

XO'S UNRESOLVED ISSUES MATRIX (DECISION POINTS LIST)¹

XO v. SBC
As of April 8, 2004

Issue No.	Issue	Relevant Section(s) of Proposed Amendment ²	XO's Preliminary Position	XO's Proposed Language	SBC's Preliminary Position	SBC's Proposed Language
1	Should SBC be required to make routine network modifications to unbundled network elements, including loops and transport (including dark fiber), consistent with FCC rules?	XO: sections 3.12.2, <i>et seq.</i> SBC: sections 8.5, <i>et seq.</i> ; sections 13.7, <i>et seq.</i> ; sections 14.13, <i>et seq.</i>	Yes, the FCC's rules require SBC to make routine network modifications to UNEs, including loops and transport (to include dark fiber).	3.12.2 Routine Network Modifications. 3.12.1 General Conditions. SBC-13STATE shall make routine network modifications to unbundled facilities, at no additional cost or charge, where the requested transmission facility has already been constructed. A routine network modification is an activity that SBC-13STATE regularly undertakes for its own customers. SBC-13STATE will perform routine network modifications to unbundled facilities in a nondiscriminatory fashion, without regard to whether the facility being accessed was constructed on behalf of, or in accordance with the specifications of, any particular carrier. Where facilities are unavailable, SBC-13STATE will not be required to build a	SBC is required to provide routine network modifications only under very limited conditions. Moreover, SBC should be permitted to exempt from its performance plan obligations any facilities that are	8.5 Routine Network Modifications – Unbundled Local Loops 8.5.1 SBC 13STATE shall make routine network modifications to unbundled loop facilities used by requesting telecommunications carriers where the requested loop facility has already been constructed. SBC 13STATE shall perform routine network modifications to unbundled loop facilities in a nondiscriminatory fashion, without regard to whether the loop facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier. 8.5.2 A routine network modification is an activity that SBC-13STATE regularly

¹ As more fully set forth in the Petition to which this issues matrix or decision points list ("DPL") is attached, XO and SBC have not engaged in direct negotiations beyond the initial exchange of written communications. Accordingly, this DPL reflects SBC's preliminary positions as XO understands them to be at this time. Moreover, because no direct negotiations have transpired between XO and SBC, XO is unable to ascertain the import of many of SBC's suggested provisions, thereby materially affecting its ability to flesh out potential issues. To the extent XO fails to address in this DPL any of SBC's proposed provisions or changes, XO's failure to so address such issues should not be misinterpreted as a tacit acceptance of, or concurrence with, SBC's positions, provisions, or changes. Likewise, XO specifically reserves the right to raise additional issues not already set forth in this DPL which may arise as a result of subsequent negotiations with SBC, SBC's response to the Petition, or further analysis/review of SBC's proposals.

² Citations to specific sections relate to XO's and SBC's respective proposed amendments.

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				<p>loop from scratch by trenching or pulling cable to provision an order of CLEC. SBC-13STATE will recover the costs of routine network modifications in its monthly recurring rates.</p> <p>3.12.2 Routine network modifications applicable to Loops or Transport include, but are not limited to: rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; adding electronics to available wire or fiber facilities to fill an order for an unbundled DS1 circuit; cross-connecting the common equipment to the wire or fiber facility running to the end user; terminating a DS1 loop to the appropriate NID; accessing manholes, and deploying bucket trucks to reach aerial cable.</p> <p>3.12.3 Routine network modifications applicable to Dark Fiber Loops or Transport include routine activities needed to enable CLEC to have light continuity and functional signal carriage across both ends of a Dark Fiber Transport or Loop facility that it has obtained from SBC-13STATE under the Amended Agreement. Routine network modifications include, but are not limited to, splicing of dark fiber; accessing manholes, and deploying bucket trucks to reach aerial cable.</p> <p>3.12.4 Performance Plans. SBC-13STATE's performance in connection with the provisioning of Loops or</p>	involved in routine network modifications and, further, should be permitted to impose substantial charges for performing these "routine" network modifications.	<p>undertakes for its own customers. Routine network modifications include rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a loop to activate such loop for its own customers. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the construction of a new loop, or the installation of new aerial or buried cable for a requesting telecommunications carrier, and SBC-13STATE is not obligated to perform those activities for a requesting telecommunications carrier.</p> <p>8.5.3 SBC-13STATE shall provide routine network modifications at the rates, terms and conditions set out in this Appendix (SBC-12STATE) or by tariff (SBC-SNET) and in the state specific Appendix Pricing (SBC-12STATE) or by tariff (SBC-SNET).</p> <p style="text-align: center;">* * * * *</p> <p>13.7 Routine Network Modifications – Unbundled Dedicated Transport</p> <p>13.7.1 SBC-13STATE shall make routine network modifications to unbundled Dedicated Transport ("UDT")</p>

