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Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A")	)	Case No. TO-2005-0336

KEVIN A. THOMPSON, Presiding,
DEPUTY CHIEF REGULATORY LAW JUDGE.

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STEVE GAW,
ROBERT M. CLAYTON,
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P R O C E E D I N G S

JUDGE THOMPSON: We are here for oral argument in Case No. TO-2005-0336, Southwestern Bell, LP, doing business as SBC Missouri's petition for compulsory arbitration of unresolved issues for a successor interconnection agreement to the Missouri 271 agreement known as the M2A.

My name is Kevin Thompson. I've served as the arbitrator in this case. I will be presiding today at the oral argument. Let's go ahead and take oral entries of appearance at this time. Let's start with SBC.

MR. LANE: Good morning, your Honor. Paul Lane, Bob Gryzmala and Leo Bub on behalf of Southwestern Bell Telephone, LP, doing business as SBC Missouri. Our address is One SBC Center, Room 3520, St. Louis, Missouri 63101.

JUDGE THOMPSON: Thank you, Mr. Lane. Now, with respect to the CLECs, AT&T?

MR. ZARLING: Good morning, your Honor. Kevin Zarling and Michelle Bourianoff for AT&T of the Southwest, TCG Kansas City and TCG St. Louis. Our business address is 919 Congress Avenue, Suite 900, Austin, Texas 78701.

JUDGE THOMPSON: Thank you, sir. The CLEC Coalition?

MR. MAGNESS: Your Honor, Bill Magness with the law firm of Casey, Gentz & Magness. Our address is 98 San Jacinto Boulevard, Suite 1400, Austin, Texas 78701. With me is Mr. Carl Lumley, Missouri counsel.

JUDGE THOMPSON: Very well. Charter?

MR. LUMLEY: If I could, your Honor, just so it's clear also, I'm here for the MCI group of companies, and also counsel of record for the Missouri Network Alliance and ICG Telecom Group.

JUDGE THOMPSON: Thank you, Mr. Lumley. Charter Fiberlink?

MR. SAVAGE: Chris Savage for Charter Fiberlink. I'm with the law firm of Cole, Raywid & Braverman in Washington, D.C., 1919 Pennsylvania Avenue NW, 20006.

JUDGE THOMPSON: Thank you, Mr. Savage. MCI? Okay. Mr. Morris is not going to be with us today?

MR. LUMLEY: That's correct. I'm here for MCI today, your Honor.

JUDGE THOMPSON: Very well. Navigator?

MR. JOHNSON: Mark Johnson of the law firm Sonnenschein, Nath & rosenthal, appearing today on behalf of Navigator Telecommunications, LLC. My address is 4520 Main Street, Kansas City, Missouri 64111. Also appearing as local counsel for Charter Fiberlink.

JUDGE THOMPSON: Thank you, Mr. Johnson. Sprint?

MR. LEOPOLD: Your Honor, Brett Leopold appearing on behalf of Sprint Communications Company, LP, located at 6450 Sprint Parkway, Overland Park, Kansas 66251.

JUDGE THOMPSON: Thank you, sir. WilTel?

MR. SHORR: Good morning. My name is David Shorr. I'm with the law firm of Lathrop & Gage. My address is 2345 Grand Avenue, Kansas City, Missouri. I'm representing WilTel Local Networks.

JUDGE THOMPSON: Very well. Thank you. Are there any preliminary matters to bring before the Commission at this time?

MR. LUMLEY: Yes, your Honor.

JUDGE THOMPSON: Mr. Lumley, I think you indicated you had a couple.

MR. LUMLEY: Thank you. First, with respect to the beginning of the arbitrator's order or report where it lists the appearances, just so the record is clear, Mr. Magness and his firm do not represent the MCI companies. So that's an error there.

JUDGE THOMPSON: Very well.

MR. LUMLEY: Secondly, after the introductory section, it discusses the status of ICG and

indicates that we did file pleadings on their behalf with regard to their intent to enter into a memorandum of understanding with SBC to adopt one of the resulting agreements. However, a few pages later in the Order there's a generic reference to a group of 19 companies that I would categorize more on the order of being in default status, and the Order indicates that they would be subject to, I believe it was Exhibit 27 to SBC's petition on a default basis.

And the petition originally referred to ICG in that group of 19. I just wanted to ask for clarification that ICG actually was outside of that group.

JUDGE THOMPSON: Okay. So the correct designation of ICG is that they have entered into a memorandum of understanding with SBC; is that correct?

MR. LUMLEY: I can't confirm that it's totally executed by all parties, but we filed pleadings on their behalf indicating that that was the intent of the parties.

JUDGE THOMPSON: Okay. Mr. Lane?

MR. LANE: I don't have any information on that, your Honor.

JUDGE THOMPSON: Okay. Well, what I will do is I will issue an Order of Correction correcting the designation of ICG and changing their status from

non-responder to one of the companies that has entered into a memorandum of understanding. Correct?

MR. LUMLEY: Thank you.

JUDGE THOMPSON: That will be satisfactory.

Any other preliminary matters?

(No response.)

JUDGE THOMPSON: Okay. I believe the order of proceeding this morning will be that SBC will have the first opportunity. And what I want to know is whether you plan to go by topic areas or whether you simply plan to present whatever you have all at one time.

Mr. Lane, why don't you let me know what it is you prefer?

MR. LANE: I think by topic areas, your Honor, would be our preference. As you remember, we divided up among the lawyers.

JUDGE THOMPSON: I do recall. And do you simply want to go with the topics in the Order they're presented in the arbitration report?

MR. LANE: That will be fine, your Honor.

JUDGE THOMPSON: Very well. Well, in that case, why don't we start.

MR. SAVAGE: Excuse me, your Honor. I have a minor procedure.

JUDGE THOMPSON: Yes, Mr. Savage?

MR. SAVAGE: One of the issues I want to address at some point today relates to the definition of switched access and local traffic.

JUDGE THOMPSON: Yes, sir.

MR. SAVAGE: I perceive that principally as an intercarrier compensation issue, but one of the aspects of that issue arises in the definition section of the general terms and conditions, and I'd like to ask consent to simply deal with that later on in the process when we get to intercarrier compensation.

JUDGE THOMPSON: I understand. As far as I'm concerned, you can present it wherever you want, I guess. As long as - as long as you get it into the record and the Commissioners hear what you have to say, then you've achieved what you're here for.

MR. SAVAGE: That's fine. I was concerned that if I waited, you would then say, oh, you should have brought that up earlier.

JUDGE THOMPSON: I don't think we're going to be doing that today. I appreciate your question.

Mr. Lane, are you ready to go with general terms and conditions, including definitions and transit traffic?

MR. LANE: Yes, your Honor.

JUDGE THOMPSON: Very well.

MR. LANE: Good morning. I'm Paul Lane, and I'm here on behalf of Southwestern Bell Telephone, LP, doing business as SBC Missouri.

First let me note the difficult job which the arbitrator and the Staff undertook in this case. There were seven simultaneous arbitrations conducted on more than 700 issues. Obviously it was an extremely difficult task, and we recognize that.

While in our view the arbitrator got many of the issues right, at least in our view, we've appealed a number of them, which isn't particularly surprising since we were the only party that was arbitrating seven different agreements.

Our request for the Commission to review here falls into two main categories. Far and away the biggest category is, in our view, the arbitrator's decision on legal issues. The UNE issues, for example, are almost entirely legal issues. From our perspective, many of the areas of the arbitrator's decision that we disagree with involve a failure to properly apply the FCC's decisions, particularly the Triennial Review Order, the TRO, and the Triennial Review Remand Order, the TRRO.

These issues, of course, should be reviewed de novo by the Commission. They are legal issues. I would also note there wasn't any cross on legal issues, so

the arbitrator didn't require any special expertise on legal matters that this Commission isn't able to address itself.

The second category is what I would describe primarily as policy issues. These involve, in our view, some substantial changes in many respects from the current agreement of the parties as reflected in the M2A and in the collocation tariff. One example of that is in the collocation area where the arbitrator's decision would call for a new way to handle collocation, which is a radical policy shift that would be, as we'll explain later, difficult to implement.

I recognize that the comments on the arbitrator's decision that we've submitted to the Commission are very long. In part that's because we followed the format that the arbitrator utilized in issuing the final report in this case. Also, there are seven arbitrations, and we felt that it was necessary for us to do this in order to apprise the Commission of exactly which issues needed to be reviewed and which -- for which CLECs and which specific contractual provisions needed to be reviewed.

For purposes of this oral argument, however, we've tried to distill this down into -- if I may approach, your Honor?

JUDGE THOMPSON: You may approach.

I think we need one more, Mr. Lane, if you happen to have one.

MR. LANE: Certainly. What we've attempted to do by what I've handed out is to distill our comments, 250 pages or however many it was, into --

COMMISSIONER CLAYTON: 43.

MR. LANE: 243. Well, we cut a lot at the end. And the purpose of this was to try to outline for the Commission the legal issues and policy issues that need to be resolved in this. I think if you answer those questions, the parties and the arbitrator will be able to take those decisions and apply them and revise the contract language accordingly.

Obviously another alternative for you is to go through the format that the arbitrator utilized in which our comments followed, but we tried to do this in a way that we thought would make it a little bit easier for the Commission to know exactly what the dispute was from our perspective and a brief statement of position on how it should be resolved.

It covers the vast majority of issues, but not each and every one of them. As we did in the hearing that the arbitrator conducted, we broke this down by lawyers per topic, and that's how this is set up. And the

first section of this which I'll address now is in general terms and conditions. Other lawyers with SBC will be addressing some of the other issues. Good morning.

COMMISSIONER GAW: Good morning.

MR. LANE: With regard to general terms and conditions, we've identified six primary issues which we believe the Commission needs to address in reviewing the arbitrator's decision. The first one is whether the arbitrator erred in requiring non-251 provisions to be included in these interconnection agreements. That's probably the biggest issue which is being presented to the Commission in this oral argument.

The addition of non-251 provisions, and in particular the inclusion of Section 271 provisions in the agreement, runs throughout each of the seven different interconnection agreements and involves literally hundreds of provisions of the contract. And the decision here, if you agree with our position, the parties will be able to take that and apply it.

In the GT&C areas, general terms and conditions, this issue arises several times. The sole basis for the arbitrator's decision here is whether SBC Missouri is required to include Section 271 provisions in the agreement in order to remain compliant with the provisions of Section 271. We believe that assertion is

plainly wrong, but in any event, it's not for this Commission to decide. When parties arbitrate in front of the Commission, any state commission under the Act, the only items that are to be arbitrated are Section 251(b) and (c) issues.

Beyond that, the only other provisions that can be arbitrated is where the parties have voluntarily agreed to negotiate and arbitrate non-Section 251(b) and (c) items.

With regard to the inclusion of Section 271 issues, it's very clear that we have not and do not agree to arbitrate these matters. That is absolutely beyond what we've agreed to do, and that is precisely why we're here today. We're here today because this Commission's authority under arbitrations is limited to Section 251(b) and (c) items.

Under the Act -- and I should note also that there's a court decision that is in our favor on this that makes it very clear that that's the limitations. Obviously it's in the Act itself, but a court decision, CoServ vs. Southwestern Bell Telephone, it's 350 F 3rd 482, a Fifth Circuit decision in 2003, makes this clear. But you don't even need that. The Act itself makes that abundantly clear.

Both the Texas PUC and the Kansas

Corporation Commission faced this exact same question in arbitrations conducted similar to that which we've conducted here.

JUDGE THOMPSON: Mr. Lane, I'm going to have to interrupt you for a moment. The Commissioners --

COMMISSIONER GAW: I have a question of the Judge if you don't mind, Mr. Lane, and I want to step out.

(AN OFF-THE-RECORD DISCUSSION WAS HELD.)

JUDGE THOMPSON: Commissioner Gaw raised a question, which was whether it was appropriate that, since I served as the arbitrator and prepared the arbitrator's report that is the subject of the objections and appeals that are being brought to the Commission today, whether it is appropriate for me to preside over this oral argument today.

Frankly, the Commission's rule doesn't give any specific guidance on that point, and this is the first arbitration that has reached this point under the Commission's new rules, so this is not something that has been determined yet. And so I will ask the parties whether any party has an objection to my presiding over the oral argument today, and if so, we will find another judge to preside.

MR. LANE: I certainly don't have any objection to your presiding. I think when the Commission

goes to reach its decision, if it needs assistance from someone in the General Counsel's office, or more appropriately maybe in the Regulatory Law Judges' office, it would probably be better to at least have somebody else involved in that process. But I certainly don't have any objection to your presiding over this.

JUDGE THOMPSON: Very well. Anyone else?

MR. MAGNESS: CLEC Coalition has no objection.

MR. SAVAGE: Charter has no objection.

MS. BOURIANOFF: AT&T has no objection

MR. SHORR: WilTel has no objection.

MR. LUMLEY: No objection, your Honor.

JUDGE THOMPSON: Do you-all agree with the condition Mr. Lane expressed, that when the Commission rolls up its sleeves and gets down to work, that there should be another judge from the adjudication division assisting the Commission with preparing its Order?

MR. SAVAGE: For Charter, I don't think it makes any difference to us at all. From our perspective, those are internal Commission decisions. We'll have a decision from the Commission, which if any party has a problem with, we will have the right to take to federal court, and that's all our rights are.

MR. JOHNSON: On behalf of Navigator, it

would seem to me that it would be certainly appropriate and probably necessary for the Commission to consult with the -- with the RLJ who presided at the hearing and who actually heard all of the testimony. Whether they utilize the services of another RLJ for actual preparation of their decision would be entirely up to the Commissioners, and Navigator would certainly have no objection to that.

JUDGE THOMPSON: Anyone else? Very well.

MR. LUMLEY: Judge, we don't have any objection at all to you being involved in the deliberative process. I don't view it as any different than any other case where the judge may draft the first draft of the Order for the Commission. You're the one that heard the case. We don't have a problem with it.

JUDGE THOMPSON: Very well.

MR. LANE: And to clarify my remarks before we go on, I think our view of it is that the Commission's review here is de novo, and that's a critical factor, and that's where my comments go.

JUDGE THOMPSON: I understand that, and again, that was something that I had not foreseen. And we appreciate you bringing that to the attention of the Commission. Please continue your discussion.

COMMISSIONER GAW: Sorry.

MR. LANE: That's okay. When last we left,

I was speaking about Section 271 and whether those provisions, non-251(b) and (c) items could be included in this interconnection agreement. And I mentioned that both the Texas and the Kansas commissions reached the same conclusions. The Texas decision is in their PUC Docket No. 28821. The arbitration award tracked two issues in an order that was issued on June 30th of this year.

And on page 18 of that Order, the Texas PUC says, quote, the Commission declines to include terms and conditions for provisioning of UNEs under FTA Section 271 in this ICA. The Commission finds that the FTA provides no specific authorization for the Commission to arbitrate Section 271 issues. Section 271 only gives states a consulting role in the 271 application/approval process. ILECs have no implied or expressed obligation to negotiate Section 271 issues in contrast to Section 251 issues. The duty to negotiate only applies to the obligations in Section 251(b)(1) through (5) and (c).

The Kansas Commission reached a similar decision in Docket No. 05BTKT-365-ARB and in Order No. 13, which the Commission issued on May 16th of 2005, and they subsequently issued another Order as well on the same topic. But on this one the Commission in Kansas stated, quote, the Commission determined on page 2, quote, both the CLEC Coalition and AT&T provided comments urging the

Commission to reverse the determination that Section 271 issues should not be included in the agreement. The Commission has reviewed the arguments presented by the parties and finds it agrees with the arbitrator.

The Commission went on to say that 47 USC makes clear that enforcement of Section 271 obligations is reserved to the FCC. The Commission finds that it cannot require inclusion of provisions in Section 252 interconnection agreements which it has no authority to enforce. Those decisions were right. They properly interpret and apply the Act.

Under the Act, the FCC, not the states, controls Section 271, both from an entry and from an enforcement perspective. The only role of the state is to consult on entry into the long distance market. That's in Section 271(d)(2)B. They have -- the states have no role whatsoever in the enforcement of contracts. That's specifically reserved to the states under Section 271(d) -- to the FCC under Section 271(d)(6). In addition, the FCC's Triennial Review Order made clear that it, not the states, have the authority that provide for that in paragraph 664 and 665.

While I make clear, I think, that the Commission doesn't have the authority over 271 items, let me also note that we understand we do have obligations

under 271, and we meet them. And we meet them by entering into commercial agreements with carriers that want those elements that have been declassified, and we file those agreements with the FCC under Section 211 of the Federal Act. And the FCC then has the authority to enforce Section 271 as it deems appropriate.

We've entered into those agreements with approximately 20 carriers covering the state of Missouri and are willing to enter into those commercial agreements with others. But what we're not willing to do and what the Act doesn't permit the Commission to do is to put in a Section 251/252 arbitration, that does not permit them to resolve and decide and include provisions that relate to non-Section 251(b) or (c) items. That's reserved to the commercial agreements that we enter into and file with the FCC.

That is by far the biggest issue I think that the Commission faces and one that I'm happy to answer any questions that the Commission might have on that. But I'll move on. I'll move on to the next GT&C item and cover that.

COMMISSIONER MURRAY: Judge, would it be easier for the Commissioners to ask questions at the points at which they have questions or wait until the end of it?

JUDGE THOMPSON: I think it would be best if the Commissioners asked questions as they occur to them, rather than wait.

COMMISSIONER MURRAY: Then I have a couple of questions regarding this issue, if I may.

JUDGE THOMPSON: Yes, ma'am.

COMMISSIONER MURRAY: Mr. Lane, as you know, and I don't have a cite to the case, but the majority of this Commission decided sometime back that an interconnection agreement filed for approval here had to include the sections that you were not obligated to provide under the Act, those privately negotiated terms and conditions. Do you recall that?

MR. LANE: Yes. I think you're referring to the Sage case.

COMMISSIONER MURRAY: Yes. And in light of that decision, did the arbitrator have a choice in the determin-- the legal determination that he made here regarding inclusion of 251 and 271 obligations?

MR. LANE: I guess the arb-- I don't know what went through the arbitrator's mind when he issued the decision, but the discussion of Sage was not a part of the arbitrator's final report in this case. There's no discussion of it. The only discussion the arbitrator had on this issue was the assertion that Section 271 requires

these type of agreements to be filed and approved, and that was the basis of the decision.

In any event, whatever the Commission decided before, it has to decide the issue correctly here. It is clear, in my view, that the Commission does not have the authority to require the inclusion of Section 271 elements in the interconnection agreement, and it runs throughout this entire seven different interconnection agreements.

COMMISSIONER MURRAY: Well, as I read this, it appeared to me that this was a major factor in the way decisions as to each element or many, many of the elements were made, whether those elements could be included. If the arbitrator's decision had gone the other way in terms of being able to include those non-- non-250 -- I get the sections mixed up, but I think it's Section 251 --

MR. LANE: B and C.

COMMISSIONER MURRAY: B and C obligations, if those had not been included or had been determined that that was not a legal part of the arbitration, how many of the arbitrator's decisions would have gone the other way, do you know, roughly?

MR. LANE: I would say there are literally hundreds of provisions in the various contracts that would not be included if the arbitrator had come to a different

conclusion. I'd also note, Commissioner, that we've had some additional input from the FCC with regard to this issue since the Sage matter was decided. At least that's my memory. I'll say that now, I haven't studied the Sage case. I don't recall the precise date that it was issued.

But I believe that the -- to the extent now that the TRRO has been released as of February of this year, which I believe was after the Sage case, although I'm not 100 percent positive, but I believe so. I'm not positive, but either way, the TRRO makes it very clear now that the Commission, the FCC reserves to itself, as the Act requires, the right to determine what the appropriate pricing level is of Section 271 elements, and has made it clear that those are not to be decided by the states, that those are to meet the just and reasonable standard of Sections 201 and 202 of the Federal Act. And they've made that abundantly clear, and the state commission has no authority in that area.

COMMISSIONER MURRAY: So in the arbitrator's report, Volume 2, Section 3, Part 1, it's on page 6 of that volume, where there is a quotation from the TRO saying that we conclude that Section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under Section 251 but does not require TELRIC pricing, are you saying that although the BOCs are still

required to provide unbundled access to those elements, it is not through interconnection agreements approved by state commissions?

MR. LANE: Yes, that is our position. Those provisions we meet by entering into commercial agreements with carriers and filing those with the FCC under Section 211.

COMMISSIONER MURRAY: And in terms of your rights to appeal, if any issues that you have -- that everybody has voluntarily submitted to arbitration, is there a right to appeal those decisions, as well as those decisions that you have not agreed to arbitrate?

MR. LANE: Yes. The CoServ decision makes that clear as well, that if one voluntarily agrees to it, it still can be subject to an appeal. In that particular case in the CoServ case, the Fifth Circuit found that the parties had not agreed to arbitrate and present for decision to the state commission the issue that CoServ sought to raise on appeal.

COMMISSIONER MURRAY: Thank you. Thank you, Judge.

JUDGE THOMPSON: Thank you, Commissioner. Please proceed, Mr. Lane.

MR. LANE: The second issue under general terms and conditions is whether the arbitrator erred in

requiring SBC Missouri to provide UNEs, collocation, resale and collocation outside of its incumbent area. This is discussed in the arbitrator's final report, Section 1A, pages 4 to 8.

Under section 251(c) of the Federal Act, the obligations there apply only to the -- to incumbent local exchange companies. And the definition of incumbent local exchange companies is contained in 251(h) of the Federal Act. The ILEC is defined here with respect to a geographic area, and the Act makes it clear that the ILEC must have provided service in the specific geographic area as of the date of the enactment of the statute.

Accordingly, the only obligations that can be imposed under Section 251(c) on an ILEC have to be done with respect to the geographic area which the ILEC served as of the date of enactment of the statute. There is no authority under the Act to impose any of the obligations under Section 251(c) outside of that geographic area. And to the extent the arbitrator's final report determines otherwise, it needs to be reversed by the Commission.

To the extent that the arbitrator in the final award cited other provisions of the Act, and in particular Section 251(c)(2)B, 251(c)(6) and 251(c)(4)A, all of those have as a predicate their application to an ILEC. And again, an ILEC is specifically defined in the

Act under section 251(h) with respect to the geographic area that that ILEC served as of the date of enactment of the statute.

Third issue I'll move on to on general terms and conditions is whether the arbitrator erred in allowing terms and conditions from tariffs and interconnection agreements to be mixed. Our objection here is not that CLECs may not order from tariffs and also order from the interconnection agreement. Our objection is the Order appears to, in some respects, permit the ILECs to pick and choose and take some provisions of a particular service from the tariff and some provisions with relation to that same service from the interconnection agreement, and that can't be done.

What we believe is the appropriate resolution is -- what we've proposed is that if the company wants to take it pursuant to tariff, then we just simply amend the interconnection agreement and permit them to order that particular service from the tariff, not from the interconnection agreement. Our billing systems aren't capable of billing for the same service from two different areas, from the tariff and from the interconnection agreements.

The fourth area that we've raised is whether the arbitrator erred in failing to require payment

for disputed bills to be escrowed. This is discussed in the arbitrator's final report at pages 34 to 41. It's not a legal issue. It's a policy issue. And this was one of the areas where we sought a change from what's contained in the M2A. We have experienced -- and the reason that we sought it from a policy matter is that we've experienced substantial losses from CLECs that have disputed and then ultimately failed to pay their bills.

We presented evidence to the arbitrator that the SBC ILECs as a group had incurred over $250 million of losses from items billed to CLECs that subsequently declared bankruptcy or went out of business, and we lost that money. It's critical to us. And we also presented information to the arbitrator that many CLECs, I'm certain not those in this room but many CLECs -- I'm not certain, but many of the CLECs have actually raised what might be called spurious disputes in order to avoid payment for some period of time, and then ultimately failed to pay.

It's a serious financial issue for us that we'd ask the Commission to take a close look at. Both Michigan and Ohio commissions have considered this issue in recent decisions, and both have agreed that escrow provisions for disputed bills are appropriate. We'd ask this Commission to do the same.

I'd note that we presented information to the arbitrator that we don't require escrow payments when the bill is disputed when the CLEC otherwise has a good payment record, meaning that they've paid for 12 months on time and so forth, or if they've disputed in the past if those decisions have been largely resolved in their favor, then they're not required to escrow. They have to have had at least four non-meritorious claims in the last 12 months in order for us to ask for an escrow.

And we also said no escrow should be required when there's a material billing error, and some of the provisions of the agreements have language that talks about if there's a significant increase in the amount of the billing, that may indicate error in the billing, and so we don't require an escrow in those circumstances.

But in others it's very appropriate and we think necessary to have that, and from a policy perspective, I think the Commission needs to recognize that our obligations here are continuing, and we have to provide service to these CLECs even though they're disputing the bills. In a normal commercial arrangement, if a supplier is not paid by the company he's -- that it is supplying to, unless they've otherwise agreed by contract, typically you stop supplying the good or service

until there's a resolution of the dispute.

We don't really have that ability here. We have to go through the dispute resolution process, and we have to continue to provide the service. And I understand there's good policy rationale for us to have that type of obligation, but at the same time, then, there needs to be a counter balance here and require that there be a corpus, a res there at the end of the process if the dispute's resolved in our favor.

The fifth issue that we've raised is whether the arbitrator erred in failing to adopt the same audit language approved in the MCI interconnection agreement with regard to the Charter agreement. This is discussed in the arbitrator's final report, Section 1, pages 71 to 75. In both cases, SBC Missouri submitted the same audit proposal. Again, let me make clear, this is not a legal issue, this is a policy issue for the Commission to resolve.

In both cases we submitted substantially identical language to the arbitrator, both for MCI and for Charter, and it appears that the arbitrator resolved the dispute by saying that our audit language was fine with regard to MCI, but not fine with regard to Charter.

The rationale for the decision is not clearly stated, but I believe from reading the opinion

that it was because the arbitrator believed that Charter was different in that it is primarily a facilities-based carrier and doesn't order UNEs and resale services from us as other CLECs do. And while that may be true with regard to Charter, what's not true is that the agreement that we have doesn't follow that. The agreement with Charter is essentially a full agreement that permits them to order all of these other services, just like any other CLEC. They can order the UNEs, they can order resale if they want.

Now, they haven't, I guess, to date. I haven't checked that, but I'll accept their representation that they haven't. But if it's in the agreement that they can, then they ought to be bound by the same provisions with regard to audit as MCI is.

And I'd also note that because the agreement is a full agreement, that other carriers can opt into that contract under Section 252(i) of the Act. It's either 251(i) or 252(i). I think it's 252(i). And because of that, whether Charter orders under it or not, others can and they should be bound by the same terms and conditions, and so the audit language should be there.

Now, if Charter operates as it does today, the odds that we'll have to audit in some respect are probably pretty slim. But the provision needs to be there

because they may choose to order in the same fashion as other -- as other CLECs, and other CLECs may opt into the same agreement. So we would ask that the Commission take a close look at that and reverse the arbitrator.

The sixth issue that we have raised is a legal question, and it involves whether the arbitrator erred in failing to adopt SBC Missouri's definition of end users. The principal issue that's involved in this is what the CLECs can do with unbundled network elements that they buy from us. We believe, and have explained in our brief, that the Act requires that the CLEC utilize the unbundled network elements or resold services to provide telecommunications services. And the definition of telecommunications services under the Act is that that has to be provided to the public for a fee.

In the main, the CLECs do this and have done that, but what this language is designed to do is to make it clear that the CLECs can't take unbundled network elements or resold services and provide them to other CLECs, other wholesale providers, because in that case they're not providing service directly to the public for a fee. It's not a telecommunications service at that point. And so this is beyond what the Act requires, and the arbitrator's decision needs to be reversed.

We've explained in our brief that the Texas

Commission has looked at this very much in depth, conducted an arbitration with a company, and then considered the issue again in the replacement to the T2A, which is currently before them, and in both of those cases the Texas PUC found that the definition of end user as described by SBC Texas in that case was appropriate, and we think this Commission should take that into consideration and reach the same result.

We've also provided some cites to the FCC rules at 47 CFR Section 69.2, where end user is defined to exclude other carriers, and this Commission should follow that principle as well.

We've also cited to the FCC's First Report and Order in Docket 96-98 at paragraph 995, and in the FCC's Order on Reconsideration, Docket 96-394 at paragraph 13. These were all discussed also in our witness Roman Smith's testimony, in his rebuttal at pages 27 to 29. So we think that needs to be clarified by the Commission and our definition of end user adopted.

COMMISSIONER MURRAY: May I ask a question?

JUDGE THOMPSON: You may, Commissioner.

COMMISSIONER MURRAY: Mr. Lane, would you just briefly state -- and you may have already stated it -- the practical effect of not adopting SBC's end user language?

MR. LANE: The practical effect is a concern that CLECs can utilize unbundled network elements and resold services to provide wholesale services to another carrier, and not use them to provide services directly to the public for a fee, not providing them for telecommunications services as designed and required by the Federal Act.

COMMISSIONER MURRAY: Okay. Thank you.

COMMISSIONER CLAYTON: Mr. Lane, aside from the legality of the FCC definition angle of this discussion, you are arguing that -- that CLECs should not be able to then turn and sell those services to another CLEC, correct?

MR. LANE: On a wholesale basis.

COMMISSIONER CLAYTON: Are they able to do that right now?

MR. LANE: I don't believe so, but I'm not aware personally of exactly what each and every CLEC is doing. But we don't think that's permitted under the Act.

COMMISSIONER CLAYTON: You don't think it's permitted at all?

MR. LANE: No, we do not think it's permitted. I can't tell you whether you or not they're doing it, because we don't know, obviously, each and every thing that each and every CLEC does, but I don't believe

that they're permitted to.

COMMISSIONER CLAYTON: As a practical matter, why would or does SBC have a problem with that type of business arrangement where a CLEC acts as a wholesaler to another CLEC?

MR. LANE: As a practical matter, it devalues services that we provide to other CLECs or to interexchange carriers. And I don't mean to say that this is limited just to CLECs. It also involves interexchange carriers who under all of the rules are required to buy their services under our access tariffs either on file with this Commission or with the FCC.

And to the extent CLECs try to take our unbundled network elements and sell those to interexchange carriers, then that takes away from those interexchange carriers ordering from our tariffs as they're supposed to do.

And from a policy matter, it also devalues the business of those that are in competition with us on selling access services to interexchange carriers. Those companies that do that are called CAPs, competitive access providers, and they utilize their own facilities to provide those services.

And we believe that it's inappropriate, unlawful and, from a policy perspective, not wise to let

CLECs utilize unbundled network elements for a purpose not intended by the Act to sell to interexchange carriers, who then avoid payment of access charges and also then don't buy services either from us under our access tariffs or from competitive access providers who are competing with us.

I don't know if I confused it, but --

COMMISSIONER CLAYTON: I never heard of a carrier trying to avoid paying access charges.

MR. LANE: It's just a bad thing to do.

COMMISSIONER CLAYTON: I've never heard of it here in the past two years.

JUDGE THOMPSON: Other questions from the Bench, Commissioner Murray?

COMMISSIONER MURRAY: Do you have a specific cite that does not -- that prohibits carriers from wholesaling UNEs purchased from an ILEC under this arrangement?

MR. LANE: I know we've cited it in our brief. I've got some notes here that our brief on -- that we filed, our comments, it's covered on pages 27 and 28. In the brief that we filed with the arbitrator, it's covered on pages 40 to 42. It's also contained in Mr. Roman Smith's testimony in his rebuttal at pages 27 to 29.

But the definition of telecommunications service is -- I do have a note on that. It's Section 153, subsection 46 of the Federal Act, that requires it to be made available to the public generally for a fee. The FCC's definition of end user in one context is contained in 46 CFR 69.2. And I think -- I would say then also, you know, if you would look at the Texas decisions that we cited in our brief that are also contained in Mr. Smith's testimony, those also conduct a pretty fair analysis of the issue from our perspective.

