requested Lawful UNE Dark Fiber Loop or Transport facilities have already been</p>

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						constructed. Routine Network Modifications do not include the installation of fiber or the provision of electronics for the purpose of lighting dark fiber (i.e. optronics), and SBC-MISSOURI is not obligated to perform those activities.
4 (XO)	<p><u>Commingling</u></p> <p>SBC MISSOURI Issues:</p> <p>May XO commingle UNEs with a non-UNE that is offered by SBC MISSOURI pursuant to Section 271 or commingled UNEs that are no longer lawful UNEs?</p> <p>XO Issue:</p> <p>(a) Must SBC permit XO to commingle unbundled network elements, combination of unbundled</p>	Sections 3.14, <i>et seq.</i> and 2.3	<p>Yes, SBC is required under the FCC's rules to permit commingling of UNEs, combinations of UNEs, and wholesale services.</p> <p>As discussed for issues above, XO objects to SBC's attempt to include only what it defines as "Lawful UNEs" in this section. SBC appears to be improperly attempting to modify or alter the change in law provisions of the Agreement so that any change of law with regard to UNEs would be self-effectuating or automatic. Nothing in the TRO provides ILECs this right, and the FCC expressly rejected BOC requests to make such</p>	<p>3.14.1 Commingling. Notwithstanding any other provision of the Agreement or any SBC-MISSOURI tariff or SGAT, but subject to the conditions set forth in the following Section 3.13.2, SBC-MISSOURI will permit the commingling of a UNE or a combination of UNEs ("Qualifying UNEs") pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51, <u>network elements provided pursuant to Section 271(c)</u>, and wholesale services obtained from SBC-MISSOURI under a SBC-MISSOURI access tariff or separate non-251 agreement ("Qualifying Wholesale Services"), to the extent required by Applicable Law. Moreover, to the extent and so long as required by Applicable Law, SBC-MISSOURI shall, upon request of CLEC, perform the functions necessary to commingle Qualifying UNEs, <u>network elements provided pursuant to Section 271(c)</u> or Qualifying Wholesale Services. The rates, terms and conditions of the applicable access tariff or separate non-251 agreement will apply to the Qualifying</p>	<p>There can be no question over whether SBC MISSOURI is required to commingle UNEs with 271 checklist items. It is not. As explained by the FCC at ¶ 655, n.1990 of the <i>Triennial Review Order</i> (as modified by the <i>Errata</i>), the Section 251(c) unbundling obligation does not require SBC MISSOURI to perform that function for CLECs, and the FCC declined to impose any such obligation under 271.</p> <p>In the <i>Errata</i>, the FCC also removed from the first sentence of ¶ 584 of the <i>Triennial Review Order</i> the reference to "any network elements unbundled pursuant to section 271," from the discussion of its commingling rules. In doing so, the FCC made clear that that SBC MISSOURI is not required to combine section 271 items with section 251 UNEs.</p>	<p><u>Commingling and Combinations.</u></p> <p>3.14.1 <u>Commingling.</u> Notwithstanding any other provision of the Agreement or any SBC-MISSOURI tariff or SGAT, but subject to the conditions set forth in the following Section 3.13.2, SBC-MISSOURI will permit the commingling of a UNE or a combination of UNEs ("Qualifying UNEs") pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51, and wholesale services obtained from SBC-MISSOURI under a SBC-MISSOURI access tariff or separate non-251 agreement ("Qualifying Wholesale Services"), to the extent required by Applicable Law. Neither Commingling nor a Commingled Arrangement shall include, involve, or otherwise encompass an SBC-MISSOURI offering pursuant to 47 U.S.C. § 271 that is not a Lawful UNE under 47 U.S.C.</p>

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	<p>network elements, and wholesale services, consistent with FCC rules?</p> <p>(b) Should XO be required to submit a Bona Fide Request and go through the BFR process in order to commingle?</p> <p>(c) Should SBC be permitted to charge XO on a time and material basis for commingling?</p>		<p>automatic changes to agreements.</p> <p>SBC's contract language states that SBC "shall not have obligation to perform the functions necessary to Commingle." However, the TRO explicitly requires an ILEC "upon request," to "perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services..." TRO, at para. 579.</p> <p>SBC's contract language inserts a number of other grounds upon which SBC may refuse to perform the functions to commingle, which are not found in the FCC's rules or the TRO. See, e.g., highlighted language. SBC incorporates this language from the U.S. Supreme Court Case in <i>Verizon</i>, which is a case that did not address commingling. Nothing in the TRO refers to these restrictions for commingling. For these</p>	<p>Wholesale Services, and the rates, terms and conditions of the Amended Agreement (or the SBC-MISSOURI UNE tariff, if applicable) will apply to the Qualifying UNEs and network elements provided pursuant to Section 271(c). "Ratcheting," as that term is defined by the FCC, shall not be required.</p> <p>2.3 <u>Commingling</u>.</p> <p>The connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from <u>an incumbent LEC</u>, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services. "Commingling" means the act of commingling.</p>	<p>Similarly, a CLEC cannot indirectly and unilaterally impose such a requirement via a two-step: by first purchasing a service which would be comprised of UNEs and 271 checklist items in order to get those facilities in place, and then, by seeking to "convert" that service into a commingled UNE/271 checklist item arrangement. Permitting 271 checklist items in commingled arrangements overrides the policy decision that the FCC has expressly made.</p> <p>Finally, note that SBC MISSOURI language reflecting the decisions made by the FCC on this issue does not prohibit or limit a CLEC's use of 271 checklist items with CLEC's own network/network elements or even facilities provided by other telecom carriers.</p>	<p>§ 251(c)(3). Moreover, to the extent and so long as required by Applicable Law, SBC-MISSOURI shall, upon request of CLEC, perform the functions necessary to commingle Qualifying UNEs, or Qualifying Wholesale Services except that SBC-MISSOURI shall have no obligation to perform the functions necessary to Commingle (or to complete the actual Commingling) if (i) the CLEC is able to perform those functions itself; or (ii) it is not technically feasible, including that network reliability and security would be impaired; or (iii) SBC-MISSOURI's ability to retain responsibility for the management, control, and performance of its network would be impaired; or (iv) SBC-MISSOURI would be placed at a disadvantage in operating its own network; or (v) it would undermine the ability of other Telecommunications Carriers to obtain access to Lawful UNEs or to Interconnect with SBC-MISSOURI's network; or (vi) CLEC is a new entrant and is unaware that it needs to Commingle to provide a Telecommunications Service, but such obligation under this Section ceases if SBC-</p>