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				<p>Transport (including Dark Fiber) for which routine network modifications are necessary shall be subject to standard provisioning intervals, included in the calculation of performance measurement results, and factored into the calculation of any remedies contained in the Amended Agreement or elsewhere.</p>		<p>facilities used by requesting telecommunications carriers where the requested UDT facilities have already been constructed. SBC-13STATE shall perform routine network modifications to UDT facilities in a nondiscriminatory fashion, without regard to whether the UDT facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier.</p> <p>13.7.2 A routine network modification is an activity that SBC-13STATE regularly undertakes for its own customers. Routine network modifications include rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the installation of new aerial or buried cable for a requesting telecommunications carrier, and SBC-13STATE is not obligated to perform those activities for a requesting telecommunications carrier.</p> <p>13.7.3 SBC-13STATE shall provide routine network modifications at the rates, terms and conditions set out in this Appendix (SBC-12STATE) or by tariff (SBC-SNET) and in the state specific Appendix Pricing (SBC-12STATE) or by tariff (SBC-SNET).</p>

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						<p style="text-align: center;">* * * * *</p> <p>14.13 Routine Network Modifications</p> <p>14.13.1 SBC-12STATE shall make routine network modifications to unbundled dedicated transport dark fiber and loop dark fiber facilities used by requesting Telecommunications Carriers for the provision of Telecommunication Services where the requested dedicated transport dark fiber or loop dark fiber facilities have already been constructed. SBC-12STATE shall perform routine network modifications to unbundled dedicated transport dark fiber and loop dark fiber in a nondiscriminatory fashion, without regard to whether the dedicated transport dark fiber or loop dark fiber being accessed was constructed on behalf, or in accordance with the specifications, of any Telecommunications Carrier.</p> <p>14.13.2 A routine network modification is an activity that SBC-12STATE regularly undertakes for its own customers. Routine network modifications do not include the installation of fiber for a requesting Telecommunications Carrier, nor do routine network modifications include the provision of electronics for the purpose of lighting dark fiber (i.e., optronics), and SBC-12STATE is not obligated to perform those activities for a requesting Telecommunications Carrier.</p> <p>14.13.3 SBC-12STATE shall provide routine network modifications at the rates,</p>