COMMISSIONER MURRAY: Thank you. And one last question here. Are there any CAPs in this proceeding?

MR. LANE: Not as such. I don't know whether any of the CLECs here have an affiliate that operates as a CAP. I don't know that.

COMMISSIONER MURRAY: Thank you.

JUDGE THOMPSON: Further questions from the Bench?

(No response.)

JUDGE THOMPSON: Hearing none. Thank you, Mr. Lane.

MR. LANE: Thank you, your Honor.

JUDGE THOMPSON: Mr. Magness?

MR. LANE: I'm sorry. We had -- Mr. Bub

handled the transiting traffic issue.

JUDGE THOMPSON: Very well.

MR. LANE: Is that better handled later?

JUDGE THOMPSON: We should probably handle it in order.

MR. LANE: It's the one thing, it's mentioned in GT&C's but it has obligation elsewhere.

JUDGE THOMPSON: Why don't we have Mr. Bub, then, step up and take up transit, and then we'll turn to Mr. Magness.

MR. BUB: Thank you, your Honor. We'll do this rather briefly. This is one of those issues that falls in the category of legal. And here what the arbitrator ruled was that the question of whether transiting is a 251 obligation, the arbitrator ruled that it has already been decided by the Commission in the Chariton Valley order. And they found that -- in that case the Commission found that transit is a service that falls within the definition of interconnection.

And they reference specifically the interconnection obligation that incumbent LECs or that all LECs have been under 251(a)(1), and that's the requirement that all telecommunications carriers have to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. And that's the

obligation that all telecommunications carriers have.

And with the error that the arbitrator made here, and similarly the Commission made in the Chariton Valley case, is that they're treating that 251(a)(1) of that obligation that all telecommunications carriers have to directly or indirectly interconnect as if it were a 251(b) or (c) obligation that are imposed on incumbent LECs, things that must be negotiated and arbitrated under Section 252 of the Act.

And from a legal perspective, strictly looking at the statute, if that had been Congress' intent to make that obligation to interconnect directly or indirectly a 251(b) or (c) obligation that had to be negotiated, they would have put it under 251(b) or (c). They didn't. It was a 251(a) obligation.

You can also see Congress' intent to limit the type of interconnection they wish to subject to 252 arbitrations and negotiation by looking at 251(c)(2), and that's the obligation that imposes the duty to provide for facilities and equipment of any requesting telecom carrier interconnection with the incumbent local exchange carrier's network.

Looking at that provision, it's clear that the duty of an ILEC is limited to providing requesting carriers interconnection with its own network, not

providing interconnection with other carriers' networks, which transiting does.

Briefly, the FCC has never ruled that transiting is a requirement on any of the -- on SBC or any other ILEC. In fact, when the FCC's Common Carrier Bureau sat in for the Verizon Commission in an arbitration between Verizon, I believe it was AT&T and WorldCom and maybe Cox, and that transiting issue specifically came up, and the FCC's Common Carrier Bureau indicated there was nothing in the Act that transforms that -- that right to indirectly interconnect into a duty on the part of an ILEC to provide transit service. And they didn't require Verizon in that arbitration to provide the transit service.

And then they also looked at the 251(a) obligation, and they said, you know, we're not going to determine whether there's a specific duty under that section to provide transit, but even if there is, they certainly wouldn't have to do it under TELRIC. So in this particular situation, and in the Chariton Valley decision, we believe a legal error has been made in requiring transiting to be handled as a 251(b) or (c) service and required under the interconnection agreement.

COMMISSIONER MURRAY: May I ask a question?

JUDGE THOMPSON: You may, Commissioner.

COMMISSIONER MURRAY: Mr. Bub, is the Chariton decision on appeal?

MR. BUB: I believe it is, your Honor. I think we've asked for reconsideration. So at that point, I think it's back to the Commission, and then from there it will go to Cole County Circuit Court. I think the procedural status is, I believe we've asked for a reconsideration of the Commission's Order.

COMMISSIONER MURRAY: And that has not been ruled on yet?

MR. BUB: I don't believe it has.

COMMISSIONER MURRAY: Okay. Thank you.

MR. BUB: Thank you, your Honor.

COMMISSIONER CLAYTON: Just to clarify the conversation you had, will that decision be appealed to the circuit court or to the federal court, federal district court?

MR. LANE: It is federal district court.

COMMISSIONER CLAYTON: It is federal. Okay. Thank you.

MR. BUB: Thank you, your Honor.

JUDGE THOMPSON: Thank you, Mr. Bub. I believe we are now ready for Mr. Magness.

MR. MAGNESS: Thank you, your Honor, Commissioners. My name is Bill Magness, and I represent

the CLEC Coalition. Just for the Commissioners' information, the members of that coalition in this case are Big River Telecom Company, Birch Telecom of Missouri, ionex Communications, NuVox Communications of Missouri, Socket Telecom, XO Communications Services and Expedious Management Company, all companies -- some located here in Missouri and all doing business here.

Commissioners, I think I'd like to take the issues in reverse order, start with the transit issue maybe while it's still fresh on your mind. I will note just as a matter of general introduction, we also filed comments on the arbitration report. There are some issues, and I will raise them as they occur, where we had issues.

Our batting average was not great in this report. We counted up and figured we won 43 percent of the issues we brought up here, but nevertheless commend the Judge and all the Staff for an extraordinary amount of work in a very short amount of time. This is a very well put together arbitrator's report. So we appreciate that effort, no matter what the result.

On transit, let me start by saying that the CLEC Coalition does agree with the arbitrator's ruling on transit, as do the state commissions of Texas and Kansas, as does the arbitrator in the Oklahoma arbitration. That

is in all four of the five states where the 271 agreements have expired and been re-arbitrated. The issue of transit being in the interconnection agreement has been adopted about everywhere it's been tried. So we don't think it is inconsistent with anything that's gone before.

On this question of whether the FCC has ever ruled that transit must be included in interconnection agreements, they have not, nor have they ruled that they don't. This is an argument that the ILECs came up with within the last couple of years probably. In the first round of interconnection agreements, and in the 271 agreements, transit was not a big old fight. Transiting provisions were included, they were incorporated, there were TELRIC rates established for transit and it was not a big deal.

Apparently, and you can see this in the further notice of proposed rulemaking that the FCC issued in March of this year, the ILECs have now taken the position nationwide as an industry that, as Mr. Bub says, indirect interconnection should not have to be in interconnection agreements. And like many of the themes you'll hear through the course of the day, the ILECs want fewer and fewer things subject to state commission jurisdiction, fewer and fewer things subject to negotiation and arbitration process in Section 251 and

252. This is just one of those things.

I will tell you what the FCC said in March of this year concerning transit. They threw this issue out for comment in their further notice of proposed rulemaking on intercarrier compensation and, of course, they didn't decide it since they have to get comments, since someone's taken a legal position, they need to get comments from all the parties on this, and the parties have filed comments in Washington on it.

What the FCC said, though, in its initial thinking in that rulemaking is, and I'll quote, the record -- and this is from that March 2005 Further Notice of Proposed Rulemaking at paragraph 125. The FCC said, the record suggests that the availability of transit service is increasingly critical to establishing a direct interconnection, a form of interconnection explicitly recognized and supported by the Federal Act. It is evident that competitive LECs, CMRS carriers, that is wireless carriers and rural LECs, often rely upon transit service from the incumbent LECs to facilitate indirect interconnection with each other. Without the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks.

This is obviously a critically important

issue for competition, and one the FCC is going to take pretty seriously when it does indeed -- is required to rule on this explicitly, which it has not been yet. We think the arbitrator dealt with this issue extensively, cited the recent Commission decision in Chariton Valley, which we understand may be subject to some disagreement and appeal, but I think it's clear on this issue.

As to the end user issue, Mr. Lane discussed primarily Texas precedent on that, and there is some background to that that I want to discuss and discuss the FCC rule on it as well.

In Texas, as far back as 1999 in a case called Waller Creek Communications, Docket 17922, the Texas Commission was faced with this question of if a carrier decides to create a business plan where it will wholesale services to other CLECs, can UNEs used by that wholesaling carrier be part of that business plan?

Waller Creek Communications in that case had -- was purchasing dark fiber as a UNE in the transport part of the SBC network. It was installing facilities in collocations. It was offering services to CLECs, offering competitive transport services, as well as other services, and so the issue was joined. Can a company that uses UNEs use them as a component of a wholesale service? The Texas Commission ruled in Docket 17922 that Waller Creek could

do that.

Waller Creek was then purchased by El Paso Corporation, became El Paso networks, and has since now changed its name to Alfius (ph. sp.) Networks. But in any event, the docket that Mr. Lane was referring to was the arbitration of the successor agreement to the Waller Creek agreement. That's Docket 25188 in Texas.

Now, there are -- there's an important distinction that needs to be made. In Docket 25188, the Texas Commission -- and this is consistent with what we're learning from the FCC, which I'll talk about in a minute -- said that for a loop, that a loop, a UNE loop needed to terminate to an end user premises. When I say this is consistent with what the FCC is saying, the FCC has found that CLECs should not be able to purchase UNE loops to serve an IXC and then create the sort of CAP service that Mr. Lane described, should not be able to use those loops to serve CMRS or wireless providers.

And I'll read you the FCC rule on that in a moment, but that's the limitation. The limitation is not -- the limitation is not that CLECs cannot generally use UNEs to pursue a wholesale business plan. And if I could read to you a bit from the Texas Commission's actual Order in Docket 25188, part of the holding the Texas Commission made was, and I'll quote, CLECs, quote, can use

UNEs to carry traffic for other telecommunications providers, regardless of who is serving the retail local end user customer. And that is from Docket 25188 arbitration award -- I'm sorry -- Order Approving Revised Arbitration to award and interconnection agreement, at page 3. That document is dated August 1st, 2004.

And the CLECs -- something I have a quarrel with and have not had a quarrel down in Texas with that -- there is a debate going on right now, and in fact, there were motions for reconsideration and clarification filed by parties in Texas just Monday discussing this issue, because there was some confusion in the Texas Commission's T2A Order as to were they -- they said they were sticking with the decision from Docket 25188 that I just read, but when you look at the contract language, there's an implication that they are going further. It is not clear. It's subject to reconsideration and clarification by the parties.

But the Commission down there certainly has said in their Orders that they plan to stick with the content of the ruling I just read to you, which is that CLECs can continue to do the wholesale business plan. The Commission there, consistent with the FCC has said, as I noted, that for UNE loop it's got to terminate to an end user and not to an IXC or a CMRS provider, which is

consistent with what the FCC ruled in the Triennial Review Remand Order which came out this February.

There the FCC said CLECs are entitled to use UNEs for the provision of any telecommunications service except for exclusive provision of mobile wireless service and long distance service, and that is reflected in the FCC rule at 47 CFR 51.309(b).

Having included that limitation, then, the FCC made clear that that was the only limitation. When you read 51.309(d), the FCC says, a requesting telecommunications carrier that accesses and uses an unbundled network element consistent with paragraph D of this section, the one I just read you, consistent with those limitations, may provide any telecommunications services over the same unbundled network element.

In fact, in the TRO, the Triennial Review Order, the FCC emphasized that when a wholesale transport provider has obtained dark fiber from another carrier, including unbundled dark fiber from the incumbent, then competing carriers that offer wholesale DS1 and DS3 transport using unbundled dark fiber will be counted for purposes of the impairment test. The FCC is assuming that CLECs can pursue that business plan.

And when we talk about a practical effect, I am not aware, none of my clients are providing that sort

of wholesale business plan now in Missouri, but they might. And in addition, CLECs that are having some success with their own facilities at the loop level or at the switch level may find this kind of business plan attractive to serve, whether it be cable companies, other CLECs or other permissible purposes going forward.

So eliminating that kind of potential business plan, which we have seen in Texas is actually working for this company, in El Paso, we think would be a big error.

On issue No. 5, by my count, the audit issue, that's one I'll leave for Mr. Savage from Charter if he wants to discuss it.

Yes, ma'am.

COMMISSIONER MURRAY: I have a question before you move on. The language that is in the arbitrator's Order would now allow CLECs to use UNEs for wholesale provision of services to other CLECs, cable companies or some other business plans you mentioned?

MR. MAGNESS: In order to comply with the FCC's rule, a CLEC cannot use a UNE to terminate -- for example, to terminate a loop to a CMRS carrier or an IXC. Other CLECs or other types of businesses, the CLEC can use the UNEs to wholesale to them. The limitation is on terminating that loop to particular kinds of other

telecommunications carriers.

And the reason we believe that the limitation is set out as it is is that's the evil I guess Mr. Lane talked about trying to prevent, which is that if you can provide that link to an IXC, then the IXC can avoid access, you can deliver that to their POP, but the FCC said no go on that approach.

COMMISSIONER MURRAY: Okay. My question is, the way the arbitrator's decision is here, does that provide that there shall be no wholesale termination to IXCs and CMRS and/or CMRS provider, or does it potentially allow that?

MR. MAGNESS: Our understanding -- and I could get the actual contract language he recommended, but our understanding is that it would comply with the FCC rule and include that sort of limit. I mean, that's certainly not a limit that we would have any objection to. But as we read it, it's compliant with what the FCC said.

COMMISSIONER MURRAY: Thank you.

MR. MAGNESS: On the audit issue, that was not a CLEC Coalition issue, so I won't be addressing it.

On the escrow provision, Mr. Lane notes the record evidence concerning what SBC has lost to CLECs. There was a great deal of record evidence concerning why these escrow provisions are a problem. Namely Mary Jo

Wallace from Birch Telecom testified concerning billing disputes. Her testimony was that of the hundreds of billing disputes that Birch has been involved in, they've prevailed on well over 80 percent of those.

The underlying problem that was clear from the record evidence and that the arbitrator addressed is that there are very serious billing issues on the wholesale side between SBC and CLECs. Bills are getting delivered late and yet payment demands are -- have to move quickly, and then if you don't pay on time, even if you got your bill quite late, then you're thrown into the bad payer bucket. So there was a great deal of record evidence concerning those problems.

As to CLEC bankruptcies and losses to SBC, there was testimony on record from Jim Falby of Expedious, and when Expedious actually went through a Chapter 11 and came out the other side, SBC owed it a great deal of money in the bankruptcy proceeding.

One of the large settlements that occurred was the settlement of payments between Expedious and SBC where SBC was the net payer, so -- and this actually is a problem that we raised in our comments, that we believe that the three-month requirement when deposits are required is too much, considering situations like Expedious' where the balance of payments is actually far

in favor of the CLEC, and yet it's the CLEC that has to put the dent in its cash flow and put a two or three-month deposit up.

So -- and I will also note, since Mr. Lane talked a great deal about other commission decisions, Texas, Kansas and Oklahoma hearing similar evidence have come to not exactly the same conclusion as the arbitrator came here but substantially similar conclusions on the billing payment issues and on the escrow and deposit issues. This is an area where there was quite a bit of factual testimony. Whether people chose to cross those witnesses or not, that testimony is in the record and is fairly clear. So we would ask that the Commission sustain that.

The issue on mixing interconnection agreement and tariff issues is not --

COMMISSIONER CLAYTON: Can I ask a question?

JUDGE THOMPSON: You may.

COMMISSIONER CLAYTON: Before you leave -- I don't mean to cut in front of you. Before you leave the escrow issue, let me ask you a question. You mentioned a person testified regarding billing disputes and that Birch succeeded in 80 percent, winning 80 percent of those billing disputes. I was wondering how those disputes were

resolved and where they were resolved, I guess? What state and what tribunal?

MR. MAGNESS: Those are -- the figure that were cited in Ms. Wallace's testimony is in the five-state region of Southwestern Bell. They were resolved through the dispute resolution process internally between the companies. The CLEC gets a bill and, you know, one has to put this in context. These bills are several inches high or thick. They're very large bills.

COMMISSIONER CLAYTON: Don't try to impress me with size.

MR. MAGNESS: So every month there's an auditing process that immediately begins as soon as you get the bill. The items are highlighted, they're set for dispute. Sometimes they're worked out quickly. Other times the dispute has to escalate levels within the companies.

COMMISSIONER CLAYTON: Is the amount to be escrowed just the amount in dispute or is the problem -- or is 100 percent of a particular bill -- if just a portion is disputed, does the whole amount get paid into escrow under these terms, or is it just the amount -- say you have -- say you have bills running at regular $50,000 a month and then you -- I mean, I don't know. Is it just a fraction of the bill that's paid into escrow or is it

all the bills are paid into escrow until --

MR. MAGNESS: It's all disputed. That's the proposal. That was the SBC proposal was that they all get paid in, all those disputed amounts, and --

JUDGE THOMPSON: Just the disputed amount?

MR. MAGNESS: Right. The disputed amounts are paid into the escrow.

COMMISSIONER CLAYTON: But there's no mechanism to separate what is disputed and what is not disputed. I mean, if you have one party that says, we dispute, then that would make 100 percent of the bill disputed and it would get paid into escrow, correct?

MR. MAGNESS: Right. That's how that proposal works.

COMMISSIONER CLAYTON: Okay. Thank you.

MR. MAGNESS: On the issue about interconnection outside the ILEC area, I think I primarily refer the Commission to the discussion in the arbitrator's report at page 7 of that section, of the GT&C section. Section 251 of the Telecom Act requires interconnection in any technically feasible point.

The arbitrator's ruling distinguishes this in its discussion between resale service interconnection, but the FCC rules on interconnection which underlie the statute make it pretty clear that interconnection be at a

technically feasible point as identified by the carriers and that there is not a strict boundary line limit on that particular obligation of the ILEC. So we would disagree with SBC's arguments there.

Finally, on the 271 issue, this is, as Mr. Lane said, an issue of great import for the CLECs as well, and before going specifically into Mr. Lane's arguments, let me just give you a little bit of context of why it's so important.

When SBC made its claim that the market in Missouri was irreversibly open to competition and, therefore, safe for them to be in long distance, UNEs were being provided pursuant to Section 251. There had not been the delisting of UNEs or declassifying of UNEs that we've seen recently, so they were being provided at TELRIC prices, and the availability of those UNEs was one of the things, of course, SBC relied on to show this Commission and the FCC that it was good to go for long distance service.

All that time, Section 271 had a checklist that required certain things be unbundled, including loops, transport and switching, call-related databases. There's a whole list of them in Section 271. It also required that everything that had to be unbundled under 251 was offered at cost-based rates. So the -- they sort

of worked in tandem for a long time.

The reason this became an issue recently, and it's an issue that's being litigated around the country unfortunately, or fortunately for some, I guess, is that once the FCC began to take away unbundled elements under Section 251, the issue arose, well, okay, they still have to be available under Section 271, so under what terms, rates and conditions?

And in the Triennial Review Order this issue was raised and the FCC directly addressed it, and said, even if we say that SBC, for example, does no longer have to provide a particular high-capacity loop because it is no longer impaired, they still have to provide that loop under the Section 271 checklist. It's still got to be available. What are the rates, terms and conditions?

Well, it doesn't have to be available at TELRIC pricing. It has to be available at a just and reasonable rate. So there is a different rate standard. There was no indication that the quality of loop could be degraded or that anything else would change about the availability of that loop. The FCC primarily set a pricing standard.

Then the issue that has been joined since then is, where do those 271 checklist items that are no longer available under 251, where did those need to be

provided? And who decides? And this is where I think we get into refuting the arguments that Mr. Lane made.

First, in the statute, in Section 271, in Section 251 and 252, our view is diametrically opposed to SBC's. This may not surprise you. If you actually look at the statute and read the words, Section 251(c)(1)(a) and Section 25 -- 271(c)(2)(a)(i) provide that if a BOC is going to be in long distance, it has to be providing everything that's on the competitive checklist. The way that it provides what's on the competitive checklist is either through -- it must enter into one or more binding agreements that have been approved under Section 252, specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities. So Section 252 is specifically referenced in Section 271.

Then if you go further into (c)(2)(a), there are specific interconnection requirements that are required for a BOC to stay in long distance. One is that, A, an agreement is required. A Bell operating company meets the requirements of this paragraph within the state for which the authorization is sought if such company is providing access and interconnection pursuant to one or more agreements described in paragraph 1A. That's what I just read you. Paragraph 1A references Section 252

agreements.

So in the statute itself, you have a pointer over to the 252 process. And if you step back from it, and Mr. Lane talked about 251 being the only way into arbitration, 251 applies to all incumbent local exchange carriers, and it points to the 252 state commission negotiation process and says, the obligations under 251, to the extent you cannot agree to them, they get worked out there, in negotiation or state commission arbitration.

Section 271 applies only to BOCs, including SBC. It points to Section 252 and says BOCs that are in long distance have got to meet the competitive checklist. The local market has to remain open. The way that we determine whether it's open and whether the checklist is met is when you have an agreement under Section 252. So again, it points back into the state commission negotiation and arbitration process.

And that reference back means not that this Commission is being asked to enforce a 271 obligation, but that what has to be included in a 252 agreement for this company that's in long distance is the items in the competitive checklist. So when we come to arbitrate, one of the things we're arbitrating is that competitive checklist. That's what we arbitrated here.

And we think that the analysis in the report is correct, that SBC's either got to offer, according to Section 271, a statement of generally available terms or it's got to put it in its interconnection agreements. They don't have a statement of generally available terms in Missouri. These are their interconnection agreements.

So that's the statutory analysis. And when we look at the CoServ case, what happened in CoServ, which is a Fifth Circuit case, a company came to negotiate with SBC and said, we want something -- they called it compensated access. It wasn't a 271 obligation. It was a completely new approach to interconnecting with this company. And SBC said, we're not going to give it to you, we don't have to, it's not in 251. And I guess they didn't say this, but I can tell you it's not in 271 either.

And then this company goes to the Texas Commission and says, we want to arbitrate and one of the things we want to arbitrate is this compensated access. The Texas Commission said, SBC doesn't have to arbitrate that with you because it's not in 251 and they didn't voluntarily agree to do it. If they voluntarily agree to negotiate some -- you know, to paint your house or wash your car, well, you know, you can voluntarily arbitrate

anything, but you can't make them unless it's in the statute.

That CoServ case, you can do a word search. 271 doesn't appear in it. The Fifth Circuit nor the District Court below was faced with the question of whether 271 network elements were voluntary or not when it comes time to negotiate 252 agreements. So that case just simply isn't applicable to the issue before us.

And as to the state commissions that Mr. Lane referenced, the Texas Commission and the Kansas Commission have ruled, saying they think the issue is one for the FCC to look at. The Illinois Commission, however, has issued an Order in January -- sorry -- June 2nd in its Docket 05-0154. Yeah, June 2nd, 2005, the Commission issued an Order in which they looked at whether interconnection agreements included 271 obligations, existing interconnection agreements, and found that interconnection agreements that referenced those 271 obligations had to include 271 UNEs in them.

That Commission seemed to find it a fairly straightforward matter that those 271 items could be in interconnection agreements and, in fact, were in approved Illinois interconnection agreements that the parties were operating under currently.

In addition, the Oklahoma arbitrator's

report, the ALJ's report follows in large measure what the judge did here. That is -- a decision on that has not been finalized by the Oklahoma Corporation Commission. That commission is expected to decide now July 19th, I think. So we don't have a commission decision there, but this ruling is consistent with that ALJ's report.

In addition, the Tennessee Regulatory Authority last year in a case ITC Delta Comm arbitration with BellSouth issued -- or not issued an Order, had a -- there was a hearing transcript where the Commissioners discussed it and voted on June 21st of 2004 in Case No. 03-119, in which they determined that they had the authority to set an interim rate for 271 elements while the commission considered final rates to set those elements.

And while I'm on that point, that is one issue where we, the CLEC Coalition, asked for reconsideration, is that there is not an interim rate set for 271 elements going forward. So even if they are available, there still needs to be a rate until the Commission determines a final just and reasonable rate, which no one was asking the Commission to do in this case.

We suggested in testimony and in Briefs that the higher rate that the FCC has put in place for the TRRO transition for 271 elements -- or rather that the

higher rates they put in effect that are above TELRIC for delisted UNEs, that that be applied as the interim rate going forward.

So the CLEC Coalition completely understands that the standard is not a TELRIC rate standard. We know the rate's going up for 271 elements unless we put in cost studies that show you that just and reasonable is lower than TELRIC. But our interim proposal is that we use the FCC's transition rates and raise the rates going forward until the Commission decides on a final just and reasonable rate.

As to what the FCC has said about this, they did address it in the Triennial Review Order. In paragraph 663, the FCC talked about the pricing standard. They said, yeah, it's -- it's not TELRIC anymore, it's just and reasonable. What's just and reasonable? Well, for interstate services, just and reasonable is the traditional 201/202 of the Communications Act standard that they've applied for interstate services. But then they also reference intrastate services.

They say pricing for checklist network elements that do not satisfy the unbundling standards set forth in Section 251(d)(2) are reviewed utilizing a basic just, reasonable and nondiscriminatory rate standards of Section 201 and 202 that is fundamental to common carrier

regulation, that has historically been applied under most federal and state statutes, including, paren, for interstate service, the Communications Act. So they're saying a just and reasonable rate standard is one states apply under state statutes, the feds apply under federal statutes. That's basically what we mean.

They did not make a statement of jurisdiction that they were the only ones that can set that rate, just like they've always set TELRIC standards under 251 and then it's been to the states to actually implement them in 252 arbitrations.

But our contention is we're in the same situation here. The FCC has set the rate standard at just and reasonable. It is now in the context of the 252 agreements to determine exactly what the content of that standard is.

As to the contention that SBC is meeting its 271 obligation through commercial agreements, I think this is the fundamental -- where the swords cross. And why is it that the CLEC Coalition cares that this be done in Section 252 agreements instead of commercial agreements? To the extent parties can reach commercial agreements and operate properly under them, that's a good thing for those companies. There's no question. But not having the opportunity to have these checklist elements in

252 agreements presents a volley of problems.

First, it's illegal for the reasons I hope I've outlined. Second, 252 agreements are, as Mr. Lane pointed out, available to other CLECs. That assures nondiscrimination. That's one of the main points of Section 252, is that these agreements have to be filed and approved so that the ILEC can't discriminate against other CLECs by giving one CLEC a good deal and hurting the other ones. So the nondiscrimination point is extremely important.

And there is no limit, just and reasonable limit that can be put on these rates if commissions aren't looking at them. Yes, a company could sign a bad deal with a non-just and reasonable rate and then it would be in effect and then they could complain to the FCC. One could do the same thing with what's supposed to be a TELRIC compliant rate.

We think that Section 271 points directly at the 252 process and says, that's where those need to be decided, and that's where they need to live. We think the arbitrator saw that and addressed the legal issue properly, and both for legal and policy reasons, it's a correct approach.

COMMISSIONER MURRAY: I have a question. If the 271 elements are to be set at one set of just and

reasonable rates, what is the purpose of encouraging carriers to negotiate private agreements?

MR. MAGNESS: I think to the extent that carriers can negotiate private agreements and operate under those, that may be a very good deal for a particular company. I think the concern that's been expressed by --

COMMISSIONER MURRAY: I'm sorry. Let me stop you there, because if a particular company gets a very good deal and has to file with the state commission for approval, making it available for opt-in by any other carrier, how can that -- how can a carrier negotiate a very good deal that -- why would an ILEC negotiate with a carrier, knowing that every other carrier could adopt that?

MR. MAGNESS: I think the limitation that's been inherent in the Communications Act and in the FTA, the Federal Telecom Act is that there's a limit on how good a deal an ILEC can give a CLEC, and the limits are established in the Act. And the big reason why those have to be filed and approved is, No. 1, to be sure they comply with the Act, and No. 2, to make sure they don't discriminate.

So if SBC decides to give AT&T a smoking deal that hurts another CLEC, the judgment Congress made was, we want to preserve nondiscrimination provisions so

that the members of the CLEC Coalition, for example, who aren't AT&T have the availability of those issues -- or excuse me -- of those agreements, and that they are nondiscriminatory.

Now, if there were specific provisions that applied to a particular company and it were brought before a commission and the commission said, that doesn't discriminate against the other carriers, then full speed ahead.

COMMISSIONER MURRAY: But the other carriers could all adopt it, correct?

MR. MAGNESS: Because it's nondiscriminatory. One of the findings -- when the Commission approves a negotiated interconnection agreement, one of the findings that the Commission has to make is that it's nondiscriminatory. So if the parties come together and work out a deal, it may be a very different deal than other CLECs have worked out.

Like, for example, I talked about this company in Texas that does the wholesale business plan. Let's say you've got a specific business plan, you work out something that's very good for you. It may be really good for your specific business plan, but it doesn't discriminate against someone else. They could do it, too, if they wanted to. The Commission can find that that's

nondiscriminatory and the parties can go about their merry way.

If, however, the deal that you get is premised upon discriminating against another carrier, that's contrary to what the Act says is supposed to be going on in 201 and 202. In 271 and 252 it repeats over and over again that nondiscrimination is very important.

So I think the encouragement that has been given by the FCC, by this Commission and by others to go try to negotiate agreements voluntarily is healthy and a lot of companies have done that. But the limit on that is where the -- is where the tension is, and the limit has a lot to do with nondiscrimination.

COMMISSIONER MURRAY: So although the market -- a marketplace would allow negotiations between companies that would be private between the two companies who negotiated it, it's your position that even after the TRRO, the telecommunications industry still has to be subject to all carriers' agreements being open and viewable and basically accessible by every other carrier?

MR. MAGNESS: Well, it depends on what they're about. But, yes, if those agreements are between a BOC and another company and they're going to be the agreements that assure state and federal regulators and other carriers that the local market is irreversibly open

to competition, that is their competitive checklist items, the FCC has said the competitive checklist items still have to be provided, and the question is under what rates, term and conditions?

And if it's one of those competitive checklist items, then yes, our contention is what the federal law says and remains post-TRO and post-271 is, if it's going to be a 271 checklist item, it needs to be in a 252 agreement. And 252 agreements are subject to state commission jurisdiction.

COMMISSIONER MURRAY: Okay. I've had another question, which I think is related to this, and I'll go ahead and ask you this now if you wouldn't mind commenting. In the TRRO, Section (4)(b)29, the Commission said, we revise our standard to foreclose unbundling exclusively to provide services and markets that are already-- that already are sufficiently competitive.

MR. MAGNESS: I'm sorry, Commissioner. Where is this, in the TRO?

COMMISSIONER MURRAY: I don't know if my pagination would be the same as yours. It's on my page 17, but it is --

MR. MAGNESS: In what paragraph?

COMMISSIONER MURRAY: -- Section 4, subsection B, paragraph 29.

MR. MAGNESS: Thank you.

COMMISSIONER MURRAY: And then skipping to the end of that paragraph, it says, we amend our unbundling framework and prohibit requesting carriers from obtaining UNEs exclusively to provide service in end user markets that already are competitive without UNEs. And if a market area is declared competitive in the long distance market area, there's no dispute that that is competitive; is that correct

MR. MAGNESS: The long distance market, uh-huh.

COMMISSIONER MURRAY: But then if you get various local areas that are declared competitive, does this mean that there will no longer be the requirement for the ILEC to provide UNEs at any rate and that there will no longer be the requirement to have the interconnection agreements incorporating those UNEs presented to the state commissions and approved?

MR. MAGNESS: Well, as we understand the legal process, what the Commission's saying in paragraph 29 is we believe -- take switching as an example, because it was a nationwide finding. We found that ILECs don't have to provide -- and setting aside the transition periods and all, that just generally, once the transition is over, the ILEC no longer has to provide UNE

switching under 251.