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			<p>reasons, these restrictions are inappropriate.</p> <p>There is also no basis for SBC to require XO to submit a BFR for commingling. Generally, requests for commingling will constitute nothing more than a conversion request, which is a billing change. The ILECs have been required to perform conversions since, at least, the FCC's issuance of its UNE Remand Order. SBC has specifically completed such requests for XO. XO was not previously required to submit a BFR in order to have its conversion or billing change requests implemented by SBC nor should XO be required to do so now.</p> <p>The TRO states that ILECs may assess monthly recurring rates for commingling on an element by element basis and a service-by-service basis but does not discuss assessing any non-</p>			<p>MISSOURI informs CLEC of such need to Commingle. The rates, terms and conditions of the applicable access tariff or separate non-251 agreement will apply to the Qualifying Wholesale Services, and the rates, terms and conditions of the Amended Agreement (or the SBC-MISSOURI UNE tariff, if applicable) will apply to the Qualifying UNEs. "Ratcheting," as that term is defined by the FCC at paragraph 580 of the TRO, shall not be required.</p> <p>3.14.1.3 In accordance with and subject to the provisions of this Section 3.14, any request by CLEC for <u>SBC-MISSOURI</u> to perform the functions necessary to Commingle (as well as requests where CLEC also wants <u>SBC-MISSOURI</u> to complete the actual Commingling), shall be made by CLEC in accordance with the bona fide request (BFR) process set forth in this Amended Agreement.</p> <p>3.14.1.3.1 In any such BFR, CLEC must designate among other things the Lawful UNE(s), combination of Lawful UNEs, and the facilities or services that CLEC has obtained at wholesale from SBC-MISSOURI sought to be</p>

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			recurring charges for commingling, including time and material charges for performing commingling functions. TRO at para. 582.			<p>Commingled and the needed location(s), the order in which such Lawful UNEs, such combinations of Lawful UNEs, and such facilities and services are to be Commingled, and how each connection (<i>e.g.</i>, cross-connected) is to be made between them.</p> <p>3.14.1.3.2 In addition to any other applicable charges, CLEC shall be charged a reasonable fee for any Commingling work done by SBC-MISSOURI under this Section 3.14.1 (including performing the actual Commingling). Such fee shall be calculated using the Time and Material charges as reflected in the State-specific Appendix Pricing. SBC-MISSOURI's Preliminary Analysis to the BFR shall include an estimate of such fee for the specified Commingling. With respect to a BFR in which CLEC requests SBC-MISSOURI to perform work not required by this Section 3.14.1.4, CLEC shall be charged a market-based rate for any such work.</p> <p>3.14.1.4 The preceding includes</p>

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						<p>without limitation that SBC-MISSOURI shall not be obligated to Commingle network elements that do not constitute Lawful UNEs, or where Lawful UNEs are not requested for permissible purposes. If CLEC does not meet the applicable eligibility criteria or, for any reason, stops meeting the eligibility criteria for a particular Lawful UNE involved or to be involved in a Commingled Arrangement, CLEC shall not request such Commingled Arrangement or continue using such Commingled Arrangement. Eligibility Criteria for Commingling include, but are not limited to, those set forth in Section 3.14.3 , below.</p> <p>3.14.1.5 In the event that Commingling involves SBC-MISSOURI performing the functions necessary to combine Lawful UNEs (e.g., make a new combination of Lawful UNEs), and including making the actual Lawful UNE combination, then Section 3.14.2 shall govern with respect to that Lawful UNE combining aspect of that particular Commingling and/or Commingled Arrangement.</p>