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						terms and conditions set out in this Appendix (SBC-12STATE), and in the state specific Appendix Pricing (SBC-12STATE) or by tariff (SBC-SNET).
2	Must SBC permit XO to commingle unbundled network elements, combination of unbundled network elements, and wholesale services, consistent with FCC rules?	XO: section 3.10.1 SBC: sections 2.14, <i>et seq.</i>	Yes, SBC is required under the FCC's rules to permit commingling of UNEs, combinations of UNEs, and wholesale services.	3.10.1 Commingling. Notwithstanding any other provision of the Agreement or any SBC-13STATE tariff or SGAT, but subject to the conditions set forth in the following Section 3.6.2, SBC-13STATE will permit the commingling of a UNE or a combination of UNEs ("Qualifying UNEs") pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51, network elements provided pursuant to Section 271(c), and wholesale services obtained from SBC-13STATE under a SBC-13STATE access tariff or separate non-251 agreement ("Qualifying Wholesale Services"), to the extent required by Applicable Law. Moreover, to the extent and so long as required by Applicable Law, SBC-13STATE shall, upon request of CLEC, perform the functions necessary to commingle Qualifying UNEs, network elements provided pursuant to Section 271(c) or Qualifying Wholesale Services. The rates, terms and conditions of the applicable access tariff or separate non-251 agreement will apply to the Qualifying Wholesale Services, and the rates, terms and conditions of the Amended Agreement (or the SBC-13STATE UNE tariff, if applicable) will apply to the Qualifying UNEs and network elements provided pursuant to Section 271(c). "Ratcheting," as that term is defined by the FCC, shall not be required.	SBC is required to allow commingling only under very limited conditions and is not required to price commingled facilities at multiple or blended rates as may be necessary to reflect the fact that the facility in question includes both UNE and non-UNE circuits or services.	2.14 Commingling 2.14.1 "Commingling" means the connecting, attaching, or otherwise linking of a UNE, or a combination of UNEs, to one or more facilities or services that CLEC has obtained at wholesale from SBC-13STATE, or the combining of a UNE, or a combination of UNEs, with one or more such facilities or services. "Commingling" means the act of commingling. 2.14.1.1 "Commingled Arrangement" means the arrangement created by Commingling. 2.14.1.2 Neither Commingling nor a Commingled Arrangement shall include, involve, or otherwise encompass an SBC-13STATE offering pursuant to 47 U.S.C. § 271 that is not a UNE under 47 U.S.C. § 251(c)(3). 2.14.1.3 Where processes for any Commingling requested pursuant to this Agreement (including, by way of example, for existing services sought to be converted to a Commingled Arrangement) are not already in place, SBC-13STATE will develop and implement processes, subject to any associated rates, terms and conditions. The Parties will comply

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						<p>with any applicable Change Management guidelines.</p> <p>2.14.2 Except as provided in Section 2.15 and, further, subject to the other provisions of this Agreement including this Section and Section 2.12 of this Appendix, SBC-13STATE shall permit CLEC to Commingle a UNE or a combination of UNEs with facilities or services obtained at wholesale from SBC-13STATE to the extent required by FCC rules and orders.</p> <p>2.14.3 Upon request, and subject to this Section and Section 2.15, SBC-13STATE shall perform the functions necessary to Commingle a UNE or a combination of UNEs with one or more facilities or services that CLEC has obtained at wholesale from SBC-13STATE (as well as requests where CLEC also wants SBC-13STATE to complete the actual Commingling), except that SBC-13STATE shall have no obligation to perform the functions necessary to Commingle (or to complete the actual Commingling) if (i) the CLEC is able to perform those functions itself; or (ii) it is not technically feasible, including that network reliability and security would be impaired; or (iii) SBC-13STATE's ability to retain responsibility for the management, control, and performance of its network would be impaired; or (iv) SBC-13STATE would be placed at a disadvantage in operating its own network; or (v) it would undermine the ability of other Telecommunications Carriers to obtain access to UNEs or to</p>

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						<p>Interconnect with SBC-13STATE's network; or (vi) CLEC is a new entrant and is unaware that it needs to Commingle to provide a Telecommunications Service, but such obligation under this Section ceases if SBC-13STATE informs CLEC of such need to Commingle.</p> <p>2.14.3.1 For purposes of Section 2.14.3 and without limiting other instances in which CLEC may be able to Commingle for itself, CLEC is deemed able to Commingle for itself when the UNE(s), UNE combination, and facilities or services obtained at wholesale from SBC-13STATE are available to CLEC, including without limitation:</p> <p>2.14.3.1.1 at an SBC-13STATE premises where CLEC is physically collocated or has an on-site adjacent collocation arrangement;</p> <p>2.14.3.1.2 for SBC CALIFORNIA only, within an adjacent location arrangement, if and as permitted by this Agreement.</p> <p>2.14.3.2 Section 2.14.3(i) shall only begin to apply thirty (30) days after notice by SBC-13STATE to CLEC. Thereafter, SBC-13STATE may invoke Section 2.14.3(i) with respect to any request for Commingling.</p> <p>2.14.4 In accordance with and subject to</p>

