section 271.[378] Section 252 only confers upon the states the authority to arbitrate issues and to set rates for UNEs that must be unbundled "*for purposes of [§ 251(c)(3)]*."[379] This Commission has already recognized that section 252(d)(1) "is quite specific that it only applies for the purposes of implementation of section 251(c)(3)" and "does not, by its terms," grant the states *any* authority as to "network elements that are required only under section 271."[380] For that reason, contrary to AT&T's argument, the references in section 271(c)(1) to agreements approved under section 252 simply confirm that states do not have any rate-making authority under section 271.

In this respect, AT&T's reliance on the Fifth Circuit's decision in *Coserv, LLC v. Southwestern Bell Telephone Co.*, 350 F.3d 482 (5th Cir. 2003), is misplaced.[381] The question presented in *Coserv* was whether the Texas commission had jurisdiction to arbitrate issues outside of the duties described in section 251(b) and (c). The Fifth Circuit concluded that the Texas commission *lacked* jurisdiction over such issues where the parties have not voluntarily agreed to negotiate them under section 252. Where a particular service falls outside of the requirements of section 251(b) or (c) and one party refuses to negotiate the rates and terms of a non-section 252 item in the context of a section 252 interconnection-agreement negotiation, the issue is "not a mutually agreed upon subject of voluntary negotiation between" the parties.[382] Incumbents have no duty to include section 271 elements in negotiations to create a section 252

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[378] *See* AT&T at 178-81; *see also* Loop & Transport Coalition at 134-36; NJ Division of Ratepayer Advocate at 13-14.

[379] 47 U.S.C. § 252(d)(1).

[380] *Triennial Review Order* ¶ 657.

[381] *See* AT&T at 179-80, 181 n.80.

[382] 350 F.3d at 488.

interconnection agreement, and this argument provides no basis for a state commission to exercise authority over the rates and terms for section 271 elements where incumbents choose to address those separate and apart from negotiations under section 252.[383]

C. The Commission Should Ensure That Change-of-Law Provisions Are Not Permitted To Delay Implementation of Lawful Unbundling Rules

The Commission must not allow change-of-law provisions in existing interconnection agreements to impede a smooth transition to the Commission's new list of network elements established in this proceeding. The Commission should, therefore, adopt a single national transition plan so that all interconnection agreements can be brought into compliance with the Commission's new rules on the same timetable.

Many interconnection agreements provide generally for amendment pursuant to "legally binding" intervening law[384] or a "final and nonappealable" order.[385] Now that the Supreme Court has denied the petitions for certiorari to review *USTA II*, there is a final, binding, nonappealable order that triggers these change-of-law provisions. The vacatur of the prior rules has thus become final, and the legal obligation upon which the existing interconnection

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[383] In any case, to the extent *Coserv* holds that state commissions have authority under federal law to arbitrate any "issues that were the subject of the voluntary negotiations," 350 F.3d at 487, without any guidance as to the standard state commissions should apply in resolving such issues, it is clearly incorrect and conflicts with the Eleventh Circuit's decision in *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (per curiam) ("§ 252(b)(1)'s language 'any open issues' can only be read to include those issues which an incumbent is mandated to negotiate").

[384] *See, e.g.*, Interconnection Agreement Between Pacific Bell Tel. Co. and AT&T Communications of California, Inc., General Terms and Conditions § 8.3 (Aug. 14, 2000) (California).

[385] *See, e.g.*, Interconnection Agreement Between Ameritech Information Indus. Servs. and MCImetro Access Transmission Servs., Inc. § 29.3 (July 31, 1997) (Michigan).

agreements were based no longer exists. As the Commission has recognized,[386] the D.C. Circuit vacatur thus creates the change of law; the Commission should confirm that the elimination of the old requirements – and thus the change of law – has now taken place.

Moreover, the Commission should establish a uniform, national transition plan for implementation of its new rules. The interconnection agreements under which ILECs currently operate were implemented pursuant to a prior, now-vacated regulatory regime, and the Commission has the power to ensure the success of the transition to the new regime it intends to put in place. While it is true that the change-of-law provisions were intended to anticipate the modification of federal unbundling rules,[387] they were not intended to provide CLECs a means of impeding or negating changes to the national UNE regime established by the Commission. The D.C. Circuit has held that, "where intervening circumstances – in this instance, FERC-mandated open access transmission – affect an entire class of contracts in an identical manner, we find nothing in the *Mobile-Sierra* doctrine to prohibit FERC from responding with a public interest finding applicable to all contracts of that class."[388] Likewise, this Commission's removal of any network element from the mandatory unbundling list, pursuant to this generic rulemaking proceeding, would affect "an entire class of contracts in an identical manner," and the public interest therefore demands that the Commission provide for uniform implementation regardless of any purportedly inconsistent provisions in interconnection agreements.

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[386] *See Triennial Review Order* ¶ 705.

[387] *See* AT&T at 198.

[388] *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 710 (D.C. Cir. 2000), *aff'd*, 535 U.S. 1 (2002).

The Commission need not abrogate interconnection agreements to achieve this goal, although, given the circumstances, it could do so if it so chose.[389] Instead, the Commission should simply take steps to ensure that any negotiation of new interconnection agreement terms for implementation of new unbundling requirements be carried out in good faith and in a manner that complies with the time frames established by the Commission for the implementation of those rules. Specifically, the Commission should make clear that any CLEC that fails, within 30 days, to adopt an amendment reflecting a Commission decision to eliminate a particular unbundling requirement shall be presumptively considered to be negotiating in bad faith and will be subject to sanctions.