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						<p>2.3 <u>Commingling</u>.</p> <p>The connecting, attaching, or otherwise linking of an Lawful unbundled network element, or a combination of Lawful unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from SBC-MISSOURI, or the combining of an Lawful unbundled network element, or a combination of Lawful unbundled network elements, with one or more such facilities or services. "Commingle" means the act of commingling.</p>
5 (XO)	<p><u>Combinations</u></p> <p>SBC MISSOURI Issue:</p> <p>(a) Should the ICA incorporate the rules for combinations established by the Supreme Court in <i>Verizon Comm.</i>?</p> <p>XO Issue:</p> <p>(a) Is SBC</p>	Section 3.14.2 <i>et seq.</i>	<p>Yes, the FCC's rules require SBC to combine UNEs.</p> <p>XO did not submit this issue for arbitration in MO. If SBC insists on leaving it in the proceeding, XO states the following:</p> <p>XO objects to SBC's attempt to include only what it defines as "Lawful UNEs" in this section and to modify the change of</p>	<p><u>3.14.2 Combinations.</u></p> <p><u>3.14.2.1 SBC-MISSOURI shall provide any technically feasible UNE combination upon request, including, but not limited to, combinations of DS0, DS1, DS3 and Dark Fiber Loop and Transport facilities. Where SBC-MISSOURI claims that a combination is not technically feasible, SBC-MISSOURI must prove to the "State Commission" that the request to combine UNEs in a particular manner is not technically feasible or would undermine the ability</u></p>	<p>XO once again seeks to mislead the Commission by its issue statement which suggests that SBC MISSOURI has refused to combine unbundled network elements. This is not the case. In fact, SBC MISSOURI has proposed quite extensive language regarding how SBC MISSOURI will provide combinations. SBC MISSOURI simply proposes that the combining language should be consistent with the law.</p> <p>XO's language is inconsistent with</p>	<p><u>3.14.2 Combinations.</u></p> <p>3.14.2.1 Pre-Existing Combinations</p> <p>SBC-MISSOURI shall provide "Pre-existing Combinations" of Lawful UNEs as set forth below. A Pre-existing Combination includes all orders within the definition of "Contiguous Interconnection of Lawful UNEs."</p> <p>3.14.2.1.1 "Contiguous Interconnection of Lawful UNEs" means the situation when CLEC</p>

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	<p>required to combine unbundled network elements consistent with FCC rules?</p> <p>(b) Since the FCC affirmed its rules on combinations, is SBC's language regarding pre-existing combinations or new combinations required by the TRO?</p>		<p>law provision to make <i>USTA</i> //self effectuating. SBC proposes additional language that is an attempt to modify the change of law provisions of the Agreement. It is improper for SBC to attempt to exclude certain UNE combinations immediately upon a change of law (see,e.g., SBC Section 3.15.2).</p> <p>In addition, XO has the same objections to the contract language proposed by SBC as proposed for commingling. While the <i>Verizon</i> case did address combinations it upheld the FCC's rules regarding combinations. In the TRO, the FCC reaffirmed its combination requirements and did not incorporate additional restrictions or conditions from the <i>Verizon</i> case. See TRO, para. 574. XO's language reflects the FCC's reaffirmation of its existing rules in the TRO. In contrast, the modifications that SBC is</p>	<p><u>of other carriers to obtain access to UNEs or to interconnect with SBC-MISSOURI's network.</u></p> <p><u>3.14.2.2 Notwithstanding any other provision of the Agreement or any SBC-MISSOURI tariff or SGAT, SBC-MISSOURI shall bill CLEC at UNE rates for each element that is fully a UNE.</u></p>	<p>Supreme Court precedent, Seventh Circuit precedent and the FCC's rules because it requires SBC MISSOURI to provide <u>any</u> technically feasible combination without limitation. In <i>Illinois Bell Telephone Co. v. McCarty</i>, 362 F.3d 378 (7th Cir. Mar. 5, 2004), the Seventh Circuit held that the Supreme Court identified four limitations on a ILEC's duty to combine and that the parties' ICA must set forth the limitations on an ILEC's duty. The Supreme Court limitations on an ILEC's obligation to combine, identified in <i>Verizon Communications, Inc. v. FCC</i>, 535 U.S. 467 (2002), are set forth in SBC MISSOURI's language. XO's language, on the other hand, ignores these limitations and is not appropriate for inclusion in the ICA.</p>	<p>orders all the SBC-MISSOURI Lawful UNEs required either (1) to convert to a combinations of Lawful UNEs-only (which must include Lawful UNE Local Loop and Lawful ULS) an SBC-MISSOURI End User, another carrier's pre-existing End User served exclusively using Lawful UNEs, or CLEC's or another carrier's resale End User; or (2) if the Pre-Existing Combination includes a Lawful UNE Local Loop with Lawful ULS, to activate that Pre-Existing Combination for CLEC (a) without any change in features or functionality that was being provided at the time of the order, and/or (b) with the only change needed being to route the operator service and directory assistance ("OS/DA") calls from the End User to be served by that Pre-Existing Combination to CLEC's OS/DA platform via customized routing, and/or (c) with only changes needed in order to change a local switching feature resident and activated in the serving switch and available to the switch port class used to provide service, <i>e.g.</i>, call waiting for residential local service, and/or (d) at the time of the order</p>