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						<p>the provisions of this Section 2.14, any request by CLEC for SBC-13STATE to perform the functions necessary to Commingle (as well as requests where CLEC also wants SBC-13STATE to complete the actual Commingling), shall be made by CLEC in accordance with the bona fide request (BFR) process set forth in this Agreement.</p> <p>2.14.4.1 In any such BFR, CLEC must designate among other things the UNE(s), combination of UNEs, and the facilities or services that CLEC has obtained at wholesale from SBC-13STATE sought to be Commingled and the needed location(s), the order in which such UNEs, such combinations of UNEs, and such facilities and services are to be Commingled, and how each connection (e.g., cross-connected) is to be made between them.</p> <p>2.14.4.2 In addition to any other applicable charges, CLEC shall be charged a reasonable fee for any Commingling work done by SBC-13STATE under this Section 2.14 (including performing the actual Commingling). Such fee shall be calculated using the Time and Material charges as reflected in the State-specific Appendix Pricing. SBC-13STATE's Preliminary Analysis to the BFR shall include an estimate of such fee for the specified Commingling. With respect to a BFR in which CLEC requests SBC-13STATE to perform work not</p>

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						<p>required by this Section 2.14.4, CLEC shall be charged a market-based rate for any such work.</p> <p>2.14.5 SBC-13 STATE shall not be required to, and shall not, provide "ratcheting" as a result of Commingling or a Commingled Arrangement. As a general matter, "ratcheting" is a pricing mechanism that involves billing a single circuit at multiple rates to develop a single, blended rate. SBC-13STATE shall charge the rates for UNEs (or UNE combinations) Commingled with facilities or services obtained at wholesale (including for example special access services) on an element-by-element basis, and such facilities and services on a facility-by-facility, service-by-service basis.</p> <p>2.14.6 Nothing in this Agreement shall impose any obligation on SBC-13STATE to allow or otherwise permit Commingling, a Commingled Arrangement, or to perform the functions necessary to Commingle, or to allow or otherwise permit CLEC to Commingle or to make a Commingled Arrangement, beyond those obligations imposed by the Act, including the rules and orders of the FCC. The preceding includes without limitation that SBC-13STATE shall not be obligated to Commingle network elements that do not constitute required UNEs under 47 U.S.C. § 251(c)(3) (including those network elements no longer required to be so unbundled), or where UNEs are not requested for permissible purposes. If CLEC does not</p>

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						<p>meet the applicable eligibility criteria or, for any reason, stops meeting the eligibility criteria for a particular UNE involved or to be involved in a Commingled Arrangement, CLEC shall not request such Commingled Arrangement or continue using such Commingled Arrangement. Eligibility Criteria for Commingling include, but are not limited to, those set forth in Section 2.15, below.</p> <p>2.14.7 In the event that Commingling involves SBC-13STATE performing the functions necessary to combine UNEs (e.g., make a new combination of UNEs), and including making the actual UNE combination, then Section 2.12 shall govern with respect to that UNE combining aspect of that particular Commingling and/or Commingled Arrangement.</p> <p>2.14.8 Subject to this 2.14, SBC-13STATE shall not deny access to a UNE or a combination of UNEs on the grounds that one or more of the UNEs:</p> <p>2.14.8.1 Is connected to, attached to, linked to, or combined with, a facility or service obtained at wholesale from SBC-13STATE; or</p> <p>2.14.8.2 Shares part of SBC-13STATE's network with access services or inputs for a Non-Qualifying Service.</p> <p>2.14.9 Commingling in its entirety (including its definition, the ability of</p>

