Exhibit No.:	
Issues:	
Witness:	Scott Porter
Sponsoring Party:	WilTel Local Network
Type of Exhibit:	Rebuttal Testimony
Case No.:	TO-2005-0336

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI CASE NO. TO-2005-0336

WILTEL LOCAL NETWORK, LLC

Rebuttal Testimony

of

SCOTT PORTER

May 18, 2005

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I. INTRODUCTION AND QUALIFICATIONS

Q. PLEASE STATE YOUR NAME, POSITION, EMPLOYER, AND BUSINESS ADDRESS.

A. My name is Scott Porter. I am a Regulatory Affairs Analyst for WilTel Communications, LLC. My business address is 100 South Cincinnati, Tulsa, Oklahoma, 74103.

Q. PLEASE DESCRIBE YOUR RELEVANT EDUCATION AND WORK EXPERIENCE.

A. I received a Bachelor of Arts degree in Political Science from Colorado State University and my Juris Doctor degree from the University of Tulsa. I have been working for WilTel Communications since January of 2000. I started with the company as a Contract Negotiator, and in that position my responsibilities included analysis, negotiating and advising upon agreements, including upon various substantive issues. I have been in my current position within the Regulatory Affairs department for over a year where my responsibilities include working with internal business units in helping to define WilTel's positions on various issues arising in the telecom regulatory environment.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. I will be providing rebuttal testimony in response to testimony provided by SBC on the factual issues between WilTel and SBC in this proceeding. I do not intend to provide any response to issues of a legal nature since WilTel's responses to legal issues will be provided in its briefing on the issues later in the proceeding.

II. WILTEL DPL – GENERAL TERMS AND CONDITIONS

Q. HAVE YOU REVIEWED THE TESTIMONY OF SBC'S WITNESSES WITH RESPECT TO ISSUES IDENTIFIED IN THE GENERAL TERMS AND CONDITIONS DPL?

A. Yes, I have.

Q. PLEASE RESPOND TO MR. SILVER'S TESTIMONY IN SUPPORT OF SBC'S USE OF THE TERM "LAWFUL" AND SBC'S POSITION THAT REGARDLESS OF CONTRACTUAL TERMS, SBC'S OBLIGATIONS UNDER THE AGREEMENT ARE LIMITED BY ITS INTERPRETATION OF APPLICABLE LAW. [GT&C Issue #1]

A. I understand that this is really a question of law, and WilTel will address in more detail the legal arguments pertaining to this issue in its briefing. To address Mr. Silver's testimony, however, using the word "lawful" in the Agreement will in fact ensure that there *is* dispute or confusion as to SBC's obligations, contrary to what Mr. Silver would have the Commission believe. Use of the word creates ambiguity insofar as it relies upon each party's own individual interpretation of the law at the time, and as evidenced by the regulatory world over the past year, such interpretations can differ markedly. The result will be delay, as SBC seeks unilaterally to enforce its interpretations, as well as constant dispute resolution. The only way to ensure clear delineation of the parties' rights and obligations under the agreement is to explicitly state what they are. In the case of UNEs, the agreement should clearly provide which network elements are considered to be UNEs under the agreement. If that changes at any time, then the parties can amend the agreement or they can create a clear process

within the agreement to make changes. Additionally, use of the term "lawful" to describe a legal obligation is unnecessary. Any effective law, rule or regulation is by definition "lawful." SBC's attempts to use this language is self-serving and will enable SBC to circumvent the change of law provisions and unilaterally relieve itself of contractual obligations to which it has agreed in writing with WilTel. The Act, and this Commission's procedures, provide for a clear and well-established process for negotiating Agreements and any amendments. This process of negotiation and, if needed, arbitration sufficiently protects SBC's interests as well as WilTel's, so SBC should not be permitted to circumvent the law and the terms of the Agreement solely for the self-serving purpose of taking advantage of what SBC perceives as a change in law from which SBC will benefit.

SBC's assertion that it should not be required to continue providing network elements that are no longer required to be provided under applicable law is not only self-serving but also misleading. SBC's proposed language strategically placed throughout the Agreement enables SBC to excuse itself from its contractual obligations any time SBC perceives that the law, upon which such contractual obligations were based, changes to its advantage. However, change of law events related to unbundling obligations should be treated no differently from other change of law events under the Agreement, and Mr. Silver has failed to present any reason or justification for handling such changes in law any differently. It is only reasonable that the parties to a mutually negotiated agreement should negotiate and agree to any changes to the rights and obligations under such agreement. To do differently would

violate the very letter of the Act requiring good faith negotiations, and would also call into question the very purpose for having a written agreement in the first place.

Similarly, use of any other similar language by SBC, such as statements like "notwithstanding anything to the contrary, SBC shall be obligated to provide UNEs only to the extent required by Section 251," is unnecessary and creates ambiguity. SBC uses these phrases in the Agreement for the same purpose it uses the term "lawful" – as a modifying limitation on SBC's obligation to provide unbundled network elements. WilTel's proposed alternative use of "Applicable Law," as the parties have agreed to define it in the Agreement, is more reasonable and applicable to describe the parties' rights and obligations with regard to network elements. "Applicable Law" is already defined to encompass the applicable sources of legal obligations which the Agreement is intended to implement, so there is no need to create potential for dispute by further limitation in various provisions throughout the Agreement.

As Mr. Silver admits, it is better to use contract language that specifically expresses the parties' intent under the agreement. Since the parties' intent under this Agreement is to provide for rights and obligations for the provision, for example, of WilTel's nondiscriminatory access to certain unbundled network elements, then the contract language should set out clearly and precisely which network elements are available to WilTel as of the Effective Date of the Agreement. It is not enough to say that the elements available on any given day are those that SBC thinks should be made available on that day. The clear result of that would be one unnecessary dispute after another in front of this Commission as well as continual delay.

Q. PLEASE RESPOND TO SBC'S TESTIMONY REGARDING THE APPROPRIATE DEFINITION OF "LOCAL CALLS" UNDER THE AGREEMENT. [GT&C Issue #2]

A. WilTel's proposed definition of "Local Calls" would permit both parties to exchange traffic subject to Section 251(b)(5) reciprocal compensation pricing on a LATA-wide basis. This is a reasonable proposal and would benefit consumers in such LATA-wide calling areas by providing them with lower rates for calls originating and terminating in that area. Additionally, WilTel's proposed definition would avoid many of the issues in relation to FX-type calls.

Q. WHAT IS YOUR RESPONSE TO MR. McPHEE'S TESTIMONY THAT WILTEL'S REVISION TO SECTION 2.12.1.1 OF THE AGREEMENT OBLIGATES SBC TO PROVIDE SERVICES OUTSIDE OF ITS SERVING AREA? [GT&C Issue #3]

A. SBC is incorrect in its assertion that WilTel's proposal obligates SBC to provide services outside of its serving area. SBC's proposed language could potentially allow SBC to unlawfully restrict WilTel's use of UNEs or interconnection services under this ICA. For example, WilTel is permitted to use UNEs for the provision of interexchange traffic provided that the UNE is not purchased solely for that purpose. In the event that through WilTel's use of UNEs to provide services to End Users WilTel additionally is providing exchange access services over such UNE, as WilTel is permitted to do pursuant to FCC rules, then SBC's "only to the extent" language could be interpreted to allow SBC to cease providing the UNE to the extent it is also being used to provide exchange access service. WilTel's proposed alternate language

accomplishes SBC's goal of restricting SBC's obligations to a specific geographic area while at the same time alleviating the potential conflict described.

Q. DO YOU HAVE A RESPONSE TO SUZETTE QUATE'S TESTIMONY ABOUT THE INCLUSION OF REFERENCE TO SOURCES OF UNBUNDLING OBLIGATIONS OUTSIDE OF SECTION 251? [GT&C Issue #4]

A. GT&C Issue #4 is actually an issue of law for the Commission to decide based upon the parties' briefs in this proceeding, and WilTel will address it in detail there. In general, however, throughout the Agreement and its Appendices, SBC attempts to impose upon WilTel and other CLECs a contractual representation that is simply incorrect, in particular that SBC is only obligated to provide nondiscriminatory access to unbundled network elements pursuant to "Section 251(c)(3) of the Act". In fact, SBC is obligated to provide access to such elements also pursuant to Section 271 and potentially pursuant to state law. Although the pricing standard for such elements may vary, the fact is that SBC has legal obligations outside of Section 251, so the parties should not state affirmatively in this Agreement that it does not. WilTel's proposed alternative use of the term "Applicable Law" as it is defined in the Agreement (to encompass the applicable sources of legal obligations which the Agreement is intended to implement) is more reasonable and applicable to describe the parties' rights and obligations with regard to network elements anyway. There simply is no need to create potential for dispute by using a legally limiting term when "Applicable Law" protects both parties' rights and obligations under this Agreement.