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			trying to incorporate are inconsistent with the TRO determination that SBC must combine UNEs, without restriction, for CLECs. See, particularly highlighted language.			<p>and when the order is worked by SBC-MISSOURI, the End User in question is not served by a line sharing arrangement as defined herein (or, if not so defined, by applicable FCC orders) or the technical equivalent, <i>e.g.</i>, the loop facility is being used to provide both a voice service and also an xDSL service. (Section 3.14.2.1.1(2)(b) applies only to orders involving customized routing after customized routing has been established to CLEC's OS/DA platform from the relevant SBC-MISSOURI local switch, including CLEC's payment of all applicable charges to establish that routing.)</p> <p>3.14.2.2 New Combinations Involving Lawful UNEs</p> <p>3.14.2.2.1 Subject to the provisions hereof and upon CLEC request, SBC-MISSOURI shall meet its combining obligations involving Lawful UNEs as and to the extent required by FCC rules and orders, and <i>Verizon Comm. Inc. v. FCC</i>, 535 U.S. 467(May 13, 2002) ("<i>Verizon Comm. Inc.</i>") and, to the extent not inconsistent therewith, the rules and orders of relevant state Commission and any other Applicable Law.</p>

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						<p>3.14.2.2.2 In the event that SBC-MISSOURI denies a request to perform the functions necessary to combine Lawful UNEs or to perform the functions necessary to combine Lawful UNEs with elements possessed by CLEC, SBC-MISSOURI shall provide written notice to CLEC of such denial and the basis thereof. Any dispute over such denial shall be addressed using the dispute resolution procedures applicable to this Amended Agreement. In any dispute resolution proceeding, SBC-MISSOURI shall have the burden to prove that such denial meets one or more applicable standards for denial, including without limitation those under the FCC rules and orders, <i>Verizon Comm. Inc.</i> and the Amended Agreement, including Section 3.14.2.2 of this Appendix.</p> <p>3.14.2.2.3 In accordance with and subject to the provisions of this Section 3.14.2.2, including Section 3.14.2.2.3.2 and 3.14.2.2.5, the new Lawful UNE combinations set forth in the Schedule(s) – Lawful UNE Combinations attached and incorporated into this Attachment shall be made available to CLEC as specified in the specific Schedule for a</p>

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						<p>particular State.</p> <p>3.14.2.2.3.1 A "Pre-existing Combination" shall not be considered a new combination involving Lawful UNEs under this Section. A Pre-existing Combination is a combination as defined in Section 3.14.2.1, above.</p> <p>3.14.2.2.3.2 The obligation of SBC-MISSOURI to provide any new Lawful UNE combination involving a Lawful UNE Local Loop and/or Lawful UNE Transport is also subject to Section 3.14.3, including the need for submission of a certification, where required thereunder, associated with the submission of an order for a new Lawful UNE combination</p> <p>3.14.2.2.3.3 The Parties acknowledge that the United States Supreme Court in <i>Verizon Comm. Inc.</i> relied on the distinction between an incumbent local exchange carrier such as SBC-MISSOURI being required to perform the functions necessary to combine Lawful UNEs and to combine Lawful UNEs with elements possessed by a requesting Telecommunications Carrier, as compared to an incumbent LEC being required to</p>

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						<p>complete the actual combination. As of the time this Appendix was agreed-to by the Parties, there has been no further ruling or other guidance provided on that distinction and what functions constitute only those that are necessary to such combining. In light of that uncertainty, SBC-MISSOURI is willing to perform the actions necessary to also complete the actual physical combination for those new Lawful UNE combinations set forth in the Schedule(s) – Lawful UNE Combinations to this Attachment, subject to the following:</p> <p>3.14.2.2.3.3.1 Section 3.14.2.2, including any acts taken pursuant thereto, shall not in any way prohibit, limit or otherwise affect, or act as a waiver by, SBC-MISSOURI from pursuing any of its rights, remedies or arguments, including but not limited to those with respect to <i>Verizon Comm. Inc.</i>, the remand thereof, or any FCC or Commission or court proceeding, including its right to seek legal review or a stay of any decision regarding combinations involving UNEs. Such rights, remedies, and arguments are expressly reserved by SBC-MISSOURI. Without affecting the</p>

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						<p>foregoing, this Amended Agreement does not in any way prohibit, limit, or otherwise affect SBC-MISSOURI from taking any position with respect to combinations including Lawful UNEs or any issue or subject addressed or related thereto.</p> <p>3.14.2.2.3.3.2 Upon the effective date of any regulatory, judicial, or legislative action setting forth, eliminating, or otherwise delineating or clarifying the extent of an incumbent LEC's combining obligations, SBC-MISSOURI shall be immediately relieved of any obligation to perform any non-included combining functions or other actions under this Amended Agreement or otherwise, and CLEC shall thereafter be solely responsible for any such non-included functions or other actions. This Section 3.14.2.2.3.3.2 shall apply in accordance with its terms, regardless of change in law, intervening law or other similarly purposed provision of the Amended Agreement and, concomitantly, the first sentence of this Section 3.14.2.2.3.3.2 shall not affect the applicability of any such provisions in situations not</p>