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						CLEC to Commingle, SBC-13STATE's obligation to perform the functions necessary to Commingle, and Commingled Arrangements) shall not apply to or otherwise include, involve or encompass SBC-13STATE offerings pursuant to 47 U.S.C. § 271 that are not UNEs under 47 U.S.C. § 251(c)(3).
3	Is SBC required to convert a wholesale service, or a group of wholesale services, to unbundled network elements or combinations of unbundled network elements consistent with FCC rules?	XO: sections 3.11, <i>et seq.</i> SBC: sections 2.13, <i>et seq.</i>	Yes, the FCC's rules mandate that SBC must convert a wholesale service, or a group of wholesale service, to UNEs or combination or UNEs.	<p>3.11 Conversions</p> <p>3.11.1 There will be no charge for conversions from wholesale to UNEs or UNE combinations.</p> <p>3.11.2 Until such time as SBC-13STATE implements its ASR-driven conversion process in its territory, conversion of access circuits to unbundled Network Elements will be performed manually pursuant to SBC-13STATE's conversion guidelines. The effective bill date for conversions is the first day of the month following SBC-13STATE's receipt of an accurate and complete ASR or electronic request for conversion pursuant to SBC-13STATE's conversion guidelines (which are posted on the web at _____).</p> <p>3.11.3 All ASR-driven conversion requests will result in a change in circuit identification (circuit ID) from access to UNE or UNE to access.</p> <p>3.11.4 All requests for conversions will be processed within fifteen (15) days.</p> <p>3.11.5 Should SBC-13STATE deny a request from CLEC for a UNE, including, but not limited to, based on a lack of facilities, SBC-13STATE shall, at CLEC's</p>	SBC is required to provide conversions only under very limited conditions and is permitted to include numerous extraneous provisions that are not contemplated by the <i>Triennial Review Order</i> .	<p>2.13 Conversion of Wholesale Services to UNEs</p> <p>2.13.1 Upon request, SBC-13STATE shall convert a wholesale service, or group of wholesale services, to the equivalent UNE, or combination of UNEs, that is available to CLEC under terms and conditions set forth in this Appendix, so long as the CLEC and the wholesale service, or group of wholesale services, meets the eligibility criteria that may be applicable for such conversion. (By way of example only, the Qualifying Service requirement is one such eligibility criterion.)</p> <p>2.13.2 Where processes for the conversion requested pursuant to this Appendix are not already in place, SBC-13STATE will develop and implement processes, subject to any associated rates, terms and conditions. The Parties will comply with any applicable Change Management guidelines.</p> <p>2.13.3 Except as otherwise provided hereunder, SBC-13STATE shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service for the first time, in</p>

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				request, convert an equivalent special access service within thirty (30) days, with no minimum period termination liability.		<p>connection with any conversion between a wholesale service or group of wholesale services and a UNE or combination of UNEs.</p> <p>2.13.3.1 SBC-13STATE may charge applicable service order charges and record change charges.</p> <p>2.13.4 This Section 2.13 only applies to situations where the wholesale service, or group of wholesale services, is comprised solely of UNEs offered or otherwise provided for in this Appendix.</p> <p>2.13.5 If CLEC does not meet the applicable eligibility criteria or, for any reason, stops meeting the eligibility criteria for a particular conversion of a wholesale service, or group of wholesale services, to the equivalent UNE, or combination of UNEs, CLEC shall not request such conversion or continue using such the UNE or UNEs that result from such conversion. To the extent CLEC fails to meet (including ceases to meet) the eligibility criteria applicable to a UNE or combination of UNEs, or Commingled Arrangement (as defined herein), SBC-13STATE may convert the UNE or UNE combination, or Commingled Arrangement, to the equivalent wholesale service, or group of wholesale services, upon written notice to CLEC.</p> <p>2.13.5.1 This Section 2.13.5 applies to any UNE or combination of UNEs, including whether or not such UNE or combination of UNEs had been previously converted</p>

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						<p>from an SBC-13STATE service.</p> <p>2.13.5.2 SBC-13STATE may exercise its rights provided for hereunder and those allowed by law in auditing compliance with any applicable eligibility criteria.</p> <p>2.13.6 In requesting a conversion of an SBC-13STATE service, CLEC must follow the guidelines and ordering requirements provided by SBC-13STATE that are applicable to converting the particular SBC-13STATE service sought to be converted.</p> <p>2.13.7 Nothing contained in this Appendix or Agreement provides CLEC with an opportunity to supersede or dissolve existing contractual arrangements, or otherwise affects SBC-13STATE's ability to enforce any tariff, contractual, or other provision(s), including those providing for early termination liability or similar charges. (By way of example, where provided for, early termination liability charges may apply upon a special access circuit being considered disconnected for billing/inventory purposes.)</p>
4	May XO, consistent with FCC rules, provide non-qualifying services using the same unbundled network	<p>XO: sections 1.2 and 2.39</p> <p>SBC: sections 2.10, <i>et seq.</i></p>	Yes, the FCC's rules provide that XO may provide non-qualifying service using the same UNEs it uses to provide	1.2 SBC-13STATE shall offer UNEs to CLEC for the purpose of offering a Qualifying Service or a combination of Qualifying and Non-Qualifying services. CLEC may use individual UNEs, commingled UNEs, or combinations of UNEs, to provide any feature, function, capability, or service option that such UNEs are technically capable of providing, except as may be specifically limited herein.	No, XO's ability to use unbundled network elements purchased from SBC is subject to very strict criteria, and	<p>Network Elements of Appendix UNE is deleted and replaced with the following (and with new Section 19; see Item 15 below):</p> <p>2.10 Qualifying Services Conditions</p> <p>2.10.1 As conditions to accessing and using any UNE (whether on a stand-alone basis or in combination with other UNEs, with a network</p>