What that means is they don't have to provide it at TELRIC pricing anymore. So TELRIC priced UNE switching is not an ILEC obligation, no matter which kind of ILEC you are. Okay? But then you go back to the TRO, in paragraph 663 and others that we were talking a minute ago, and the FCC said, even where we find that a UNE is no longer available under 251, which is what they did in paragraph 29 there is say, no more UNEs under 251, then the question is under what rates, terms and conditions does switching have to be offered as a checklist item?

And that's where our debate is. Does it have to be -- what is the just and reasonable rate? Because the FCC still said, it's a regulated rate, it's a just and reasonable rate. It's just not TELRIC.

So then I think the final piece of that is, if the FCC wanted to decide that switching did not have to be provided as an unbundled element under the checklist, the way it would do that is forebear from enforcing Section 271 on that issue. And in fact, there is a Verizon forebearance petition where the FCC did forebear from enforcing certain provisions of 271, but it all had to do with broadband-type issues.

They explicitly did not forebear from

enforcing the checklist as to loops, switching and transport. So there is a way that they can get to that result, but that's not where we live right now.

COMMISSIONER MURRAY: Okay. But my question here is the language in the TRRO that says, we prohibit requesting carriers from obtaining UNEs exclusively to provide service in end user markets that already are competitive without UNEs. I mean, that doesn't say, we no longer require that they be provided at TELRIC rates. It says, we prohibit requesting carriers from obtaining UNEs.

MR. MAGNESS: But what they mean when they say capital U, capital N, capital E, UNEs in this Order is provided under Section 251. And I think SBC in their appeal here protested the use of the term network element in the interconnection agreement and said that what a capital U, capital N, capital E means under the Act is an unbundled network available under Section 251.

So I would contend that reading this paragraph and reading the rest of the context of the Order, that when they say UNEs are not available, they mean Section 251 TELRIC-priced UNEs. They are not saying that checklist items don't have to be provided anymore. The TRRO did not touch that. The TRO did.

COMMISSIONER MURRAY: Okay. Thank you.

MR. MAGNESS: Thank you, ma'am. Any other questions?

JUDGE THOMPSON: No, sir. Were you going to discuss the deposit issue, which I believe you want reversed?

MR. MAGNESS: I think I did. We -- what we want to reverse to is a lower, a two-month deposit. A three-month deposit was approved, and we think the evidence supports the lower amount, and that's described in our comments. We think the evidence is strong enough on these billing and deposit and escrow issues to justify that outcome.

JUDGE THOMPSON: Very well. Thank you, Mr. Magness.

AT&T, why don't we -- yeah, I think we're ready to take a break at this time. We'll take a ten-minute recess and return with AT&T. Thank you.

(A BREAK WAS TAKEN.)

JUDGE THOMPSON: AT&T group?

MS. BOURIANOFF: Yes.

JUDGE THOMPSON: Ms. Bourianoff, please step up to the podium.

MS. BOURIANOFF: Good morning. I'm Michelle Bourianoff, and with me is Kevin Zarling representing AT&T and TCG Kansas City and TCG St. Louis.

To provide some guidance, I will be addressing the general terms and conditions argument that SBC raised, and Mr. Zarling will be addressing the transit issue that they raised.

To begin and as an overview, I'd like to suggest that the word for today's hearing, and possibly tomorrow's hearing if it goes that far, is discretion or deference, but that might be a good word to keep in mind.

Mr. Lane suggested in his overview, his opening arguments that SBC's 240-page comments were reasonable and really not that excessive in light of the numbers presented in the appeal. From AT&T's review of SBC's 240 pages of comments, SBC exercised no discretion at all in the issues that it commented on. SBC commented on every disputed issue it had with AT&T that it lost in whole or in part from our review of those comments. So from our review they exercised no discretion.

And while we haven't done the same kind of tally that Mr. Magness did for the CLEC Coalition, AT&T did indeed try to exercise some discretion in the issues it commented on. AT&T commented on a total of eleven issues. Five of those were UNE issues, two pricing issues, two network issues, one recip comp issue and one comprehensive billing issue.

And just to provide a little bit of

perspective, we commented on five UNE issues and there were thirteen UNE issues that we lost in whole or in part. So we did not try and go through and pursue a scorched approach to comments.

We recognize, like the CLEC Coalition, like Mr. Lane and SBC, the tremendous job that the arbitrator and Staff did in getting this decision made in the time available to it.

I also wanted to respond briefly to Mr. Lane's suggestion that the standard of review that the Commission should exercise is a de novo review. Now, he did characterize two sets of issues. He said there were legal issues and there were policy issues, and he suggested that for legal issues the review should be de novo. And while AT&T does not disagree that for purely legal issues the review would be de novo, I would suggest that there are very few purely legal issues in this proceeding.

The 271 issue might be a purely legal issue, but we strongly disagree that the UNE issues in large part are purely legal issues. Most issues involve a combination of law and fact, a combination of law and policy or a combination of an application of law to contract language that's being propounded by competing parties and an interpretation of which party's contract

language better implements the law or policy that the Commission should apply.

So we would suggest that for anything but a purely legal issue -- and that there are very, very few pure legal issues -- that the standard of review is not de novo, but the standard of review should be to to provide some deference to the discretion that was afforded arbitrator.

Finally I would suggest that the goal of this Commission in this hearing and in coming up with its final Order cannot and should not be to rehear the case in total. There just isn't time, and Mr. Lane, by emphasizing the de novo nature of this Commission's review, effectively suggests that the Commission should rehear in total this case. And that's just simply not possible by the July 6th deadline for this Commission to get an Order out. That's only eight days away.

So with that overview, let me turn to the general terms and conditions issues. Commissioner Murray?

COMMISSIONER MURRAY: Thank you. I just have a question. If the legal issue regarding -- if there are at least -- if there is at least one purely legal issue, that would impact on many of the decisions of the individual decisions throughout the Order, wouldn't that provide a means for the Commission to do what Mr. Lane has

asked us to do?

MS. BOURIANOFF: I think definitely if, for example, the 271 issue, that we would agree is largely legal. That does impact some other issues. We would disagree with Mr. Lane that it impacts hundreds of other issues, but obviously I think the Commission can review that 271 issue, that determination de novo, and that if it does reach a contrary conclusion regarding what the law requires on that 271 issue, it would impact the determinations on any issue related to that 271 issue.

For AT&T, that's two issues. That's one general terms and conditions issue -- I'm sorry -- three issues, one general terms and conditions issue and two UNE issues. And so it's not huge, but I don't think that's a means to go into every UNE issue, regardless of whether it's related to 271, for example, and de novo review of the arbitrator determination if the determination was based on policy or based on facts or based on contract interpretation.

Did I respond to your question?

COMMISSIONER MURRAY: Yes, you did. Thank you.

MS. BOURIANOFF: The first item that Mr. Lane talked about was the 271 issue, and that's No. 1 on Mr. Lane's cheat sheet that he handed out today. And

generally we agree with and support the comments that Mr. Magness made. I did want to add two brief things.

First, I wanted to respond -- Commissioner Murray asked Mr. Magness a question at the end of his response about paragraph 29 of the TRRO and language therein, whether it prohibited CLECs from obtaining UNEs in markets already deemed competitive. And Mr. Magness answered that he thought UNEs needed to be read in that paragraph to refer to Section 251 UNEs.

I would concur with that. I would also point the Commission to paragraph 34 of the TRRO where they talk a little bit more about that language in paragraph 29, and that's under subsection 2, prohibition on unbundling for exclusive service to competitive markets.

And in paragraph 34, the FCC says, in light of the guidance received from the DC Circuit, we abandon our previous interpretation of Section 251(d)(2) and subject all telecommunications services to our unbundling framework, and go on, we now conclude that whether a requesting carrier -- sorry. Let me get to the next page -- seeking to provide a telecommunications service is eligible to access UNEs not subject to such pre-qualification and instead depends solely on our impairment analysis and other factors we consider under

Section 251(d)(2).

And then the last sentence of that paragraph they talk about -- I'm sorry, the next sentence, consistent with USTA-II, we deny access to UNEs in cases where the requesting carrier seeks to provide service exclusively in a market that is sufficiently competitive without the use of unbundling.

And so I think they're expanding there on that phrase you referenced in paragraph 29, and the entire discussion you see that they're talking about it in light of Section 251 and not in terms of network elements that have to be provided under the checklist in Section 271.

One other thing that I would refer the Commission to is that I think SBC's own comments on this issue suggest the need for 271 obligations to be contained in an interconnection agreement. And specifically I'd refer the Commission to page 5 of SBC's comments.

And at page 5 of SBC's comments on this general terms and conditions issue, SBC says, the fact that SBC Missouri objects to the CLECs' proposed language does not mean that SBC Missouri is in any way shirking its Section 271 obligation. So not even SBC is suggesting that they don't have to comply with these 271 checklist items.

They're just saying they don't want to do it in an

interconnection agreement.

Instead they say, SBC Missouri has a binding written commitment by virtue of its Section 271 application and approval to continue to adhere to those obligations.

Now, I lived through the 271 application here at the Missouri Commission for two or two and a half years that it was pending, and if you'll remember, SBC Missouri's binding written commitment in its Section 271 application that this Commission recommended that the FCC approve and that the FCC ultimately did approve, that binding written commitment was contained in the M2A. It was contained in an interconnection agreement. And that M2A expires July 16th, 2005.

So if the M2A expires and those 271 obligations are not contained in the successor interconnection agreements, that binding written commitment in their 271 application won't be contained anywhere.

And so I think even SBC, when they say they recognize that they continue to have this obligation and that their obligation was contained in a binding written commitment, that points to the need for the 271 obligations and checklist items to be contained in interconnection agreements. And so, like Mr. Magness for

the CLEC Coalition, we would suggest that the arbitrator reached the right result and that his decision should be affirmed.

The next item I'd like to touch on is No. 2 on Mr. Lane's list, and this has to do with SBC Missouri being obligated to provide collocation interconnection outside of its incumbent local exchange area. Again, Mr. Lane -- I'm sorry -- Mr. Magness touched on this issue, and we agree and support the comments that he made.

The one thing that I'd like to add is that this issue is related to a network interconnection issue. It's AT&T Network Interconnection Issue 16, and it is premised and tied to SBC's overly narrow and restrictive view of its network.

We would suggest, like Mr. Magness, that the arbitrator reached the right conclusion that SBC has obligations regarding interconnection and collocation if SBC has network facilities outside its serving area. So we're not asking SBC to go do something where it doesn't have network facilities. We're asking SBC, for example, to open NPA/NXX codes for CLECs to enable interconnection when it has tandem switches outside the serving area.

And we believe the arbitrator reached the right conclusion. Nothing in the FCC's rules or the FTA requires a different conclusion.

And I'd also like to mention that we've heard a fair amount from SBC about what the Kansas Commission did on the 271 issue, for example, but Mr. Lane didn't tell you what the Kansas Commission did on this issue. And on this issue, the Kansas Commission agreed with AT&T and disagreed with SBC and approved SBC having an obligation where it has network facilities outside of its local exchange area to enable interconnection and collocation.

The third issue I'd like to touch on is No. 3 on Mr. Lane's cheat sheet, and this has to do with -- SBC characterizes it as mixing and matching terms from the tariff and the ICA. And that is not a fair characterization or summary of the issue between AT&T and SBC. This issue arises in three separate G, Ts and Cs issues on the AT&T DPL. There are AT&T G, Ts and Cs Issues 2, 3 and 7.

And the issue between AT&T and SBC is not about mixing and matching. AT&T's testimony clearly demonstrated that we were not going to mix and match terms from the tariff in the ICA, and we also committed that we would amend our interconnection agreement to incorporate tariff terms and conditions if we want to order out of the tariff.

The dispute between AT&T and SBC is very

narrow. It is whether AT&T has to amend its ICA before it's allowed to order out of a tariff, and we want to be able to go ahead and order out of a tariff while we're in the process of amending the ICA.

It's really just a timing issue. It's so we don't have to go through the extra delay of getting the ICA amended, which can take some time both in terms of negotiations and in terms of getting it filed and approved at the Commission. So it's a much narrower issue than SBC indicated in its comments, and we would suggest that the arbitrator reached the right conclusion.

Tariff terms and conditions are generally available. They're publicly filed, and SBC presented no reason why AT&T shouldn't be able to take out of those tariff terms and conditions, if it's willing, as we stated we are, as we stated we will in our proposed contract language, to go through the process of amending our ICA to incorporate those terms and conditions.

COMMISSIONER MURRAY: One question. You're not proposing going back and forth between the ICA terms and conditions and the tariff?

MS. BOURIANOFF: We're not. We're not.

COMMISSIONER MURRAY: You're proposing that you be able to use the tariff rates as you amend the ICA, and not go back and use the ICA again for that same thing?

MS. BOURIANOFF: Yes. That's right. Our witness Mr. Goetz prefiled testimony on this and said clearly that AT&T had no intention and would not mix and match. We understand SBC's concern about not being able to bill two different rates for the same element, and we will not do that. This really just has narrowed down to a very specific issue about when we're able to order out of the tariff.

COMMISSIONER MURRAY: Thank you.

MS. BOURIANOFF: And then the final thing I wanted to comment on, AT&T doesn't have issues in category No. 4 or 5 on SBC's cheat sheet, and AT&T does not have end user definition issues in the general terms and conditions section of the ICA either with SBC, but it is related to an unbundled network element issue that we have with SBC, and so I just want to touch on that.

Mr. Lane expresses the concern that SBC has with requiring a definition of end user that CLECs not be allowed to use UNEs to sell service to another carrier via wholesaler, and Mr. Magness responded to that and provided perspective on the Texas Commission decision, and I don't want to respond to that because we do not have a specific G, Ts and Cs issue, but I just wanted to point out that this is related to an issue in the UNE attachment, and SBC's language is broad enough that it would just prevent

a CLEC from wholesaling service to another CLEC. SBC's language is broad enough in the related UNE issue to prohibit a CLEC from using UNEs to provide service for itself for administrative purposes, and that's AT&T's concern.

We don't see anything in the Federal Act that precludes such a use. We think it's consistent with the Federal Act. And to Commissioner Murray's point about the specific restrictions in the FCC rules regarding using UNEs for CMRS providers and IXCs, AT&T incorporates that specific restriction in our contract language in the UNE attachment, and it's in Section 2.1.1.2 of Attachment 6. It's agreed language. We agree that we will not use UNEs for those restricted uses, but we do think we should be able to use UNEs to provide service to us as an end user when we're using UNEs for administrative purposes.

And with that, I'll turn it over to Mr. Zarling on the transit issue. Thank you.

JUDGE THOMPSON: Thank you.

MR. ZARLING: Good morning, Commissioners, Judge Thompson, and Staff. I'll just echo the sentiments of some of the previous speakers about I think the remarkable job that the Staff did and the arbitrator did just plowing through all this material and getting an Order out on time. I'll have some more comments on that

later when I talk about the network section of the decision.

And really this transit issue is one that I think more properly belongs in the network, the interconnection part of the case, but SBC has raised it here in the general terms and conditions section, because I think it dovetails with their arguments about the 251 obligation.

And there are all sorts of knock-out arguments in response to Mr. Bub's arguments, but in an effort to move it along, I think what I'll do is echo a lot of the comments that Mr. Magness brought up, the arguments he raised about why transiting is appropriately included in this agreement, and only touch on one small thing, which is I think to explain hopefully, okay, how do you get transiting into this interconnection agreement.

And we've argued this in our brief. What kind of obligation is it under the Federal Telecom Act? And we've argued and, again, just to harken back to what Mr. Magness said of the Wireline Competition Bureau here and the FCC, so we really don't have rules on this. So we're looking at getting rules for it.

I don't think there's any denying that really virtually every state that I'm aware of has found transiting to be an obligation, and they've been in

interconnection agreements since 1996. They certainly have been in the Missouri interconnection agreements since 1996. But how to get there when you look at the Federal Telecom Act in the absence of rules is you look at 251(c)(2), which is the interconnection obligation. Well, Mr. Bub said, you know, that is clearly just to have the carriers exchange traffic between themselves. It's not what that statutory section says. It says it's exchange to local exchange and interexchange traffic. It doesn't say it's limited to the traffic of one party.

If you look at the FCC's rules implementing that section, it says for the mutual exchange of traffic. Well, that in my opinion just very easily means that a CLEC can't interconnect with an ILEC for the purpose of only sending its traffic to the ILEC. It's a two-way exchange of traffic, but there's no limitation on who can send the traffic over that exchange.

And of course, it's been going on for years, and I think it would be very difficult for you to have local competition where carriers all have to be directly interconnected with each other simply to have a bare minimum exchange of traffic with other carriers. And the best example of that is, that's supported by the indirect interconnection obligation that is in the statute and which the Commission noted in its Chariton Valley

decision, and so the indirect interconnection obligation comes out of 251(a).

It's my view, it's AT&T's view, and perhaps the report can be a little clearer on this, but the obligation to provide transiting service is a function of 251(c) interconnection. So when a CLEC wants to interconnect with SBC, it's via 251(c), but in order to effectuate indirect interconnection under 251(a), it still needs that 251(c) interconnection. So we put those arguments in our brief. 251(c) is the source of this transiting obligation. It's simply interconnection with SBC.

And I don't know why the Wireline Competition Bureau in the Virginia decision didn't find very clearly in the First Report and Order that this was an obligation. Because if you look at paragraph 997 in the -- in the First Report and Order, which discusses indirect interconnection, that paragraph very clearly describes a scenario in which a CLEC directly interconnects with an ILEC -- with an ILEC in order to indirectly interconnect with another CLEC or another carrier.

So again, I don't know why the Wireline Competition Bureau didn't find within its own -- the FCC's own orders this description of what supports 251(c) as the

source of transiting obligations, but that's a way to get there legally. It's not really a 251(a) obligation that is imposed on SBC, but you can't have indirect interconnection and you can't satisfy that 251(a) obligation if you don't have transiting that results from a direct interconnection under 251(c).

So with that, hopefully I've addressed legally how you can get there without resorting to 251(a). Thank you.

JUDGE THOMPSON: Thank you very much. Mr. Zarling. Mr. Leopold?

MR. LEOPOLD: I wanted to start with one procedural issue. This is -- I'm Brett Leopold appearing for Sprint. With regards to the list of questions that was circulated by Mr. Lane, I have no objection to using that as an organizational tool for purposes of sequencing the argument, but I thought I heard him say that perhaps what the Commission should do is just answer these questions and that would be the answer to the riddle of who have wins and loses this arbitration and what contract language they get.

It seems clear to me that the rules, in fact, would require you to work from the arbitration report that specifically references the issues as characterized by the parties over the many months and the

contract language they proposed associated with those questions that were proposed, or when this Order comes out on July 6th, the likelihood of having a conformed agreement one week later on July 13th is already going to be a spectacular feat, which I look forward to seeing. But if you were to use a different decisional matrix for your report, as opposed to what we've been working with for these several months, I think that would only complicate matters further.

And to the extent I don't respond to each question or argument that Mr. Lane includes in his questions, that doesn't mean I agree with him, although he's certainly a good enough guy, but I just don't have time to talk about everything he's going to talk about.

MR. LANE: Is there a stipulation to that?

MR. SAVAGE: We stipulate you're a good enough guy.

MR. LEOPOLD: Let me just briefly address the transit issue. The bottom line is what the arbitrator has proposed is not unlawful. It's justified by the Federal Act. Several of your colleague regulatory bodies in other states have already ruled that transiting is a 251 obligation, and in some instances they've also ruled that it's subject to TELRIC pricing. Some of these decisions include a decision of the Indiana Commission,

the North Carolina Commission and the Texas Commission. Those are included in their entirety in an appendix to Sprint's legal brief.

Also there was an arbitrator's report in California that ruled along those lines as well. That was not reduced to a Commission Order because Level 3 and I believe it was with SBC reached basically a negotiated agreement after the arbitrator's report came out and before a final Commission decision was issued to that effect.

Of those rulings, I would commend to you for your reading for several reasons the North Carolina decision in that -- attached to the Sprint Brief. First, it's short. It's about seven pages. Secondly, it addresses numerous of the key interconnection issues you're deciding in a very concise fashion. Third, it contains some sort of folksy southern witticisms, and that makes it moderately entertaining to read in the world of regulatory law. And finally, it rules basically consistently with the Sprint position on these issues. That's NC Docket No. P19, sub 454. Again, that is attached to the Sprint Brief, along with these other decisions that I've referenced.

I think that should be sufficient for me on the general terms and conditions. Throughout this

proceeding I'll reference you to our Briefs, our testimony, our comments. You've got a big record on these issues already, as well as an extensive and well-documented arbitrator's report to guide you.

JUDGE THOMPSON: Thank you, Mr. Leopold. I commend your succinctness. I'm going to get that stop watch back out.

Mr. Savage?

MR. SAVAGE: Good morning, Judge, Commissioners. My name is Chris Savage. I represent Charter Fiberlink.

There's been some back and forthing about sort of policy and law, and I just want to make sure that -- I think it's actually fairly clear on the statute what you -- the confines of your activity. Under 252(e)(3), I believe it is -- 252(e)(1) rather, you're required to impose conditions that implement the requirements of 251(b) and (c). However, under 251(d)(3), you are specifically empowered to impose state-specific conditions that are not inconsistent with what the federal law says.

And 252(e) related to the approval of the agreement again reinforces your ability to do that. So on this question of law versus policy, the federal law plainly gives you the authority to do Missouri-specific

things that in your view it is correct for the operation of local competition in Missouri, as long as it's not inconsistent with the federal law.

Now, the federal law itself lays out certain specific things, but the operative thing in most of the ILEC obligation in 251(c)(3) is the terms and conditions associated with interconnection, resale, UNEs, whatever it happens to be, have to be just, reasonable and nondiscriminatory.

In traditional regulatory terms, that gives you a range of discretion. There's some things that if you don't do them, a federal court will reverse you saying, come on, you have to do that. There's some things if you do them, they'll say that's going too far. But in that range of what's just and what's reasonable, which is a very traditional kind of regulatory activity, that's where you have what I would call discretion and policy and that sort of thing.

So I think it's important to remember that all of this is taking place within the framework of federal law that gives you a certain amount of discretion and a certain amount of direct power to impose state-specific obligations, as long as you're not trampling on what the feds have said.

Now, the specific issue I want to address

under general terms and conditions is this issue of audits. Charter had two objections to SBC's audit language, broadly speaking. First, which I don't take Mr. Lane to even have addressed, is the notion that they can, quote, audit a CLEC using their personnel. And in normal sort of business terms, that's not an audit, that's an invasion.

When you want to audit someone, what you do is you hire someone to do that, and the fact that you have to hire someone to do that is itself a rational check on doing it indiscriminately, doing it without reason, doing it for inappropriate purposes.

And the arbitrator quite properly held that Charter's language that required the use of outside auditor and did not permit use of SBC employees to come into our offices and audit us, that Charter's position on that was correct. Again, I didn't even take Mr. Lane in his discussion to even mention that, so that's something that I think you have to look at.

The second audit issue has to do with once an audit has been conducted and there is some error found in terms of the amount of money that was owed one way or another, what is the threshold percentage in effect at which, if it's a big enough error, the audited company has to help pay for the audit? SBC said 5 percent. We said

10 percent.

The reason we said 10 percent was very specific. It's sort of a mathematical question of what's your denominator and what's your enumerator. Because the agreement that we have with SBC is bill and keep for the exchange of local traffic, there will be an enormous amount of business activity between the companies that does not get reflected in a dollar amount. The total dollar amounts billed back and forth, therefore, will not be a fair reflection of the total business activity between the companies and, therefore, you need a higher percentage of that total dollar amount in order to reflect a material error.

Putting it another way, most of what we do isn't going to be on a cash basis. It's going to be on a barter basis. That's the reason why it makes sense to say you should have a 10 percent threshold and not a 5 percent threshold.

Now, I certainly agree with Mr. Lane, you know, they have never audited us. I hope they never do. But there was testimony on this precise point in the record that so much of what we to won't be billed that the amount of amount isn't the right criterion.

And as to Mr. Lane's point that somehow anybody could audit -- enter into our agreement, well, our

agreement, since you have to take the whole thing, contains the bill and keep provision. And so anybody who adopts our agreement will be in exactly the same circumstance of most of the traffic that they exchange, most of their business back and forth not being on a cash basis, which is the logical justification for using 10 percent threshold and not the 5 percent threshold.

If there are no questions, that's all I have to say on G, Ts and Cs and I'll be quiet until we get get to interconnection.

COMMISSIONER MURRAY: I have a question related to your citations of the Federal Act in testimonies of what state power is versus federal authority. And I'm looking back at the TRO.

MR. SAVAGE: Yes.

COMMISSIONER MURRAY: And I'm looking specifically at Section 665 of the TRRO, with is dealing with post-entry requirements. In the event a BOC has already received a Section 271 authorization, Section 271(d)(6) grants the Commission enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271. And it appears to me that post-entry 271 enforcement authority is with the FCC.

MR. SAVAGE: Let me be clear on a couple

things. One is Charter doesn't have a dog in that particular fight, so I defer to the other folks on the details of that.

And the general proposition I would put your legal authority as follows: Suppose there wasn't 271 at all, suppose it didn't exist, but the Missouri Commission decided that this or that condition or requirement on SBC was a good idea for purposes of promoting competition in Missouri.

What Section 251(d)(3) and 252(e)(3) say is, you can do that, you can impose this thing which is a good idea, as long as it's not inconsistent with the requirements of federal law. And so what that says to me is, 271 is, in effect, an overlay on this. It may be that as a matter of federal law Section 271 requires them to do some particular thing, and if they fail to do that particular thing, then they're getting in trouble with the FCC. They've got the ability to complain and that whole process.

That doesn't mean as a matter of Missouri law for your decision as to what makes for a good competitive environment here in Missouri you don't have independent authority to require the same thing. I mean, in criminal law terms, it's taking a Supreme Court case, you know, the medical marijuana case. Now, if you've got

a state that doesn't allow medical marijuana and you possess the contraband drug, you can violate state law by having it and violate federal law by having it.

Similarly, Section 251(d)(3) and 251(e)(3) say you can require something under your authority, the FCC can require it under 271 and those are independent requirements. You would enforce yours, they would enforce theirs.

So I'm not taking any position particularly on whether a particular thing should or shouldn't be required, but I think you would be mistaken in the sense of not appreciating the full scope of what you can require of SBC if you were to conclude that because the FCC doesn't require something under 271, you can't require it under your own authority under 251(d)(3) and 252(e)(3).

COMMISSIONER MURRAY: Okay. Thank you.

MR. SAVAGE: Thank you.

JUDGE THOMPSON: Thank you, Mr. Savage. Mr. Johnson?

MR. JOHNSON: Thank you, your Honor, Commissioners. Mark Johnson appearing on behalf of Navigator this morning.

And I guess I need to echo my colleagues in saying that in the 20 years that I've been practicing before the Commission, this is a truly unique proceeding.

Never has so much been presented so quickly to so few, and handled so well. But I do have a couple of quibbles.

As you can probably see from the comments which I filed last week on behalf of Navigator, I'm only going to address two of the points that I raise -- that I raised in the comments. The first point has to do with the coin port functionality, which is Issue 20 in the G, Ts and Cs for Navigator. And the second point is actually a set of two issues raised in our comments. That's Issues 10 and 11, concerning the escrow and deposit requirements. And I'll address the set of issues first, if you don't mind.

I raise that in our comments as being an inconsistency in the arbitrator's report. The arbitrator found quite properly that the CLECs, including Navigator, did not have to escrow funds if they wished to dispute a bill from SBC given the fact, as the arbitrator correctly found, that there is -- there was a significant amount of evidence concerning the mistakes, if you will, that appear every month in the SBC bills.

On the other hand, the arbitrator found with respect to Navigator, and this is our Issue 10, that SBC could terminate service to us, it could disconnect our service that we purchase from SBC if we don't escrow disputed amounts. You know, he gives with one hand and

takes away with the other.

We're simply asking that the Commission -- that the Commission review the Commission -- the arbitrator's decision with respect to Issue 10 and reverse him so the -- so Issues 10 and 11 will have consistent answers. That's the first item I wanted to address.

The second item relates to the functionality for the coin service which Navigator provides in Missouri. Compared to the other parties before you, Navigator is a gnat. We have a few thousand customers in this state, but a significant portion of those are coin telephones. And as you might guess, there are certain people in Missouri who, if they don't have access to a coin telephone, don't have access to a telephone at all. They can't afford wireline service or they don't have it. They can't afford wireless service.

So from a policy point of view, the arbitrator's decision that SBC does not have to provide this service should be examined by the Commission.

Navigator isn't asking for a free ride, by the way. Navigator isn't asking for TELRIC pricing for this service. Navigator is simply asking for the transition period until March of next year that for a just and reasonable price, SBC provide that switching service to Navigator while Navigator finds other options to put

into place next March to provide that service.

Those are the points I wanted to raise with you this morning. If you have any questions, I'd be happy to entertain them. Otherwise, I will follow Mr. Leopold's and Mr. Savage's example and sit down. Thank you very much.

JUDGE THOMPSON: Thank you, Mr. Johnson. Mr. Kapetsky (sic).

COMMISSIONER GAW: May I ask a very quick question?

JUDGE THOMPSON: You may. Is this for Mr. Johnson? If you don't mind coming back?

MR. JOHNSON: I almost thought I was going to get away.

COMMISSIONER GAW: Just very quickly.

Mr. JOHNSON: Yes, Commissioner.

COMMISSIONER GAW: Your argument in regard to having that provision of service through next March hinges on what? What is the justification?

MR. JOHNSON: From a legal point of view, it hinges on the fact that it's a part of the transition that the FCC put into place with the TRRO. That's how we get to next March. March 11th, 2006, I think, is the precise date.

COMMISSIONER GAW: So how do you disagree

again with the arbitrator's recommendation on that particular topic?

MR. JOHNSON: Well, the arbitrator found that SBC does not have to provide that service, and quite candidly, as I mentioned in my comments, he summarized two or three points which SBC makes in its brief, summarizes the point which we made in our brief, and then finds for SBC saying for the reason stated above. So we're not quite sure why the arbitrator decided the way he did.

COMMISSIONER GAW: Do you believe that this -- that the decision if you have -- if you were to look, do you believe the decision is based upon a legal analysis or a policy decision?

MR. JOHNSON: If I were to guess, I'd think it was based on a legal analysis.

COMMISSIONER GAW: And what would your reply be to -- what's your justification specifically waiting to March on a legal basis, other than what you just told us?

MR. JOHNSON: As I understand SBC's legal argument or legal position, they raised two points. First, that they are not required to provide switching; therefore, they're not provided to -- they're not required to provide this particular type of service that Navigator wants. We simply disagree on that point. We believe that

we are -- that they are obligated to provide it through March next year.

COMMISSIONER GAW: Point me to why. Where is it from a legal standpoint that justifies your position? Can you do that?

MR. JOHNSON: Could you let me do that over lunch? I'll provide that to you.

COMMISSIONER GAW: I'm not trying to put you on the spot.

MR. JOHNSON: I want to provide you chapter and verse.

COMMISSIONER GAW: That would be fine, or if it's in something you've already given to me.

MR. JOHNSON: I think it may be in our initial brief. I'll identify that for you.

The second legal argument I believe they raised was that we had simply -- we had not raised this in negotiations. I don't believe that to be the case, but in addition to that, in the disputed point list, they did not raise that as an argument. I think they waived that. I think this is an argument they came up with after the hearing was over.

If you look at the DPL, their position as they state in the DPL, they say nothing about we didn't raise this in negotiation. In fact, in their legal

position -- pardon me -- in their position as stated in the DPL, they say this shouldn't be in the G, Ts and Cs, this should be in the UNE appendix. I think that's what they said. So they argued about where this provision should go.

COMMISSIONER GAW: Okay. All right. And since you have already compared your company to a gnat, do you have animals for the rest of them?

MR. JOHNSON: Well, they're just bigger. Thank you, Commissioner.