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						<p>covered by that first sentence.</p> <p>3.14.2.2.3.3.3 Without affecting the application of Section 3.14.2.2.3.3.2 (which shall apply in accordance with its provisions), upon notice by SBC-MISSOURI, the Parties shall engage in good faith negotiations to amend the Amended Agreement to set forth and delineate those functions or other actions that go beyond the ILEC obligation to perform the functions necessary to combine Lawful UNEs and combine Lawful UNEs with elements possessed by a requesting Telecommunications Carrier, and to eliminate any SBC-MISSOURI obligation to perform such functions or other actions. If those negotiations do not reach a mutually agreed-to amendment within sixty (60) days after the date of any such notice, the remaining disputes between the parties regarding those functions and other actions that go beyond those functions necessary to combine Lawful UNEs and combine Lawful UNEs with elements possessed by a requesting Telecommunications Carrier, shall be resolved pursuant to the dispute resolution</p>

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						<p>process provided for in this Amended Agreement. Such a notice can be given at any time, and from time to time.</p> <p>3.14.2.2.3.4 A new Lawful UNE combination listed on a Schedule –Lawful UNE Combinations does not imply or otherwise indicate the availability of related support system capabilities, including without limitation, whether electronic ordering is available for any particular included new Lawful UNE combination in one or more States. Where electronic ordering is not available, manual ordering shall be used.</p> <p>3.14.2.2.3.5 For a new Lawful UNE combination listed on a Schedule – Lawful UNE Combinations, CLEC shall issue appropriate service requests. These requests will be processed by SBC-MISSOURI, and CLEC will be charged the applicable Lawful UNE service order charge(s), in addition to the recurring and nonrecurring charges for each individual Lawful UNE and cross connect ordered.</p> <p>3.14.2.2.3.6 Upon notice by SBC-MISSOURI, the Parties shall engage in good faith negotiations</p>

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						<p>to amend the Amended Agreement to include a fee(s) for any work performed by SBC-MISSOURI in providing the new Lawful UNE combinations set forth in Schedule(s) – Lawful UNE Combinations, which work is not covered by the charges applicable per Section 3.14.2.2.3.5. For any such work done by SBC-MISSOURI under Section 3.14.2.2.1, any such fee(s) shall be a reasonable cost-based fee, and shall be calculated using the Time and Material charges as reflected in State-specific pricing. For any such work that is not so required to be done by SBC-MISSOURI, any such fee(s) shall be at a market-based rate. If those negotiations do not reach a mutually agreed-to amendment within sixty (60) days after the date of any such notice, the remaining disputes between the parties concerning any such fee(s) shall be resolved pursuant to the dispute resolution process provided for in this Amended Agreement. Such a notice can be given at any time, and from time to time.</p> <p>3.14.2.2.4 In accordance with and subject to the provisions of this Section 3.14.2.2, any request not</p>

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						<p>included in Section 3.14.2.2.3 in which CLEC wants SBC-MISSOURI to perform the functions necessary to combine Lawful UNEs or to perform the functions necessary to combine Lawful UNEs with elements possessed by CLEC (as well as requests where CLEC also wants SBC-MISSOURI to complete the actual combination), shall be made by CLEC in accordance with the bona fide request (BFR) process set forth in this Amended Agreement.</p> <p>3.14.2.2.4.1 In any such BFR, CLEC must designate among other things the Lawful UNE(s) sought to be combined and the needed location(s), the order in which the Lawful UNEs and any CLEC elements are to be connected, and how each connection (<i>e.g.</i>, cross-connected) is to be made between an SBC-MISSOURI Lawful UNE and the lawful network element(s) possessed by CLEC.</p> <p>3.14.2.2.4.2 In addition to any other applicable charges, CLEC shall be charged a reasonable cost-based fee for any combining work done by SBC-MISSOURI under Section 3.14.2.2.1. Such</p>

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						<p>fee shall be calculated using the Time and Material charges as reflected in the State-specific Appendix Pricing. SBC-MISSOURI's Preliminary Analysis to the BFR shall include an estimate of such fee for the specified combining. With respect to a BFR in which CLEC requests SBC-MISSOURI to perform work not required by Section 3.14.2.2.1, CLEC shall be charged a market-based rate for any such work.</p> <p>3.14.2.2.5 Without affecting the other provisions hereof, the Lawful UNE combining obligations referenced in this Section 3.14.2.2 apply only in situations where each of the following is met:</p> <p>3.14.2.2.5.1 it is technically feasible, including that network reliability and security would not be impaired;</p> <p>3.14.2.2.5.2 SBC-MISSOURI's ability to retain responsibility for the management, control, and performance of its network would not be impaired;</p> <p>3.14.2.2.5.3 SBC-MISSOURI would not be placed at a disadvantage in operating its own network;</p>