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	elements it uses to provide qualifying services?		qualifying services.	<p style="text-align: center;">* * * * *</p> <p>2.39 Qualifying Service.</p> <p>A telecommunications service that competes with a telecommunications service that has been traditionally the exclusive or primary domain of the incumbent LECs, including, but not limited to, local exchange service, such as plain old telephone services, and access services, such as digital subscriber line services and high-capacity circuits.</p>	SBC is permitted to include numerous provisions that go well beyond the requirements in the <i>Triennial Review Order</i> .	<p>element possessed by CLEC, or pursuant to Commingling, or otherwise) CLEC must continuously meet each of the following:</p> <p>2.10.1.1 CLEC must be a Telecommunications Carrier. CLEC hereby represents and warrants that it is a Telecommunications Carrier and that it will notify SBC-13STATE immediately in writing if it ceases to be a Telecommunications Carrier. Failure to so notify SBC-13STATE shall constitute material breach of this Agreement.</p> <p>2.10.1.2 CLEC must be providing one or more Qualifying Services to either residential or business End Users using that particular UNE.</p> <p>2.10.1.2.1 "Qualifying Service" is defined as a Telecommunications Service provided in direct competition with a Telecommunications Service that has been traditionally the exclusive or primary domain of SBC-13STATE (e.g., local exchange services such as POTS and local data service, or access services such as xDSL and hi-capacity circuits).</p> <p>2.10.1.2.1.1 For purposes of this Section, "local"</p>

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						<p>means within the SBC-13STATE designated local calling area in which the requested UNE is provided.</p> <p>2.10.1.3 CLEC must be providing that Qualifying Service(s) on a "Common Carrier" basis.</p> <p>2.10.1.3.1 For purposes of determining whether CLEC is providing the Qualifying Service(s) on a "Common Carrier" basis, the phrase "Common Carrier" shall be interpreted as in National Ass'n. of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608-09 (1976) (NARUC II)" (CLEC (1) holds itself out to serve indifferently all potential users, and (2) allows its End Users to transmit intelligence of their own design and choosing).</p> <p>2.10.1.3.2 By way of example only, the self-provision of access services used solely as an input to provide a retail interexchange service does not qualify as the provision of exchange access on a Common Carrier basis.</p> <p>2.10.2 Where CLEC requests any combination of UNEs (including a</p>

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						<p>combination of UNEs with network elements possessed by CLEC, or with wholesale services pursuant to Commingling, or otherwise, each as may be permitted under this Agreement), CLEC must satisfy the Qualifying Services conditions as to each UNE used in the particular combination.</p> <p>2.10.3 Satisfaction of the Qualifying Service(s) conditions is required in addition to any other eligibility criteria that must also be met (e.g., for DS1 or DS3 EELs as set forth in Section 2.15).</p> <p>2.10.4 By ordering, accessing or using a UNE (whether on a stand-alone basis, in combination with other UNEs, with a network element possessed by CLEC, or pursuant to Commingling or otherwise) CLEC continuously represents and warrants that it satisfies the Qualifying Service(s) conditions as to the particular UNE, UNEs or combination of UNEs. Additionally, CLEC agrees to provide written certification upon SBC-13STATE request identifying:</p> <p>2.10.4.1 the Telecommunications Service it will provide using the UNE; and</p> <p>2.10.4.2 which core SBC-13STATE service the Telecommunications Service directly competes with by</p>