Q. DO YOU HAVE A RESPONSE TO SBC'S REQUIREMENT THAT WILTEL'S AFFILIATES SHOULD EACH BE REQUIRED TO BE BOUND BY THIS AGREEMENT? [GT&C Issue #5]

A. WilTel is the party to this Agreement with SBC, no other WilTel affiliated entity, and it doesn't make sense to seek to bind entities that are not parties to this agreement. No entity but WilTel can order UNEs or other services under this Agreement, but it appears that SBC wants to hold WilTel's affiliates responsible for any obligations under this Agreement in the event WilTel breaches the agreement. Although WilTel believes that no entity but WilTel should be bound by this agreement, WilTel has agreed to compromise and allow WilTel Local Network, LLC's wholly owned subsidiaries (of which there are none at this time) be bound. WilTel-affiliated entities may desire to take advantage of this negotiated agreement if they can do so, but that should be solely at their option and not for SBC to decide. If affiliated legal entities each wish to negotiate their own interconnection agreements with SBC, there is nothing that prevents that. To the contrary, it would be discriminatory to permit SBC to mandate the terms and conditions to which a particular CLEC should be bound in obtaining access to UNEs and interconnection services.

Q. HOW DO YOU RESPOND TO MS. QUATE'S TESTIMONY REGARDING SBC'S INSURANCE REQUIREMENTS? [GT&C Issue #6]

A. SBC's proposed policy limits for insurance coverage under the Agreement are unreasonably high. SBC's so-called "absolute minimum commercially reasonable" proposed limits, as Ms. Quate puts it, are as much as 5 times more than they are in WilTel's existing Agreement with SBC, and 5 times more than they are in the

Physical Collocation Appendix of the Agreement that is also before this Commission today. Ms. Quate does not provide any reasonable justification for such limits except to say that the PSTN is worth "billions of dollars." I don't understand how SBC can seriously assert that industry changes have occurred since WilTel signed its existing Agreement that have increased SBC's risk so dramatically that it would necessitate an increase of insurance coverage amounts of 500%. WilTel, of course, does not object to providing reasonable insurance coverage, but WilTel cannot be expected to provide unreasonably and unnecessarily high insurance coverage, insurance that is costly to WilTel to maintain particularly when it maintains it without a commercially justifiable reason. Whether or not it is intended, requiring CLECs to provide costly insurance in unreasonable amounts could potentially have the effect of driving competition out of the marketplace. Further evidence that SBC's proposed amounts are unreasonable lies in SBC's own Physical Collocation Appendix where the amounts proposed by SBC, and accepted by WilTel, are the very same amounts that WilTel proposes for the General Terms and Conditions in section 4.6.2. By Ms. Quate's own testimony, SBC admits that its risk of exposure arguably necessitating higher insurance coverage limits from CLECs would be at collocation points where, according to Ms. Quate, "[t]here is increased potential for liability when a CLEC's employees and/or contractors have direct access to SBC Missouri facilities." Ms. Quate fails to explain, then, why the Physical Collocation Appendix contains its own insurance requirements that require coverage amounts that are identical to the amounts WilTel has in its current Agreement and what WilTel seeks in this section 4.6.2 of the general agreement. If collocation represents the greatest

potential for risk to SBC, then the insurance coverage proposed by SBC for the collocation appendix is sufficient to alleviate that risk by SBC's own admission. WilTel's proposed limits are commercially reasonable and sufficient to protect SBC's interests.

Ms. Quate also does not provide any evidence justifying why WilTel's contractors should maintain the same unreasonably high insurance coverage amounts. WilTel's proposal that it will require its subcontractors to maintain insurance in amounts that it deems reasonable and appropriate under the circumstances is reasonable because the party using the subcontractors is in the position to know the work being performed and, thus, the risk posed by such work. For the same reasons above, subcontractors should not be forced to maintain coverage amounts that are exorbitantly high. Such a requirement would impact WilTel and other CLECs by potentially excluding many, if not most, of WilTel's choice of subcontractors to perform work on its behalf. Arguably, the result may be that WilTel is forced to use SBC's choice of contractors instead of its own, possibly to the detriment of the quality of WilTel's network and likely at higher cost.

Q. HOW DO YOU RESPOND TO MS. QUATE'S TESTIMONY THAT WILTEL SHOULD HAVE TO OBTAIN CONSENT TO AN ASSIGNMENT OF THE AGREEMENT ASSOCIATED WITH AN OCN/ACNA CHANGE? [GT&C Issue #8]

A. I believe Ms. Quate's testimony on Issue #8 misses the issue that WilTel has with SBC's requirement of consent. WilTel agrees to obtain SBC's consent to an assignment of the agreement to another entity other than an affiliate, which has

already been agreed to by both parties in Section 4.8.1.1 of the agreement. The issue with section 4.8.3.1, however, is directed toward an OCN/ACNA change, and in this section SBC is attempting to prohibit WilTel from changing its OCN/ACNA unless it obtains SBC's consent to do so. This is an unreasonable request because WilTel should not need SBC's consent to change its OCN/ACNA, identification numbers which Ms. Quate admits are industry-wide standard numbers assigned by Telcordia and NECA and are used throughout the industry for many purposes. I believe that what SBC is actually seeking by its language in this section 4.8.3.1 is to ensure that it can give its consent to an assignment of WilTel's assets or of the agreement itself to some other entity. This, however, is already covered by section 4.8.1.1, and WilTel's desire to change its OCN/ACNA should not be tied to the same consent. Obviously, if SBC doesn't give consent to assign the agreement to another entity, then WilTel would not have reason to change its OCN/ACNA in conjunction with the prohibited assignment.

Q. MS. QUATE ARGUES THAT WILTEL SHOULD PAY ANY UNDISPUTED CHARGES OWED UNDER THE AGREEMENT PRIOR TO BEING ABLE TO ASSIGN THE AGREEMENT TO ANOTHER PARTY. WHAT IS YOUR RESPONSE? [GT&C Issue #8]

A. WilTel actually does not have a problem with bringing itself current on payment for any charges that are outstanding as of the date it wants to assign the *agreement* to another entity. But Ms. Quate's testimony is off-point in that this SBC requirement is in section 4.8.3.1 which is dealing with OCN/ACNA changes by WilTel. For the same reasons I set forth above, WilTel should not have to accelerate its payment

obligations simply because it is changing its OCN/ACNA, which is what SBC's proposed language would require. If SBC's intent is what Ms. Quate testifies, then WilTel would be willing to agree to bring its undisputed payment obligations current prior to being permitted to assign the interconnection agreement to a non-affiliated third party as set forth in section 4.8.1.1 of the agreement.

Q. WHAT IS YOUR RESPONSE TO MS. QUATE'S TESTIMONY THAT SBC SHOULD BE ABLE TO REQUIRE THAT WILTEL PLACE DISPUTED BILLING AMOUNTS INTO ESCROW? [GT&C Issues #9 and #11]

A. According to Ms. Quate, SBC's justification for an escrow requirement as a condition of disputing any charges under the Agreement is to "deter unscrupulous CLECs" from filing disputes as a means of avoiding paying their bills, or to "protect SBC against the increased risk of CLEC non-payment." Neither of these are reasonable justifications insofar as they apply to WilTel. SBC may be correct that there are companies that use the billing dispute process as a means of avoiding paying their bills, but such companies are in the vast minority. SBC should not be permitted to paint all CLECs with such a broad brush, particularly when the majority do not operate under such methods. Moreover, SBC's financial interests are protected by means of their credit assurance processes. To the extent that SBC considers a particular CLEC customer to be "an unacceptably high credit risk" as Ms. Quate describes, then such customers should be subject to more stringent credit requirements, such as larger deposits. To allow SBC to require that all CLECs escrow amounts that are the subject of legitimate disputes would be effectively giving SBC control over its competitors' ability to efficiently operate their businesses and to

dispute wrongful charges in good faith. WilTel only makes bona fide billing disputes based upon a reasonable belief that an SBC billing is incorrect, and WilTel should not be penalized for what SBC interprets as bad motives on the part of a few companies.

Ms. Quate testifies that SBC's escrow requirements are subject to exceptions and only applicable to CLECs that meet specified criteria. SBC has never made such an offer to WilTel during negotiations, and this is the first that WilTel is aware of SBC's offer. My understanding of SBC's position is that a CLEC should not be required to place disputed billing amounts into an escrow account if the CLEC: (i) has a good payment record, and (ii) has not filed 4 or more meritless claims within the preceding 12 month period. Additionally, SBC graciously offers to waive the escrow requirement regardless of the above if SBC makes a "material billing error" in its judgment. Without waiving its right to argue that any escrow requirement for billing disputes is unreasonable and improper, WilTel acknowledges for the record that it is currently attempting to negotiate this issue further with SBC. The issue of what constitutes a "good payment record" is the subject of dispute elsewhere in this Agreement because WilTel believes that 12 consecutive months of timely payment without exception is too broad for these purposes. And "meritless claims" must be clearly defined so that SBC cannot claim that because WilTel disputed X amount but only a portion of it was resolved in WilTel's favor, then the dispute would be deemed a "meritless claim". Only truly "meritless" billing disputes should result in penalty to WilTel.