MR. LANE: We'd be the teddy bear.

COMMISSIONER GAW: I knew you shouldn't have let him have that opportunity.

JUDGE THOMPSON: Mr. Johnson, you're stepping away too quickly.

MR. JOHNSON: Almost made it again. Yes, Commissioner?

COMMISSIONER MURRAY: The provision that you're speaking about to allow you to operate coin telephones is a 271 obligation, correct?

MR. JOHNSON: Yes, that would be correct.

COMMISSIONER MURRAY: And is it your position that everything that was required by 271 continues as an obligation to provide that service?

MR. JOHNSON: Boy, you know, in some ways I

might echo Mr. Savage and say I'm not sure I have a dog in that hunt. Honestly, I have not thought that through. I've just been looking at this particular issue for my client.

COMMISSIONER MURRAY: And what makes you think that this particular function has to continue to be provided?

MR. JOHNSON: Because it's a part of switching, which is a checklist item.

COMMISSIONER MURRAY: But under 250 --

MR. JOHNSON: 271. That's why, for example, we're not saying that we should get this at TELRIC pricing. We are -- we will pay a just and reasonable rate for the service under 271.

COMMISSIONER MURRAY: And in the TRO, this again is post-entry requirements that I referred to earlier, sections -- paragraph 665.

MR. JOHNSON: Right.

COMMISSIONER MURRAY: The FCC said, while we believe that Section 271(d)(6) established an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that, quote, the conditions required for such approval, end quote, would not change with time. Absent such a reading, the Commission would be in a position where it was imposing different backsliding

requirements on BOCs solely based on date of Section 271 entry, rather than based on the law as it currently exists, we reject this approach.

MR. JOHNSON: Right. We don't -- if you're implying that this requirement of providing this particular service is outdated --

COMMISSIONER MURRAY: Wasn't switching specifically included in those UNEs that are no longer required under 251?

MR. JOHNSON: I understand there's a transition.

COMMISSIONER MURRAY: Yes, but you're saying, as I understand, and maybe you're not --

MR. JOHNSON: That's all we're asking. Pardon me.

COMMISSIONER MURRAY: I thought you were saying that during the transition -- maybe I don't understand what you're saying. Are you saying that after the transition period, you no longer believe they have to provide it at negotiated rates?

MR. JOHNSON: After the transmission period?

COMMISSIONER MURRAY: Yes.

MR. JOHNSON: Honestly, as I understand it, they don't have to provide it after the transition period.

COMMISSIONER MURRAY: Provide it at all. Okay. I misunderstood.

MR. JOHNSON: So that's why we're just asking for a year. I mean, we're just asking for -- well, technically not even a year.

JUDGE THOMPSON: Make sure your microphone is on.

COMMISSIONER MURRAY: I'm sorry.

MR. JOHNSON: March of next year, so nine months, ten months, whatever it is.

COMMISSIONER MURRAY: You're not asking for it at any rate beyond that period?

MR. JOHNSON: We're just looking for the transition period. That's correct.

COMMISSIONER MURRAY: All right. Thank you.

JUDGE THOMPSON: Other questions from the Bench?

(No response.)

JUDGE THOMPSON: Very well. WilTel?

MR. SHORR: Good almost afternoon. My name is David Shorr, and I'm with the law firm of Lathrop & Gage. I represent WilTel Local Networks. We will only be -- in our comment we only address six issues total with regard to the arbitrator's report. Four of those are

general terms and conditions and two of those are UNEs, and I will only be addressing actually two of the general terms and conditions.

I would defer you to our comments. If Navigator is a gnat, by comparison we are a chipmunk, a warm little mammal that's nice and cute. We, too, would like to recognize the arbitrator for the significant undertaking that was comprehensive, thorough, completed in a professional manner. We'd also like to recognize the Commission's Staff for their effort shifting through a huge amount of detail.

We have several issues of concern with the arbitrator's draft. When compared with the complexity and scope of the overall agreement, they are small in scope but no less important to our operation. Again, this is a credit to the arbitrator's effort and we appreciate that.

These are policy concerns and concerns about having a level playing field to negotiate in good faith with SBC on what we consider key legal issues throughout the life of this document.

In particular, we are addressing General Terms 13 in our document, which addresses how changes in law are to be implemented under the agreement. We acknowledge and recognize and agree with the arbitrator's conclusion that, quote, public policy is best served by

the prompt implementation of changes of governing law.

Under the draft GTC 13 language, SBC could, and I emphasize the word could, make a unilateral decision regarding the status of law and begin implementation of that conclusion and engage -- and then engage in negotiation with the locals. Where the change of law is the result of an Order that expressly states that it is self effectuating, this is not an issue. In this fact scenario, the arbitrator's position statement of policy is very effective and we concur. The Commission itself appears to favor this policy concept of quick implementation where there's an express self effectuating provision.

However, those expressly stated self-effectuating Orders defining and interpreting law are few. The majority of these, quote, changes of law situations stem from interpretation. And where they unilaterally present themselves as conclusions of SBC, allowing SBC to unilaterally proceed dramatically alters the level playing field to negotiate with regard to the concept of whether the change in law is appropriate.

It is difficult to have fair negotiations over issues where one party is permitted to proceed with their position before arriving at the bargaining table. Under the draft language, SBC can determine a, quote,

change in law exists. They can proceed along a path favorable to their interpretation. They can spend administrative capital labor dollars toward their interpretation before first meeting on the subject with those contrary to their position.

Inertia will determine SBC's negotiating position. The result will be that almost all these negotiations will end up in dispute resolution and eventually as complaints before this Commission.

WilTel's language addressed this problem, allowing express self-effectuating orders to proceed, but were not specifically addressed requiring the negotiation before expenditures of SBC's administrative capital and labor so fair and good faith negotiation could occur consistent with the requirements and concepts provided in the Telecommunications Act.

Our request is reasonable, consistent with law and we believe consistent with the objectives presented by your arbitrator, and we request that you reconsider the language of GTC 13 for WilTel to what we have presented in terms of trying to level the playing field with regard to these changes in law.

The second policy issue that we wish to address may not even be a policy issue, in our opinion. It relates to GTC 12 of WilTel's document. We believe an

error in transcription may have occurred, resulting in the language presented in that manner.

This section deals with indemnification. The arbitrator's findings are consistent with the position presented by Willtel where he determines that it is improper -- where he determines, quote, it is improper for this ICA to attempt to limit or alter damages available under statute, closed quote. However, the language provided in the draft selects SBC's language, which is inconsistent with the statement of that position. We believe this to be an error of interpolation (sic) and request that it be made consistent with the expressed arbitrator's position, which is the Willtel language.

Finally, for expediency, considering the length of time that this is going on, we obviously have some other concerns. These relate to our GTC 7, which is changes in names and company codes, and GTC 10, which does in part deal with the issue of escrow and credit determinations, and those are more fully stated in our comments, and I will not go into those further and would request that the record reflect that our concerns on those sections have been expressed previously by the other CLECs, and that they be as fully stated herein.

In closing, we request the Commission to review those comments, modify the final arbitrator's

report accordingly, recognize the arbitrator and the Staff for comprehensive efforts on behalf of citizens of the state of Missouri.

JUDGE THOMPSON: Thank you, Mr. Shorr. Questions from the Bench?

COMMISSIONER MURRAY: Just one. On the auditing provision, you didn't -- I don't believe you just addressed that here, did you?

MR. SHORR: No.

COMMISSIONER MURRAY: Are you basically taking the same position or similar position to what Mr. Johnson had?

MR. SHORR: Actually, I will be punting to Mr. Magness with regard to that position. I thought he did an excellent presentation in that regard.

COMMISSIONER MURRAY: Okay. Thank you.

JUDGE THOMPSON: Thank you, Mr. Shorr. Mr. Lumley?

MR. LUMLEY: Good morning. I'm -- it's appropriate that I bat last because I can't hit the curve ball.

Two quick items. First, with regard to Item 3 on SBC's summary sheet, which is the issue of CLECs being able to purchase from tariffs and interconnection agreements, the arbitrator properly found it's in the

public interest to allow CLECs to make full use of the best available terms and conditions. The Sixth Circuit Court of Appeals agrees, having ruled that way regarding a Michigan matter. SBC is required to do it in Michigan. It's a simple billing process of adding a billing code that they can handle.

This is not a pick and choose issue. They've tried to throw that language in here for purposes of confusion. Pick and choose has to do with the previously allowed process of taking various sections of various interconnection agreements and pasting them together, which is no longer allowed. It has nothing to do with the issue of being able to purchase out of publicly available tariffs, even though you're a party to a contract.

In fact, SBC allows this with virtually all of its customers. They can enter into contracts and they can still purchase under tariffs. I would observe that as long as a CLEC is entitled under the terms of the tariff to purchase under it, it makes absolutely no difference what the contract says because the law in Missouri makes it very plain the contracts cannot override tariff provisions. We believe the arbitrator's ruling is correct.

Secondly, one of the items in our comments

has to do with general terms and conditions, and that was our Issue No. 9. And I'm sorry. I should have introduced myself as speaking for MCI on these points. I apologize for not having done that.

This has to do with the change in law provisions and was already argued on behalf of Willtel. I'll just echo his comments, that it will be virtually impossible to negotiate implementing contract language if SBC is allowed to unilaterally implement changes in law on its own. Thank you.

JUDGE THOMPSON: Questions from the Bench. Commissioner Murray?

COMMISSIONER MURRAY: Thank you. Mr. Lumley, tell me how you would envision the change of law to take effect. And I'm sorry. I'm not familiar with your language.

MR. LUMLEY: The basic concern is that actual implementation should not occur until there's contract language. And again, aside from if there's a ruling that says -- from the FCC or the Commission that says it has to happen immediately, that's the law and that's the law.

But we're talking about where the change is not that clear and the parties have to work it out. There may be retroactive effects to it, depending on what the

ruling was, and there may be pricing adjustments and true-ups and all those things.

But the actual issue of allowing somebody to just change what's going on on a business-to-business basis before the contracts have been ramped up to the change is just not proper, and it places us in the position of them basically saying, well, we've already changed it, maybe we'll get around to fixing the contract language and maybe we won't.

COMMISSIONER MURRAY: Would there be anything there that would put any kind of timeline on the change of contract language?

MR. LUMLEY: I think it's going to be determined case-by-case based on the change in law that you're dealing with, but again, there's dispute resolution provisions that have time frames to them and allowed to be brought to the Commission, I believe, in our case. I'm not sure that applies in every contract.

COMMISSIONER MURRAY: And when it took an extended period of time to complete might have retroactive application?

MR. LUMLEY: Depending on the circumstance, that's certainly possible, but I don't believe the time frames allow it to take very long.

COMMISSIONER MURRAY: Thank you.

JUDGE THOMPSON: Further questions from the Bench?

(No response.)

JUDGE THOMPSON: Very well.

Thank you, Mr. Lumley. We've now reached the time for the lunch recess, and in an almost unbelievable occurrence of serendipity, we've also reached the end of the GTC presentations, have we not, Mr. Lane?

MR. LANE: Well, your Honor, since we went first and gave our positions and they all had the opportunity to respond to it, to the extent those parties raised GT&C issues on their own, we ought to have a chance to respond, particularly since procedures --

JUDGE THOMPSON: Why don't you come up to the podium so our listeners in Germany can hear what you're saying, and also help me to hear what you're saying.

MR. LANE: And after lunch is fine. The point was we raised several GT&C issues, we went through them. The parties responded to those. They also raised their own where they had asked the Commission to consider reversing the arbitrator. We haven't had a chance to respond to those, either orally or in writing, since nobody responded to -- in writing to the --

JUDGE THOMPSON: I hear what you're saying.

MR. LANE: I think we should have that opportunity and would -- it's going to take time. After lunch is fine with me.

JUDGE THOMPSON: I understand. Any objections?

(No response.)

JUDGE THOMPSON: Okay. Hearing none, then when we reconvene after the lunch break. We will hear from SBC solely in rebuttal to the GTC definitions and transiting matters raised by the other parties, correct, where they're affirmatively seeking a change in the arbitration report. And then we will proceed on to our next topical area, which I think is resale.

We're only going to be able to take a one-hour lunch break because some of us would like to finish today.

MR. JOHNSON: And, your Honor, the issues that they will be allowed to raise, are they simply going to be issues that we addressed this morning or are they going to have free reign to address every issue?

JUDGE THOMPSON: I think they can address anything in your comments. The fact that you didn't choose to address all of the affirmative changes in the GTC area, for example, that you list in your comments, that's your choice to use your time as you want. But I

think SBC, you know, those changes are still in front of the Commission in the form of your written comments, and so SBC has the right to respond to them orally.

MR. LEOPOLD: Shouldn't they respond to those when they do their initial presentation?

JUDGE THOMPSON: Well, as I said, Mr. Lane came up, made his suggestion, his motion, if you will, and I asked if there were any objections and I heard none. Now I gather you're making an objection, Mr. Leopold.

MR. LEOPOLD: I think that if oral argument is put forward that he hasn't had an opportunity to respond to, he should respond to that, but I don't think that he should on rebuttal go back to a catalog of issues drawn from the comments that weren't addressed either by him in the first instance or by the CLECs in oral argument.

MR. ZARLING: And, your Honor, for the record --

JUDGE THOMPSON: You can go ahead and be seated and use your microphone.

MR. ZARLING: I don't have a microphone, so I'll try to speak up. For the record, Kevin Zarling for AT&T.

As I understand, too, Mr. Lane can certainly clarify what he's requesting. Why I didn't

object was consistent with what I think Mr. Leopold is saying is, if Mr. Lane wants to respond to those issues that the CLECs have brought up on their own independent of responding to SBC's arguments when they went first, that's fine.

But if his intent is to now go into other issues that the CLECs didn't address in their oral argument as their own affirmative issues, I didn't -- I think there's a problem with that and we'd be here all day on just one issue. So maybe Mr. Lane needs to clarify what he's requesting.

But I don't have a problem with him, for example, responding to something AT&T comes up and says, look, SBC didn't talk about this, here's my problem with the award, and let him respond to what I've said.

JUDGE THOMPSON: Mr. Lane?

MR. LANE: I thought that's what I asked for.

JUDGE THOMPSON: That's what I thought you asked for, too.

MR. SAVAGE: Your Honor, this was the --

JUDGE THOMPSON: Straighten me out.

MR. SAVAGE: The point of my earlier comment is that we have an issue with AT&T's -- or with SBC -- with SBC's treatment in one of the definitions,

GT&C issues, and I made a point of saying I'm going to address that later. To make sure I'm clear about that, I think I'm in concurrence with what Mr. Lane just said, if he wants to get up and respond to other people's affirmative issues they talked about, that's fine. But we will be here all day if he starts going through the checklist of everything that everybody else raised but nobody talked about. So I think that would be a mistake.

JUDGE THOMPSON: Okay.

MR. LANE: Let me --

JUDGE THOMPSON: Somebody else want to jump in on this?

MR. LANE: There are two things that we might do. One is to respond to affirmative issues raised by the CLECs in their oral comments. Second is that we may respond to issues raised by the CLECs in their Briefs but that they didn't comment on orally, because on those issues the Commission has no record in front of it whatsoever as to what our view of what they had to say is because there weren't any written responses.

MR. MAGNESS: Might I make one suggestion?

JUDGE THOMPSON: Let me explain what I think is going on and then you can tell me how I'm wrong. Okay. As I understand what I have witnessed this morning, Mr. Lane led off by presenting SBC's affirmative requests

for modifications to the final arbitrator's report. He did not at that time respond to the other parties' affirmative requests for changes.

Okay. Then each of the CLEC parties had an opportunity to take the podium and address whatever they wanted to address, and many of you spent quite a bit of time responding to Mr. Lane's affirmative requests for modifications, and some of you also then argued in favor of your own affirmative requests for modifications, right? And again, that was at your discretion.

Of course, everyone's affirmative requests for modifications are before the Commission in the written comments that have been filed, correct?

Mr. Lane then moved for an opportunity to respond orally to the CLEC parties' requests for affirmative modifications. As he pointed out, SBC has not had any opportunity to say, whoa, don't do that, or something along those lines, probably more eloquent, but that would be in general, am I correct? That's what you want, Mr. Lane?

MR. LANE: Yes, your Honor.

JUDGE THOMPSON: And he may elect -- he may be more outraged on behalf of his party by something in your written comments that you didn't address orally, in which case that's what perhaps he wants to address; am I

right?

MR. LANE: Yes, your Honor.

JUDGE THOMPSON: So he doesn't want to be limited to just rebutting what you chose to address orally. He may have some other burning issue in your written comments that he thinks it's more important on behalf of his clients to talk about. And from my point of view, I think that's fine.

MR. MAGNESS: Your Honor, for the --

JUDGE THOMPSON: In the event that you don't think that's fine, then what we'll do is we'll have to let everybody file some kind of written rebuttal to the comments that have been filed, and I don't think that he wants that. There's been enough writing in this case already.

MS. BOURIANOFF: Your Honor, if I may?

JUDGE THOMPSON: You may.

MS. BOURIANOFF: Mr. Lane suggested that the reason they need to rebut what the CLECs might have included in their written comments but not addressed orally is because SBC's had no opportunity to present their position on it, but, of course, that just ignores the entire record,

JUDGE THOMPSON: Right. There has been an opportunity.

MS. BOURIANOFF: There's briefs, there was hearing, there were DPLs, I mean, in addition to the arbitrator's report itself. CLECs are only going to be commenting on issues that went adverse to the CLECs, and so I understand what Mr. Lane is asking for, but just as a practical matter, if we pursue that course of action, SBC's comments are 240 pages long and the CLECs will feel compelled to address every issue that's raised in their comments regardless of whether or not SBC brings it up, and we won't be done today.

We won't be done tomorrow. We probably won't be done Friday if all seven CLECs here have to respond to every point raised in SBC's comments and SBC responds to every point raised in the CLECs' comments regardless of whether the parties think it's necessary or important enough to raise orally before the Commission.

So I would just say there's a tremendous record here. There should be some sort of presumption that if the parties don't raise it here, it's not that important to them.

JUDGE THOMPSON: I don't think I would presume that.

MR. MAGNESS: As a suggestions, I think for the set we just went through we ought to do what he requested. I don't have an objection to that given how we

started, but it may be in --

JUDGE THOMPSON: But then going forward we should say you get one shot, say what you want, you're done. I like that.

MR. MAGNESS: So if there is an issue in which outrage and burning desire is so strong that the words must be spoken, that they're spoken when you get up and make your comments. So, for example, Mr. Lane would say, here's the things that are most important to me. They're in my 240 pages, but I want to make sure you hear, here are the things that the CLECs said that are outrageous and, you know, stick with your guns because they're wrong.

Then the CLECs get up and do essentially the same thing, which is here's the stuff they're wrong about, here's the stuff we're right about, and we do it all in one round and everybody gets an opportunity to respond to everybody but it's in their one round.

JUDGE THOMPSON: I understand, and I like your suggestion, Mr. Magness. I'm going to adopt it. So when we return from the bunch break, which will be in an hour, ten minutes after one, I will give SBC an opportunity to rebut whatever it wants to rebut with respect to GTC. And then on a going-forward basis we will adopt Mr. Magness' suggestion and every party will have

one trip to the podium both to argue in favor of the changes that it wants and against the changes that other people want. Okay?

And I think what we'll do is put a time limit on how much time Mr. Lane will have to rebut GTC matters when he comes back. Okay. And to me, ten minutes pops into my mind. Do you think that's adequate?

MR. LANE: Sure. We spent more time on this already.

JUDGE THOMPSON: See, we could have been done with it. All right. We'll be back in ten minutes after one.

MR. LUMLEY: One comment. If you tell us that we'll be done today at five o'clock, we will be done today at five o'clock.

JUDGE THOMPSON: We will be done today at five o'clock. As I said at the hearing, I turn into a vapor at five o'clock.

(A BREAK WAS TAKEN.)

JUDGE THOMPSON: As we discussed before we went off the record this morning, we're going to afford SBC ten minutes to respond to the affirmative requests for changes to the arbitrator's report that the CLECs have filed. At this time, Mr. Lane . . .

MR. LANE: Thank you, your Honor.

Let me start with Navigator. They raised two issues orally on GT&C 10 and 11. Their claim was that the arbitrator's decision was inconsistent on those points. And in GT&C 10, I will say that the arbitrator might look at Section 14.2.4 and decide that it's inconsistent, but the rest of the SBC language that's in that section is valid and is appropriate under the arbitrator's decision, and it is necessary to have that language in there because it allows for termination of service when amounts that are required to be paid are not paid.

Their request to adopt all of their language on GT&C 10 would have that improper result. And if the arbitrator is otherwise inclined to agree, or the Commission I should say is otherwise inclined to agree with their point on GT&C 10, it should apply only to Section 14.2.4, not on the rest of the language that is included in the -- that the arbitrator adopted.

The second point orally raised by Navigator pertained to GT&C 20, which deals with coin phone functionality. Mr. Johnson indicated his view that this -- our contention that this issue was not raised in negotiation and that language was not proposed by Navigator was raised late, after the hearing in the briefing process.

That is an incorrect statement. It was addressed in Mr. Silver's prefiled direct and rebuttal testimony. On page 63 of his direct testimony, Mr. Silver noted that this language or this position that Navigator advanced for the first time in its own written testimony was improper because, first, it hadn't been raised in negotiations, and second, no language had been proposed at all by Navigator such that if the arbitrator and Commission ultimately were to agree with them, there's still no language out there that would implement their position.

From a substantive perspective, if you get past those I think determinative procedural questions, if you get past that and look at the substance, they are still wrong. What their proposal is, apparently, is that they be allowed to order coin phone functionality, which is a function of unbundled local switching, for new customers. And the FCC's TRRO decision makes it absolutely 100 percent crystal clear that one may not order new unbundled local switching for new customers.

Now, there's a separate issue about what a new customer is or when new lines can be added for an existing customer, but what Navigator proposes, apparently, is that they be entitled to order coin phone functionality, which is part of unbundled local switching,

for brand-new, nonexistent customers through March 11th, apparently, of next year, and that position is improper under the TRRO.

WilTel raised an issue on GT&C 13 that they covered orally. Deals with change in law. The arbitrator's decision here in our view was proper. What WilTel had proposed in their language was kind of a nonreciprocal kind of arrangement in which WilTel would be permitted to change the agreement immediately when the state Commission here ruled in its favor with regard to another CLEC's case and have that immediately added to the agreement, but not when the FCC or the court issued a ruling that was contrary to the WilTel position.

That position was rightly rejected by the arbitrator and appropriately adopted our language on change of law.

On GT&C 12 dealing with indemnification for WilTel, again, we disagree that the detailed language apparently adopted by the arbitrator is incorrect. In fact, the arbitrator adopted SBC Missouri's language on Section 13.1 but adopted WilTel's language on 13.8. He properly adopted our position on 13.1 because the price of UNEs and so forth were not set with unlimited liability in mind, which would be the case if WilTel's position on that issue were adopted.

They also raised orally GT&C 7 and 10, although they simply at that point referenced their position expressed in the Briefs, and on those we would simply say that, with regard to name changes, the Commission previously looked at this same issue in TO-2001-455 and properly determined that these charges were appropriately imposed on CLECs because they caused the cost to be incurred.

And on GT&C 10 dealing with deposits, the trigger language that WilTel now opposes is properly in the case because it would give -- otherwise adopting WilTel's language would result in a situation where there would be no deposit required even if the CLEC demonstrated a history of not making timely payments.

I believe the last was MCI GT&C 9, which deals with intervening law. And again, we disagree with MCI's request for the arbitrator's decision to be reversed. SBC's language does provide clarity concerning reservation of rights and what steps the parties must take to comply with court and regulatory rulings, and the MCI language does not and was appropriately rejected by the arbitrator.

In the interest of time, I will not go into the other GT&C issues raised by the parties that weren't addressed orally, but I would ask the Commission to

consider the Briefs on those issues and the testimony as well. Thank you.

JUDGE THOMPSON: Thank you, Mr. Lane.

I think we're ready now to start with Issue No. 2, which I believe is resale.

MR. BUB: Thank you, your Honor.

JUDGE THOMPSON: Mr. Bub.

MR. BUB: I'll try and be brief. We've raised one issue under resale, and it's an issue that pertained to Navigator only.

JUDGE THOMPSON: Remember, you need to bring up both the changes you want and how you don't want their changes, one shot at the podium.

MR. BUB: My shot will be just this one issue.

JUDGE THOMPSON: Okay. Just wanted to make sure we're all on the same page.

MR. BUB: I appreciate that.

This issue focuses on some language in 7.1 of the resale part of Navigator's agreement, and the language that the arbitrator adopted was language that concluded or that provided that local account maintenance would be described in this document called Local Account Maintenance Methods and Procedure dated July 29, 1996.

And just to give you an idea what that

document does, it provides two things; one, daily usage, and another thing called local disconnect report. That's a report that CLECs can subscribe to purchase that would tell them which of their resale customers have left them for another carrier, be it a CLEC or SBC or whoever.

And our basis for error here is that it's not supported by the facts. And we would point you back to this language because if it focuses on this July '96 document, or as otherwise may be agreed to by the parties, our concern is that this language focuses and would require account maintenance methods that are nearly nine years old.

And as this language reflected in the testimony, this language was from a year 2000 agreement that Navigator had in Texas, and I -- for a reason that wasn't articulated that we don't understand, they want that language in there, and the language itself reflects that those methods will change over time, and the fact is that they have changed over time.

I think you can look at all the parties, whether they're big or small, I think one thing that's common between them and SBC is that all companies, if they operate in multiple places, they want to do things the same and they want to mechanize as much as possible. And with that in mind, SBC and the CLECs over time have a

collaborative process where they work on things like methods and procedures for ordering, for handling different administrative things between them.

And this is one of those things that had been worked out over time so that what was provided in that old outdated document for the daily usage is now as a result of that collaborative process handled in what we've heard in other issues called a DUF, the daily usage file. And those methods and procedures are set out -- they're not in the contract, but they're set out in the CLEC handbook that's on the website.

Those methods and procedures were worked out collectively by the CLECs. I can't represent to you because I don't know whether Navigator participated in those or not, but I know the majority of CLECs here have.

Another thing that's reflected in that old document that still is available today is a local disconnect report. It's not -- that document provided for a manual process where, if they wanted that, then we had to go and manually build an Excel spreadsheet and get it to them somehow, e-mail, fax, whatever. It's manual, labor-intensive. Now that local disconnect report, it is available to them, but it's something that's handled on a mechanized basis that they can get through our operational support systems, the OSS.

We would appreciate it if the Commission would take a look at this and reevaluate the decision because what we're concerned about is being tied to a method that's no longer in place, probably one that Navigator may not want, because I would expect that Navigator, like the other parties, are using those mechanized procedures.

Thank you.

JUDGE THOMPSON: Thank you, Mr. Bub. Mr. Magness?

MR. MAGNESS: I have nothing to add, your Honor.

JUDGE THOMPSON: Very well. Ms. Bourianoff?

MS. BOURIANOFF: AT&T has no resale issues.

JUDGE THOMPSON: Mr. Leopold?

MR. LEOPOLD: Nothing for Sprint, your Honor.

JUDGE THOMPSON: Now we're finally rolling. Mr. Savage?

MR. SAVAGE: Nothing for Charter.

JUDGE THOMPSON: Mr. Johnson?

MR. JOHNSON: Is this my opportunity to respond?

JUDGE THOMPSON: This is your opportunity

to respond and to urge the Commission to change something in the way that your client favors.

MR. JOHNSON: I'm just going to respond. I don't have anything that needs to be changed. And this has to do with the issue that Mr. Bub just addressed.

What we hear from SBC is, we don't want to do it, it's inconvenient, other CLECs don't use it, Navigator may not want to use it. None of those is a reason to change the arbitrator's decision.

JUDGE THOMPSON: So could I just ask a question real quick? As far as you know, your client does want it?

MR. JOHNSON: They wouldn't have asked for it otherwise.

JUDGE THOMPSON: Very good. Thank you. Mr. Shorr?

MR. SHORR: Nothing on this item.

JUDGE THOMPSON: Thank you. Mr. Lumley?

MR. LUMLEY: I will pass as well, your Honor.

JUDGE THOMPSON: Very well. That was almost painless. Let's proceed, then, having completed resale, to our third topical area, which is UNEs. Somehow I suspect we won't get through UNEs quite so quickly. Mr. Lane?

MR. LANE: Thank you, your Honor.

Again, for purposes of presenting here this afternoon, I'm going to follow the summary sheet that I handed out earlier. The first issue that we raised was whether the arbitrator erred in requiring Section 271 network elements to be included in the interconnection agreements.

We have discussed this previously. I am not going to repeat all of the arguments, but I will add a couple of items that are in my view clarification of what we've talked about.

As we discussed earlier, the arbitrator's decision rests on the premise that Section 271 requires the inclusion of these provisions in the interconnection agreement. I want to make clear that the FCC itself has never said this. To the contrary, the FCC has made it clear that it, not the states, enforces Section 271.

That is contained in paragraph 664 of the TRO, the first sentence of which provides, quote, whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6).

There is really no question that the FCC has not left the matter to the states to decide. It references itself only as the one deciding it, and it references itself as deciding this issue in the context of either an application for 271 authority or in response to an enforcement proceeding. There's no authority for this Commission to act contrary to claims on the CLEC side.

The second point on this is that there appears to be some contention that the state commission has some independent authority either under the federal statute or under the state law to require Section 271 network elements to be included in an interconnection agreement. That is clearly not true.

First, there's no state law in Missouri that purports to require unbundling at all. That's not true in some other states where the state legislators -- legislatures have adopted some particular statutes that purported to require unbundling.

Now, in those states, like Illinois, there's some question about whether those state laws are valid or whether they've preempted, but we don't have that issue to face here because there's nothing in Missouri law that purports to give this Commission the authority to order unbundling of network elements or inclusion of anything in interconnection agreements filed with it under

the Federal Act. Nor did the arbitrator purport to rely on any alleged state authority in issuing its decision that we're asking the Commission to review here.

Second is, to the extent that there's some contention that the state commission under the Federal Act still has the authority to do what it wants with regard to adding matters to an interconnection agreement, that is clearly not true under the FCC's TRRO decision, and I would refer you specifically to paragraphs 194, 195 and 196.

In paragraph 194, the FCC states, we also find that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, is limited by the restraints imposed by subsections 251(d)(3)B and C. We are not persuaded by AT&T's argument that a state commission may impose additional unbundling obligations in the context of its review of an interconnection agreement without regard to the federal scheme.

The FCC went on in the TRO in paragraph 195 to state that, parties that believe that a particular state unbundling obligation is inconsistent with the limits of Section 251(d)(3)B and C may seek a declaratory ruling from this Commission. If a decision pursuant to state law were to require the unbundling of a network

element for which the Commission has either found no impairment and thus has found that unbundling that element would conflict with the limits in Section 251(d)(2) or otherwise decline to require unbundling on a national basis, we believe it unlikely that such -- we believe it unlikely that such decision would fail to conflict with and substantially prevent implementation of the federal regime in violation of Section 251(d)(3)C.

Those provisions as well as paragraph 196 makes it clear that the Commission does not have the authority under federal law to add unbundling obligations such as Section 271 to an interconnection agreement.

I'll move to the second issue because the rest of what I would have said on there I think we've covered adequately for the Commission. The second is whether the arbitrator erred in requiring the commingling of Section 251(c)(3) UNEs with Section 271 elements.

Before I get started, let me just give a brief explanation of what combining and commingling are about as a background. Combining under the Federal Act is combining one or more unbundled network elements under Section 251. Commingling, on the other hand, is putting together an unbundled network element, one or more, with one or more wholesale arrangements that are acquired from the ILEC. The FCC has made that clear.