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						<p>3.14.2.2.5.4 it would not undermine the ability of other Telecommunications Carriers to obtain access to Lawful UNEs or to Interconnect with SBC-MISSOURI's network; and</p> <p>3.14.2.2.5.5 CLEC is</p> <p>3.14.2.2.5.5.1 unable to make the combination itself; or</p> <p>3.14.2.2.5.5.2 a new entrant and is unaware that it needs to combine certain Lawful UNEs to provide a Telecommunications Service, but such obligation under this Section 3.14.2.2.5.5 ceases if SBC-MISSOURI informs CLEC of such need to combine.</p> <p>3.14.2.2.6 For purposes of Section 3.14.2.2.5.5 and without limiting other instances in which CLEC may be able to make a combination itself, CLEC is deemed able to make a combination itself when the Lawful UNE(s) sought to be combined are available to CLEC, including without limitation:</p> <p>3.14.2.2.6.1 at an SBC-MISSOURI premises where CLEC is physically collocated or has an on-site adjacent collocation arrangement;</p>

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						3.14.2.2.7 Section 3.14.2.2.5.5 shall only begin to apply thirty (30) days after notice by SBC-MISSOURI to CLEC. Thereafter, SBC-MISSOURI may invoke Section 3.14.2.2.5.5 with respect to any request for a combination involving Lawful UNEs.
6 (XO)	<p><u>Conversions</u></p> <p>SBC MISSOURI Issue:</p> <p>What terms and conditions should apply to conversions from wholesale service to UNEs?</p> <p>XO Issue:</p> <p>Is SBC required to convert a wholesale service, or a group of wholesale services, to unbundled network elements</p>	Section 3.15 <i>et seq.</i>	<p>Yes, the FCC's rules mandate that SBC must convert a wholesale service, or a group of wholesale service, to UNEs or combination or UNEs.</p> <p>As discussed above, XO objects to SBC's attempt to modify or alter the change in law provisions of its existing Agreement with SBC. See, e.g., SBC Section 3.15.1.</p> <p>Further, SBC should not charge for conversions of wholesale services to UNEs or UNE combinations. The FCC noted that ILECs may not impose termination charges, disconnect or re-</p>	<p>3.15 <u>Conversions</u></p> <p>3.15.3 <u>There will be no charge for conversions from wholesale to UNEs or UNE combinations.</u></p> <p>3.15.4 <u>Until such time as SBC-MISSOURI implements its ASR-driven conversion process in its territory, conversion of access circuits to unbundled Network Elements will be performed manually pursuant to SBC-MISSOURI's conversion guidelines. The effective bill date for conversions is the first day of the month following SBC-MISSOURI's receipt of an accurate and complete ASR or electronic request for conversion pursuant to SBC-MISSOURI's conversion guidelines (which are posted on the web at _____).</u></p>	<p>XO misleads the Commission by suggesting that SBC MISSOURI refuses to convert wholesale services to UNEs. SBC MISSOURI's proposed language clearly states that SBC MISSOURI will convert wholesale services to UNEs if XO and the wholesale service meet the eligibility criteria that may be applicable for such conversion. SBC MISSOURI's proposed language also provides more detailed terms and conditions surrounding conversions. XO proposes SBC MISSOURI should be required to process conversion orders manually until it creates an "ASR-driven conversion process. First, this is not an appropriate proceeding for XO to raise this operational issue. This proceeding concerns changes of law. There is no support in the TRO for the language proposed by</p>	<p>3.15 <u>Conversions</u></p> <p>3.15.1 Upon the issuance of the Court's mandate in USTA II, and in the absence of lawful and effective FCC rules or orders requiring conversion of wholesale services to Lawful UNEs, SBC-MISSOURI is not obligated to convert a wholesale service, or group of wholesale services, to the equivalent Lawful UNE, or combination of Lawful UNEs. If lawful and effective FCC rules or orders require conversion of wholesale services to Lawful UNEs, such conversion(s) shall be provided as follows:</p> <p>3.15.2 Upon request, SBC-MISSOURI shall convert a wholesale service, or group of wholesale services, to the</p>

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	or combinations of unbundled network elements consistent with FCC rules?		<p>connect fees and that because ILECs never have to perform a conversion to continue serving their own customers, it is inconsistent with the Act for an ILEC to impose such charges. TRO, para. 587.</p> <p>SBC's proposed language that SBC will "develop and implement processes" for ordering conversion is improper and unreasonable. See, e.g., 3.15.4. SBC has already completed conversions for CLECs. Thus, the processes should be in place. The FCC concluded that, if necessary, carriers will establish necessary procedures to perform conversions through negotiations, which is what XO is proposing here. TRO, at para. 585.</p> <p>3.15.7 is confusing and it is unclear what SBC intends.</p> <p>XO objects to the other</p>	<p><u>3.15.5 All ASR-driven conversion requests will result in a change in circuit identification (circuit ID) from access to UNE or UNE to access.</u></p> <p><u>3.15.6 All requests for conversions will be processed within fifteen (15) days.</u></p> <p><u>3.15.7 Should SBC MISSOURI deny a request from CLEC for a UNE, including, but not limited to, based on a lack of facilities, SBC MISSOURI shall, at CLEC's request, convert an equivalent special access service within thirty (30) days, with no minimum period termination liability.</u></p>	<p>XO, nor is there any reason to change the ordering procedures. If existing processes cannot accommodate the conversion order, SBC MISSOURI's language in Section 3.15.4 provides that SBC MISSOURI will develop and implement processes. It is not appropriate for XO to dictate the process that SBC MISSOURI is to develop.</p>	<p>equivalent Lawful UNE, or combination of Lawful UNEs, that is available to CLEC under terms and conditions set forth in the Amended Agreement, so long as the CLEC and the wholesale service, or group of wholesale services, meets the eligibility criteria that may be applicable for such conversion. (By way of example only, the Qualifying Service requirement is one such eligibility criterion.)</p> <p>3.15.3 Except as otherwise provided hereunder, SBC-MISSOURI shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service for the first time, in connection with any conversion between a wholesale service or group of wholesale services and a Lawful UNE or combination of Lawful UNEs. SBC-MISSOURI's may charge applicable service order charges and record change charges.</p> <p>3.15.4 Where processes for the conversion requested pursuant to the Amended Agreement are not</p>