It should also be noted that Ms. Quate's testimony cites to an old arbitration decision in Ohio that ruled in favor of SBC's escrow requirement. But as Ms. Quate

herself quoted from the decision, the commission's ruling was based upon "the currently tenuous financial condition of MCI WorldCom" at that time. Clearly, even the Ohio PUC determined that the escrow requirement was only appropriate for the specific circumstances in that case, and this Commission should not rely upon that example in support of SBC's position.

Finally, regardless of whether this Commission believes that an escrow account may or may not be an appropriate tool in handling funds that are the subject of billing disputes, SBC attempts to precondition the very existence of a billing dispute on whether WilTel has or has not deposited the subject amount into escrow. The existence and nature of a billing dispute should not be determined by whether funds have been deposited into an account, and SBC's attempts to get WilTel to waive any rights that it may have with regard to a billing error unless it makes such a deposit is unreasonable, discriminatory and clearly harmful to WilTel.

Q. PLEASE RESPOND TO MS. QUATE'S TESTIMONY REGARDING CREDIT ASSURANCE AND DEPOSIT REQUIREMENTS. [GT&C Issue #10]

A. Generally, SBC should be entitled to seek assurance of payment, but only when it truly is at risk of not receiving such payment. As Ms. Quate admits in her testimony, the purpose of requiring a deposit "is to protect SBC against losses it incurs when providing services to a CLEC that fails to pay undisputed charges." In other words, deposit requirements should be narrowly tailored to their purpose and not be used, for example, to penalize a CLEC for infrequent late payments. A few aspects of SBC's proposed credit and deposit requirements are unreasonable because they are too broadly drafted and open to SBC's discretionary and self-motivated interpretation.

First, SBC's right to seek assurance should be limited to only the list of given triggers in this Agreement. Second, what constitutes "satisfactory credit" must be more clearly and narrowly defined than done so by SBC in its form agreement. Third, what constitutes "impairment of credit, financial health, or credit worthiness" must be more clearly and narrowly defined than done so by SBC in its form agreement. And finally, what constitutes a good payment history or record must be more reasonable than what has been proposed by SBC.

WilTel's proposed language with regard to the issue of when and under what conditions SBC should be entitled to seek "assurance of payment" from WilTel is more reasonable than SBC's proposed language. First, WilTel proposes that SBC's right to seek assurance be limited to the occurrence of the given events listed in the Agreement and no others. On its face, SBC's proposed section 7.2 can easily be interpreted as leaving the door wide open for SBC to seek a deposit from WilTel for literally any reason whatsoever. To grant SBC's language would make any credit assurance triggers in the Agreement meaningless. It is reasonable for the parties to establish up front under what conditions a deposit or letter of credit will be appropriate so that WilTel can then rely upon that list and not have to worry if SBC will one day seek a deposit simply because it feels like it.

Additionally, WilTel's language in section 7.2.1 is more reasonable because it states that WilTel will have "established satisfactory credit" if it receives no more than 2 valid past due notices during the previous 12 month period. WilTel does not dispute that there are legitimate reasons to require a company to provide a deposit of some kind as an assurance that credit extended to that company will be paid back.

However, it is unreasonable to label a company as a credit risk simply because it pays an invoice a few days late. It is understandable that doing so repeatedly may not be reasonable, which is why WilTel's proposal of limiting it to 2 per 12 month period is a reasonable alternative. But if WilTel pays on time for 10 months but is 2 days late paying the next invoice, then SBC would be able to deem WilTel a credit risk sufficient to require a deposit. This is unreasonable, and there must be a reasonableness to the deposit requirements under interconnection agreements. Otherwise, large ILECs like SBC would have the ability to place unreasonably extreme financial pressure upon its smaller competitors when such financial burdens on the small competitor isn't a reasonable or justifiable cost of doing business.

Additionally, the "impairment of the established credit, financial health or creditworthiness" as SBC proposes it is far too broad and open to SBC's own interpretation. Such a determination should be made based upon clear and accepted standards in the financial industry of measuring a company's financial health. As everyone should now be aware, particularly in the telecommunications industry, not all financial "reports" or unverified new articles (any of which could be used by SBC under SBC's language) about companies are rational or non-biased, and it is not uncommon for a self-interested "analyst" to report on the condition of a company from a viewpoint that may be skewed entirely be an investment opportunity. Such reports should not be relied upon. Rather, WilTel proposes that only a substantial rating downgrade by Moody's or Standard and Poor's, two well-respected and non-biased sources, should be considered in making the determination of "impairment of the established credit, financial health or creditworthiness" of WilTel.

Q. HOW DO YOU RESPOND TO SBC'S TESTIMONY ASSERTING ITS POSITION THAT SBC'S LIABILITY FOR A VIOLATION OF STATUTE SHOULD BE LIMITED TO ONLY THE AMOUNT CHARGED FOR THE AFFECTED SERVICE? [GT&C Issue #12]

A. It is reasonable for parties to limit their liability *under an agreement* for contractual violations. However, the harm to WilTel in the event SBC were to violate obligations imposed upon SBC by state or U.S. statutory law could be extensive, and SBC should not be permitted to let itself off the hook for such violations (such as, for example, the duty not to subject WilTel to unreasonable disadvantage). To do so would in effect nullify the purpose of such statutory law – the deterrence of actions/inaction that Congress and/or states have determined must be deterred. If SBC is permitted to make the consequence of such behavior nominal, then the deterrent effect is gone. Additionally, there are circumstances where SBC's liability for violation of statute may be prescribed by statute, and WilTel should not be forced to give up any such statutory right to seek damages. (For example, 47 U.S.C. § 206 provides that where any common carrier that acts or omits to act in violation of law or Chapter 5 of Title 47 shall be liable to the person injured for the full amount of damages sustained in consequence of such violation, including attorney fees.) SBC's testimony that the parties are already "amply protected" by indemnification language, performance measures and remedies available under the dispute resolution process misses the point. The fact is, none of these address monetary liability for violation of the agreement, and none of these sections do anything to supercede the cap on liability of Section 13.1. Even if the dispute resolution process describes how to handle a

dispute, therefore, SBC's liability would still be overly limited when all is said and done.

III. WILTEL DPL – PHYSICAL COLLOCATION

Q. HAVE YOU REVIEWED THE TESTIMONY OF SBC'S WITNESSES WITH RESPECT TO ISSUES IDENTIFIED IN THE PHYSICAL COLLOCATION APPENDIX DPL?

A. Yes, I have.

Q. PLEASE RESPOND TO SBC'S TESTIMONY THAT WILTEL SHOULD NOT BE ALLOWED TO ORDER COLLOCATION SERVICES PURSUANT TO TARIFF. [Physical Collocation Issue #1]

A. SBC is attempting to bind WilTel, and other CLECs, to an exclusivity arrangement requiring WilTel to order products or services through either the Agreement or a tariff, but not both. Obviously, WilTel would not expect in a single collocation service order to obtain certain rates, terms and conditions from the Agreement and then supplement the same service order with certain other rates, terms and conditions from the tariff so as to get the best of both worlds in a single service order. But if WilTel desires to place one order for collocation service from the Agreement, and another order for collocation service from an available tariff, there is no reason to disallow WilTel that option. Even if this is also SBC's intent, SBC's proposed language does not state this and would clearly allow SBC to deny an attempt by WilTel to place a service order for collocation pursuant to tariff once it signs the interconnection agreement. To allow SBC to restrict WilTel's ability to order collocation services to just the Agreement when a tariff is available that could

potentially contain different, and more extensive or beneficial, terms than the Agreement would allow SBC to discriminate in its provision of collocation to WilTel. SBC's exclusivity provision should be rejected entirely.

Q. PLEASE RESPOND TO SBC'S TESTIMONY IN SUPPORT OF ITS REQUIREMENT THAT CONTRACTORS MAINTAIN THE SAME INSURANCE COVERAGE AMOUNTS AS WILTEL IS REQUIRED TO UNDER THE APPENDIX. [Physical Collocation Issue #6]

A. As I responded to Ms. Quate's testimony regarding GT&C Issue #6 above, WilTel's proposal that it will require its subcontractors to maintain insurance in amounts that it deems reasonable and appropriate under the circumstances is reasonable because the party using the subcontractors is in the position to know the work being performed and, thus, the risk posed by such work. For the same reasons above, subcontractors should not be forced to maintain coverage amounts that are unnecessarily high. Such a requirement would impact WilTel and other CLECs by potentially excluding many, if not most, of WilTel's choice of subcontractors to perform work on its behalf. The result may be that WilTel is forced to use SBC's choice of contractors instead of its own, possibly to the detriment of the quality of WilTel's network and likely at higher cost.