So the first issue that we're faced with here in the commingling area is whether we can be required to commingle Section 251(c)(3) UNEs with Section 271 elements. In our view, what the CLECs are attempting here and what the arbitrator's final report does is do an end run around the FCC's decision to end the UNE-P.

Under this approach, the CLECs would be entitled to order all of the items that make up the UNE-P and have SBC be required to put those together for them. that is clearly not appropriate under the TRO and the TRRO.

If we look first at the TRO and Footnote 1990, the Commission said, quote, we decline to require BOCs pursuant to Section 271 to combine network elements that are no longer required to be unbundled under Section 251. That probably should have been the end of it because the FCC generally has treated combining obligations and commingling obligations to be identical in terms of what one has to do, and they specifically said you don't have to combine.

They made a mistake, however, in paragraph 584 of the Order and said, we're going to make you commingle Section 271 elements. That led to the dispute that we have here. After the FCC recognized its mistake, however, it issued an errata that specifically removed the

reference to any network elements unbundled pursuant to Section 271 as an area that we were required to commingle. They went to the time and trouble of issuing an errata order specifically, among other things, to remove this.

The arbitrator's award, however, fails to take that into account and fails to consider that as being mandatory for this Commission to follow. The arbitrator's report says, that makes it more confusing, but there's still a general obligation to do some commingling, and so we're going to give effect to that. I think that is clearly wrong, and the Commission needs to reverse that.

We believe that what the Kansas arbitrator found is appropriate here. In that proceeding, the Kansas Commission, I should say, found that CLECs, quote, cannot seriously believe that the FCC would strike the 271 UNE line in paragraph 584 with no intended effect. Illinois and other states have reached the same conclusion, and we would cite the Commission to our comments on page 70 and Footnote 150 therefore for those cites.

This one is really a critical one as well. It's not appropriate to require essentially putting back together the UNE-P when the FCC has said to the contrary. So no commingling can be required with Section 271 elements.

The next issue that we have, No. 3 on our list, is whether the arbitrator erred in requiring that non-Section 251(c)(3) UNEs must be combined. This is covered in the arbitrator's final report on pages 17 to 20, and in our comments on pages 71 to 75, and actually throughout our comments.

I think this one is absolutely clear. You cannot require combining of unbundled network elements with 271 network elements. It's really not a combining question. It's a commingling question. We talked about that before. But to the extent it's a combining question, the FCC's decision in the TRO in Footnote 1990 makes it absolutely clear the Commission there said, we decline to require BOCs pursuant to Section 271 to combine network elements that are no longer required to be unbundled under Section 251. The Commission has to reverse the arbitrator on this point because it's clearly unlawful.

We would point to the Kansas Commission again which considered this identical issue and found that, quote, combinations must still be one UNE combined with one or more UNEs, not any other element, facility, service or functionality. That's in the June 6, 2005 decision at page 19 that I cited earlier.

The next issue that we raised is whether the arbitrator erred in not limiting the provision of UNE

and UNE combinations to end user customers. I believe our discussion of end users earlier generally handles this, but I'll keep my comments brief.

The arbitrator decision here says that there can be no limitations, restrictions or requirements on UNEs or use of UNEs except that they can't be used solely for nonqualifying services. That's an inadequate statement of what the FCC rules provide. It's inconsistent with the TRO, with the TRRO, and with the Verizon decisions, because many restrictions and limits do apply.

The FCC rule, for example, says the local loop can only be used to serve end users. It also says that UNEs can only be combined with other UNEs. It says that UNEs can't be combined with 271 elements. All of these factors have to be taken into account and recognized as valid and proper restrictions on the use of UNEs, in addition to what we've raised with regard to end user customers.

The next issue that we've raised, No. 5, is whether the arbitrator erred in imposing combination and commingling obligations where the activity is either not technically feasible, including impairment of the network reliability and security, that it would impair SBC's ability to manage and control its network, that it would

disadvantage SBC in operating its network, or that it would undermine the ability of other carriers to obtain UNEs or interconnection.

The Verizon decision that we cite in our Brief, the Supreme Court decision makes it clear that combining obligation is limited by technical feasibility, including these aspects that I just mentioned. That's at 535 -- U.S. at 535-536.

Since commingling now permitted, those same standards ought to apply and must be recognized in a contract such as this because commingling is another form of connecting facilities similar to combining. So when the Supreme Court indicates these factors apply to combining, then they have to apply with equal force to commingling as well.

The FCC rules recognize the relationship between combining and commingling, and in fact, the FCC rules typically treat those two the same in terms of the obligations that are imposed on a -- and how they're to be applied by an ILEC. If you look at 47 CFR 51.309(f) and 51.315(c), these indicate that these need to be treated the same. Rule 318 also requires parallel treatment by making the same eligibility criteria apply to both commingling and combining.

Finally, the TRO paragraph 574 recognizes

those Verizon limitations that were expressed as to combining, and those need to be applied to commingling arrangements as well.

The next area that we address is whether the arbitrator erred in providing that the Commission can amend or add to the FCC rules on commingling and EELs. Preemption principles do not permit the state commission to have this authority. It would create a direct conflict with FCC rules and would be unlawful. There's no need and it's not appropriate to add a provision like that in a contract.

The Kansas arbitrator recognized this and held, quote, the Commission -- I'm sorry. The Kansas Commission recognized this and held that, quote, the Commission is of the opinion that the Commission is not at liberty to devise its own unbundling rules irrespective of FCC determinations and rules, unquote. That same principle applies here. This particular contractual provision needs to be removed.

The next area is whether the arbitrator erred in imposing commingling obligations for UNEs and wholesale facilities that are provided by third parties or the CLEC.

What the commingling obligations pertain to is putting together Section 251(c)(3) UNEs with some other

wholesale provision of -- whole service of the ILEC. It does not require and the FCC rules do not require that the ILEC commingle its unbundled network elements, put them together with facilities or services of the CLEC or that provided to the CLEC by a third party.

That is the CLEC's obligation to put together or to commingle, however you want to phrase it, but it's not an obligation that can be imposed on the ILEC under the FCC's TRO decision.

The next area is whether the arbitrator erred in requiring conversions to be effective on a retroactive basis, to be provided seamlessly, to be provided without assessing nonrecurring charges, or to be performed without imposing early termination charges on tariff services. This is covered generally by the arbitrator's final report on pages 32 to 34, and in our comments on pages 99 to 104.

Our position here is it's clear that the Act and the FCC rules do not permit the Commission to impose this type of prohibition. To the extent that the arbitrator's award approved language allowing conversion prices to be applied retroactively, it must be reversed. Paragraph 588 of the TRO says that billing is prospective only after the conversion takes place.

Nor can the Commission mandate seamless

conversions as that is a goal but not a requirement as the FCC has made clear. If you look at TRO paragraph 586, the FCC specifically provides as an example that where a conversion requires network reconfiguration to comply with its Rule No. 51.318(b), that it can't be seamless.

It's a goal, but it's not something that can be imposed by contract because it's not something that can be met. Sometimes it will be, but it is not something that can be guaranteed, nor can the contract impose it because it's inconsistent with the FCC's decision.

The arbitrator's award also appears to erroneously refuse to permit service order charges when these conversions take place. These involve situations where the CLEC is moving from UNEs to a com-- to some other service combination as required by the TRO or the TRRO. When that happens, there are real costs that are incurred by SBC Missouri to make those conversions happen. The Texas PUC and the Kansas Corporation Commission both looked at this issue. Both also found that we are permitted to recover service order charges.

It's not clear to me from reading the Order whether the arbitrator's award intends to or seeks to preclude the application of tariff termination liability charges for those conversions where the CLEC is moving from a tariffed service to some unbundled network element

service.

But to the extent that's what the arbitrator's award attempts to do, it is also unlawful. Those tariff charges and provisions have been approved by the Commission, and they cannot be waived in a contract. They apply with equal force to everyone.

There's nothing in the FCC rules that purports to eliminate or waive the obligation of CLECs who have acquired tariff services and want to switch them over to UNEs to avoid the tariff termination liability charges that apply under the tariff. So to the extent the arbitrator's Order purports to do that, he's wrong and needs to be reversed.

The next issue that we have is whether the arbitrator erred in failing to adopt the eligibility requirements for the conversions to UNEs. This is discussed in the arbitrator's final report on page 36 and in our comments at page 104 and 105.

If you look at the FCC's TRO Order at paragraph 586, it unequivocally requires eligibility requirements to be met in order to convert services. The TRO also provides for conversion of UNEs to wholesale in that same paragraph.

The language adopted by the arbitrator does not incorporate all of the limitations and restrictions

that the FCC requires, including the prohibition on converting resale to UNE-P and the prohibition on converting special access to UNEs when non-impaired building or routes are involved. And unless all of those are recognized, the Order doesn't comply with the law and needs to be reversed to that extent.

The next involves whether MCI in particular should be permitted to order conversion of wholesale service to UNEs without complying with the ordering requirements that are applicable to all other CLECs. This is one of the few UNE issues that we've raised that is not a strict legal issue. This one is more what I would say is a policy or fact kind of question that the Commission can decide.

I'll note that the arbitrator award in this case simply says it was decided above, but it wasn't. It wasn't discussed anywhere in the order itself. It simply discussed as one side's language is adopted in the detailed language matrix that accompanied the Order.

COMMISSIONER GAW: Excuse me. Let me ask a quick question. Mr. Lane, did you-all did a draft order that was distributed before the final order?

JUDGE THOMPSON: No.

COMMISSIONER GAW: That was not done in this?

JUDGE THOMPSON: No, sir.

COMMISSIONER GAW: Okay. Never mind.

MR. LANE: We were operating under some time constraints. I think that's why.

COMMISSIONER GAW: I'm sorry.

MR. LANE: The parties and the arbitrator all agreed that we would not in this case because of time constraints.

COMMISSIONER GAW: No draft orders were exchanged?

MR. LANE: Right. Did not.

COMMISSIONER GAW: Okay. Thank you. That explains what I needed. Thanks.

MR. LANE: So I'm on Issue 10, which involves MCI's particular issue about how they order conversions. As I mentioned, the Order does not really discuss why MCI's language is adopted here, but it creates a significant problem for SBC Missouri.

It allows MCI apparently to bypass the existing OSS systems -- if this isn't reversed, it would allow MCI to bypass the existing OSS systems and submit orders on spreadsheets which our systems are not designed to accept or be able to handle. Doing it this way runs counter to all of the other items that were generally approved by arbitrator which recognizes that the change

management process in the ordering and billing forum in which all CLECs participate is the appropriate way to resolve any issues along this regard.

That's what should be done here. You should tell MCI that if they have an issue they want to raise, go and discuss it with the other CLECs and with SBC in these various forum that would allow the matter to be fully aired, but don't require SBC to process these because they're not consistent with our billing -- I'm sorry -- with our ordering systems and provisioning systems.

The next issue that we have is whether the arbitrator erred in adopting the definition of a building. It may strike you as a little odd that we spent a lot of time trying to define what a building is. You might say, what's the point?

The point of it is, is that the FCC has imposed some strict limitations on the number of DS1 and DS3 loops which can be ordered to serve a building, and they did that because they found that there were competitive alternatives available to CLECs when their ordering of DS1 or DS3D loops reached a certain level.

What we have here is, essentially, in our view it makes a mockery of the FCC's decision that limits the number of DS1 and DS3 loops that can be ordered.

What it does is it permits what anyone would call a single building to be considered multiple buildings for purposes of allowing DS and DS3 loops to be ordered. It provides that each tenant's space is going to be considered a separate building unless all of the tenants share a common telephone room and take all their services through that common telephone room.

That's not how services are provided in the majority of buildings in Missouri. You can look to this Commission's own structure here that it operates in where a law firm has the top floor, and under the definition of a building that's adopted here, that top floor would be considered a separate building altogether, unless it shares a common telephone room with the Commission, which I sincerely doubt is the case.

The effect of it is to create a situation where a building with 40 tenants in it winds up being considered 40 different buildings, and 40 times the number of DS1 and DS3 loops that the FCC intended to be ordered actually can be ordered consist with the contract. So it must be reversed.

I would point you to the Kansas decision, which they also agreed with SBC Missouri, and that's on page 47 of the arbitrator's determination on June 6 of 2005.

The next area that we have is whether the arbitrator erred in permitting access to packet switching. And again I'll note there's some confusion with the Order, as there is with a lot of aspects of it, because the Order in many cases simply says this issue was discussed and decided above, and one has to look very carefully to try to figure out if it was, and often there is no language that indicates where or how it was decided.

The only way you know what the arbitrator intended is to look at the detailed language matrix. So there's nothing in there that tells us why the arbitrator came to whatever decision he came to.

This is an issue that's technically critical if it means that AT&T, one of the people that raised this issue, gets access to new broadbrand capacity that the FCC has declared to be off limits. It's something that would significantly impact our investment in the state and our provision of the updated broadband architecture. These items are both that the FCC has said should not be and need not be provided to CLECs precisely because they want to give the ILEC the incentive to make the investment.

Let me also note that whatever your decision is with regard to 271, that this is not an area that is subject to 217 regardless. I think you heard

earlier this morning some discussion that the FCC has forebeared, if that's the appropriate word, forebore from regulating under Section 271 certain elements. Those include fiber to the curb, fiber to the home, packet switching and the packet switching capabilities of hybrid loops. In all of those cases the FCC has said that those aren't Section 271 elements.

so regardless of what your decision is, obviously if you decide that non-251 elements aren't to be combined or aren't to be part of the contract, that resolves the issue. But even if you come to the contrary decision and say 271 elements are part of the contract, you can't include these type of elements because we've pretty clearly been told that they're not 271 elements.

The applicable FCC rule is 51.319(a)(2) if I'm reading my notes correctly. That defines access to hybrid loops. AT&T's language is inconsistent with that rule. It's also inconsistent in our view with Section 4.11 of the Appendix UNE and creates an unnecessary conflict that would require later resolution by this Commission. It appears designed to give access to D-slams, which the FCC has prohibited in the TRO in paragraph 288.

The only obligation is to provide -- the only obligation that ILECs have with regard to the hybrid

loops is to provide TDM capability where that exists. Further, if you look at paragraph 537 and Footnote 1645 of the TRO, the FCC finds that, quote, competitors are not impaired without access to packet switching, including routers and D-slams, unquote.

So it's very clear that these items cannot be included and they are not part of the interconnection agreement. And to the extent the arbitrator's decision tends to do that to the contrary, it should be reversed.

The next item that we raised is whether the arbitrator erred in requiring SBC Missouri to provide loops where none are available. I don't think any party can contend or would contend that the FCC has imposed an obligation on ILECs to build new facilities. They quite clearly did not and said we're not to be required to provide -- build loops on behalf of the CLECs.

Again, this is an area where some clarification is necessary, I think, because the report says that, quote, SBC hay may or may not be required to build new facilities and may or may not recover costs when we do so. I would ask the Commission to clarify this and to adopt SBC Missouri's language as it comports with the TRO provisions in paragraph 632 and 645 that provide expressly that placement of cable is not required.

Next is whether the arbitrator erred in

permitting CLECs to order entrance facilities. Entrance facilities are generally connections between an ILEC, usually a switch, and a CLEC's facility, usually a switch. This is dealt with in interconnection and also in pricing, but I will cover it briefly here because it arises in the UNE area as well.

The FCC's TRO unequivocally found that entrance facilities were not UNEs and need not be provided at TELRIC rates. If you look at paragraphs 136 to 141 you'll find that clearly expressed.

The arbitrator's decision here ignores that finding and reimposes the same obligations, calling it -- relabeling it as interconnection. No matter what you label it, what we're still being asked to provide is an entrance facility to connect those two together. Interconnection obligations are not to be interpreted and are not interpreted by the FCC to require us to actually provide the facility. Interconnection obligation simply means when they come to you, here's what you have to do, but it does not require us to provide the facility itself.

The next area that we deal with essentially -- I guess one more point on that. If the arbitrator's decision were to stand, what it essentially means is that the FCC went through a long and involved process of deciding that entrance facilities need not be

provided because they were competitively available for absolutely nothing, because the end result of it is we still have to provide the same thing under the name interconnection and provide it at TELRIC rates, and that's just wrong.

It's pretty clear that the FCC took its action and decided that entrance facilities were no longer a UNE and need not be treated as such for a reason, and that reason is to be given effect.

The next area deals with switching. Did the arbitrator err in failing to limit access to unbundled dedicated transport and shared transport and unbundled local switching, including call flows, MLT testing and access to databases.

As background, unbundled local switching obviously has been declassified by the FCC. All of these things that we list here, dedicated transport and shared transport and the functionalities of the switch, including MLT testing and access to databases, they are all part of and are considered along with unbundled local switching. To the extent unbundled local switching goes away, these things go away as well. And the arbitrator's decision fails to incorporate those changes required by the FCC.

It would require apparently provision of switching at TELRIC pricing for both enterprise and mass

market customers, absolutely contrary to the requirements of the TRO and TRRO.

In terms of legal analysis, if you'd look at the TRO at paragraph 545 with regard to shared transport and paragraph 551 with regard to access to databases, those are where the FCC makes clear that those item are to be considered the same as unbundled local switching and treated in the same manner. The only obligation that we have is with regard to the embedded base of customers and only until March 10th of next year.

The next issue is whether -- I guess first did the arbitrator order and, if so, did he err with regard to provision of TDM capability into new packet based networks? Again, the decision in this is very unclear. The final report at pages 50 and 51 does not provide a substantial background or explanation to why the arbitrator came to the decision that he did.

I will say that SBC Missouri's language mirrored the FCC's new fiber loop rule as contained in 51.319(a)(3) and that should be adopted.

The CLEC language that the arbitrator appears to have adopted mixes improperly the fiber loop rule which I just mentioned with the hybrid loop rule, which is 51.319(a)(2), and it ignores the FCC's Order on Reconsideration which makes it clear that there's no

obligation to build TDM capability into new packet based networks or to add TDM capability to existing packet based networks. And that's in paragraph 20 of the Order on Reconsideration. We'd ask the Commission to look closely at that and to reverse the arbitrator's decision there.

The next issue that we have is whether the arbitrator erred in permitting access to unbundled local switching, included shared transport, for other than existing embedded base customers.

Again, the FCC set the transition period for unbundled local switching, and it limited it to, in our view, existing customers at existing locations. It precluded new arrangements, which we think the appropriate interpretation is both -- means anything new for an existing customer is also prohibited under the decision.

The language that the arbitrator adopted is also inappropriate because it imposes a burden on SBC Missouri to make the transition rather than requiring the CLEC to specify how it wants service to be provided to its own customer. And it's also unlawful in appearing to permit putting off the conversion until the last day permissible under the FCC's transitional rules.

The FCC's report is very clear that it intends the CLECs to move off on a transitional basis over a period of time. This language attempts to override that

and require SBC Missouri to make the transition for it at the very last day of the process, and that is directly contrary to the what the FCC intended and provided.

The next area is whether the arbitrator erred in requiring SBC Missouri to provide OCn loops and subloops. That's discussed in the final report on page 68, and our comments on pages 150 to 152.

Contrary to the arbitrator's decision, the FCC has made it clear that there is no obligation to provide OCn loops or subloops. That's contained in the TRO at paragraph 315. The Commission needs to review that and reverse the arbitrator on this point.

The final point that we've raised affirmatively with regard to UNEs is whether the arbitrator erred in failing to include FCC limitations on DS1 and DS3 loops and feeder subloops which meet the non-impairment standard.

Our view is, and I think if you'll look at the FCC rules you'll agree, that the FCC determined that the feeder portion of the subloop need not be unbundled. That's provided clearly in the time TRO at page 254. So to the extent the arbitrator has approved language that would require SBC Missouri to provide a subloop in the feeder portion of the loop, that is clearly wrong, clearly unlawful and must be reversed.

The FCC's determinations that DS1 and DS3 loops are subject to a per-building cap is also very clear. I've discussed that. The language that the arbitrator approved does not recognize those limitations and needs to be reversed on that basis as well.

I know there's a lot in the UNE area that we've asked to be reviewed. That's because we lost the majority of those issues, and in our view the arbitrator's decision was unlawful. I think we've only raised one issue that's more of a policy issue, which I discussed with you about MCI's report. The others are legal issues, and they are wrong and they need to be reversed and we'd ask you to do that.

In the interest of time, I'm not going to address the specific affirmative issues that are raised by the CLECs in their requests for reconsideration of those aspects of the UNEs that the Commission -- or that the arbitrator came out on our side on, but I'm more than happy -- if you-all have questions on it after you hear it, I'm more than happy to answer and explain our position. We think that the arbitrator's decision in those UNE areas where we did win was proper and should be upheld.

Thank you.

JUDGE THOMPSON: Thank you, Mr. Lane.

Mr. Magness?

MR. MAGNESS: Thank you, your Honor. I think we'll start from the beginning, which was actually the end of the last argument, now the beginning of this one, which is again about 271.

Just briefly on the additional items Mr. Lane has raised on that, this issue of whether this -- the arbitrator's Order would ask this Commission to enforce Section 271. It's an important issue, but it's one where we believe the arbitrator got it right, which is that the -- none of the parties are asking this Commission to enforce Section 271 in the sense of saying SBC is out of compliance of 271 and it shouldn't be in long distance anymore. That is a job for the FCC. That's what Section 271(b)(6) is about.

But the FCC said in paragraph 665 in the TRO that, we conclude that for purposes of Section 271(b)(6) BOCs must continue to comply with any conditions required for approval consistent with changes in law. As we argued earlier, and I don't want to repeat it again, the statute itself says that BOCs are to include their checklist items in 252 agreements. So it's -- that 252 agreement is what we're arbitrating here.

The question is whether those items need to be in this agreement, and the statute says yes. The FCC

has said that obligation doesn't go away, and I don't know that they can make it go away since it's in the statute. So it's an important distinction and one that is not one the arbitrator missed.

As to this question of state law authority and preemption, I'm not sure exactly what the thrust of this is. The CLEC Coalition certainly was not arguing that the Commission should be putting UNEs into this agreement based on state law authority. I would disagree with Mr. Lane's reading of the extent of preemption in the TRO, but I don't know that we really need to spend that much time on it because I don't know that it's really relevant to what's here before.

The thing is that 271 is part of a federal scheme, 251 is part of a federal scheme, and it's the federal scheme which is being arbitrated here in the Section 252 case.

As to the issue Mr. Lane raised about state rules being implemented, if you actually look at the specific contract language that they're complaining about, it contemplates that if this Commission issues an Order, that compliance with that Order is going to be required. So if this Commission issues an Arbitration Order in a Section 252 case, that language simply contemplates that that, as well as applicable court decisions, are to be

followed by the parties. It's not an effort to create UNE obligations through state law.

On the commingling issue, first on this question of the errata and whether it was misread, it was not. What SBC has said now and again and in testimony and everywhere else, and what the arbitrator saw through, fortunately, is that the errata included two changes that affected this issue. One is the one Mr. Lane told you about where it used to say that 271 was explicitly included in what was subject to commingling. And in the actual errata that was filed by the FCC, that was in paragraph 27 of the errata.

But then in also in paragraph 31 of the errata, they made another change, and that was in Footnote 1990. And what Footnote 1990 used to say before the errata is, we also decline to apply our commingling rules set forth in Part 7A above to services that must be offered pursuant at these checklist items, the 271 checklist.

So the FCC found that it had both, in the same Order said that commingling applied to 271 elements and that commingling did not apply to 271 elements. They took both of these references out. So what are we left with? Well, we're left with an Order that when it describes commingling in paragraph 584 says the following:

We require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services. And it says, including any service offered for resale pursuant to Section 251(c)(4) of the Act.

So I think what you find in the arbitrator's report is a straightforward following of what's left in the TRO, which is commingling is a combinations of UNEs, 251 UNEs with any other wholesale facility or service. So SBC is arguing that a 271 offering, whether it be tariff special access or a particular 271 offering in an agreement, somehow is not a wholesale facility or service, which just doesn't make a whole lot of sense.

So this errata thing is entirely a smoke screen and a very misleading one since it relies on half the errata instead of the entirety of what the FCC did. So since that is the heart of SBC's end run around commingling, it ought to be thoroughly rejected, as it was in the arbitrator's report.

Now, Mr. Lane referred to commingling, and at least the way it's going to work in this agreement is an end run around the restrictions on UNE-P. That's not right, because however a CLEC obtains access to 271 switching, which SBC concedes that 271 switching has got to be available somehow under the checklist, whether it's

under this agreement or elsewhere -- in fact, they have a 271 switching offering up on their website. It's a commercial offering. They don't want to put it in interconnection agreements, and I won't opine about the goodness or badness of it, but I don't have any clients who have taken it.

Whatever the offering is, it's got to be commingled with the 251 UNE loop. So the creation of a substitute product that allow residential and small business customers to be served using leased elements is still going to exist. It's not going to be UNE-P because the switching is not going to be TELRIC priced. It's going to be priced at whatever the just and reasonable rate for a 271 element is.

So there is no sense in which the language in this interconnection agreement if adopted is going to provide anyone the opportunity to completely recreate at the same price a UNE-P arrangement that the FCC has said has to be phased out by next March.

As to the recommendation that this Commission follow the Kansas decision on commingling, one could just as well recommend that this Commission follow the Texas decision on commingling, which is in every meaningful respect the same as the Judge's decision here and we think is more appropriate.

In general, if one -- if the Commission wants to cede its jurisdiction to the Kansas Commission and you're going to do that on UNEs, I'd please ask you do it on recip comp, too, as well because Judge Thompson was all wet on that, but the Kansas guy did a great job. You know, those rivers run both ways, I suppose.

On the question of the conditions under the Verizon Supreme Court decision, this is not a legal issue. This is a policy issue, because the language the judge approved is completely compliant with the FCC's rules, which do not apply those conditions to commingling. At times SBC wants to draw a great distinction between combining on the one hand and commingling on the other. At other times they want to say they're the same thing.

But the FCC rule at 51.309(d) doesn't incorporate those conditions. They don't have to be there legally, and there's probably a good reason why the FCC didn't just say that the combining rules were exactly the same as the commingling rules. So what the arbitrator has done is compliant with the Order.

On the other issues on conversions in particular and this question of charges for conversions, I would just refer the Commission to the TRO provision on conversions and what is appropriately charged for them, which I believe is at paragraph 587 in the TRO.

Just quickly, the FCC held on that issue, because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable and nondiscriminatory terms and conditions. So what the arbitrator again here has done enforces the TRO, does not abate it.

On the issue of concerning loop caps and the building definition, this is -- Mr. Lane is correct -- an important issue because it's going to determine when CLECs can and cannot get UNE loops. The FCC used the term building, did not define the term building, and there was testimony, factual testimony concerning this issue and what the practical implications of various ways of defining building are.

I think Mr. Lane's example is primarily hyperbole, this idea of 40 suites in a building being defined as 40 different buildings. As a practical matter -- and I'm not a witness here to testify, so I don't know for sure, but as a practical matter I would imagine that the Commission's part of this building has a single telephone closet, as do many very large high-rise office buildings, a telephone closet or room from which

everyone's telephone service emanates.

That would qualify as a building under the CLEC Coalition definition, the definition that was accepted by the arbitrator. So every single person's cube or office or floor of the building is not going to qualify that way. Even if they're all in different suites, they don't qualify that way if all the lines come into that telephone closet.

If the law firm upstairs has an entirely separate way in which loops get up to the building, yes, under this definition it would qualify as a separate building because it wouldn't make any sense -- under the way the FCC describe the taps, if you read the TRRO, as our witnesses did, it doesn't make any sense to limit it in that way.

The testimony that the judge heard, that was presented to the Commission, was based on giving a full reading to the policies behind the TRRO, which is exactly what one must do when the FCC doesn't define the term for you. This is a reasonable definition. The hyperbole SBC throws at it if one reads the record really doesn't stick.

On the entrance facilities issues, this is another one where I would advise, if the Commission wants to reconsider this, to reconsider it based on what's in

the factual record. It is an unfortunate fact that entrance facilities is a term that nobody really knows what it means unless they're in the industry, and even if you're in the industry, it gets used two different ways.

And the FCC recognized this, that the term entrance facilities is sometimes used for one purpose and sometimes for another. And in the TRRO they did, and we don't contest, say that an entrance facility that is used for purposes of a UNE is no longer available as a UNE, but if the entrance facility is used otherwise, it's still available at TELRIC rates.

It's paragraph 140 of the TRRO. And they said, that is the FCC said, we note in addition that our finding of non-impairment with respect to entrance facilities did not alter the right of competitive LECs to obtain interconnection facilities pursuant to Section 251(c)(2) for the transmission and routing of telephone exchange services and exchange access services. Thus competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

The witness sat in that witness chair, Mr. Land, and was cross-examined and redirect examined and took questions from the Staff concerning what's the difference between those two types of entrance facilities.

It's in the record, and the differences are reflected in the arbitrator's report and they should be maintained.

On unbundled local switching, Mr. Lane referenced various items that are only necessary in the agreement if unbundled local switching is available. He mentioned MLT testing, various forms of dedicated transport that, as he put it, you only need if there's switching, and they are necessary if switching is to be offered.

The real issue here is the 271 issue. The reason those terms still need to be in the agreement is the 271 switching, in order to be the same sort of service as 251 switching, needs those things to be included in it. So to the extent that 271 switching is available in this agreement, which of course we believe it should be and is consistent with the arbitrator's report, then those items need to be in the interconnection agreement as well.

On the embedded base question Mr. Lane mentioned, we spent a rather long afternoon here a couple months ago talking about that in the emergency petition. The Commission considered the legal issues there at length. The legal issues have not changed. They were under the TRRO. There they remain, and we believe the Commission should stay with what it ordered in the emergency petition, which was compliant with the TRRO.

And on this issue, Mr. Lane mentioned of getting orders in at the last minute at the end of the transition. We would submit that the language that the arbitrator approved complies with the transition period that the FCC has outlined. If orders are in on a timely basis, those orders should be processed, and if they're in too late, they should not be processed as 251 UNEs.

The language does a good job of conforming to the TRRO without unnecessarily squeezing the transition period in a way to compromise the CLECs' ability to plan for the limited time that they can get those UNEs in the future.

I think finally, I believe -- finally on the DS1 and DS3 loop caps, the language that the arbitrator adopted is consistent with what the FCC did in the TRRO. Again, there really is one specific paragraph that goes directly to this as there was with entrance facilities. That's paragraph 128 where the FCC states its limitation on DS3 transport, and it says, on routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to ten circuits.

SBC is urging that the condition for that

cap, that is that it's limited to routes where they have determined there is no unbundling obligation for DS3 transport, that that be ignored.

It's clearly in the FCC's Order and part of what the FCC contemplated. Again, there are caps. There are limitations. There are transition periods. But the ones that the FCC should be adopted and not squeezed further, and we believe that the language on all of these issues honors the law and the policy behind them.

That's all I have, if there are any questions.

JUDGE THOMPSON: Thank you very much, Mr. Magness. Ms. Bourianoff?

MS. BOURIANOFF: Thank you, your Honor. I'd like to start with the issues that AT&T commented on, and AT&T commented on five UNE issues in its filing on Friday. I only want to highlight one of them here today, and that is AT&T UNE Issue 9, which has to do with EELs, and that's actually an issue where there were some mixed decisions. Some sections of AT&T's were adopted and some sections of SBC's language were adopted.

Our comments address two particular sections of language that were addressed in the detailed matrix, and those are Sections 2.12.6, which has to do with the proof of certification that a CLEC has to submit

to be able to get an EEL, and SBC proposed language that that proof of certification should be on a circuit by circuit basis on an SBC form.

We contend that that's inconsistent with language in Footnote 458 of the TRRO where the FCC talked about a letter submitted by a CLEC saying that the circuits qualify would be sufficient. So we request reconsideration of the adoption of SBC's language in Section 2.12.6.