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			provisions as unreasonable, and providing SBC too much unilateral power, ILEC self-help remedies should be prohibited. See, e.g., Section 3.15.8 (allowing SBC to convert a UNE combination to wholesale services "upon written notice" where CLEC does not meet eligibility requirements. It is unclear how SBC would make such determination that CLEC does not meet such requirements. It is inconsistent with the certification requirements in the TRO.)			<p>already in place, SBC-MISSOURI will develop and implement processes, subject to any associated rates, terms and conditions. The Parties will comply with any applicable Change Management guidelines.</p> <p>3.15.7 Should SBC-MISSOURI deny a request from CLEC for a UNE, including, but not limited to, based on a lack of facilities, SBC-MISSOURI shall, at CLEC's request, convert an equivalent special access service within thirty (30) days, with no minimum period termination liability.</p> <p>3.15.8 If CLEC does not meet the applicable eligibility criteria or, for any reason, stops meeting the eligibility criteria for a particular conversion of a wholesale service, or group of wholesale services, to the equivalent Lawful UNE, or combination of Lawful UNEs, CLEC shall not request such conversion or continue using such the Lawful UNE or Lawful UNEs that result from such conversion. To the extent CLEC fails to meet (including ceases to</p>

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						<p>meet) the eligibility criteria applicable to a Lawful UNE or combination of Lawful UNEs, or Commingled Arrangement (as defined herein), SBC-MISSOURI may convert the Lawful UNE or Lawful UNE combination, or Commingled Arrangement, to the equivalent wholesale service, or group of wholesale services, upon written notice to CLEC.</p> <p>3.15.8.1 This Section 3.15.8 applies to any Lawful UNE or combination of Lawful UNEs, including whether or not such Lawful UNE or combination of Lawful UNEs had been previously converted from an SBC-MISSOURI service.</p> <p>3.15.8.2 SBC-MISSOURI may exercise its rights provided for hereunder and those allowed by law in auditing compliance with any applicable eligibility criteria.</p> <p>3.15.9 In requesting a conversion of an SBC-MISSOURI service, CLEC must follow the guidelines and ordering requirements provided by SBC-MISSOURI that are applicable to converting the particular SBC-MISSOURI service sought to be converted.</p> <p>3.15.10 Nothing contained in this Attachment or the Amended</p>

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						Agreement provides CLEC with an opportunity to supersede or dissolve existing contractual arrangements, or otherwise affects SBC-MISSOURI's ability to enforce any tariff, contractual, or other provision(s), including those providing for early termination liability or similar charges. (By way of example, where provided for, early termination liability charges may apply upon a special access circuit being considered disconnected for billing/inventory purposes.)
7 (XO)	<p><u>Qualifying Service</u></p> <p>SBC Issue: Should the agreement clearly set forth the terms and conditions pursuant to which XO may provide non-qualifying services using the same unbundled network elements it uses to provide qualifying services?</p> <p>XO Issue: May XO,</p>	Sections 1.2 and 2.22 <i>et seq.</i>	<p>Yes, the FCC's rules provide that XO may provide non-qualifying service using the same UNEs it uses to provide qualifying services.</p> <p>XO does not agree with SBC's definition of "local." SBC's definition is not included in the TRO.</p> <p>SBC includes numerous provisions that go beyond the requirements of the TRO, which it admits in its Response. These provisions are unreasonable and would</p>	1.2 SBC-MISSOURI shall offer UNEs to CLEC for the purpose of <u>offering a Qualifying Service or a combination of Qualifying and Non-Qualifying services.</u> CLEC may use individual UNEs, commingled UNEs, or combinations of UNEs, to provide any feature, function, capability, or service option that such UNEs are technically capable of providing, except as may be specifically limited herein.	XO's question is once again misleading and misstates SBC MISSOURI's position. SBC MISSOURI has proposed detailed language regarding the conditions pursuant to which XO may provide non-qualifying services using the same unbundled network elements it uses to provide qualifying services. XO's proposed language ignores the detailed analysis provided by the FCC in the TRO at paras. 149 – 153. SBC MISSOURI's language, on the other hand, is based directly on the FCC's discussion of why CLECs must provide qualifying services on a common carrier basis in order to justify their use of UNEs for those	<p>2.22.1 For purposes of this Section, "local" means within the SBC MISSOURI designated local calling area in which the requested lawful UNE is provided.</p> <p>2.22.2 For purposes of determining whether CLEC is providing the Qualifying Service(s) on a "Common Carrier" basis, the phrase "Common Carrier" shall be interpreted as in <i>National Ass'n of Regulatory Utility Commissioners v. FCC</i>, 533 F.2d 601, 608-09 (1976) (NARUC II) (CLEC (1) holds itself out to serve indifferently all potential users, and (2) allows its End Users to</p>