Q. PLEASE RESPOND TO SBC'S POSITION THAT COLLOCATION PAYMENT, BILLING AND DISPUTE LANGUAGE SHOULD BE UNNECESSARILY RESTATED OR ANY DIFFERENT FROM THE GENERAL PROVISIONS OF THE AGREEMENT. [Physical Collocation Issue #7]

A. WilTel has agreed to retain collocation-specific payment billing dates in this Physical Collocation Appendix. However, all other language dealing generally with payment, billing, and billing disputes is, or should be, no different than such obligations as they apply to any other product or service ordered under this interconnection agreement. Restating them here is redundant and unnecessary, and if the parties in the future desire to amend some of these provisions there is the potential for conflict between the two. WilTel doesn't understand SBC's testimony that because "collocation deals with real estate and construction" then there is some reason to maintain redundant and potentially conflicting language in two places in the agreement. SBC provided no testimony in support of this proposition, so WilTel's proposed revisions should be approved.

Q. WHAT IS YOUR RESPONSE TO SBC'S TESTIMONY REGARDING MULTI-FUNCTIONAL EQUIPMENT? [<u>Physical Collocation Issue #9</u>]

A. This issue is a legal issue that WilTel will address in its briefing. However, SBC's testimony that WilTel's proposed language "attempts to by-pass this agreement which clearly defines the types of equipment that can be placed in SBC Missouri's Central Offices for the purpose of collocation" is baseless because SBC's form agreement is drafted contrary to established FCC rules and regulations. SBC's own testimony actually supports WilTel's proposed language because, as clearly established by FCC rulings, multi-functional equipment must be permitted to be collocated in SBC's central offices. The fact that their form agreement prohibits this is evidence that SBC's language should be rejected and WilTel's language, which clearly establishes that such equipment is permitted in accordance with FCC's rules, should be approved.

Q. PLEASE RESPOND TO ROMAN SMITH'S TESTIMONY REGARDING THE ISSUES IN SECTION 10.1.3 OF THE AGREEMENT PERTAINING TO COLLOCATION AND REMOVAL OF EQUIPMENT. [Physical Collocation Issue #11]

A. First, contrary to SBC's testimony, WilTel does not have an issue with the denial or removal of equipment that is not permitted to be there pursuant to FCC rules. However, WilTel's dispute is with *who* makes that determination. SBC's proposed language would give SBC the unilateral discretion to determine if it "believes" that WilTel's equipment is necessary for interconnection or access to UNEs. This is not a requirement under FCC rules, and it further places SBC in the position of controlling WilTel's access to interconnection or UNEs and creates the potential for discrimination and anti-competitive behavior. If SBC has reason to believe that WilTel's equipment does not comply with FCC rules, then SBC has the right to challenge the use of such equipment pursuant to the dispute resolution procedures under the ICA, including negotiating with WilTel over whether it is appropriate or not. Allowing SBC to unilaterally determine that WilTel cannot place certain equipment in collocation would, however, potentially cause WilTel harm because the language prohibits WilTel from collocating the equipment until the dispute is resolved.

Additionally in this section of the Agreement, WilTel's proposed last sentence is necessary to avoid the potential circumstance that SBC would seek to invoke its remedies in Section 11 (including expelling WilTel from the space and forcibly removing its property) even during a bona fide dispute over whether certain

equipment is properly collocated. During a bona fide dispute, SBC should not be permitted to seek such unwarranted and drastic remedies.

Q. WHAT IS YOUR RESPONSE TO SBC'S POSITION THAT IT SHOULD BE ALLOWED TO STOP PROCESSING AND ACCEPTING SERVICE ORDERS AT THE MOMENT A NOTICE IS SENT OUT THAT WILTEL MAY BE IN DEFAULT UNDER THE APPENDIX? [Physical Collocation Issue #12]

A. It is unreasonable for SBC to stop accepting new service orders or, more importantly, stop processing pending service orders until the time period has passed for WilTel to cure any alleged default in performance under the Appendix. To allow SBC to take these remedial actions immediately upon sending out a notice will give SBC the ability to impede WilTel's efforts at getting collocation established so that it may gain access to UNEs or interconnect with SBC's network. If WilTel has in fact defaulted in its performance under the Appendix in some way, WilTel should have the opportunity to cure such default before any action is taken against it. If SBC has the ability to take this remedial action immediately without any response from WilTel or time period for cure, then any mistaken notice of default sent out by SBC in a situation where there has in fact been no default would be harmful to WilTel immediately and on an ongoing basis until the issue was worked out through the dispute resolution procedure. This could prohibit WilTel's access to UNEs and interconnection unnecessarily and for an indeterminate length of time. SBC's testimony that it would be left "with no remedy for breach" if WilTel's service orders were to continue to be processed, or WilTel were allowed to place new orders, is without merit. First, it has not even been established at the time of notice whether in

fact a breach has occurred, so SBC should not be permitted a remedy for something which may not even require one yet. Also, SBC is not without remedy even if WilTel were in breach because WilTel has already agreed to cure any such breach within a certain time period, and failure to do so may result in WilTel's losing its space or services. Any additional remedy sought by SBC would be unreasonable and unnecessary and constitute a penalty.

Q. PLEASE RESPOND TO SBC'S TESTIMONY WHICH ARGUES THAT WILTEL WANTS TO MAINTAIN COLLOCATION RATES FROM A PREVIOUS INTERCONNECTION AGREEMENT FOR EXISTING COLLOCATION SERVICES. [Physical Collocation Issue #14]

A. SBC's testimony on this issue is completely inaccurate and misinterprets the meaning of WilTel's proposed changes to Section 17.4.1. Contrary to Roman Smith's testimony that WilTel wants to "keep collocation rates 'as ordered under a previous interconnection agreement'," WilTel agrees that new rates in this Agreement should apply prospectively for existing collocation services ordered under a previous interconnection agreement which this Agreement will be superceding, and WilTel's proposed language accomplishes this. What WilTel disputes, however, is SBC's proposed language that the pricing in this Agreement should apply automatically to collocation ordered pursuant to tariff without WilTel's consent and without amending its tariff. Provided that WilTel chooses to maintain such collocation arrangements under the tariff pursuant to which it was ordered, then SBC has no basis to transfer such arrangements to this Agreement and change the rates, and it would be unlawful to do so. If, on the other hand, WilTel chooses to transfer such collocation

arrangements from tariff arrangements to this Agreement, then WilTel should be free to do so. SBC can always seek to change its tariff to reflect the rates it seeks to change.

IV. WILTEL DPL – INTERCONNECTION TRUNKING REQUIREMENTS

Q. HAVE YOU REVIEWED THE TESTIMONY OF SBC'S WITNESSES WITH RESPECT TO ISSUES IDENTIFIED IN THE ITR APPENDIX DPL?

A. Yes, I have.

Q. PLEASE RESPOND TO SBC'S TESTIMONY IN SUPPORT OF ITS DESIRE TO DISTINGUISH "LOCAL ONLY TRUNK GROUPS" FROM OTHER TRUNK GROUPS. [ITR Issues #1 and #2; IC Issue #4]

A. Regardless of whether SBC designs different trunk groups to handle different types of traffic (e.g., Section 251/IntraLATA Toll traffic, or just Section 251 traffic), WilTel should be able to combine long distance and local traffic over SBC tandems and trunk groups at WilTel's option. SBC admits that it has trunk groups that can carry both types of traffic, so SBC should be required to maintain such trunk groups. SBC attempts to justify its distinction also by stating that it is trying to prevent "gaming" by CLECs that seek to avoid access charges by improperly routing traffic. Requiring WilTel to establish separate trunk groups when starting to send local traffic, however, will cause WilTel to undergo inefficient network reconfigurations that would not be required for business purposes, thus allowing SBC to restrict competition by competitors who set their networks up differently than SBC. Moreover, SBC does not explain why it cannot accommodate local traffic over trunking other than "local only" trunk groups, only that it *will not* accommodate such traffic.

Q. HOW DO YOU RESPOND TO SBC'S TESTIMONY THAT WILTEL SHOULD BE REQUIRED TO PROVIDE "LOCAL ONLY TRUNK GROUPS" TO EACH SBC LOCAL ONLY TANDEM IN EACH LOCAL EXCHANGE AREA IN WHICH IT OFFERS SERVICE? [ITR ISSUES #1 and #2]

A. WilTel should not be required to provide Local Only Trunk Groups to each SBC Local Only Tandem in each local exchange area. SBC's language would require WilTel to connect to each tandem even if there was no traffic there which would be inefficient and costly for WilTel.

Q. HOW DO YOU RESPOND TO SBC'S POSITION THAT WILTEL SHOULD BE REQUIRED TO PLACE A SWITCH IN EVERY LOCAL CALLING AREA? [ITR ISSUES #1 and #2]

A. WilTel agrees that "switch" may be a proper term in section 3.3 but believes that clarification that the trunk may connect to the switch indirectly through a POP must be made. WilTel's proposed use of the term "POP" is intended to accomplish this.