We also ask that the Commission reconsider the decision to adopt Section 2.12.7.4.1. I know that's a mouthful. And that section of SBC's contract language that was adopted describes the way that the cost of an audit would be borne between the parties, and allows SBC to recover not only the costs of the auditor itself, but SBC's own internal costs.

And we contend, and this was explained in our comments filed on Friday, that that's inconsistent with paragraphs 627 and 628 of the TRO, that those paragraphs allow a CLEC to recover its internal costs if the audit shows that the CLEC was complying, and it allows an ILEC to recover the costs of the auditor if noncompliance is shown, but nothing in the TRO allows an ILEC to recover its internal cost, and we would suggest that that sets the wrong incentives.

Now I'd like to turn to issues that SBC raised either in its comments or here, Mr. Lane, orally. And quite frankly, I had trouble following the cheat sheet, the 18 issues or so on UNE issues that SBC handed out. I had trouble matching those up with the specific AT&T issues that were addressed in the arbitrator's report, which is why I'm not going through in particular the SBC issues on the cheat sheet.

And I'm going to try not to replow the same ground that Mr. Magness covered. So I'm not going to touch on 271. I think that's already been discussed fully.

I would like to start with AT&T issue -- AT&T UNE Issue 2, which Mr. Lane didn't touch on specifically but is addressed in its comments. On page 63 SBC suggests that that issue is not addressed by the arbitrator's report. I think that's incorrect. I think the thing about that issue is Issue 2 had five subparts, 2A, B, C, D and E. The DPL that the parties filed did not have specific subsections of contract language with specific subsections of the DPL.

And the arbitrator's report addressed all of the disputed sections of contract language in UNE Issue 2 in the section entitled UNE Issue 2B. And so in later subsections 2C, for example, it just says see above,

but I believe there was a decision on all the disputed contract sections in AT&T UNE Issue 2, and I do not think that was overlooked, that the Commission needs to reconsider that.

Regarding commingling and whether the Verizon commingling restriction -- I'm sorry -- the Verizon combination restriction should also apply to commingling, Mr. Magness did a good job of talking about that. One thing I would like to add is point Commission to paragraph 579 of the TRO.

I think that supports the decision that the arbitrator reached. And in paragraph 579 of the TRO, the FCC said specifically that ILECs must perform the necessary functions to effectuate such commingling upon request. That language talks about the ILEC coming to do the work for commingling, and that is different than combinations.

On AT&T UNE Issue 8, which has to do with conversions and whether there's an obligation to have conversions be seamless, Mr. Lane talked about this in his arguments. SBC in their comments said that there's no obligation for an ILEC to have conversions be seamless. Mr. Lane described it as a goal, I think was the term he used.

And I would point the Commission to

paragraph 586 of the TRO, and in that paragraph the TRO said that converting between wholesale service and UNEs or UNE combinations should be a seamless process that does not affect the customers' perception of quality. I believe the AT&T contract language that the arbitrator approved talked about conversion process shall be seamless. So it tracked this language in the TRO pretty closely.

Another point that SBC raised on this issue in its comments that I just wanted to touch on, it's on page 100 of SBC's comments. SBC claimed that the arbitrator erred in approving AT&T's language that would allow rates from this interconnection agreement to apply to orders that had previously been submitted.

And I would just refer the Commission to AT&T's contracts language. It does not propose that at all. It's 2.10.5, and there's no such language in the contract language proposed by AT&T and approved by the arbitrator.

I'd like to touch on this issue about CLECs submitting conversions or orders at the end of the transitional period. That's raised in AT&T Rider Issue 4. I think it was No. 17 on Mr. Lane's cheat sheet, and he said that CLECs are attempting to circumvent the transition provisions and period of the TRRO, and that the

arbitrator's report should be reconsidered in adopting the CLECs' language.

I believe that's a reference to contract language that AT&T had proposed in Section 2.3.4 of the rider, and that language provides that AT&T will submit an order to convert UNEs to alternative arrangements at any time before the end of the transitional period, but the effective date shall be the last day of the transition period. This issue is discussed in detail at pages 42 through 45 of AT&T's post-hearing brief.

We think the arbitrator's position on that is fully consistent with the spirit of the TRRO, and I would point the Commission to paragraphs 145, 198 and 228 of the TRRO that clarify that a CLEC's entitled to the transitional rates for the entire period of the transition, so for the entire time until March 11, 2006. We believe the arbitrator's decision on that issue was correct and should be upheld.

Mr. Lane also talked about entrance facilities. I would just suggest that the arbitrator nowhere required SBC to continue to provide entrance facilities. I think there's no disagreement that entrance facilities no longer are required to be provided. Instead, there was a decision to require interconnection facilities to be provided.

AT&T treats that as a network interconnection issue, and I'll let Mr. Zarling address that when we get to that section of this afternoon's hearing.

Finally, regarding packet switching, Mr. Lane complained about AT&T's request for packet switching and that the arbitrator's award or report would improperly require SBC to provide packet switching. Those are AT&T UNE Issues 16 and 17, and I just want to clarify that AT&T is not in any manner or form requesting access to packet switching. And, in fact, there is agreed-to language in Section 4.2 of the UNE attachment that says specifically that a UNE loop does not include electronics provided for advanced services, including D-slams. So I think that makes it pretty clear that we're not going to go try and get packet switching or other types of advanced service functionalities that Mr. Lane alluded to and discussed in his argument. Instead, our language is broad and talks about loops including fiber loops, stuff we think should be fairly non-controversial in fact.

That's all I have, unless there are any questions.

COMMISSIONER GAW: Judge, may I ask Mr. Lane to respond to that last piece? Is that a communication issue -- imagine talking about communication

with you-all -- or is it -- is it a real issue for SBC? If so, would you please explain in regard to the packet switching issue?

MR. LANE: Well, I guess, Commissioner, it's a difference of opinion on what the language calls for. I'm glad to hear with regard to AT&T on that particular issue that they won't subsequently claim that if their language is adopted that they get that particular functionality.

But the issue that was raised is broader, I believe, than just AT&T, and I'd have to dig into their language to tell you exactly why we were concerned about that. But if the Commission clarifies that, that they're not entitled to that, that would be very helpful.

COMMISSIONER GAW: Does that help -- does that deal with that particular piece on that issue if that's --

MR. LANE: I think what the Commission needs to do is to make the declaration of what CLECs are and are not permitted to do with regard to that, and then we'll conform the language to that decision.

COMMISSIONER GAW: Okay. Thank you. Do you want to come back and --

MS. BOURIANOFF: Well, your Honor, I mean, I don't disagree with that. We said in prefiled

testimony, we had witnesses saying we weren't seeking access to packet switching. I'm a little concerned about how the Commission makes this kind of declaration as to what CLECs are entitled to because the way to do that in an arbitration is to decide between disputed contract language, which is what's been done.

But I just wanted to clarify, if you actually look at our contract language on the table, nowhere do we preference packet switching. In fact, we have this agreed contract language that says we're not seeking access to the electronics used to provide advanced service, including D-slams.

COMMISSIONER GAW: Okay. Thank you, Judge.

JUDGE THOMPSON: Thank you, Commissioner, Mr. Leopold?

MR. LEOPOLD: Brett Leopold for Sprint. I just have a couple of brief issues. Primarily will rely upon our comments and Briefs again.

I do want to note that there is one, call it a scrivener's error, technical error that we point out in our comments where it appears that one of our proposed contract provisions was divided inadvertently into two pieces, and so in the matrix it results in a disconnect where the SBC proposed language and the Sprint proposed language aren't lined up next to each other.

And I think, in fact, that led potentially, as I read the rationale of the decision and then see what contract language was adopted by the arbitrator, to a substantive error where perhaps the arbitrator rejected one of Sprint's proposed contract provisions partly because it was cut in half and it wasn't being compared to its pier proposed language that SBC had put forward.

Other than that, I think Sprint's major issue here is the transition period, and we would urge the arbitrator to continue to adopt the proposed Sprint transition period.

The self-effectuating language put forward by SBC is not appropriate, not justified by the law, and frankly, in some portions of their testimony and briefs, I think it's described in a more reasonable, more moderate way than is borne out by the actual language that SBC proposes, something like the issue that Mr. Lane and Ms. Bourianoff were just discussing where what SBC says about its transition language to us doesn't appear to be borne out in the actual language they propose, and we think the Sprint language is most appropriate.

I'm very excited to talk about entrance facilities, but I'm going to wait until the interconnection section, but I look forward to that issue in the near future.

JUDGE THOMPSON: We'll attempt to contain ourselves.

MR. LEOPOLD: Thank you.

JUDGE THOMPSON: Any questions for Mr. Leopold?

Okay. Mr. Savage?

MR. SAVAGE: Two very brief points. One, I also have some comments about entrance facilities. They relate to interconnection, but I will follow the crowd and defer that.

I'll make one comment, then, in response to what Mr. Lane said about the legal standard that the Commission should apply in imposing new obligations or different obligations than in the federal law.

In response, I think, to my earlier comments about the scope of this Commission's authority under 251(d)(3) and 252(e)(3), he referred to some specific language in the TRO saying effectively it would be inconsistent with federal law for the state to do thus and so. And my only comment would be that that doesn't in any way change the fact that the state commission has the authority under 251(d)(3) and 252(e)(3) to do things over and above what federal law requires as long as not inconsistent with federal law.

That's simply an instance in which the FCC

has made a declaration that something might be. And I'm raising this point just because I think the Commission's authority to do these things matters over the scope of a number of issues rather than just one.

The other point that Mr. Lane observed is, well, gee, the arbitrator's ruling didn't cite 251(d)(3) or 252(e)(3), to which I would say that doesn't matter at all because I think we've all agreed that at least on issues of law the Commission's review here de novo. So to the extent that there legal grounds for modifying or doing something that might not have appeared in the arbitrator's original decision, that isn't in the slightest a constraint as to what the Commission can do on review.

Frankly, given the number of issues to be dealt with, it would have been astonishing if all of the proper cites of everything had made it into the initial decision. So it's simply a matter of highlight now.

But I will restrain myself on entrance facilities and bring that up later.

JUDGE THOMPSON: Very good.

MR. SAVAGE: Let me say for Mr. Johnson, he had another commitment. He authorized me to say on behalf of Navigator that on the UNE issues he would rest with respect to what he said in his actual comments last Friday.

JUDGE THOMPSON: Okay. Mr. Shorr?

MR. SHORR: David Shorr for WilTel. WilTel refers for the purpose of economy this afternoon the Commission to its comments on UNEs in its Brief and has nothing further in addition to the comments of the other CLECs -- CLECs.

JUDGE THOMPSON: Whatever they are.

MR. SHORR: Whatever they are.

MR. MAGNESS: We're not chipmunks.

JUDGE THOMPSON: Mr. Lumley?

MR. LUMLEY: If you play back the tape of these proceedings at a high enough speed, we'll sound like chipmunks. On the issue --

JUDGE THOMPSON: You know, on that note, we're getting very close to the afternoon break. Can we hold it together long enough to --

MR. LUMLEY: Yes. MCI had several points on UNEs in its written comments. Just to highlight them briefly, the first one had to do with UNE 29, routine network modifications. The law requires SBC to make all routine network modifications, and the language that was included that would allow SBC to determine whether and how dilutes that in an illegal manner, and we would ask for reconsideration and just use of the express language of the rule.

Secondly, on EEL criteria, two points. One was in UNE 44. The arbitrator adopted some MCI language, the lead language basically setting forth the parameters of the section, but then attempted to paste in some conflicting language from SBC. We would ask reconsideration and use of the entirety of MCI's language on that point because it hangs together better. We don't have conflicting terms.

And then under UNE 45, the detailed recordkeeping requirements that SBC proposed and which were accepted are contrary to the FCC's requirements and we would ask reconsideration there.

With regard to several of the points that SBC has made, first on their Item 7 in the list they provided this morning in terms of commingling obligations, this pertained to MCI Issue UNE 15. I would refer the Commission and the arbitrator to the DPL between SBC and MCI, and you'll find that there was no opposition whatsoever to this portion of the text and no competing language provided. We submit it's too late to try to make an issue out of it now, and the decision should stand as is.

With regard to Item 10, the conversion process, here I think it's probably just a matter of miscommunication. I'm not really sure.

On the question of whether the arbitrator decided the point, if you look at the decision in Section Roman numeral III, letter C, 3A, and compare that explanation of the arbitrator's decision with MCI's proposed text, it matches up exactly. There's no doubt whatsoever that the arbitrator approved MCI's language.

The point that SBC seems to be most concerned about is the use of the spreadsheet in the ordering process, and MCI expressly throughout that aspect of its proposal in its Brief, and we would understand that that portion of our text would not be in the conforming contract given that we voluntarily gave that part of the issue up.

On their Item 13, it was not clear from their presentation, but if you look at their written comments at pages 120 to 21, you'll see that this is an issue concerning routine modifications, and their concern is that somehow MCI would be asserting the right to get new loops placed in the process of routine modifications. In fact, under UNE 29 the arbitrator approved MCI's proposed Section 9.9.2, which expressly says that new loops are not routine modifications. So there's just no issue there.

One point that was raised in SBC's written comments that they did not touch on today, it's pages 61

to 62 and concerns MCI UNE 3, and this has to do with the declassification of UNEs. In their comments, they contend that the language they proposed is limited to circumstances where there's no express transition period provided in an FCC Order or some other similar authority, but, in fact, that's not the case. And the arbitrator properly rejected SBC's language as overly broad.

Finally, in their written comments they address under the UNE section the same issue of use of tariffs and interconnection agreements. I'd just refer to my prior comments this earlier in the general terms and conditions section.

Thank you.

JUDGE THOMPSON: Very good. Questions for Mr. Lumley? Very well. Hearing none.

We are at the appropriate point to take ten minutes, and so we will return after a ten-minute recess.

(A BREAK WAS TAKEN.)

JUDGE THOMPSON: Okay. The reporter tells me that if we're going to go tomorrow, if we're going to resume tomorrow, she needs to call her office before five. So the closer I guess we get to five, let's keep our minds on that. Of course, you guys are welcome to stop right now if you'd like, but somehow I don't think you're going to want to.

Before we leave UNEs, could you remind me, what was the -- Mr. Lane, you were explaining that there was something, the TRRO, I believe, that was later an errata that came back and struck out. Am I right, or am I misremembering that?

MR. LANE: It's correct, your Honor.

JUDGE THOMPSON: What did that have to do with exactly?

MR. LANE: It eliminated the requirement that had been in the TRO that erroneously indicated that we had to commingle Section 271 elements with 251(c)(3) UNEs.

JUDGE THOMPSON: Great. Thank you. Okay. I think we're up to Section No. 4, if I'm not completely mistaken, which is pricing. Mr. Lane?

MR. LANE: I'll look at the Commissioners on this one.

JUDGE THOMPSON: They're coming.

MR. LANE: I'm going to convince you you're wrong. We've raised seven issues on pricing that I will cover with you in order as I -- as are contained on the sheet that I handed out earlier. The first --

COMMISSIONER GAW: Mr. Lane, I have a question. In regard to -- there was discussion earlier about this provision in the FCC Order to eliminate the

requirement to commingle 271 elements, I think, with the 251(c)(3) UNEs. Have I got that right?

MR. LANE: Yes.

COMMISSIONER GAW: And I'm just trying to understand because -- about this so-called correction that was done later. Can you tell me what that correction was again?

MR. LANE: Yes. The errata that the FCC issued struck the sentence in paragraph, I believe, 584 that indicated that there was a requirement to commingle 251(c)(3) UNEs with Section 271 network elements.

COMMISSIONER GAW: And now -- and that's what I -- that's what you told us earlier, and then Mr. Magness, I believe, was up here stating that there was another sentence --

MR. LANE: It was actually Ms. Bourianoff I believe said it.

COMMISSIONER GAW: Well, I think he's claiming responsibility.

MR. LANE: I will not take that away from him.

COMMISSIONER GAW: That there was another sentence that had to do with this topic that was also struck. Do you know whether or not that's accurate?

MR. LANE: Yeah. He's referring to

Footnote 1990 of the TRO. There was a sentence at the end of that footnote that otherwise had been dealing with combining that discussed commingling, and in my view, what the import of that was is that they were leaving the footnote to discuss combining only, and the section of the errata that we discussed where they specifically imposed the requirement to commingle with Section 271 network elements was specifically lifted. And that indicates exactly what the FCC's intent was to eliminate that requirement.

COMMISSIONER GAW: So you totally disagree with him that the two provisions that were reflected in the errata order did not relate -- you don't believe they related to one another?

MR. LANE: I think what his claim was, well, these things cancel each other out and so --

COMMISSIONER GAW: It was basically that as I took him.

MR. LANE: Right. They cancel each other out so let's put it back in, was his point. Obviously we do disagree with that.

CHAIRMAN GAW: But do you think that other provision is relevant at all to this -- to the other sentence that was struck that you referred to?

MR. LANE: I don't think it changes what

the FCC intended or what you should do with it, no.

COMMISSIONER GAW: And you don't think it's relevant at all to the issue?

MR. LANE: I think that the FCC's decision in paragraph 584 where they have initially said you have to commingle 271 network elements and they went back specifically and removed that is controlling and makes it very clear that they do not intend and do not require commingling of Section 271 network elements. I think it's very clear.

COMMISSIONER GAW: Mr. Magness, if I could, I just want to make sure I'm understanding these points on this topic. Would you mind replying to Mr. Lane's argument?

MR. MAGNESS: Of course, Commissioner. The errata was released in the TRO docket by the FCC on September 17th, 2003. It was a separate filing in the TRO docket. They corrected a number of things. The two that matter to this argument are in the errata filing in September 2003, at paragraph 27 and paragraph 31 of the errata. Paragraph 27 is the one Mr. Lane's relying on where, prior to the errata, the FCC had explicitly said that commingling included any network elements unbundled pursuant to Section 271. They took that out.

But then what they also had in the original

document, and this is reflected in the change they made at paragraph 31 of the errata, it says, in Footnote 1990 we delete the last sentence. So you go back to Footnote 1990, and you see there, Mr. Lane's right, they were saying -- let me just read you the footnote.

We decline to require BOCs pursuant to Section 271 to combine network elements that no longer are required to be unbundled under Section 251. Unlike Section 251(c)(3), Items 4 through 6 and 10 of Section 271's competitive checklist contain no mention of combining, and as noted above, do not refer back to the combination requirement set forth in Section 251(c)(3).

Okay. Here's what they deleted. The last sentence said, we also decline to apply our commingling rule which is set forth in Part 7A above to the services that must be offered pursuant to the checklist items.

So what they wrote in the initial order, in paragraph 584 they explicitly said, commingling applies to 271 checklist elements. But then in Footnote 1990 they explicitly said, commingling doesn't apply to 271 checklist elements. So they went back and took them both out.

COMMISSIONER GAW: Mr. Lane, how is that argument flawed?

MR. LANE: The net effect of it is that

there is no obligation to commingle Section 271 network elements with 251(c)(3) unbundled network elements. That's the net effect.

COMMISSIONER GAW: My question is, how is Mr. Magness' argument flawed?

MR. LANE: Because the net effect of the two things is the same. It removes any obligation to commingle Section 271 network elements. There's nothing affirmative that requires it, and they specifically struck that which had in the initial order in paragraph 584 required it.

COMMISSIONER GAW: Didn't they also strike the portion that said they would not be allowed to be commingled? That's why I'm trying to understand whether or not there were arrows pointing in opposite directions and they simply removed the arrows. That's what I hear Mr. Magness saying, and I'm trying to -- what I'm asking you is, what's wrong with his analysis? Not the conclusion that you're drawing about whether or not there should -- we should or shouldn't be doing it, but what's wrong with his analysis about what the FCC did with the Order?

MR. LANE: Well, I don't disagree that both of us have correctly cited to what the errata said, but that's -- the question is, what does that mean?

COMMISSIONER GAW: Yes, and I understand that's the argument.

MR. LANE: What's left is --

COMMISSIONER GAW: What I'm worried about is -- what I'm really worried about here is whether or not we've got all the information from both of you about what was struck. Did Bell cite to both of the provisions that were struck?

MR. LANE: I have to go back and look at the Brief. I assume that we did, but I don't specifically have a recall of it right now. But it doesn't change.

COMMISSIONER GAW: It doesn't, but I just -- when we have things like this in front of us, it's important for me that even if the documentation doesn't necessarily agree with the argument, that we hear that it's there, and then that we hear why that fact is not -- shouldn't be influential, and I just -- that's what I'm really asking about.

MR. LANE: And that's --

COMMISSIONER GAW: Was it cited? Did SBC inform this Commission that both of those provisions were struck? And if you can find out for me.

MR. LANE: Sure.

COMMISSIONER GAW: I'll listen to the arguments about what it did, and I understand you-all

disagree with that, with one another about that, but I do -- I do think it's important for us to know if you've got one piece that bears on an issue that's struck and an additional one that is struck, I would like to know that both of them occurred.

MR. LANE: Okay. That's fine.

COMMISSIONER GAW: Anyway, and I --

MR. LANE: Do you want me to address the net effect again or not, or do you understand our perspective?

COMMISSIONER GAW: No. I think I understand your arguments. I just want to make sure that --

MR. LANE: There's nothing affirmatively in the FCC's TRO that requires commingling of Section 271 network elements.

COMMISSIONER GAW: Or includes it either?

MR. LANE: Well, the question is not -- it has to be there or you don't have the obligation, and it's not there.

COMMISSIONER GAW: That's your argument?

MR. LANE: Yes.

COMMISSIONER GAW: And the CLECs have their own argument about it.

MR. LANE: Right.

COMMISSIONER GAW: But please find out for me about that. You may have cited --

MR. LANE: If we didn't, it was an oversight and I apologize.

COMMISSIONER GAW: -- in your oral presentation, and I might have missed it.

MR. LANE: And I don't know that I did. I'm sure I didn't in the oral presentation. You asked about the Brief, and I don't know about that.

COMMISSIONER GAW: Thank you.

MR. MAGNESS: Your Honor?

JUDGE THOMPSON: Sir.

MR. MAGNESS: It's page 87 and page 88 of SBC's comments, and they cite to paragraph 655, Footnote 1990, but not to tell the Commission anything about what was struck from it, only to tell the Commission that it continues to say that 271 doesn't include a combining obligation. So they reference Footnote 1990, but not for that purpose.

And if I could just have half a minute because Mr. Lane has stated their ultimate position several times, our ultimate position is we would ask the Commission to look at what is left in paragraph 584 and the rest of the TRO, and what you will find is that commingling is between UNEs and other wholesale facilities

and services. And the argument is over whether whatever a 271 checklist items looks like, does it qualify as an other wholesale facility or service, and we believe it does and leave it at that. Thank you.

JUDGE THOMPSON: Let's go ahead and start pricing.

MR. LANE: There are seven issues that we've raised here. The first one involves DS3 loop rates, and in the arbitrator's final report, the arbitrator adopted AT&T's proposal that rates established in Texas for DS3 loops should apply here in Missouri, and we ask that that be reversed.

As a factual matter, the information presented to the arbitrator was that there were -- DS3 loop prices are not contained in the M2A today. No one has ordered DS3 loops in Missouri today in any of our interconnection agreements, and so we're dealing with what is a new issue.

The final report's adoption of AT&T's proposal to use Texas rates is wrong for several reasons. First is that there was no cost study presented by AT&T in support of its rates. There obviously was a cost study at one point in Texas, but I can tell you that it didn't propose that the costs in Texas were those adopted by the Texas arbitrator or the Texas Commission.

Instead, as often happens, commissions make adjustments to various cost studies when they set prices. So whatever adjustments were made in Texas were not presented to the Missouri arbitrator here or to the Commission here, and there's no basis for the Commission to adopt prices that are based on a cost study that wasn't presented and on one that was subject to various unstated adjustments that were made by another state commission.

I would also note that the rates established in Texas in which the -- which AT&T proposes here utilize the same rate across each of the four zones which this Commission has previously set to determine what appropriate rates are. In all of the prior arbitrations in Missouri and in the M2A itself loops are subject to varying prices based upon what zone they're in.

Obviously those that are in the more urban areas are often shorter loops, and they often cost less to install as compared to loops that are put into the more rural areas which are often longer and have different terrain to go through, et cetera, and have something of a higher cost associated with them. Those things are not reflected in the price that is recommended by AT&T which the arbitrator adopted.

I will also tell you that while we proposed rates that are based on TELRIC, the arbitrator points out

that we did not put our cost study into evidence either. That's true.

So you may feel that if you agree with me that it's inappropriate to adopt Texas rates based on a cost study not presented to it, based on adjustments that weren't shown to be valid in Missouri or even what they were, it's also inappropriate to adopt SBC's rates. If that's the way that you feel, what should you do?

What I would say do the same thing that would happen if somebody wanted to order a DS3 loop today in Missouri under the M2A, and that is when someone wants some unbundled network element that does not have a price, the CLEC orders that element via the BFR process, bona fide request. Under that process, parties discuss it, they try to reach agreement on a price, and failing to do so, it goes through dispute resolution and ultimately is presented to the Commission if need be to them decide it.

That BFR process was otherwise adopted by the arbitrator and will be a part of each of the contracts, obviously AT&T's as well, which is the only one disputing DS3 loops. That to me is the appropriate resolution for you to make. But it's not appropriate to adopt rates that are based upon a Texas cost study that wasn't introduced that was subject to unspecified adjustments made in Texas.

The second is what should the rates be for removal of non-excessive bridged tap and line station transfers? What this involves is AT&T Pricing Issue 1. It's covered in the arbitrator's final report at Section 4, pages 4 and 5. The arbitrator there says that AT&T's rates are drawn from Commission decision, and that's why they're adopted.

There's two problems with that. The first is, is that AT&T doesn't propose rates, and the second is, is that the Commission has never decided or addressed this particular issue. This arises on, it's AT&T's Attachment 30, which was marked, I believe, as a demonstrative Exhibit 210 in the case, and it involves rates for removal of all bridged tap on lines 87 through 91 of that -- of that exhibit. And when the Commission looks at it, you'll see that SBC Missouri has proposed rates and AT&T has not.

We also have above that in what the Commission has addressed is the removal of excessive bridged tap, and the loop conditioning prices for that are included, and in this case ultimately we agreed that the prices that this Commission set should be adopted and were, but that's for removal of excessive bridged tap. What's proposed here is the removal of all bridged tap, even that which is non-excessive. That's an option that's

available to CLECs that wish to acquire a loop to use for the provision of broadband services.

Accordingly, we think the Commission should reverse the arbitrator because the basis of the arbitrator's decision is simply wrong, and it should include the rates for removal of all bridged top, including non-excessive bridged tap, as we presented in our case.

The same is true with regard to line station transfer, and that's lines 96 through 99 of the same attachments, same demonstrative exhibit that I discussed with you earlier. This is something that we proposed rates; AT&T didn't propose any rates. This would allow them to order that service if they want, and it should be included within the contract.

The third issue that we have is whether the arbitrator erred in establishing rates for entrance facilities. This involves AT&T's Pricing Issue 4 and MCI's Pricing Issue 18, and it's addressed in the arbitrator's final report at pages 15 and 16.

As has been explained to you previously, the FCC has clearly declassified entrance facilities under the TRO, and in specifically paragraphs 136 to 141, and the CLECs are not entitled to TELRIC rates per the TRO and again at paragraph 136, Footnote 184.

What AT&T seeks and what the arbitrator ultimately ordered was to put in those rates under the label entrance facilities, and that is simply improper and not permitted and should be overturned by the Commission.

Even if they call them interconnection, which they don't here but do in other places, that doesn't change the fact of what they are. There's only one physical facility that connects typically an SBC Missouri switch and the facilities, usually a switch, of another carrier. It's an entrance facility. It's not an interconnection facility. It's one thing, and the FCC has clearly said entrance facilities, which that is, need not be provided. It's not a UNE because competitive alternatives are available and CLECs can provide them themselves.

The next issue that we raise is No. 4, whether the arbitrator erred in including rates for voice grade transport. This was addressed in the final report in Section 4 at pages 16 and 17, and is in our comments on pages 162 and 163.

The arbitrator's report here says simply, quote, the arbitrator agrees with AT&T for the reasons stated above. I assume from that that the arbitrator is accepting all of AT&T's rationale, but that rationale is simply wrong. AT&T claims that voice grade transport

should stay in the contract because the FCC has not made a non-impairment finding, but that has it backwards.

Under the Act, it is not a UNE until the FCC finds impairment, where the CLEC is impaired if it doesn't have access. That's the provision of Section 251(d)(2). There's no claim here -- and you should ask AT&T's counsel when they come up, but there's no claim that the FCC has made a finding that voice grade transport is a UNE.

Accordingly, since that impairment finding has not been found, it's not been made a UNE by the FCC, it's not appropriate for inclusion in the contract, it's not appropriate to set it at a TELRIC rate.

The next issue that we've raised is whether the arbitrator erred in including prices for DCS in the interconnection agreement for MCI. This involves MCI Pricing Issue 20, and it's discussED in our Brief at pages 280 and 281.

I would note that we have an inconsistent decision from the arbitrator on this, and that on AT&T Pricing Issue 3 the arbitrator sided with SBC Missouri and found that DCS was not a UNE and shouldn't be included in the interconnection agreement. That's contained in the arbitrator's final report, Section 4 at page 6.

We believe the arbitrator was right with

regard to AT&T Pricing Issue 3 and wrong here. Obviously you can't -- it can't be -- they can't both be right. The Commission needs to make the decision here, and we believe that it needs to follow what the FCC has said, and that is that DCS is not a UNE. And we would specifically cite the Commission to the UNE Remand Order and to Rule 51.319(d)(2)D.

Under the FCC's decision and rule, what the requirement is with regard to DCS is that ILECs offer it to CLECs in the same manner as they offer similar services to interexchange carriers. We meet that obligation by providing to interexchange carriers that service via the access tariff, and that's how we offer it to CLECs pursuant to that same access tariff.

Accordingly, that meets the FCC's requirements, and the arbitrator's decision on this has to be reversed because it's not a UNE and is not subject to TELRIC pricing, just as the arbitrator found with regard to AT&T.

The sixth issue that we raise is whether the arbitrator erred in setting prices for standard optical multiplexing. Optical multiplexing is part of the provision of an OCn loop or an OCn transport. The FCC has declassified all OCn loops and OCn dedicated transport. Accordingly, it's simply unlawful to include the price for

this service as a UNE and to include it at TELRIC prices and it needs to be reversed.

The last area that we have is whether the arbitrator erred in setting prices for SS7 signaling. This involves MCI Pricing Issue 21. It's in the arbitrator's final report, Section 4, page 37, and covered in our comments at page 168 and 169.

The arbitrator here adopted MCI's rates for signaling system 7 because, I think, two reasons; one, they were set by the Commission in TO-2005-0037, and also on the basis that the rates should be included since SBC Missouri wants CLECs to use its SS7. One reason is -- both reasons are wrong and let me explain them.

First, the claim that the Commission has -- the fact that the Commission has set rates for SS signaling 7 in? TO-2005-0037 is not controlling, and that is because the FCC has subsequently determined that unbundled local switching has been declassified. It's in the TRO at paragraph 544. SS7 signaling is a part of unbundled local switching and is available only for the embedded base of customers and only for the transition period through March 10, I believe, of next year. Accordingly, the fact that this Commission set prices is irrelevant because it's no longer a UNE as determined by the FCC.

The second advanced by the arbitrator was SBC Missouri wants them to have SS7, so let's make them give it to them at the rates that are set by TELRIC, and that position is simply incorrect.

We do support SS7 functionality, but we don't support doing it at TELRIC rates. It's up to the CLEC whether they want to self provision SS7 signaling, whether they want to acquire it from a third party, or whether they want to buy it from SBC Missouri. But if they want to buy it from SBC Missouri, it's available under our access tariff.