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						<p>providing a detailed description of the Telecommunications Service that will be provided and by designating the core ILEC service(s) with which it competes.</p> <p>2.10.4.3 This Section 2.10.4 is in addition to any other certification to eligibility criteria that may be required by Section 2.10.5, below, or other provisions hereof.</p> <p>2.10.5 SBC-13STATE has no obligation to provide any UNE (whether on a stand-alone basis, in combination with other UNEs, with a network element possessed by CLEC, or pursuant to Commingling or otherwise) unless CLEC continuously meets the Qualifying Services conditions for that UNE. If CLEC does not meet the Qualifying Services conditions or, for any reason, stops meeting the Qualifying Services conditions for a particular UNE (whether on a stand-alone basis, or in combination with other UNEs, with a network element possessed by CLEC, or pursuant to Commingling or otherwise), CLEC shall not request such UNE or continuing using such UNE. Failure to provide accurate certifications that CLEC is providing a Qualifying Service(s) with such UNE, or to actually provide a Qualifying Service(s) on a "Common Carrier" basis with such UNE, constitutes a material breach of this Agreement. Accordingly, in addition to any other</p>

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						<p>audits or reviews contemplated by this Agreement, SBC-13STATE may request and/or review CLEC's Qualifying Services certifications at any time, even after the UNE has been provided to CLEC, and may discontinue providing that UNE(s) (including a combination(s) or Commingled Arrangements (as defined herein) including that UNE(s)) upon 90 days' advance written notice to CLEC if CLEC's certifications indicate that it is not using UNE(s) to provide Qualifying Services or if CLEC is, in fact, not using UNE(s) to provide Qualifying Services. Without affecting the application or interpretation of any other provisions regarding waiver, estoppel, laches, or similar concepts in other situations, CLEC shall fully comply with this Section 2.10 "Qualifying Services Conditions" in all cases and, further, the failure of SBC-13STATE to require such compliance, including if SBC-13STATE provides or continues to provide, access to a UNE (whether on a stand-alone basis, in combination(s) with other UNEs or other services, Commingled, or otherwise, that does not meet the Qualifying Services conditions, including those in this Section 2.10, shall not act as a waiver of any part of this Section, and estoppel, laches, or other similar concepts shall not act to affect any rights or requirements hereunder.</p>

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						<p>2.10.6 CLEC may only use a UNE (whether on a stand-alone basis, in combination(s) with other UNEs, with a network element possessed by CLEC, or pursuant to Commingling or otherwise), to provide a Non-Qualifying Service only to the extent that CLEC is permitted such use of that particular UNE by FCC rules and orders.</p> <p>2.10.6.1 A "Non-Qualifying Service" is a service that is not a Qualifying Service.</p> <p>2.10.6.2 CLEC may not access any UNE for the sole purpose of providing a Non-Qualifying Service(s).</p> <p>2.10.7 By way of example, use of a UNE (whether on a stand-alone basis or in combination with other UNEs), with a network element possessed by CLEC, or pursuant to Commingling or otherwise) to provide service to CLEC or for other administrative purpose(s) does not constitute using a UNE to provide a Qualifying Service.</p>
5	Should SBC's right to audit XO's compliance with the qualifying service eligibility criteria for high-capacity	<p>XO: sections 3.10.3.5, <i>et seq.</i></p> <p>SBC: sections 2.15.7, <i>et seq.</i></p>	Yes, SBC's audit requirements for high-capacity EELs should be limited, consistent with the FCC's rules.	<p>3.10.3.5 Audits. SBC-13STATE will have a limited right to audit compliance with the qualifying service eligibility criteria.</p> <p>3.10.3.5.1 To invoke this limited right, SBC-13STATE will send a Notice of Audit to CLEC, identifying the specific cause. This Notice of Audit will include, at a minimum, the particular circuits involved and the specific service eligibility</p>	SBC is entitled to the whole panoply of audit rights, in addition to those specifically set forth in the <i>Triennial</i>	2.15.7 In addition to any other audit rights provided for this Agreement and those allowed by law, SBC-13STATE may obtain and pay for an independent auditor to audit CLEC, on an annual basis, applied on a State-by-State basis, for compliance with this Section 2.15. For purposes of calculating and applying an "annual basis", it means for a State a consecutive 12-month period, beginning upon SBC-13STATE's written