Q. WHAT IS YOUR RESPONSE TO SBC'S TESTIMONY REGARDING WHAT THE PROPER ROUTING, TREATMENT AND COMPENSATION FOR SWITCHED ACCESS TRAFFIC, INCLUDING WITHOUT LIMITATION ANY PSTN-IP-PSTN TRAFFIC, AND IP-PSTN TRAFFIC SHOULD BE? [ITR Issue #3]

A. WilTel agrees that the FCC must decide the issue of the proper regulatory treatment of IP-enabled traffic. WilTel reserves the right to argue that IP-PSTN traffic should be subject to reciprocal compensation. At the very least, however, it should be

subject to nondiscriminatory rates, terms and conditions such that a rate available to one CLEC is available to other CLECs.

Q. PLEASE RESPOND TO TESTIMONY THAT WILTEL SHOULD BE REQUIRED TO ROUTE IP-ENABLED CALLS OVER SEPARATE FACILITIES. [ITR Issue #3]

A. WilTel should be able to route such traffic over any facility that is reasonable in accordance with WilTel's business practices, provided that WilTel can identify such traffic and that PSTN-PSTN traffic be subject to access charges. SBC should not be permitted to prevent WilTel from routing such traffic in this manner.

V. WILTEL DPL – OUT OF EXCHANGE TRAFFIC

Q. HAVE YOU REVIEWED THE TESTIMONY OF SBC'S WITNESS WITH RESPECT TO THE SINGLE ISSUE IDENTIFIED IN THE OUT OF EXCHANGE TRAFFIC DPL?

A. Yes, I have.

Q. PLEASE RESPOND TO MR. SILVER'S TESTIMONY IN SUPPORT OF SBC'S USE OF THE TERM "LAWFUL" AND SBC'S POSITION THAT REGARDLESS OF CONTRACTUAL TERMS, SBC'S OBLIGATIONS UNDER THE AGREEMENT ARE LIMITED BY ITS INTERPRETATION OF APPLICABLE LAW. [OELEC Issue #1]

A. My response is the same as it is for GT&C Issue #1 and UNE Issue #1.

VI. WILTEL DPL – INTERCARRIER COMPENSATION

Q. PLEASE RESPOND TO SBC'S TESTIMONY REGARDING THE ISSUE OF WHAT TERMS AND CONDITIONS SHOULD GOVERN THE

COMPENSATION OF TRAFFIC THAT IS EXCHANGED WITHOUT CPN. [IC Issue #3]

A. SBC's proposed section 3.3 of the Agreement is based upon the premise that CPN is an accurate identifier of the jurisdictional nature of all types of traffic. However, CPN is not necessarily an accurate identifier of all types of traffic so should not necessarily be relied upon in determining what compensation arrangements should apply under the Agreement.

Q. PLEASE RESPOND TO THE ISSUE OF WHETHER INTERCONNECTION TRUNK GROUPS SHOULD CARRY ONLY SECTION 251(B)(5)/ INTRALATA AND ISP BOUND TRAFFIC. [IC Issue #4]

A. My response is the same as to ITR Issue #1 above.

Q. PLEASE RESPOND TO THE ISSUE OF THE PROPER ROUTING, TREATMENT AND COMPENSATION FOR IP-ENABLED TRAFFIC AND SWITCHED ACCESS TRAFFIC. [IC Issue #5]

A. My response is the same as to ITR Issue #3 above.

VII. WILTEL DPL – UNE APPENDIX

Q. HAVE YOU REVIEWED THE TESTIMONY OF SBC'S WITNESSES WITH RESPECT TO ISSUES IDENTIFIED IN THE UNE APPENDIX DPL?

A. Yes, I have.

Q. PLEASE RESPOND TO MR. SILVER'S TESTIMONY IN SUPPORT OF SBC'S USE OF THE TERM "LAWFUL" AND SBC'S POSITION THAT REGARDLESS OF CONTRACTUAL TERMS, SBC'S OBLIGATIONS

UNDER THE AGREEMENT ARE LIMITED BY ITS INTERPRETATION OF APPLICABLE LAW. [UNE Issue #1]

A. My response for UNE Issue #1 is the same as my response to GT&C Issue #1 above. Also, this is also a legal question and issue which WilTel will address in its brief. The Agreement should not contain the "lawful" qualifier at all as it creates ambiguity and will only lead to confusion and unavoidable dispute as to SBC's obligations under the Agreement. Furthermore, SBC and other ILECs have already demonstrated in the recent past that they are willing to assert their own interpretations of a court or FCC decision and begin self-serving implementation immediately and without first seeking to negotiate with CLECs what the parties' rights and obligations are following such a decision. This Commission should help to curtail such disruptive and anti-competitive behavior by not allowing SBC the unilateral right to determine what it is or is not obligated to do under the Agreement.

Q. PLEASE RESPOND TO MR. SILVER'S TESTIMONY IN SUPPORT OF SBC'S USE OF THE TERM "DECLASSIFICATION" AS SBC DESIRES TO USE IT UNDER THE AGREEMENT. [UNE Issue #2, #24, #25, and #27]

A. My response to GT&C Issue #1 and UNE Issue #1 are both relevant here as they relate to the same issue as SBC's "declassification" issue poses. WilTel is not opposed to an appropriate transition process for handling UNEs which were ordered when available under the Agreement at one time but which are no longer available as UNEs under the Agreement because they were properly removed by negotiation and mutual agreement between the parties pursuant to the change of law provisions. However, such a process for transitioning such elements should not take place until

the parties have agreed that a particular UNE is no longer available as a UNE under FCC rules. SBC's proposed definition of "Declassification" is simply another means by which SBC seeks to impose a unilateral interpretation of applicable law at any given time and would allow SBC to circumvent the change of law procedures agreed to by the parties under the Agreement. Any language that would effectively give SBC the unilateral right of changing its obligations under the terms of the Agreement, or which would place into ambiguity such obligations, should be rejected or modified to remove such ambiguity. Recognizing the reasonableness of a process under the Agreement for handling transition of discontinued elements, WilTel has successfully addressed the ambiguity that SBC's proposed language created. WilTel's definition of "Declassification" clarifies that the Agreement's change of law provisions will apply to identify those UNEs that my no longer be available, and only after such process has been followed to then provide for a reasonable process to discontinue them.

Q. SBC TESTIFIES THAT CERTAIN NETWORK ELEMENTS SHOULD BE LISTED IN THE AGREEMENT AS BEING "DECLASSIFIED". HOW DO YOU RESPOND TO THIS? [UNE Issue #2, #25, and #27]

A. Taking into consideration my response above regarding SBC's definition of "declassification," there should be no need to list out in this Agreement what network elements are *not* available because the Agreement should only contain terms and conditions for those network elements that *are* available as of the Effective Date of the Agreement. If a network element is not available as a UNE, and the parties agree that it is not, then there is no need to even mention it. It should not be left to open

and vague interpretation by each party as to which elements are or are not available as UNEs under this Agreement. If the law changes in the future as to SBC's obligations to provide a specific UNE listed in the Agreement, then the parties will negotiate a change to the agreement to accommodate such change in law.

Q. HOW DO YOU RESPOND TO MR. SILVER'S TESTIMONY THAT WILTEL'S PROPOSED LANGUAGE IN SECTION 2.7.6 OF THE AGREEMENT SHOULD BE REJECTED? [UNE Issue #3]

A. WilTel's proposed language in section 2.7.6 is in actuality the actual language proposed by SBC in its form agreement to WilTel upon initiation of negotiations. WilTel accepted the language as it was written, but SBC then proposed new language. WilTel's proposed language is consistent with FCC Rule 51.309(a) as well because that Rule requires that the ILEC shall not impose limitations on WilTel's use of UNEs except as provided by the FCC's rules. This does not contradict the fact that other FCC rules may restrict WilTel's use of the UNEs (e.g., use by a telecom company, for telecom services, and not exclusively for the provision of CMRS or IXC services), and the parties have made these restrictions clear elsewhere in the Appendix. Furthermore, SBC and MCI have already agreed to this very same language that WilTel seeks in this proceeding. If SBC believes it is reasonable to agree to this language with MCI, then SBC should agree to the same with WilTel. To do otherwise would be discriminatory.

Q. PLEASE RESPOND TO MR. SILVER'S TESTIMONY ARGUING THAT THE AGREEMENT SHOULD REFERENCE THE "NECESSARY" AND "IMPAIR" STANDARDS. [UNE Issue #4]

A. By definition, UNEs are network elements that have been found by the FCC to be subject to unbundling obligations under the "necessary" and "impair" standards. Therefore, if there is a UNE available under this Agreement, then it was determined that it met the FCC's standards for impairment to qualify it as a UNE. If the FCC has not declared an element to be a UNE, it is not listed in this Agreement as a UNE. This Commission should take notice that the FCC has made its decisions of impairment with regard to UNEs within its authority and subject to applicable law, and it is not for SBC to call into question the FCC's determinations through use of this contractual language. SBC's proposed section 2.7.8 is redundant, unnecessary and creates ambiguity that could result in potential disputes over SBC's obligations and WilTel's rights under the Agreement. And to the extent an existing UNE is one day determined to be no longer subject to unbundling obligations, then the change of law provisions will govern its removal from the Agreement. My response to UNE Issue #1 is applicable here as well. SBC's proposed language could be used by SBC as another means of making an end-run around change of law provisions.