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	consistent with FCC rules, provide non-qualifying services using the same unbundled network elements it uses to provide qualifying services?		make it difficult for a carrier to use UNEs for non-qualifying services even if the conditions required by the FCC were met. <i>See, e.g.</i> Section 1.2.3 (the certification requirements that SBC would establish).		<p>services. This concept is so important to the FCC that it "reiterates" it elsewhere in the TRO (see, e.g. para. 133). XO's treatment of qualifying services is simply too brief and does not provide enough guidance to the parties regarding how and when it applies. SBC MISSOURI's detailed language will result in fewer disputes over how to interpret and apply the qualifying services criteria.</p> <p>SBC MISSOURI proposes a definition of "local" for this section because it is critical for the application of the qualifying services test. The FCC very specifically defined a "qualifying service" as one which is provided in "direct competition" with an ILEC core service. Accordingly, it is appropriate to analyze whether a CLEC is in direct competition with the ILEC's service, <i>suing the ILEC's defined calling areas</i>. Otherwise, the analysis would not be apples-to-apples.</p>	<p>transmit intelligence of their own design and choosing).</p> <p>2.22.3 By way of example only, the self-provision of access services used solely as an input to provide a retail interexchange service does <i>not</i> qualify as the provision of exchange access on a Common Carrier basis.</p> <p style="text-align: center;">*****</p> <p>1.2 In order to access and use Lawful UNEs, CLEC must be a Telecommunications Carrier, as that term is defined in the Act, and must use the Lawful UNEs for the provision of a Telecommunications Service, as that term is defined in the Act. Together, these conditions are called the "Statutory Conditions." SBC-MISSOURI shall offer Lawful UNEs to CLEC for the purpose of providing at least one Qualifying Service on a Common Carrier basis. CLEC may use individual UNEs, commingled UNEs, or combinations of UNEs, to provide any feature, function, capability, or service option that such UNEs are technically capable of providing, except as may be specifically limited herein. CLEC may not access a Lawful UNE for the sole purpose</p>

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						<p>of providing a Non-Qualifying Service, but may use a Lawful UNE (whether on a stand-alone basis, in combination with other UNEs (Lawful or otherwise), with a network element possessed by CLEC, or otherwise), to provide a Non-Qualifying Service only to the extent that CLEC is permitted such use of that particular Lawful UNE by FCC rules and orders. By way of example, use of a Lawful UNE (whether on a stand-alone basis, in combination with other UNEs (Lawful or otherwise), with a network element possessed by CLEC, or otherwise) to provide service to CLEC or for other administrative purpose(s) does not constitute using a Lawful UNE to provide a Qualifying Service.</p> <p>1.2.1 Where CLEC combines Lawful UNEs (including a combination of Lawful UNEs with network elements possessed by CLEC or otherwise, each as may be permitted under this Amended Agreement), CLEC must satisfy the Qualifying Services conditions as to each Lawful UNE used in the particular combination.</p> <p>1.2.2 Satisfaction of the Qualifying</p>

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						<p>Service(s) conditions is required in addition to any other eligibility criteria that must also be met.</p> <p>1.2.3 By ordering, accessing or using a Lawful UNE (whether on a stand-alone basis, in combination with other UNEs (Lawful or otherwise), with a network element possessed by CLEC, or otherwise) CLEC continuously represents and warrants that it satisfies the Qualifying Service(s) conditions as to the particular Lawful UNE, Lawful UNEs or combination of Lawful UNEs. Additionally, CLEC agrees to provide written certification upon <u>SBC-MISSOURI</u> request identifying:</p> <p>1.2.3.1 the Telecommunications Service it will provide using the Lawful UNE; and</p> <p>1.2.3.2 which core <u>SBC-MISSOURI</u> service the Telecommunications Service directly competes with by providing a detailed description of the Telecommunications Service that will be provided and by designating the core ILEC service(s) with which it competes.</p> <p>1.2.3.3 This Section 1.2.3 is in</p>

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						<p>addition to any other certification to eligibility criteria that may be required by Section 3.14.3 below, or other provisions hereof.</p> <p><u>1.2.4 SBC-MISSOURI</u> has no obligation to provide any Lawful UNE (whether on a stand-alone basis, in combination with other UNEs (Lawful or otherwise), with a network element possessed by CLEC, or otherwise) unless CLEC continuously meets the Statutory Conditions and any lawful and effective Qualifying Services conditions for that Lawful UNE. If CLEC does not meet the Statutory Conditions and any lawful and effective Qualifying Services conditions or, for any reason, stops meeting the Qualifying Services conditions for a particular Lawful UNE (whether on a stand-alone basis, in combination with other UNEs (Lawful or otherwise), with a network element possessed by CLEC, or otherwise), CLEC shall not request such Lawful UNE or continue using such Lawful UNE.</p> <p>1.2.4.1 For lawful and effective Qualifying Services conditions, failure to provide accurate</p>