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	EELs be limited consistent with FCC rules?			<p>criteria with which SBC-13STATE asserts noncompliance.</p> <p>3.10.3.5.2 The audit will examine CLEC's compliance in all material respects with those specific service eligibility criteria applicable to EELs with which SBC-13STATE has asserted noncompliance. Any such audit shall be conducted no more than once annually.</p> <p>3.10.3.5.3 The Parties will mutually agree on the auditor, who shall perform the audit in accordance with the standards established by the American Institute for Certified Public Accountants. The auditor, who shall be paid by SBC-13STATE, will be independent, not affiliated with either Party, and regularly utilized by both ILECs and CLECs. The auditor may not be substantially dependent upon either Party for work.</p> <p>3.10.3.5.4 To the extent the independent auditor's report concludes that CLEC failed to comply with the service eligibility criteria specified by SBC-13STATE, then CLEC must convert the noncompliant circuits to the appropriate service, true up any different in payments, and make appropriate payments on a going-forward basis. If the independent auditor's report concludes that CLEC failed to comply with the service eligibility criteria identified by SBC-13STATE in all material respects, CLEC will reimburse SBC-13STATE for the pro-rata cost of the independent auditor, in proportion to the number of circuits found to be noncompliant.</p>	<i>Review Order.</i>	<p>notice that an audit will be performed for that State, subject to Section 2.15.7.4 of this Section.</p> <p>2.15.7.1 Unless otherwise agreed by the Parties (including at the time of the audit), the independent auditor shall perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants (AICPA), which will require the auditor to perform an "examination engagement" and issue an opinion regarding CLEC's compliance with the qualifying service eligibility criteria.</p> <p>2.15.7.2 The independent auditor's report will conclude whether CLEC complied in all material respects with this Section 2.15.</p> <p>2.15.7.3 Consistent with standard auditing practices, such audits require compliance testing designed by the independent auditor, which typically include an examination of a sample selected in accordance with the independent auditor's judgment.</p> <p>2.15.7.4 To the extent the independent auditor's report concludes that CLEC failed to comply with this Section 2.15, CLEC must true-up any difference in payments beginning from the date that the non-compliant circuit was established as a UNE/UNE combination, in whole or in part (notwithstanding any other provision hereof), CLEC must convert the UNE or UNE combination, or Commingled Arrangement, to an equivalent or</p>

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				<p>3.10.3.5.5 Should the independent auditor confirm CLEC's compliance in all material respects with the service eligibility criteria identified by SBC-13STATE on the particular circuits, then CLEC shall provide to SBC-13STATE a statement of CLEC's costs associated with the audit, and SBC-13STATE shall then reimburse CLEC for its costs within thirty (30) days. CLEC shall maintain appropriate records to support its certification.</p>		<p>substantially similar wholesale service, or group of wholesale services, (and SBC-13STATE may initiate and affect such a conversion on its own without any further consent by CLEC), and CLEC shall timely make the correct payments on a going-forward basis, and all applicable remedies for failure to make such payments shall be available to SBC-13STATE. In no event shall rates set under Section 252(d)(1) of the Act apply for the use of any UNE for any period in which CLEC does not meet the conditions set forth in this Section 2.15 for that UNE, arrangement, or circuit, as the case may be. Also, the "annual basis" calculation and application shall be immediately reset, e.g., SBC-13STATE shall not have to wait the remaining part of the consecutive 12-month period before it is permitted to audit again in that State.</p> <p>2.15.7.4.1 To the extent that the independent auditor's report concludes that CLEC failed to comply in all material respects with this Section 2.15, CLEC must reimburse SBC-13STATE for the cost of the independent auditor and for SBC-13STATE's costs in the same manner and using the same methodology and rates that SBC-13STATE is required to pay CLEC's costs under Section 2.15.7.4.2.</p> <p>2.15.7.4.2 To the extent the independent auditor's report concludes that the CLEC complied in all material respects with this</p>

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						<p>Section 2.15, SBC-13STATE must reimburse CLEC for its reasonable staff time and other reasonable costs associated in responding to the audit (e.g., collecting data in response to the auditor's inquiries, meeting for interviews, etc.).</p> <p>2.15.7.5 CLEC will maintain the appropriate documentation to support its eligibility certifications, including without limitation call detail records, Local Telephone Number assignment documentation, and switch assignment documentation.</p>