Q. PLEASE RESPOND TO MS. QUATE'S TESTIMONY ABOUT DISPUTE RESOLUTION AS IT PERTAINS TO SECTION 2.15.2 OF THE AGREEMENT. [UNE Issue #5]

A. SBC argues that WilTel proposed revisions to this section are unreasonable. WilTel's proposed language is intended to address situations where SBC wrongly denies a request to combine UNEs or to perform functions necessary to combine UNEs. Failure to perform in such situations could cause harm to WilTel and WilTel's customers by virtue of the delay that would be caused in the event WilTel is required

to follow the complete Dispute Resolution process. WilTel does not seek to avoid "Informal Dispute Resolution" procedures and is willing to abide by such procedures; however, section 10.6.1 of the proposed General Terms states that "[u]nless agreed between both Parties, formal Dispute Resolution procedures, including arbitration or other procedures as appropriate, may be invoked not earlier than sixty (60) calendar days after receipt of the letter initiating Dispute Resolution." So, WilTel would be forced to wait a minimum of 60 days before being able to seek assistance from the Commission in determining whether a combining request falls within the qualifications listed in section 2.15.5 of this Appendix. WilTel's modification is reasonable because it is limited to those situations in 2.15.5 since these were specifically referenced by the FCC in its TRO where the FCC made clear that "[ILECs] must prove to state commissions that a request to combine UNEs in a particular manner is not technically feasible or would undermine the ability of other carriers to obtain access to UNEs or to interconnect with the incumbent LEC's network." It is reasonable to expect, therefore, that if SBC claims that a combination, or performing functions to combine, is not technically feasible, for example, then WilTel should not be forced to wait 60 days when it is the Commission who should ultimately make the decision.

Q. HOW DO YOU RESPOND TO SBC'S TESTIMONY REGARDING SBC'S OBLIGATIONS AND WILTEL'S RIGHTS IN SEEKING TO COMBINE OR COMMINGLE UNES? [UNE Issues #6, #7 and #11]

A. Much of this issue involves questions of legal interpretation of FCC rules and court decisions, so these will be addressed in WilTel's briefing. In response to Mr. Silver's

testimony, however, I would say generally that SBC seeks to impose restrictions on WilTel's right to commingle and combine UNEs that are not supported by any FCC rules. (These restrictions are in sections 2.15.3, et seq. and 2.15.5 et seq. for combinations and 2.17.3, et seq. for commingling.) WilTel proposes revisions to SBC's language that bring it into conformity with current law and with the FCC's rulings on this issue. For example, SBC should be required to perform the functions necessary to combine elements because SBC is in the best position to perform such functions by virtue of its control of the elements of its network. Also, SBC proposes language in relation to this issue that is both redundant and ambiguous and, per my response to UNE Issue #1 above, could potentially allow SBC to circumvent the change of law provisions of the ICA as well as cause potential disputes between the parties over what the obligations in this Appendix are with regard to combinations. Finally, SBC seeks to impose certain conditions upon its obligations to combine or commingle UNEs for WilTel that are not justified or legally supported, such as, among others, claiming that it is only required to do so if WilTel cannot make the combination itself. However, as will be explained in WilTel's briefing, these are legally without merit and should be deleted from the Agreement.

Q. PLEASE RESPOND TO SBC'S TESTIMONY REGARDING THE TERMS AND PROCESSES THAT SHOULD APPLY TO REQUESTS FOR CONVERSIONS UNDER SECTION 2.16 OF THE AGREEMENT. [UNE Issue #8]

A. Most of the issues pertaining to conversions are legal issues involving the interpretation of the FCC's rules and the TRO, so the issues pertaining to conversions

in this section of the Agreement will be addressed in WilTel's briefing. To address some issues generally, however, SBC proposes language in 2.16.1 that is vague and ambiguous. Any eligibility criteria that may apply are known today and should be clearly stated in the ICA.

Further, in section 2.16.2, SBC could potentially use its proposed language to decline to perform a conversion in a timely manner. If in fact SBC does not have certain processes in place for some specific type of conversion, then it should not reasonably be such a burden to establish a billing process. It is reasonable for WilTel to expect that a request for a conversion takes place expeditiously and in particular that price changes take place by the next billing cycle. Furthermore, SBC should not be permitted to determine unilaterally what rates, terms and conditions would apply as this would only serves to cause potential conflict between the parties and allow SBC to circumvent its obligations under the ICA and FCC rules. WilTel agrees too that SBC is entitled to charge a reasonable "record change" charge and also agrees that it is reasonable for SBC to expect to recover actual costs that it incurs associated with a particular conversion request provided that such costs are not recovered by some other means (such as through UNE pricing, etc.). SBC should be required to justify any such claimed costs before being permitted to charge them to WilTel. WilTel's proposed language accomplishes this by clearly stating that other than a record change charge, no other charges will apply unless SBC represents to WilTel that a charge is directly attributable to a costs not already recovered elsewhere. SBC's proposed language, on the other hand, opens the door for SBC to assess charges to WilTel that it is not entitled to collect under the Act.

Additionally, SBC's proposed language is too ambiguous as to what "eligibility criteria" apply. Additionally, SBC should not be permitted to convert such a service to a wholesale service without sufficient notice for WilTel to have an opportunity to object or dispute SBC's claim that a particular service fails to meet the eligibility criteria. SBC's language would allow it to email notice and 1 minute later convert the service to wholesale, and if SBC was wrong then WilTel will have been harmed. WilTel proposes 30 days notice which is reasonably sufficient to allow for any objections.

Q. PLEASE RESPOND TO SBC'S TESTIMONY THAT WILTEL CANNOT COMMINGLE SECTION 271 ELEMENTS WITH SECTION 251 ELEMENTS. [UNE Issue #10]

A. This issue will also be addressed in WilTel's legal briefing as it involves questions of law. However, in response to the testimony on this issue, Mr. Silver mistakenly believes that Section 271 elements cannot be commingled or combined with Section 251 elements. On the contrary, there may be a network element available *solely* through Section 271, such as a dedicated interoffice transport circuit that is no longer available at TELRIC rates under Section 251 but which is still required to be unbundled pursuant to Section 271, albeit at different rates. It is still a network element that may be involved in a commingled arrangement. For example, WilTel may wish to commingle a UNE loop with a non-UNE dedicated interoffice transport facility (e.g., one that is no longer unbundled under Section 251). In such case, SBC must allow WilTel to commingle these elements. WilTel's proposed language clarifies this situation and is not meant to obligate SBC to allow WilTel to commingle

a network element available solely through Section 271 (e.g., no longer unbundled under 251) with another *wholesale* service. SBC's language is too restrictive in that it reads that a Section 271 network element cannot be part of a Commingled Arrangement which, for the foregoing reasons, is wholly inaccurate. SBC's language would be inconsistent with the rationale cited by the FCC for instituting commingling rules because it would require WilTel to provision services over separate and distinct facilities if it elected to commingle Section 251 UNEs with Section 271 elements to provide services to a customer. It would also allow SBC to deny WilTel access to Section 251 loops if it were seeking access to corresponding Section 271 elements thereby giving SBC the ability to leverage control over voice-grade loops, which is contrary to the purpose of Section 251 and 252 of the Act.

Q. HOW DO YOU RESPOND TO MR. SILVER'S TESTIMONY IN SUPPORT OF SBC'S LANGUAGE THAT IS THE SUBJECT OF UNE ISSUE #13? [UNE Issue #13]

A. This involves the same issue in my response to UNE Issue #1 and GT&C Issue #1, which I incorporate here, and WilTel will address it in briefing. But in response to Mr. Silver's testimony, SBC's language is redundant and unnecessary and potentially conflicts with what the entire section 2.17 was presumably drafted to accomplish – the parties' rights and obligations with respect to commingling arrangements under the Agreement. To the extent that Mr. Silver asserts that SBC's commingling obligations are somehow limited by law, then the Agreement should clearly and unambiguously address such limited instances rather than place its obligations into ambiguity. More importantly, however, SBC's proposed language is potentially

conflicting with other provisions in the ICA in that it could be used by SBC to circumvent the Agreement's change of law provisions and permit SBC to make a unilateral determination of what its obligations under the ICA are.