What the Commission can't do is to require us to provide that at TELRIC rates and include it in the interconnection agreement. That violates the FCC's order.

That's all I have on pricing, unless there's any questions.

I'm sorry. I guess I have to say one other thing if we're supposed to be responding to what we think the other side's going to raise. I believe the CLEC Coalition has a proposal that says that for all of the Section 271 network elements, if you decide to include them in the contract, that they would be happy if you included the M2A rates or included the rates adopted by the FCC for its transition period.

That request is clearly unlawful. The FCC

has said that Section 271 network element rates are to be set on the basis of whether they're just and reasonable under Sections 201 and 202 of the federal act, and the FCC has reserved the authority to determine those rates to itself, not to the state commissions.

And so this Commission has no authority to adopt TELRIC rates for any 271 network element, period. I think the arbitrator recognizes that. Nor does this Commission have the authority to determine what just and reasonable rates are. The arbitrator's Order doesn't specifically address that, but I'm presuming that that means that the Commission can't set them, but if it's intended otherwise, that would be unlawful. It's up to the FCC.

And the way we meet our obligations, as I said before, is via arrangements that are entered into on a commercial basis with those companies that want to take these network elements from us under 271, and we file them with the FCC under Section 211 of the Federal Act. And if anyone wants to complain about the rates, the FCC has said bring it to them, they'll be happy to investigate it in the course of any claim that we should have our 271 authority removed. But it's not for this Commission to decide.

So that's all I have. Thank you.

JUDGE THOMPSON: Thank you, Mr. Lane. Mr. Magness?

MR. MAGNESS: I guess every section begins and ends with 271 somehow. His will end with it. I will begin with it.

We've argued about Commission authority, and we don't need to return to that, but the specific issue here is if the Commission maintains what's in the arbitrator's report and has 271 checklist elements in the interconnection agreement, there is not a just and reasonable rate set in this proceeding, so what will the interim rate be?

We think it's an important issue because if CLECs are to order out of that interconnection agreement, we don't want to receive the response of, well, yeah, it's there, but you can't have it because there's no price. So we propose an interim rate.

The interim rate we're proposing is not a TELRIC rate. It's a rate for loops and transport 115 percent above the rate that they pay, that CLECs now pay. That's what the FCC said that CLECs will pay for declassified loops and transport that no longer qualify under 251. So it's above the 251 TELRIC rate. We're using this as a proxy for an interim rate, and would need to ask the Commission to set a permanent rate if the

parties didn't agree to it.

And then on switching, there's a dollar increase that's incorporated as the interim or rather the transitional rate by the FCC. So again, we're not asking you to set a TELRIC rate. We're asking you to use these FCC rates as an interim just and reasonable rate 'til a final one is set. So I will leave the rest of the 271 jurisdictional argumentation to what we've already done.

The only other issue we have on rates is one concerning loop rates, and I want to make sure, since there's so much talk of 271, it's clear here this has nothing to do with 271. These are UNE loop rate for DS0. No one debates these are Section 251 UNEs. It's a question of what the proper TELRIC rate for them is.

As Mr. Lane referenced, SBC didn't file any cost studies in this case justifying rate changes. Neither did the CLEC Coalition. We asked in negotiations and we asked in arbitration that the M2A rates remain in effect. There are certain M2A rates that SBC considered to be voluntary, and it said it wanted to increase them now because the M2A was expiring. Our argument was we should just try and stick with what is in the M2A currently.

The arbitrator approved SBC's argument, and the upshot of that we're concerned about has to do with

DS0 UNE loops. The urban rate, the St. Louis/Kansas City kind of rate isn't going to be affected. That rate is still $12.71 monthly. Doesn't change. The problem as we see it is the rates that SBC proposed for rural, that is UNE Rate Zone 2 and 3 increased substantially. UNE Rate Zone 2, which is more suburban, 5,000/59,000 lines, goes up by 11 percent.

But the real most serious problem is in UNE Rate Zone 3 where the approved rates go up by 69 percent. CLECs that are purchasing -- well, just to give you some real world examples, for Big River and Socket who are in our coalition who have switches, who have purchased facilities in some of these rural rate zones and they're currently paying $19.74 for a plain old vanilla DS0 voice grade loop, that goes up $33.29.

And that 69 percent is going to make it extraordinarily difficult for them to keep using facilities to serve rural Missouri customers on the small business and residential side where you use the DS0 loops.

And we urge in our comments that the Commission follow the precedent it has followed in prior arbitrations where the question of whether the M2A rates was accessible was at issue, because as I said, and Mr. Lane said, there are no current cost studies to validate these rates. These rates go back pre-M2A and are

essentially based on cost studies of, I guess, 1996 or 1997 vintage, I suppose. They're certainly not current.

And we cited in our comments to the Commission's decision in Case No. TO-2001-455, which was an AT&T arbitration. The Order there was issued June 14th of 2001. In that case the Commission faced the question of whether to apply M2A UNE rates in place of the rates that were based on cost studies of SBC's that were similarly outdated. I think these are probably more outdated.

And the Commission contrasted in that case the outdated rates proposed by SBC with the M2A rates which it said, quote, were the product of a lengthy proceeding and close scrutiny. The Commission concluded in 2001 that it was appropriate to apply M2A rates in the AT&T agreement although they had not been litigated by the parties in that arbitration proceeding.

The commission expressed confidence in the M2A rates as being, compliant with both the 1996 Act and the FCC's regulations and noted that the Commission, quote, had already determined that the M2A complies with all the standards applicable to interconnection agreements, including the 14 point checklist in Section 271. And that again is from the TO-2001-455 Arbitration Order at page 14.

So we urge the Commission here in this situation where there are no current cost studies to not create a situation where we see any of these rates for DS0 plain vanilla loops jump up like this. If the Commission is concerned about going this way, we at least strongly urge you to consider perhaps continuing the M2A rates at least for DS0 loops in UNE Zone 2 and 3 where this is going to have a real world and immediate impact on CLECs who are using facilities to serve customers in those rural areas.

The last point I wanted to raise, and I know Mr. Lane gave you a pointer towards AT&T counsel on this, it is an issue for us as well, are DS0 transport. This is another area where if CLECs are going to actually come up with facilities-based alternatives to UNE-P, DS0 transport is an important piece of that puzzle.

There are references in the Triennial Review Order -- and all of these are discussed in the Briefs, and I don't want to regurgitate them again here -- about the FCC's understanding that the DS0 transport continue to be available as a UNE. We think the arbitrator acted appropriately there and hope his order will be upheld on that.

Thank you. Are there any questions?

JUDGE THOMPSON: Thank you, Mr. Magness.

Ms. Bourianoff?

MS. BOURIANOFF: Yes. Thank you. Let's start with the DS3 loop rate, and Mr. Lane criticized the arbitration report for adopting the DS3 loop rates that AT&T had proposed. And to be clear, the rates that AT&T had proposed were not from some Texas cost study. They were the DS3 loop rates that the Texas Commission had approved.

And as Mr. Lane noted, SBC did not introduce a cost study, did not attach a cost study supporting their DS3 loop rates in this proceeding, and DS3 loop rates had not been established under the M2A. So AT&T went to Texas, and I think there is a good and strong precedent for using Texas rates in Missouri interconnection agreements. And I'll refer you to -- refer the Commission to the Missouri 271 Order that the FCC issued.

If you'll remember back to the M2A days back in 2001, SBC actually proposed that 95 rates in the M2A be taken from Texas because there were Missouri rates that had been established and they needed rates in the M2A to get their 271 application approved. So they looked around and they went to Texas and they took 95 rates from Texas. And that's talked about in paragraph 49 of the FCC's Missouri 271 Order.

And the FCC went on to talk about why Texas was a reasonable benchmark for Missouri, and they said specifically in paragraph 56, a comparison is permitted when the two states have a common BOC, the two states have geographic similarities, the two states have similar although not necessarily identical rate structures for comparison purposes, and the Commission has already found the rates in the comparison state to be reasonable.

Here we found that Texas meets this test and is a permissible state for comparison. The two states have a common BOC, similar rate structures, and sufficient geographical similarities, and the Commission has already found Texas rates to be within a reasonable TELRIC range.

So AT&T's thinking was, it was good for SBC to get 271 approval in 2001, it ought to be good enough for use in the M2A. We certainly think it's much more reasonable than using a cost study that SBC has not put forward.

And I do think Mr. Lane's statement and his argument is significant and surprising to me. Mr. Lane said that there is no basis for this Commission to adopt prices based on a cost study that's not presented. So that would knock out their proposed DS3 rates because they can't point to anything supporting their proposed DS3 rates except a cost study that was not presented.

It also knocks out their proposed line and station transfer rates and their proposed removal of non-excessive bridged tap rates because they're based only on an SBC cost study that was not presented to the Commission for approval.

Mr. Lane argued that if the Commission is uncomfortable adopting SBC's proposed prices for DS3 loop rates, that the thing they ought to do is just rely on the BFR process. And this was discussed some in the hearing, and I would point the Commission to the transcript of May 25th, 2005 at pages 983 and 984.

There it was established during the hearing that the BFR process is not appropriate because by its terms and conditions the BFR process only applies to elements that are not already in ICA. They're for things that the ICA didn't address, and DS3 loops are specifically mentioned in the UNE attachment of the ICA. So the BFR process would not be applicable.

With regard to entrance facilities, again, this is connected to the interconnection facility issue, which is Network Interconnection Issue 8 for AT&T. The arbitrator did adopt rates that are titled entrance facilities, but that does not make them available as entrance facilities as UNEs.

If the Commission would look at the

language that AT&T proposed in Network Interconnection Issue 8, and specifically at Section 1.2 and the following subsections, that clarifies that the prices for interconnection facilities are the prices that are labeled as entrance facilities on the pricing appendix, and that's just trying to keep as much of the current M2A pricing appendix as we could. We just carry it forward.

And so it's -- the approval of rates for entrance facilities is not approving rates for entrance facilities as a UNE. It's approving rates for interconnection facilities pursuant to Attachment 11.

Regarding voice grade transport, I think Mr. Magness responded to that, and I'll rest on that.

The final thing is the rates for non-exclusive bridged tap and line station transfers. With regard to non-exclusive bridged tap, AT&T proposed no rates in the pricing appendix. We stipulated during the hearing that we do not have the non-excessive removal of bridged tap attachment or appendix to our ICA. We don't have those provisions, we're not seeking to do it, and therefore we don't think rates that have not been approved by the Commission for something that we don't have terms and conditions for in our ICA should be approved. That's what we proposed. That's what the arbitrator adopted.

With regard to line station transfer rates,

we proposed that the current zero rate should go forward, because this Commission has never approved line station transfer rates previously. There's no evidence put forth by SBC that they're not already fully recovered in the loop rates, and SBC did not put forward a cost study. Again, we think the arbitrator reached the right result on that point.

And that's all I have, unless there are any questions.

JUDGE THOMPSON: Commissioner Murray?

COMMISSIONER MURRAY: I have a question. You said that there were no cost studies presented by SBC for -- would you state those again, please?

MS. BOURIANOFF: DS3 loop rates.

COMMISSIONER MURRAY: Non-excessive bridge tap?

MS. BOURIANOFF: Non-excessive bridge tap and line station transfers. And, in fact, there were no -- I want to be clear. There were no cost studies put forward by SBC on anything in this proceeding. Those are the issues that we have with SBC that are currently in dispute, I believe. I believe the CLEC Coalition and other parties may have had other rates that were in dispute.

COMMISSIONER MURRAY: But I thought you

said you did not have non-excessive bridge tap in your ICA?

MS. BOURIANOFF: Well, our proposal was just that the pricing schedule not even refer to non-excessive bridge tap. SBC proposed to include rates for non-excessive bridge tap in our ICA. And we're saying we don't have terms and conditions, we don't want rates for it, so we propose that it just not be there.

COMMISSIONER MURRAY: Thank you.

MS. BOURIANOFF: Thank you.

JUDGE THOMPSON: Thank you. Mr. Leopold?

MR. LEOPOLD: I have nothing except to refer to paragraph 140 of the TRRO previously cited in oral argument and also cited in Sprint's Brief and other Briefs that clearly says that interconnection facilities should be cost based and priced at TELRIC.

JUDGE THOMPSON: Thank you, Mr. Leopold, Mr. Savage?

MR. SAVAGE: Nothing, your Honor.

JUDGE THOMPSON: Mr. Johnson? Mr. Shorr?

MR. SHORR: Nothing, your Honor.

JUDGE THOMPSON: Mr. Lumley?

MR. LUMLEY: Very quickly to reply to Items 5, 6 and 7 on SBC's list that Mr. Lane just went over, which pertain to MCI Prices Issues 20 through 22,

and just refer the Commission to Mr. Price's direct testimony at page 136 where he indicated that all these items are in the agreement and therefore need a price. He proposed the last price approved by the Commission in the 37 docket. SBC had no alternative proposal, and the arbitrator properly selected ours.

Thank you.

JUDGE THOMPSON: Thank you, Mr. Lumley. Section 5, interconnection, including network interconnection methods, network interconnection architecture, interconnection trunking requirements. SBC?

MR. GRYZMALA: Good afternoon, your Honor. Good afternoon, Commissioners. Thank you for hearing us out at SBC.

My name is Bob Gryzmala, and I will be presenting the network related portion of the discussion, with the exception of a couple items which my partner Leo Bub will be presenting. As you may note, we'll have under the network category seven issues. I will be working with Issues 1 through 4, and 6 and 7. Leo Bub will be working with SS7 right after I'm completed, if that's acceptable.

JUDGE THOMPSON: Very good.

MR. GRYZMALA: Thank you.

There have already been several points and counterpoints made with regard to entrance facilities.

The first and the most important is the item listed as No. 1 on your list sheet. The list sheet indicates that the issue is whether the arbitrator erred in concluding that a point of interconnection could occur at points not within SBC Missouri's network.

It's an integral issue. It's an important issue to my company and no doubt to the CLECs, but I think that I want to spend a little bit of time with it because it does expand into several other areas of the M2A. There's no dispute about certain things, absolutely none. This is a legal issue. It is not a factual issue.

Section 251(c)(2)B is the second point, and it is clear that each ILEC has the duty to provide to the facilities and equipment of any requesting telecommunications carrier interconnection with the local exchange carrier's network, and here's the operable phrase, at any technically feasible point within the carrier's network. The question becomes, what is within the carrier's network?

The third point I wish to make, the TRO made that expressly clear. At paragraph 366 of the Triennial Review Order, the Commission stated, defined the ILEC's network to be only those transmission facilities within the incumbent's LEC's transport network, that is the transmission facilities between incumbent ILEC

switches.

The fourth point, undisputed unless we've missed a portion of the DPL that conveys this, consistently SBC Missouri has defined in its portions of the network interconnection DPL the point of interconnection as being, quote, at an SBC Missouri tandem or end office building.

There's no question, no suggestion that either a tandem or end office building is not within SBC's network. That is why SBC maintains that our language is, in the words of the arbitrator, most consistent with the arbitrator's report than are the various proposals by the CLECs, which we will walk through.

The arbitrator got a good chunk of this right on. The arbitrator acknowledged that, quote, it is clear from reading Section 251(c)(2)B that the point of interconnection must be within SBC Missouri's network.

Page 4, the arbitrator also -- that is at page 4, excuse me, of the arbitrator's report in Section 5. Roman 5 is the Internet network-related piece. The arbitrator also noted that, quotes, SBC is correct in its assertion that any point, quote, within its geographic service territory, end quote, is synonymous with, quote, within its network for those CLECs who would have extended the point of interconnection to a point beyond our network

simply because there's a service territory out there.

The arbitrator -- that's the same page, page 4. The arbitrator also agreed that if the proposed POI is not within SBC Missouri's network, SBC may refuse to interconnect at that point. Completely consistent with the rules of the FCC and the law.

And I also might point out, just for those of us who disagree with Ms. Bourianoff's question or observation that this is a factual dispute, there really is not a factual dispute as to where an entrance facility is. We could all come up with some sort of picture, but I kind of think of an old-time dumbbell that you lift up and down where one sphere on one end is the CLEC's network, and the sphere on the other end is the ILEC's network. The entrance facility is the part in the middle. It's the bar.

The FCC referenced the entrance facility when it discussed dedicated transport in the original TRO, and in doing so they talked about the concept first that I found -- first found in the Order of an entrance facility being the notion that traffic -- it says ultimately when you collect traffic at the ILEC switches, ultimately that traffic all comes together at a switch on the ILEC network. And so says the FCC in the last sentence in paragraph 361 of the TRO, ultimately the traffic is

carried to the competitor' switch or other equipment, often from an incumbent LEC's central office along a circuit generally known as an entrance facility.

So that's my way of thinking about it. The one end of the dumbbell is the ILEC switch, or as SBC has proposed in its hard language, tandem or end office building, and other end is the CLEC's network, and the part in the middle is an entrance facility.

And the bottom line is that in these federal proceedings the FCC has determined that, while it might have been a UNE at one time, it is -- regardless of whether it's a UNE, it should not be regarded as a UNE for which the CLECs would be impaired if they were not provided by SBC.

The FCC has made absolutely clear in an extended discussion that there are several reasons for which entrance facilities should not any longer be made available to CLECs. They can play word games. With all due respect, an entrance facility is not an interconnection facility.

And with all due respect, we would submit to His Honor, the arbitrator, as well as this Commission, that the arbitrator erroneously ruled that SBC Missouri's network, quote, includes all facilities of SBC Missouri, including entrance facilities and outside plant.

With all due respect, that conclusion was legally wrong and cannot be sustained and must be reversed.

The consequence of that, the practical effect of that is that as one looks at the detailed language matrix wherein the language of the CLEC is stacked against the language of SBC Missouri, there were suggestions made that the CLECs' language -- so with respect to that holdings that includes entrance facilities, that must be reversed.

The arbitrator also indicated, concluded that SBC Missouri may not preclude a CLEC from interconnection at a customer's premise as long as the interconnection arrangement is acceptable to the customer and is technically feasible. That's not in our network.

Now, we're going to hear from the CLECs, and I'm sure there's going to be several of them, that are all going to try to tell you, as Ms. Bourianoff and told you -- and I may be wrong because I was writing while she spoke -- something to the effect, if the entrance facility is used for interconnection, it can be at TELRIC. Well, you know what, that's a word game. An entrance facility is not an interconnection facility.

They're going to hang their hat on paragraphs 140 -- rather paragraph 140 of the TRRO. And I want to talk about the TRRO just very briefly, because as

your Honor will remember, I asked a few of the CLECs' witnesses about that, about the economic considerations in the deployment of where a CLEC puts their switch. Those questions were all drawn from the FCC's analysis, and in our Brief we cited those instances in which a CLEC fairly said, yeah, we agree, we agree. And these are the kinds of things that the FCC concluded.

Entrance facilities are less costly to build, more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices.

The arbitrator will remember that I asked a CLEC witness, isn't it up to you to decide where to put your own switch? Because as you'll recall from -- or as you'll note from the analogy of the barbell, the further away the sphere is on one end, the longer the bar on the barbell and, therefore, the longer the entrance facility.

A CLEC does not have to park its switch ten miles away from an SBC central office. It can bring it very close, and many of them do. That's a CLEC decision. And the FCC's paragraphs, as Mr. Lane cited, paragraphs 136 to 141 go through that in the TRRO and emphasize that these deployment choices as to where to put their switches are up to them.

They can also can collocate with other

CLECs in what has been called in one CLEC's point of interconnection proposed language POPs. I always have regarded a POP hotel as being a point of presence hotel with a lot of CLECs in there office sharing. That's a POP hotel. CLECs can do that, and they can gather the space and the cost, the efficiencies from doing that.

These are all choices that are made available to the CLECs that the FCC recognized and that drove their economic and competitive decision to determine that BOCs or ILECs no longer had to make entrance facilities available at all.

And here's where we come to paragraph 140, which is virtually the only support I have ever heard for a notion that interconnection facilities, no longer UNEs under 251(c)(3), now magically become interconnection facilities under 251(c)(2), and here it is, two sentences in paragraph 140: We know in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to Section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network. That's it.

Okay. So what we get out of that, competitive LECs, CLECs will have access to these facilities at cost-based rates. Great. What are these facilities? The previous sentence tells us what they are. These facilities are to obtain interconnection facilities. Nowhere in that paragraph does it say that entrance facilities that we just decided are no longer necessary to provide to CLECs now have to be provided as interconnection facilities under 251(c)(2).

That's the leap the CLECs want you to make, because unless they can have you make that leap, they cannot sustain a point of interconnection beyond SBC's tandem office or end office building. That's the point of this fight in our view.

The Texas Commission figured this out pretty quick, and we cited this in our Brief, your Honors, but I think that it would be worth just pointing out briefly, if I may. The Texas Commission concluded in its decision of June 20 that, given that entrance facilities are not available as UNEs, a CLEC should not be able to obtain those facilities at TELRIC rates merely by characterizing those same facilities as interconnection facilities instead of entrance facilities. To do so would contradict the FCC's finding that ILECs do not have to provide entrance facilities at UNEs.

The Illinois Commission likewise heard the similar argument that I believe Mr. Magness was pointing out and Mr. Leopold just alluded to moments ago, the paragraph 140 argument of the TRO, and the Illinois Commission figured that out, too.

The Illinois Commission referred to 251(c)(2)'s clear language, that is the reference to the facilities and equipment of any requesting telecommunications carrier. That commission said, look, those apply, those words apply to the CLEC's facilities, and the interconnection reference to the LEC simply means that the LEC -- the ILEC, excuse me, the ILEC's network must be ready to receive them.

And forgive me, I hope -- I did not mean to quote that. Those were my words. This is the quote: Paragraph -- or rather TRO paragraph 366 refers to the facilities needed by CLECs to interconnect with a LEC with an ILEC's network. Once more, we construe this reference to pertain to the facilities an ILEC must have ready to accommodate the CLEC's own facilities used in interconnection.

Again, the only facilities identified in 251(c)(2) are CLEC facilities. And the above-cited rule, citation to Rule 51.5 of the FCC, excludes transport and termination from the definition of interconnection. Thus

the ILEC's obligation is to provide connection to the CLEC's facilities, including transport, termination facilities that the CLEC employs to interconnect with the ILEC's network.

The sum and substance of this is that 251(c)(2) is clear what our network is in terms of what the FCC intended after an economic and competitive analysis is clear. The Texas Commission and the Illinois Commission have both figured out quickly that the CLECs are going to argue vehemently that what used to be an entrance facility available as a UNE under 251(c)(3) ought to be a 251)(c)(2) interconnection facility, and that should not happen. Those are not facts. That's the law. Ms. Bourianoff is wrong if she suggests to the contrary.

I want to point out to you some particular examples of why this is of some importance to us in the language. I want to start with AT&T. AT&T's language -- and what I want to do here is just in a few examples, if I may, just go through the language that the arbitrator found to be more consistent with its report that SBC urges the Commission to turn around and find that SBC's language is more consistent because, as I mentioned before, SBC's language is tied uniformly to the notion that the point of interconnection must be at a tandem office or end office building.

This may be an error, unintended, but the arbitrator did correctly reject language of AT&T that would have been able to establish a POI within a LATA in which AT&T offers local exchange service and in its sole discretion. AT&T NA 4, that's the Network Architecture 4 issue point, Section 1.2.

There was additional language that the -- that AT&T offered that, again, at its discretion it would connect at SBC Missouri's tandem rather than on SBC Missouri's end office that homes on another's tandem.

SBC pointed out this doesn't commit AT&T to do anything with regard to the establishment of a POI, and if -- if I would submit to the Commission, this identical language in Section 1.2 was rejected as it were in connection with NA 4, but it was not on NA 5. It was ruled more consistent, if I read the DPL right. So it's just a consistency question there to reflect the same conclusion, in this case correctly, as the arbitrator reached for NA 4.

But the reason why I point this out, why it's such a vivid example, is that the language said basically here's where the POI can go, within a LATA at which AT&T offers local exchange service. Do you hear the words network in there, SBC Missouri's network?

Such points as outside plant which is in

Section 1.1, AT&T NA 2, Network Architecture Issue 2, outside plant, not defined, nowhere referenced in terms of the network, the tandem or end office, the TRO's definition of between ILEC switches. That should be turned around. Customer premises, SBC -- CLECs may interconnect with SBC only within our network, not at customer premises.

The Texas Commission also found that to be the case as well. Quote, CLECs may interconnect with SBC Texas only within SBC Texas' network. Furthermore, the Commission finds that carrier hotels, outside plant facilities and customer premises are not part of SBC Texas' network. That was the February 23 decision at page 19.

The Commission should reject the CLEC Coalition's proposed language as well, Network Interconnection Issue 2. That's NIM 2.

JUDGE THOMPSON: Is this all specified in your written comments, Mr. Gryzmala?

MR. GRYZMALA: It is.

JUDGE THOMPSON: You might want to move on to your next --

MR. GRYZMALA: I'll run through them briefly. Points between -- the switch obviously is not. The CLEC switch is not within SBC's network. Points

between the switch and SBC's network is not on SBC's network.

Those would govern then -- and I'll just simply note them for the record --- CLEC Coalition proposed language in NIM 2, at Section 1.1 and Section 1.1.1, MCI's proposed language at NIM 9 and 14 in Section 4.4.1, Charter' proposed language between SBC and CLEC at any technically feasible point and commercially feasible point between them and us at NIM 4 and Section 3.4.1, as well as Sprint NIM 1, ITR 5, Section 2.6.2.

Those are all issues, those are all languages for which because of the TRO do not lie on SBC's network, and therefore it is -- we request that the Commission determine that in each of those cases SBC's language is more consistent than that of the CLECs.

There was another one, if I may, because it just happens to fall within this category. MCI NIM 13 is a matter we did not particularly -- well, it is a matter I would like to turn to very briefly because it was a subject of Mr. Lumley's client's comments at page 6. The Issue NIM 13 appears to be a conforming matter, and we would submit that this is not a conforming matter in the sense that MCI's language which is referred to at that -- in that pleading is no less vulnerable as the rest of the CLECs' language in this regard.

To the extent that MCI would suggest that its client's language or that its own language is appropriate because the arbitrator correctly ruled that entrance facilities are a part of our network, that language is not more acceptable. SBC's language should be substituted in its place.

In closing on this point -- and this has to do with entrance facility point No. 1. In closing on this point, I simply want to emphasize again that it's one thing to try and turn a word or turn a phrase, you know, sometimes it can be the case that it's like reading tea leaves when you're at FCC orders, especially if you're focusing on a paragraph or a sentence, but if you read the entirety of these passages which Mr. Lane and I have pointed you out to, paragraphs 136 to 141 of the TRRO, paragraphs 365 through 369 of the TRO, they provide you a solid background as to why it's not just a quick cut here. It's thoughtful, economic and competitive analysis. And for the CLECs to tell you that you owe them these facilities under the guise of interconnection facilities under 251(c)(2) is dead wrong.

Point No. 2 for the network portion has to do with whether the arbitrator erred in failing to specifically adopt a 24 DS1 threshold for CLECs to establish an additional POI. In other words, that when

traffic moving to a POI exceeds 24 DS1s back or forth over three consecutive months, that's the time to establish an additional POI, an additional point of interconnection.

Our position is that, and as our Brief has laid out and our comments at pages 185 to 189, we've presented that there are several network integrity and reliability considerations that support the fact that CLECs should establish additional points of interconnection when they reach the 24 DS1 threshold.

I just want to briefly touch on what is indisputably ample reasons to adopt a threshold. Might I say before I get there is that the arbitrator was fairly generous in the sense that he -- the arbitrator recognized that there comes a point at which there should be additional POIs.

That's the way I and we read the Order. The arbitrator said at page 8, SBC Missouri raises valid concerns about the continued feasibility of maintenance of a single POI when increasing traffic demands threaten network integrity. We agree. Where we depart are those portions of the entries in the arbitrator's column of the detailed matrix that says words to the effect that SBC's language is more consistent but threshold was not established.

And very candidly that leaves us -- we

don't know what to do. Our language is all tied to the 24 DS1 level threshold, and we cannot leave this unattended to. Quite frankly, CLECs would quite expectedly argue that because your threshold was not specifically adopted, SBC, you lose, our language wins and it's over. We need to attend to that, and we're asking that you do that if at all possible.

The Texas Commission has upheld the 24 DS1 threshold for establishing an additional POI, and rather than go through this chapter and verse, this is in our Brief, February 23, the February 23rd, 2005 decision at page 16. Basically the Texas Commission's decision in this regard is correct, it's right.

An initial POI is most viable for a market entry mechanism when you're a new or newly established CLEC, but as you begin to no longer be that status and as one takes into account the network and integrity issues, the network reliability, network integrity issues that were spoken to at the hearing, then additional factors come into play.

And the Commission determined that, consistent with its own prior Commission decisions where it had already made this decision, the Commission finds that CLECs may establish a single point of interconnection per LATA but only as a market entry mechanism. The

Commission further concludes that CLECs shall establish additional POIs when traffic exceeds 24 DS1s. There has to be a bright line number. There really has to be.

Level 3 and SBC agreed to a bright line number, and this Commission approved it. It was not that long ago where there were quite a few cases in the SBC states all litigating with level 3. Those are all done, interconnection agreements filed, the Commission approved them, you find it in there. That's in TK-2005-0285.

The CLECs don't fundamentally disagree that there ought to be some point at which it makes sense to establish an additional POI. Charter conceded that it makes sense to establish additional POIs when traffic exchanged over the POI reaches an agreed-upon threshold. Charter again, at some point prudent network planning suggests that both parties would benefit from establishing a POI so that some of the traffic that was over the first POI could be moved to the second POI. That's good network planning. Charter agrees.

The CLEC coalition said that he answered yes to his own question in prefiled direct. He answered yes when he asked himself whether in the instance of an equipment failure at the POI or a cable cut between the POI and the CLEC switch it would result, quote, in the CLEC's customers being unable to complete calls except to

other customers served via that switch. Yes. They answered the question themselves.

And briefly there is a point, I believe, made in -- I'm on the defense for a moment here. Charter's comments argues that its language was rejected with regard to additional POIs and it can't figure out why. It must be an scrivener's error. Well, you know, I don't think so.

The judge heard ample evidence on the point, and the judge heard about Charter's suggestion that an additional POI could be established or maybe should be established at an OC12 level. Now, an OC12 level is a lot of calling. An OC12 is several thousand DS0, roughly akin to voice grade lines but not quite, DS0, voice grade like, 8,000 plus.

To briefly allude to Charter's comments, that was not a scrivener's error. I don't think it was a mistake. In any case, if it was, it shouldn't be ruled in favor of Charter. It should be ruled in favor of SBC. In that case, again, SBC cited its threshold consistently as the 24 DS1 level.

JUDGE THOMPSON: Let me break in for a moment if I could. I think at this point we're going to have to start doing some logistical planning because I think it's becoming apparent that we're not going to

complete this oral argument today by five o'clock, which is only about 40 minutes away at this point. So it would be my proposal that we stop today at approximately 5 p.m. and that we take up again tomorrow during normal business hours.

The Commission does have an agenda session scheduled for tomorrow morning beginning at 9:30. It's not much use to you to present oral argument to Commissioners who are not here and who are instead in the agenda session. I don't think it's a particularly heavy agenda, so I think perhaps 10:30 might be an appropriate time to reconvene. Is that --

COMMISSIONER CLAYTON: You could start earlier.

MR. SAVAGE: Your Honor, a very minor suggestion before we get to tomorrow. I know that some people have already missed their planes. If I can get out of here by six o'clock tonight or by five, I actually can get back home. I have FCC meetings all day tomorrow. So my request is simply if I could get taken out of order in response, I think I can get done with all my issues and be gone, and other people may have to be here tomorrow anyway. I'm suggesting if I could be next rather than whatever, I can make my flight at least and not --

JUDGE THOMPSON: I don't think Mr. Gryzmala

is going to be done by six o'clock.