Q. PLEASE RESPOND TO MR. SILVER'S TESTIMONY WILTEL SEEKS COMBINATION RIGHTS BEYOND AND IN ADDITION TO THOSE ALLOWED BY LAW. [UNE Issue #14]

A. This is a legal issue involving the direct interpretation of an FCC ruling and will be addressed in WilTel's briefing. In response to Mr. Silver's testimony that WilTel seeks to require SBC to combine elements beyond and in addition to those required by the FCC, Mr. Silver is incorrect. First, WilTel objects to the first phrase proposed by SBC in section 2.17.8 because the obligations set forth in this section should not be subject to anything else. If there are some other grounds to deny access to a UNE or combination set forth elsewhere in the ICA, then this section would be inapplicable in that situation anyway. Adding this phrase creates ambiguity and potential for conflict. Further, WilTel's proposed additional language is supported by the TRO wherein the FCC stated that SBC cannot deny WilTel access to a UNE or UNE combination on the grounds that such UNE or UNE combination shares part of the incumbent LEC's network with access or other non-UNE services.

Q. HOW DO YOU RESPOND TO SBC'S TESTIMONY THAT WILTEL'S PROPOSED REVISIONS TO SECTION 2.18.2 DOES NOT ACCURATELY REFLECT THE VARIOUS EEL COMBINATIONS? [UNE Issue #16]

A. The changes that WilTel proposed to section 2.18.2 of the Agreement simply clarify and distinguish the various EEL combinations of unbundled loops and unbundled

dedicated transport that Mr. Silver acknowledges are available pursuant to the FCC's rules. WilTel's version of this section is a more accurate description of such EEL combinations and should be approved.

Q. PLEASE RESPOND TO MR. SILVER'S TESTIMONY THAT SBC'S PROPOSALS SETTING FORTH THE FCC'S MANDATORY ELIGIBILITY CRITERIA FOR HI-CAPACITY EELS IN SECTION 2.18 OF THE AGREEMENT SHOULD BE APPROVED OVER WILTEL'S PROPOSED PROVISIONS. [UNE Issue #16 and #17]

A. Much of this issue is a question of law for the Commission to determine insofar as the appropriate representation of the FCC's rules are concerned, and WilTel will address these issues in its briefing. In response to the testimony, WilTel doesn't object to the inclusion of the applicable eligibility criteria established by the FCC in its rules for a CLEC's access to high-capacity EELs contrary to Mr. Silver's implications. Section 2.18 of this Agreement is intended by the parties to set out such eligibility criteria as well as related issues as mandated by the FCC in the TRO. However, SBC proposes restrictions and language that are not part of such rules and should, therefore, be excluded from this Agreement. As for the specific mandatory eligibility criteria set out in Rule 51.318(b), the Agreement should either state verbatim what the applicable eligibility criteria are, or it should simply reference and incorporate the rule for the applicable criteria. SBC cannot be permitted to broaden the criteria established by the FCC.

The parties intend that sections 2.18.2.1 and 2.18.2.2 (and its subsections) of the Agreement contain the list of the FCC's mandatory eligibility criteria as set forth

in FCC Rule 51.318(b). Mr. Silver testifies that the language as it was proposed by SBC accurately reflects the eligibility criteria as specified in the FCC's TRO, but it in fact does not. All of the language that WilTel has objected to as proposed by SBC in sections 2.18.2.2.1, 2.18.2.2.2, and 2.18.2.2 (identified in Issue #17 by SBC as section 2.18.2.2.7) is not reflected in the TRO or in the FCC's rules and should be deleted. Each of these attempts to impose additional obligations upon WilTel unnecessarily and without justification and in violation of SBC's obligations to provide WilTel with access to hi-capacity EELs in accordance with the FCC's rules. The language at the end of section 2.18.2.2 (identified in Issue #17 by SBC as section 2.18.2.2.7) in particular is unnecessary as it attempts to invoke an "example" of the criteria established in this section 2.18 and the FCC's rules. The Agreement and the FCC's rules speak for themselves, and introducing an example as SBC wishes to do only serves to confuse the issues and create potential for later dispute. SBC could even attempt to invoke the example as if it were part of the criteria, so the example should be removed.

Additionally, SBC interjects its own additional requirement into section 2.18.4 of the Agreement when it requires that the trunk be located in the same LATA as the End User premises. However, there is no such requirement in the FCC's rules. Further, SBC's proposed sections 2.18.5, 2.18.5.1, and 2.18.6 attempt to impose ordering and certification restrictions in the EEL process which are not mandated by the FCC and, therefore, not appropriate. The FCC declared that it is reasonable for WilTel to be able to certify as to the mandatory eligibility criteria by simply doing so by letter. In any case, it is WilTel's discretion as to how it will certify compliance as

long as such certification complies with the FCC's requirements, and SBC cannot impose its own "form" for WilTel to use for such certification.

Q. PLEASE RESPOND TO SBC'S TESTIMONY REGARDING THE PROVISIONS FOR AUDITING OF THE FCC'S MANDATORY ELIGIBILITY CRITERIA FOR HI-CAPACITY EELS UNDER THE AGREEMENT. [UNE Issue #18]

A. Generally speaking, in SBC's testimony Mr. Silver states that SBC's proposed audit language in section 2.18 of the Agreement does not suggest anything that is "unnecessary or contrary to the rules established by the FCC or the TRO," that SBC's proposed audit language "more closely tracks" the TRO, and that nothing SBC proposes is unduly burdensome. However, SBC's language is either too broad, ambiguous, or creates obligations that are overly burdensome and unnecessary and contrary to FCC rules. As explained below, WilTel's proposed language for the auditing of EEL eligibility criteria, on the other hand, is more reasonable, more appropriately tracks the FCC's rules and the TRO, and is less burdensome. All of WilTel's proposed auditing language should be approved.

For instance, WilTel's proposed language clarifies that SBC's auditing rights in section 2.18 should be restricted only to auditing the eligibility criteria set forth in Rule 51.318(b) (as contractually effectuated in section 2.18.2.2 of this ICA), and further that only these audit rights in particular should apply to the auditing of Rule 51.318(b) eligibility criteria, not "any other audit rights" as SBC proposes. The FCC held in the TRO that ILECs should have a limited right to audit compliance with the service eligibility criteria, so SBC's audit rights should be limited to those set forth in

this section alone. Further, WilTel's language properly narrows references to "Section 2.18.2.2" specifically (as opposed to SBC's broader proposed references to "Section 2.18"), which importantly restricts SBC's auditing rights to only the FCC's mandated eligibility criteria (which are set out in section 2.18.2.2).

Also, WilTel's proposed addition of "materiality" language in its auditing provisions tracks the FCC's intent and ruling in the TRO where it properly determined that the independent auditor's report will conclude whether WilTel has complied in all "material" respects with the eligibility criteria. Likewise, WilTel should only reimburse SBC for the audit costs if the auditor's report concludes that WilTel failed to comply in all "material" respects with the criteria, and SBC is to reimburse WilTel for its costs associated with the audit if the auditor's report concludes that WilTel complied in all "material" respects with the criteria. SBC's proposed language, on the other hand, could give SBC an open door to claim that, based upon some immaterial issue raised by the auditor, WilTel is in non-compliance and must convert an EEL to wholesale service and reimburse SBC for auditing costs.

WilTel additionally proposes language that would require true-up of any difference in payments in the event of non-compliance beginning with the "first date of non-compliance of the non-compliant circuit," as opposed to SBC's proposal to allow true-up to date back to the time the "circuit was established." SBC's proposed language would allow SBC a windfall because it could seek payment at non-UNE rates even for the time period when WilTel was compliant and entitled to UNE rates. UNE rates should apply to any EELs used by WilTel at all times except for any period of time when WilTel fails to meet the Rule 51.318(b) eligibility criteria, and

WilTel's proposed language accomplishes this. Further, WilTel's language appropriately clarifies that SBC's nonpayment remedies are contained in Agreement – *e.g.*, they have no further remedies outside the nonpayment remedies in this agreement, nor should they be entitled to any.

SBC's language also attempts to "reset" the annual basis calculation but offers no basis for doing so. The FCC does not allow SBC the ability to restart the annual clock and in fact to do so would contradict the FCC's conclusion that ILEC's audit rights should be limited.

In recovery of costs, WilTel's proposal tracks the FCC's Rules more closely and requires that SBC should be reimbursed for its "reasonable out-of-pocket" costs of the auditor is reasonable; whereas, SBC's language is overly broad and could encompass any manner of "costs" that SBC incurs from the auditor which would not normally be considered reasonable. Additionally, SBC's language attempts to collect its own internal costs for the audit when the FCC held in the TRO that only the costs of the independent auditor should be reimbursed.

SBC's proposed language attempts to dictate what "appropriate documentation" WilTel *must* maintain. WilTel is agreeable to listing these types of documentation as "possible" types, but it is unreasonable to state that these are types of documentation that WilTel *must* maintain. The FCC specifically declined to adopt any specific documentation requirements for these criteria and expects only that WilTel maintains appropriate documentation to support its certifications, which WilTel will do. It is not for SBC to determine in advance what is appropriate or not.

Q. HOW DO YOU RESPOND TO MR. SILVER'S TESTIMONY REGARDING WHAT RATES, TERMS AND CONDITIONS WILL APPLY TO NEW UNES? [UNE Issue #19]

A. WilTel disagrees with what Mr. Silver's testimony proposes insofar as processes should already be in place for UNEs available under this Agreement. However, to the extent there are no processes yet in place and SBC can justify a reason for the absence of such processes (such as a new UNE becomes available pursuant to FCC rules), then WilTel agrees with SBC that such new UNEs will need to be subject to appropriate rates, terms and conditions. WilTel disagrees with Mr. Silver, however, insofar as SBC wants to unilaterally impose such rates, terms and conditions. WilTel's proposal provides that the parties will negotiate such rates, terms and conditions that will apply to the new UNE. That is the only reasonable solution and what is required under the Act. WilTel's simple additional language should be approved.

Q. PLEASE RESPOND TO SBC'S TESTIMONY THAT WILTEL SHOULD NOT BE ALLOWED TO ORDER UNES PURSUANT TO TARIFF. [UNE Issue #20]

A. SBC is attempting to bind WilTel, and other CLECs, to an exclusivity arrangement requiring WilTel to order products or services through either the Agreement or a tariff, but not both. Obviously, WilTel would not expect in a single UNE service order to obtain certain rates, terms and conditions from the Agreement and then supplement the same service order with certain other rates, terms and conditions from the tariff so as to get the best of both worlds in a single service order. But if WilTel desires to place one order for UNEs from the Agreement, and another order from an

available tariff, there is no reason to disallow WilTel that option. Even if this is also SBC's intent, SBC's proposed language does not state this and would clearly allow SBC to deny an attempt by WilTel to place a service order for UNEs pursuant to tariff once it signs the interconnection agreement. To allow SBC to restrict WilTel's ability to order UNEs to just the Agreement when a tariff is available that could potentially contain different, and more extensive or beneficial, terms than the Agreement would effectively give SBC control over the rates, terms and conditions pursuant to which WilTel accesses unbundled network elements. SBC's exclusivity provision should be rejected entirely.

Q. SHOULD SBC'S OBLIGATION TO PROVIDE LOCAL LOOPS BE LIMITED BY SBC'S PROPOSED LANGUAGE IN SECTION 8.2 OF THE AGREEMENT? [UNE Issue #24]

A. Mr. Silver testifies that deleting SBC's proposed qualifier "where such loops are deployed and available in SBC-13STATE wire centers" from section 8.2 of the Agreement would lead to confusion and potential dispute before this Commission, but doesn't state why. Contrary to Mr. Silver's testimony, however, leaving this language in potentially conflicts with other language in the Local Loop provisions of the Agreement and will likely lead to potential for dispute. It is unnecessary and redundant to restate in this one introductory section what is going to be dealt with in detail in each of the subsections dealing with Local Loops and when and how they are available. When and where Local Loops are available are set out in other sections, so it should not be placed into ambiguity by qualifying the general statement of SBC's obligations in this section.

Q. PLEASE RESPOND TO SBC'S TESTIMONY REGARDING THE ISSUE OF RECLASSIFICATION OF WIRE CENTERS FOR PURPOSES OF ACCESS TO LOCAL LOOPS AND DEDICATED INTEROFFICE TRANSPORT. [UNE Issues #27 and 32]

A. This issue involves primarily issues of law that WilTel will address in its briefing. Additionally, this issue involves the same issue that I've responded to in GT&C Issue #1 and UNE Issues #1 and #2 above, so I hereby incorporate those responses here by reference. Generally speaking, WilTel's proposed process for handling any future wire center "re-classifications" where they exceed the FCC's threshold criteria are fully in line with the TRO Remand Order and FCC rules. SBC's proposed language, on the other hand, exceeds the FCC's rulings and seeks to impose unlawful limitations on WilTel's rights under Section 251. Further, SBC seeks to unilaterally avoid its contractual obligations under this ICA if SBC believes that DS1 or DS3 Loops are no longer available as UNEs in a particular wire center. SBC's language further gives SBC free reign to determine the "legal" status of a network element if it believes that it has changed, and there is no reasonable basis to apply different change of law procedures for the "declassification" of UNEs from any other change in law under the ICA. WilTel is not opposed to establishing a process by which the parties will handle changes in circumstances of specific wire centers that at some point in time take them above the FCC's mandated minimum threshold requirements. However, this is a separate and distinct process from determining whether there has been a change in law, and SBC's language can be used for that purpose. In any event SBC is not permitted by the FCC's TRO Remand Order to unilaterally determine that

a given wire center is no longer subject to unbundling requirements. If WilTel requests a DS1 or DS3 Loop from a wire center that WilTel believes, after making a reasonably diligent inquiry, is available, then SBC *must* process the order. If SBC disagrees that the wire center is available, SBC has the burden of establishing this with this Commission. Further, WilTel's "reasonably diligent inquiry" is not for SBC to determine itself in advance. WilTel will base its decision of the status of a wire center upon available information that it deems reliable, including information provided by SBC. It is for WilTel to determine, in good faith, whether such information accurately reflects the status of a wire center.

WilTel's proposed section 8.4 is reasonable and addresses both parties' rights and obligations in accordance with the FCC's ruling in the TRO Remand Order. The section provides that if a wire center exceeds the applicable FCC mandated threshold criteria, and such status has been established through the process set forth in 8.4.1 and 8.4.2 as mandated by the FCC, no future unbundling will be required. The process provides that WilTel may request access to DS1 or DS3 Loops in any wire center where it believes they are available, based upon reasonably diligent inquiry into their availability. The FCC, clearly placing the burden of establishing that a given wire center is not subject to unbundling obligations, has mandated that SBC must process any such request but can challenge it through the dispute resolution procedures and ultimately this Commission. WilTel's proposed "reclassification" process is clearly more reasonable and in line with the FCC's rulings. Finally, WilTel's proposed language in section 8.4.3 clarifies the application of the process above and provides

for the reasonable effect on existing Loops in a wire center that has been reclassified as one where unbundling is no longer required.

Q. PLEASE RESPOND TO ROMAN SMITH'S TESTIMONY REGARDING ROUTINE NETWORK MODIFICATIONS. [UNE Issues #28 and #29]

A. SBC's testimony on this issue states that its position on routine network modifications specifically tracks the FCC's TRO and FCC Rules. However, WilTel's first proposed modification to 8.5.1 in fact is necessary to make it conform to FCC Rules, specifically that SBC be required to make "all" routine network modifications. Additionally, WilTel's proposed modifications to section 8.5.3 of the Agreement are necessary to clarify that SBC's language does in fact track the FCC's ruling in the TRO and simply provides clarity that if "removing or reconfiguring packetized transmission facility" is something that SBC "regularly undertakes for its own customers", then it will be deemed a routine network modification as defined by Rule 51.319. If it is not, then SBC has nothing to worry about with WilTel's proposed addition. The FCC made clear that the list of activities in the rule is not an exclusive list, and any attempt by SBC to make the list of activities in the Agreement an exclusive list should be rejected. SBC also cannot claim that this particular activity is one which the FCC has determined is not a routine network modification activity. The FCC has only declared that "the construction of a new loop, or the installation of new aerial or buried cable for a requesting telecommunications carrier" are not such activities.

Contrary to Roman Smith's testimony, SBC is incorrect when it testifies that WilTel disregards SBC's right to recover its costs associated with such routine

network modifications. WilTel proposed language regarding this issue specifically permits SBC to impose a charge for any routine network modification to the extent that a particular cost associated with performing such modification is not already recovered through existing UNE rates or any other rate or by any other means. SBC's proposed language, however, goes too far and allows SBC to unilaterally determine whether there should be a charge and what those charges should be, particularly in "ICB" situations. SBC should not be permitted to unilaterally determine rates and charges for routine network modification work. WilTel takes the position that there should be no charge for such work, but if the Commission determines there should be then any such rates and charges must be approved by the Commission after SBC has certified and provided evidence of the cost of doing such work.

Q. PLEASE RESPOND TO SBC'S TESTIMONY THAT WILTEL'S PROPOSED LANGUAGE IN SECTION 13 OF THE AGREEMENT OBLIGATES SBC TO PROVIDE UNBUNDLED DEDICATED INTEROFFICE TRANSPORT IN ALL CASES. [UNE Issue #32]

A. WilTel's proposed language for unbundled Dedicated Interoffice Transport (UDT) does not obligate SBC to provide UDT in all cases. WilTel's proposed language more accurately tracks the FCC's Rules as modified by the TRRO than SBC's proposed language. See also my response to UNE Issue #27 above.

Q. PLEASE RESPOND TO SBC'S TESTIMONY THAT WILTEL'S PROPOSED LANGUAGE IN SECTION 14 OF THE AGREEMENT OBLIGATES SBC TO PROVIDE UNBUNDLED DARK FIBER TRANSPORT BEYOND WHAT IS REQUIRED BY FCC RULES. [UNE Issue #33]

A. WilTel's proposed language for unbundled Dark Fiber Transport (DFT) does not obligate SBC to provide DFT in all cases. WilTel's proposed language more accurately tracks the FCC's Rules as modified by the TRRO than SBC's proposed language.