MR. GRYZMALA: I think another 15 minutes, your Honor.

JUDGE THOMPSON: Mr. Bub?

MR. BUB: One of the issues, believe, that Mr. Savage is talking about is an intercompany compensation issue that comes in Section 6. If he wants to take that out of order, as long as I get -- go first, as long as I get an opportunity to go after him to respond to it, I'm okay with it.

MR. SAVAGE: My presentation will take about two minutes.

JUDGE THOMPSON: I'm perfectly willing to take people out of order and do things like that. We also have other people here who are from out of town who are probably equally eager to shake the dust of Jefferson City from their sandals.

MR. SAVAGE: My only point was I actually can make a nine o'clock flight out of St. Louis, and I think the other people have already missed their flights.

JUDGE THOMPSON: I don't know. I don't know. If everyone's willing to agree to that, we can go ahead right into your issue, but I don't know how everyone else feels, where they need to be, how eager they are to get to where they want to be.

Mr. Magness?

MR. MAGNESS: I have nowhere to go. I would like Mr. Savage to make his flight.

JUDGE THOMPSON: Very good.

MR. MAGNESS: I think Ms. Bourianoff, you're in the --

MR. ZARLING: If he can make his flight, more power to him.

MR. SAVAGE: Now, that's a CLEC coalition.

JUDGE THOMPSON: I'm hearing a consensus that Mr. Savage gets to make his flight if we can do that. Mr. Lumley?

MR. LUMLEY: Your Honor, I have like five minutes at the most left for the whole proceeding for MCI, and I'd just as soon not to have to charge them the cost of me coming back another day. I mean, honestly.

COMMISSIONER CLAYTON: Put him under oath.

JUDGE THOMPSON: Again, if everyone is agreeable, we can take you up immediately after Mr. Savage. You guys can ride to St. Louis together in the same cab as far as I'm concerned.

Mr. Shorr?

MR. SHORR: We do not have anything further.

JUDGE THOMPSON: Good-bye. Nice seeing

you.

MR. SHORR: All I want to do is find out when and what's going to happen with regard to coming in here tomorrow. If we're going to have proceedings tomorrow, that's -- what's necessary for me to get staff back to Oklahoma.

JUDGE THOMPSON: So if there are going to be proceedings tomorrow, you want to have someone here even though you're done with what you have to say?

MR. SHORR: It's client's option, but --

JUDGE THOMPSON: I understand that. Okay. Like I say, I don't see how we could possibly be finished tomorrow -- or excuse me -- today at five. I understand that we can go out of order, we can get Mr. Savage on his plane, we can get Mr. Lumley back to St. Louis, but I still think there's going to remain items that will necessarily be taken up tomorrow unless somebody wants to waive their opportunity to make oral remarks on something.

And we've gone down this road a certain distance before we got off onto your airplane flight, and that was that 10:30 tomorrow looks like about the earliest we can start, because as I say, we have an agenda meeting. Of course, we can start at eight, I suppose, and get in an hour and an half before agenda.

MR. ZARLING: Since we're talking

logistics, I was going to pursue that line and see if we could start earlier.

JUDGE THOMPSON: That's fine with me.

MR. ZARLING: Eight o'clock would be fine. The rest of us that are out of town might be able to make flights tomorrow at some point.

JUDGE THOMPSON: Why don't we plan on starting tomorrow at eight. Why don't we plan on going right to Mr. Savage right now so that we can get Mr. Savage out of town. And Mr. Bub will then get a chance to respond to that. Do you want to go before Mr. Lumley or after?

MR. BUB: As long as I get a chance to respond. If Mr. Lumley needs to go first, that's okay.

MR. LANE: What are your issues?

MR. LUMLEY: I can be here as long as we wanted to tonight.

MR. BUB: Are yours any of mine?

MR. LUMLEY: It's collocation.

MS. BOURIANOFF: Your Honor, I was actually going to ask, Mr. Zarling's here also, but I'm only here to address one more collocation issue. Would it be possible to do those together at the same time?

JUDGE THOMPSON: Fine with me. You know I like innovative solutions. Whatever we can do to move it

along and get people off on the road, that's certainly fine with me.

(AN OFF-THE-RECORD DISCUSSION WAS HELD.)

JUDGE THOMPSON: Fire away, Mr. Savage.

MR. SAVAGE: Thank you very much for accommodating my schedule. We only have three issues. I'll pick up with the threshold for new POIs. I think it's a combination of a legal issue and a factual issue. Legally, the FCC has been clear and unequivocal that CLECs have a right to a single POI.

And as we mentioned in our comments, I think that obviously has to be conditioned with some kind of technical feasibility that if for some reason a single POI is not feasible, then you have to have a separate POI. But in the absence of that, there's simply no legal provision to have multiple POIs.

Now, that said, Charter and SBC agree that at some point it makes sense to do that, and we think that's at a fairly high traffic level given the nature of our network. And we presented network testimony by a competent witness explaining why an OC12 level is appropriate given the size of our interconnection and that sort of thing.

SBC's witness flat out under oath said that there was no engineering support for their 24 DS1 number.

I'm glad somebody worked it out in Texas. I'm happy for them. It has nothing to do with the evidence in this case and nothing to do with our legal rights.

Our point there is very simply we didn't have to offer up anything at all to them. We would have been perfectly correct to stand on our rights and then to say, no, we'll do it at the OC12 level because that makes sense to us. Supported with competent network testimony, that's pretty clearly what should have prevailed.

And the reason I characterized what was in the Order as scrivener's error is that as between something that is closer to what the absolute federal right is, which is our OC12 provision, something further away, which is 24 DS1, it seemed pretty clear to us that ours was closer, and yet as we read the detailed language it seemed to be the other one.

I guess our position on this is, if it was just a scrivener type error, then we'd like it corrected. If it wasn't, then substantively we're correct on that.

In response to Mr. Gryzmala on his notion of what does it mean to be within the network, I think we can make this more complicated than it needs to be. If I say I'm going to have a party within my house, including in my living room and dining room, that makes a lot of sense. If I say I'm going to have a party within my

house, but only in the living room and dining room, not in the family room, not in the rec room, not in the bathroom, not in the bedrooms, you know, I could say that, but if the law requires me to make my house available, then the second it has to be only here and only there is just wrong.

And in that regard, I think Charter may be a little different than some of the other CLECs. We agree there is a certain degree of lack of clarity about what within SBC's network means, but it is absolutely clear that their network is bigger, more fulsome, more ubiquitous and complete than just a tandem office and an end office.

And it matters to us because of the way we interconnect with them. We interconnect with them by means of a fiber meet point. And so our job in interconnecting with SBC is finding a place that's convenient to both of us to build out fiber or to connect fiber that might already exist so we can exchange traffic. That's how we do it. Now, it's certainly true that they'll have fiber at their end offices and at their tandem, but they have fiber theoretically in a lot of places.

And so the arbitrator's language or the arbitrator's decision and our language that we can

interconnect at any technically feasible point where we can find that fiber between our networks makes sense and is consistent.

In that regard, I'm pretty sure he mentioned this in the briefing, but if not, the August 1996 Local Competition Order at paragraph 553 specifically addresses fiber meet points and specifically states that it's reasonable to require the ILEC to make certain reasonable accommodations in terms of building out facilities in order to get to a meet point.

That has never been changed, and that's why I've been so concerned, while I'll let other people get into it in detail, with this notion that, well, they now have no obligation to do anything other than sit there at their end offices.

The paragraph 140, the paragraph 366 stuff you've been hearing about relates to this notion that when the issue is interconnection for the exchange of traffic and not getting access to UNEs, they do have to do some things, including building out a little bit to accommodate. Now, how much is a little bit, you know, reasonable business people work it out.

It's interesting how excited they are about commercial agreements when they don't have a statutory standard to go by. They think that's wonderful. When

there is a statutory standard that says it has to be technically feasible, it has to be reasonable, somehow that's when they need to have everything nailed down when, in fact, the FCC and the Congress didn't nail everything down. They said, you've just got to work it out on a case-by-case basis. If you can't work it out, we'll come back to you.

That's issue No. 1. As between our language and their language for when you establish a POI, a 24 DS1 standard is -- it's arbitrary, there's no evidence supporting it, and it doesn't work for us.

The second issue where we really are taking issue with something -- I'm sorry. You have a question?

COMMISSIONER MURRAY: Is there a network reliability issue as to those bright point of determining whether it's a DS1, 24 DS1 level or an OC12 level?

MR. SAVAGE: No, none whatsoever.

COMMISSIONER MURRAY: Does not affect the reliability at all?

MR. SAVAGE: Not at all. The -- how can I put this? The capacity of fiberoptics to transport traffic is immense, and they can say, gee, an OC12, that's thousands of calls, but we have thousands of customers. In St. Louis we have roughly 45,000 customers now and growing. It doesn't take a large proportion of them to be

on the phone at the same time to -- it would dwarf 24 DS1s, the volume of traffic that we've got. But it all gets carried over fiber.

I mean, you can have -- an OC12 is 12 DS3s, which is a -- one DS3 is approximately what they're talking about when they say 24 DS1s. We can get to the details if we need to. But there's one DS3, 12 DS3s is an OC12. But the OC hierarchy, you know, major carriers interconnect at an OC192 level given the volume of traffic. I mean, we can say, gosh, it's a lot of calls, but not really in relation to the size of our respective networks.

But in terms of reliability, I mean, fiber works. It's not reliable if the fiber gets, you know, cut by a bulldozer. What my -- what my witness' testimony says is every network engineer has to make a choice between spreading your eggs out so they're not all in one basket on the one hand or putting them in one basket and watching that basket very carefully. And there's no bright line for that. It's just a question of engineering judgment.

COMMISSIONER MURRAY: My other question before you move on is the fiber meet point, what is -- physically what is required to have a fiber meet point?

MR. SAVAGE: Okay. It's addressed in the

testimony. See if I can give you a sketch of it. Optical fiber is just, you know, flexible glass that laser blips and bleeps go down that the magic of electronics translates into end use. At either end of it to work there's something called a fiberoptic terminal that it connect to that on one end sends the laser signals outbound and the other end reads them inbound.

To establish a fiber meet point entails essentially having our fiberoptic terminal at our end and theirs at their end connected by a single strand of fiber. And then the question is simply, who builds what part of the fiber?

What they want to say is, in every case we have to bring fiber all the way to their central office, their end office, their tandem. And then technically typically what's used, we would come to manhole zero right outside the building and give them an extra 100 or 200 feet of fiber that they then run up and connect to their fiberoptic terminal. That's what they would propose.

What the FCC indicates is, no, it's perfectly reasonable to expect them to bring some of their fiber out to some convenient place in the middle and for us to bring our fiber to some convenient place in the middle and splice it into a single fiber connection, and the meet point is where they meet.

COMMISSIONER MURRAY: So part of what you want to require SBC to do is bring fiber out where they don't currently have it; is that correct?

MR. SAVAGE: To a reasonable degree, and I think -- and the question what is reasonable have to be worked out depending on where they actually do have fiber, how much we have to build versus how much they have to build, all of which within the context of paragraph 553 of the original Local Competition Order.

So the answer is, to some extent yes, but if it was ten miles away where our office happens to be, no, we wouldn't -- we wouldn't say that that constitutes a reasonable accommodation to our interconnection. But if we build ten miles of fiber to get close to them and they build one mile of fiber to reach a common point, that probably would be reasonable.

But again, the specifics have to be worked out on a case-by-case basis, which is why on that point the arbitrator's language is quite correct. If it's technically feasible, commercially reasonable, you do it. If it's not, you don't. If you can't work it out, you come and have a dispute resolution.

COMMISSIONER MURRAY: Okay. I'll let you go on. Thank you.

MR. SAVAGE: Great. Thank you. The second

issue that --

COMMISSIONER GAW: Let me ask a question, too. This issue is one that the arbitrator ruled against Charter?

MR. SAVAGE: There's two pieces to it. We've gotten into two different issues. On one issue, which is where we will establish a fiber meet, the arbitrator ruled in favor of Charter. Mr. Gryzmala was bemoaning that and I was responding to that, and the Commissioner's question was related to that.

The specific question of how much traffic do you need to establish another physical POI is one where, as I read the arbitrator's substantive ruling, I was reading the substantive ruling saying, yeah, this makes sense, and then I get back to the specific language and it said that Charter's language wasn't the one that was more consistent, it was SBC's language.

And honestly, that struck me as a mistake, which is what we put in our pleading. But if it's not a mistake, then I think we're right for the reasons I've described. So the substantive discussion in the arbitrator's order on the one hand versus which language he said was more consistent seemed not to match to us.

COMMISSIONER GAW: I see. But you're saying the Order was in your favor in regard to making SBC

in particular, though, relating to SBC rolling out fiber to some meet point?

MR. SAVAGE: Correct. Our proposed language affirmatively and specifically did not specify how much they have to go because, frankly, the FCC's Order doesn't specify. It just says they have to make a reasonable accommodation to us, and that's going to vary case by case. That's essentially what --

COMMISSIONER GAW: And does the FCC Order, is it specific about this fiber meet point in the description of saying they have to make some reasonable effort, is it specific about that?

MR. SAVAGE: Yes. This is a different part of the FCC's sort of long regulatory history with all this entrance facility stuff we've been talking about.

COMMISSIONER GAW: I have one more question just to make sure. The recent Supreme Court decision in regard to cable companies, does it have any impact whatsoever on this arbitration?

MR. SAVAGE: The Brand X case?

COMMISSIONER GAW: Yes.

MR. SAVAGE: The short answer is no, it has no substantive impact. In fact, at the beginning -- the first time I got up here I talked about you have a certain degree of discretion within.

There's some legal discussion in that decision about when courts are supposed to give deference to agencies and what it means when there's a statute that isn't precisely clear about delegation to agencies. That language I believe supports my general legal point about your authority under 251(d)(3) and 252(e)(3), although it didn't mention it. It was sort of in that spirit.

But the specific discussion about how cable operator offerings are classified for regulatory purposes has nothing to do with this case at all.

COMMISSIONER GAW: All right. Thank you.

MR. SAVAGE: Second point. We're talking about the POI, which is the point of interconnection between our networks, and it matters for a couple of reasons. If you picture the POI as sort of Checkpoint Charlie at the Berlin Wall, on one side of it it's our network, it's our responsibility to make it work, it's our cost responsibility, except as specified in intercarrier compensation arrangements. On the other side its theirs.

So where the POI is matters financially. We're agreed, I think, that the POI will be at this meet point, whether it actually is right outside their office or is in some convenient intermediate location, for everything except E911 traffic. And for reasons which I don't think are really sufficient, the arbitrator

concluded that for E911 traffic the POI is not where our physical facilities meet but is instead a little bit deeper into SBC's network which is where their E911 switch, which is called the selective router, is located.

And there was a lot of discussion at the hearing about the difference between facilities on the one hand, there's like fiberoptic stuff, and trunking on the other hand, which is like the lanes within that big highway as to what goes where.

E911 traffic, it requires separate lanes. You have to route it separately. You have to keep it separate so that it doesn't block. But in the grand scheme of things, you know, obviously every E911 call is an important call, but in network terms, it's just a call.

I mean, the PSAPs buy service from SBC, and I think probably the exhibit I introduced was the Missouri tariff to which they buy service. So the PSAP that receives a 911 call, again, critically important, but in economic terms, they're just a customer of SBC, just like -- just like you are. I mean, people call up the PSC, and part of your mission is to take calls from consumers who have things they want to talk to you about. So you the PSC benefit by having a service that allows you to get calls. The same is absolutely true with regard to PSAPs. Their job as a government agency is to receive

calls, and they buy a service from SBC that allows them to do that.

Now, for a lot of good public policy reasons you just dial 911 to get that particular agency, but in network terms it's just traffic. So there's really no reason to say that the cost responsibility for Charter for all traffic except this goes to this POI where we hand off the traffic physically, but for this traffic goes beyond it.

It's a matter of there's just nothing in the record to support that conclusion. It's important traffic, it has certain special characteristics, but at the end of the day, they've got a customer, our customers want to call them. The POI for purposes of financial responsibility should just be the same place.

That's laid out a little more detail in the Briefs. If you have any questions on that I'll take them, but otherwise I'll move on.

My last issue is purely legal. It's a little counter-intuitive, and I lay it out in the Briefs, but it has to do with when -- if I send traffic to SBC or they send traffic to Charter, when do you pay access charges and when do you pay reciprocal compensation.

And the legal error that the arbitrator made is to rely on the legal regime that was in place

before 2001 and not the legal regime that replaced it in 2001. Very simply it's this: Prior to 2001, the FCC made this determination of when you pay access when you send them traffic and when you pay reciprocal compensation on a single test, and the single test was geographic. If it's inside the local calling area, then it's recip comp. If it's outside the local calling area, it's access.

For extremely complicated reasons relating to ISP-bound calling, which is not an issue between Charter and SBC, the FCC rethought that entire regime and in April 2001 issued new rules. And the new rules have the legal effect, and I trace it all out in the Brief, of saying instead of there being just one test, there's now two.

In order to be subject to access charges, a call can't just cross one local calling area boundary to another. It has to do that, but in addition there's also a pricing test. There's a geographic test and a pricing test. There has to be a separate charge for the call that crosses the local calling area boundary.

If you trace it out, if there's not a separate charge, then the underlying call is not telephone toll service. The black and white, no room for interpretation, there must be a separate charge. If there's not a separate charge, then the process of

terminating it is not exchange access, because exchange access says origination/termination for telephone toll service. And if it's not telephone toll service, then -- if it's not exchange access rather, it is not excluded from the intercarrier compensation regime setup in FCC Rule 701(b)(1).

It's just connecting the dots, but there's no room for interpretation. The rule uses a defined statutory term, which refers specifically to another defined statutory term which specifically requires there being a separate charge.

Now, SBC basically says if you do this, the sky will fall, the billing system will break, you know, civilization as we know it will come to an end. None of that's true.

First, the only way we're going to be able to establish a calling area that's bigger for our customers than SBC has, which is when this will come up, is if we file a tariff with you and say, you know, we would like to compete with SBC by having a bigger local calling area. As I understand Missouri law, you have to say yes to that.

Now, if you say yes to that, what we're saying is we are going to forego the right to charge our customers an intraLATA toll call even though it goes a

little further than SBC would give them. And logically if we're foregoing the right to get that extra money from the customer, it kind of makes sense that we shouldn't then have to pay the extra money that's the access charge to SBC.

So although it's a little counter-intuitive to say a toll call has to both go across local calling boundary and have a separate charge, in fact it makes perfect economic sense, because what it says is if you cross that boundary and you get a separate charge, you can afford to pay access charges. If you don't get a separate charge if you're not extracting the money from the customer, why should you give it to SBC?

So it all hangs together. It's just -- I admit it's a little strange. You think, well, if it's within this area, it's local. If it's outside, it's long distance. That's the way it was until 2001, but that's just not what the law says at that point. And so it's a purely legal question, but the result we're seeking isn't economically bizarre. In fact, it lines up economically with what we would collect from our customer in the case of an expanded local calling area on the one hand and what we would pay SBC.

Now, in terms of billing, you know, our testimony I think made clear, it's fairly simple, you

decide whether a call is subject to recip comp, or in our case bill and keep, or access by looking at the originating NXX code, exchange code and the terminating code. They will need to have a list that does that properly. That won't be hard.

Our tariff, our hypothetical, because we don't have it now, our hypothetical expanded local calling area tariff would specify the exchanges that would be local, and they'd just have to program their computer to put those in the bill and keep bucket and not in the access bucket. There's no evidence that that's hard. They just don't want to do it.

The other short of, oh, my gosh, what would happen complexity that they raise was, what about third-party carriers? What about this? What about that? That doesn't have anything to do with this case. This has to do with our charges back and forth with us and SBC. You know, what we owe a third-party carrier who might be at the other end of a transiting agreement isn't the subject of this agreement.

So that's that issue I guess. Again, it's a little -- it's not quite the way it used to be, but all I'm asking for on Charter's behalf is simply that you look at what the law says and do that. That's what I have on that.

COMMISSIONER MURRAY: If I had time to think about it, I would certainly have some questions for you, but perhaps I can come up with one anyway, even though I don't have time to think about it.

You're saying in 2001 the new rules actually provided that they didn't -- certainly did not provide that local traffic would be subject to access in any place; is that correct?

MR. SAVAGE: Yeah. Here's what happened. The original rules in 1996 said the traffic that's subject to reciprocal compensation is local traffic. That's the word they used. And they said, what local traffic means is traffic within an area defined by a state commission. Simple, straightforward, traditional.

The whole mess about what do you do with ISP-bound calling led them to rethink that whole thing, and in the Order where they changed rule they said, you know, this whole local thing was a mistake. They used that word, it was a mistake to use that term that is not defined in the statute. It created ambiguity. They characterized what they were doing as correcting that mistake.

And then you look at the 2001 rules under 51 CFR Section 701 and afterwards, they totally purged the word local. They took it out. It was ambiguous, it was a

mistake, it was causing problems, they took it out. And instead they said, intercarrier comp or reciprocal compensation applies to everything that isn't, one, ISP bound information stuff; two, we have a special rule for wireless traffic; and then three, anything that isn't exchange access. Exchange access isn't a phrase they made up. It was there in the federal act, which again gets you back to telephone toll service, that definition, which requires the separate charge.

So the old way was simple and made sense, except it didn't work. It was ambiguous, it was a mistake and they threw it out. And that's -- I mean, again, it's not -- it seems a little odd until you think about it. It only makes sense. If there's no toll charge, why would you call it a toll call? If there's no toll charge and it's not a toll call, why would you pay extra money to terminate it? It's not the way it used to be done, but it actually hangs together and makes sense on its own terms.

COMMISSIONER MURRAY: Thank you.

MR. SAVAGE: That's it for me. I appreciate it.

COMMISSIONER GAW: I guess I am still struggling with that concept. I felt a little bit like a beagle chasing a rabbit when I was reading through your remarks on this subject, and so I'm trying to figure out

whether the argument is circular or whether I'm just not following correctly.

And so I'll look at it again obviously, but when you're -- when I was reading through the definitions, it almost -- it almost came across as though the argument had some circularity to it. And if you've got some comment to straighten me out on that if you believe it's not circular, that would be helpful to me.

MR. SAVAGE: Let me be real clear. It's not circular for two reasons. First, the definitions in the Act recognize that what happens in the retail market actually matters, and so that's -- one of the things that makes it non-circular is if I, in fact, am charging customers in the retail market, that should have different intercarrier consequences than if I am not. And so it's not --

COMMISSIONER GAW: And when you say if I, are you talking about in your case if Charter is not charging the customer?

MR. SAVAGE: It's the originating carrier. The originating carrier would be charging an intraLATA toll charge or not as the case may be.

COMMISSIONER GAW: To their retail customer?

MR. SAVAGE: Correct. Correct.

COMMISSIONER GAW: So by that definition, does that mean that if a -- if Charter wishes to have expanded calling, that the range of its expanded calling scope where it does not charge customers would be the range of where they do not pay exchange access?

MR. SAVAGE: Yes. The other place that it's not circular is we can't just do that.

COMMISSIONER GAW: All right. Go ahead. That's the piece I think I'm missing.

MR. SAVAGE: The Commission -- I suppose the question comes down to this. The Commission has plenty of power under Missouri law to decide when and whether we can have big local calling areas, small local calling areas, LATA-wide local calling areas, intergalactic, whatever. You guys get to make that decision. Once you make that decision, that then determines, as I see the law, what the intercarrier compensation is.

So it's not that you don't have the authority to reign in or let run free what our local calling areas are going to be, it's your authority doesn't derive from and shouldn't be exercised in an interconnection agreement. Your authority derives from and should be exercised in proceedings under Missouri law.

COMMISSIONER GAW: You're not suggesting

that Charter can on its own define its own boundary on exchange access unless the Commission, the Missouri Commission itself has stated that that's the boundary?

MR. SAVAGE: Correct.

COMMISSIONER GAW: That helps me some.

MR. SAVAGE: What happens in the real world if we win this is we would have what we consider to be another competitive option against SBC.

COMMISSIONER GAW: That being what?

MR. SAVAGE: We could come and we could say we're going to go to the Commission and say we want to offer LATA-wide local calling, and so instead of costing whatever our rate is, 29 bucks for 39 bucks, you get LATA-wide local calling. We would present that. We'd have to get your approval for that. Right?

If we get your approval for that, then we would not pay them access charges for intraLATA toll, but that's only because we wouldn't have any intraLATA toll, do you see what I'm saying, because you would have approved this LATA-wide local calling.

COMMISSIONER GAW: But only for in this case of your example Charter?

MR. SAVAGE: Correct. Again, you may not want to do that. You may say, no, we want to have as a matter of state policy everyone have -- there are all

kinds of state law things that you may -- that sort of bridge we'll cross when we come to it.

But if we don't win this, then for the duration of this interconnection agreement, essentially we can't even ask you rationally if we can compete that way, because if we show up and say we want to do this, all we're doing is saying we'll pay you access charges when the calls come to you, SBC, but we're going to give up collecting the toll to fund the access charges.

So it's giving us an option to come to you and do a new way of competing with SBC. It's not requiring anything of you or, frankly, requiring anything of them.

COMMISSIONER GAW: Okay. Thank you. Sorry to take the time.

MR. SAVAGE: I appreciate it. If there are no more questions, I will conclude.

JUDGE THOMPSON: Good-bye.

MR. SAVAGE: Thank you. I appreciate very much the scheduling accommodation.

JUDGE THOMPSON: That's quite all right. Let's see. We were going to take up Mr. Lumley and Ms. Bourianoff. We are at five minutes to five. I don't know that the reporter can stay after five.

(AN OFF-THE-RECORD DISCUSSION WAS HELD.)

JUDGE THOMPSON: We'll go back on the record. One correction. We will start tomorrow, I think, at 8:30 rather than 8 because, frankly, none of us think we can get here quite that early and be ready to be in here going. But that will give us an hour before we will have to break for the agenda meeting, and then assuming we're not done by then, we'll pick back up around 10:30. Okay? Very good.

Mr. Lumley?

MR. LUMLEY: Thank you, your Honor. Very briefly, Mr. Gryzmala referred to MCI Issue NIM 13, which corresponds to Item 4 on the list they provided today. Basically conceded our point, which was that our language was just as objectionable to SBC as the other CLEC language which was approved. And we believe it was an oversight that ours wasn't approved.

He called for the substitution of SBC's alternate language. I'd point out in the DPL they had no alternate language.

Two other issues raised in MCI's comments, one on line splitting, one on reciprocal compensation. I'd refer the Commission to those comments.

Finally, in response to a collocation -- the collocation issue that's raised on SBC's list which has to do with the power meter draw, the metering of power

for collocation, MCI proposed language that called for being charged for power as used. That's exactly what the arbitrator ruled on. SBC asserts that somehow there's an inconsistency between the ruling and our proposed language. There's not.

The arbitrator then took it one step further and said, I'm going to clarify what I mean by that. That is you're going to use the rated power draw. We understand that clarification. It can be worked into the language. There's no inconsistency between our proposed language and the ruling.

Thank you.

JUDGE THOMPSON: Thank you, Mr. Lumley. Questions from the Bench? I hear none. Have a safe drive home.

Ms. Bourianoff?

MS. BOURIANOFF: Thank you, your Honor, and I appreciate the accommodation.

JUDGE THOMPSON: That's quite all right.

MS. BOURIANOFF: I also wanted to speak to the one collocation issue that AT&T had with SBC, which is the same issue regarding metering power. And as Mr. Lumley indicated, SBC's complaint in their comments is that the arbitrator's language in the award seems to be inconsistent with the actual language that was approved in

the detailed matrix.

They also complained that the reference in the arbitrator's award to charges should be based on the rated power draw of the equipment actually installed in the collocation space, that that result is not reflected in any of the contract language put forward by the parties.

Like MCI, we think that the arbitrator's conclusion in the report is consistent with the language that AT&T had put forward and teed up in the DPL. If you look on the final joint DPL that had been filed in Section 19.2.3.1 of AT&T's proposed language, it talked about measuring collocators' actual power usage. So that's consistent with the arbitrator's determination that charges should be based on the power actually consumed by the CLECs.

And then additionally, AT&T had specifically proposed in Section 19.2.3.7 language that said SBC Missouri will assess charges for power on a per-ampere per-month basis using the rated ampere capacity in the collocators' collocated space. That's consistent with this idea that the arbitrator discussed in his report that charges should be based on the rated power draw of the equipment actually installed in the collocation space.

Charging for power using the rated ampere

capacity of the equipment located in the collocated space is charging based on the list one or list two drain of the equipment. That was explained in both the AT&T position in the final DPL and in the direct testimony of AT&T witness Jim Henson at pages 16 through 17.

So AT&T did indeed, in addition to talking about a couple of different methods of actually metering power, talked about in their testimony charging based on the rated ampere capacity of the equipment, which is the same as the drain of the equipment in the collocated space, and proposed contract language consistent with that.

So we would suggest that SBC's arguments regarding the inconsistencies between the arbitrator's report are without merit, and that the Commission should affirm the arbitrator's decision, and the Commission should adopt the specific language that AT&T proposed regarding rated ampere capacity, which is the same as list two drain.

Are there any questions? Thank you.

JUDGE THOMPSON: Okay. I think that concludes what we were staying late for; is that correct? And then we're going to pick back up tomorrow. I'm composing an e-mail even as we speak to let the Commission staff know they have to get into the room and do some

things to prepare the electronics for tomorrow.

MS. BOURIANOFF: Your Honor, if I may, could I just add one reference?

JUDGE THOMPSON: You may.

MS. BOURIANOFF: I did want to point the Commission to pages 123 through 128 of AT&T's post-hearing brief where we talked about all the factual issues surrounding powered metering, if there are any questions I don't -- or any issues. I don't feel like repeating that, but did want to make that reference.

JUDGE THOMPSON: Thank you. That was one of my favorite issues in the entire arbitration. I just wanted you to know that. I was able to understand it.

MR. JOHNSON: Your Honor, one point. I have nothing further for Navigator, would ask to be excused.

JUDGE THOMPSON: You are excused. Anyone who doesn't want to be here tomorrow, please, don't bother to come. We will struggle on without you.

Mr. Savage, your client will not be represented tomorrow; is that correct?

MR. SAVAGE: That's correct. And just to be clear, my understanding is I have no further right to respond, and I have no further affirmative issues, so that's why --

JUDGE THOMPSON: Yeah, you're pretty well done. Mr. Johnson, you're not going to be here tomorrow?

MR. JOHNSON: No.

JUDGE THOMPSON: AT&T, is anyone going to be here for you? Mr. Zarling. Okay. So they'll be covered.

Mr. Lumley, will you be here?

MR. LUMLEY: No, sir.

JUDGE THOMPSON: You will not. Okay. So MCI then has left.

MR. LUMLEY: We're finished.

JUDGE THOMPSON: They're done. Very good. Well, with a somewhat smaller cast -- Mr. Shorr, will you be here?

MR. SHORR: I don't plan on being here.

JUDGE THOMPSON: Do not plan.

MR. SHORR: Yes.

JUDGE THOMPSON: Very good. With a smaller cast, we will continue tomorrow, as I said, at 8:30 because that way we can be sure everyone's here in their places. All right. Anything further?

Hearing nothing. Mr. Magness?

MR. MAGNESS: Are we starting with more --

JUDGE THOMPSON: I would think we're going to go back to Mr. Gryzmala. We're going to pick up where

I rudely interrupted him. I apologize, but I think we can pick right up there and we'll go forward from that point.

Very good. We are then in recess until tomorrow morning at 8:30. Thank you very much.

WHEREUPON, the hearing of this case was recessed until July 30, 2005.