The Commission has ample authority to require the parties to act promptly in implementing its new requirements. *See* Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 17806, ¶¶ 34-36 (2000) (when establishing

[389] *See Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (upholding the Commission's finding that contracts containing international settlement rates exceeding FCC benchmarks were not in the public interest); *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956); First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1095 (1996) ("*Local Competition Order*") ("Courts have held that 'the Commission has the power . . . to modify . . . provisions of private contracts when necessary to serve the public interest.'") (quoting *Western Union Tel. Co.*, 815 F.2d at 1501) (subsequent history omitted); *see also id.* ¶ 1322 (explaining that § 252(a)(1) "clearly states that 'agreement' for purposes of section 252, 'includ[es] any interconnection agreement negotiated before the date of enactment'") (alteration in original); *see also Callery Props., Inc. v. United Gas Improvement Co.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (reading *Callery Properties* to embody the "general principle of agency authority to implement judicial reversals").

national, default collocation intervals, the Commission required ILECs to file tariff and SGAT amendments within 30 days and required prompt good faith renegotiation of agreements to reflect those intervals). The Commission should require all parties to negotiate and implement new contract language (and state commissions should approve such changes) so that the Commission's new unbundling rules are implemented within strict time frames.

As SBC explained in its opening comments, the Commission should establish a presumption that it constitutes bad faith not to agree within 30 days to an amendment simply deleting from agreements items that no longer must be unbundled under the Commission's rules. Moreover, the Commission should clarify that state commissions are empowered to enforce these obligations through show-cause orders. There is no legitimate dispute over the proper phrasing of particular obligations, for these amendments are merely striking out language that no longer belongs.

Finally, just as the Commission did in the collocation context, it should require that ILECs amend any existing state tariffs within 30 days to conform to the new rules, and further mandate that those tariffs be effective at the earliest time permissible under state law. Further, the Commission should preempt as contrary to federal law any decision by a state commission that refuses to allow such tariff amendments to become effective. A state commission that refuses to adopt appropriate, conforming tariff amendments would effectively be adding to the list of network elements that need to be unbundled, and, for the reasons discussed above, the Commission must make clear that any such decision is preempted.

D. The Commission Should Adopt a Prompt Transition Away from Maximum Unbundling and Prevent Any Attempts To Slow-Roll the Implementation of the New Rules

If the Commission insists on adopting transitional rates for existing CLEC customers – and, given the length of time that has already transpired since March 2004 when *USTA II* was released, the Commission should decline to impose any transition at all – the Commission needs to ensure that any transition lasts for only a very brief period. And there is certainly no reason to permit competitors to add *new* UNE customers during any transition.[390]

CLECs have already benefited tremendously as a result of having been able to obtain UNEs without any lawful impairment finding to support such access. The CLECs have certainly known since *USTA II* that the Commission's blanket unbundling rules were unlawful. Despite that decision, the Commission has effectively retained the identical regime on an "interim" basis in all markets through at least the end of 2004. The CLECs have had ample notice that they needed to stop relying on unbundling where there is no impairment.

The CLECs insist that the Commission should adopt a multi-year transition period to minimize disruption caused by "flash cut" changes.[391] This is nonsense. It is not this Commission's job to protect inefficient competitors. Where the Commission has concluded that competitors are not impaired (and unbundling is, therefore, not necessary), efficient competitors are able to compete without UNE access. And, if the CLECs want to obtain continued access to ILEC facilities – either while they transition to their own facilities, or as an end in itself – they can do so either pursuant to resale under section 251(c)(4) or under a commercial agreement.

[390] *See Interim Order and NPRM* ¶ 29.

[391] *See, e.g.*, AT&T at 205; *see also* Alpheus at 3 (proposing a 48-month transition off of dark fiber).

If the Commission nonetheless determines that some additional transition period is necessary, there is no reason that it should exceed four months. With respect to the UNE-P, SBC could, utilizing its batch hot-cut process, transition the entire embedded base in over 99% of its central offices in 90 days.[392] And, as noted, for those CLECs that are not prepared to offer service on a facilities-basis – or do not wish to do so – there is resale and/or commercial agreements. There is, as a result, no basis for a transition period that exceeds three months, and certainly not one that exceeds the six months proposed in the NPRM.

As SBC explained in its opening comments, the Commission must also adhere to the position stated in the *NPRM* that it will not allow CLECs during this transition to serve *new* customers with UNEs without an affirmative finding of impairment (and especially where the Commission has expressly concluded there is no impairment). Allowing CLECs to add new UNE customers in the face of an affirmative finding of no impairment is inconsistent with a lawful unbundling regime.

E. The Commission Should Create a Climate Conducive to Commercial Negotiations

As SBC explained in its opening comments, a critical facet of its movement away from the discredited, maximum unbundling regime is a clear determination that, where parties engage in commercial negotiations, they must be permitted to reap the fruits of their agreements, free from the threat of state commission intervention. Only with such a guarantee will the parties be able to engage in truly robust commercial negotiations, and only then can the Commission claim to have implemented Congress's aim of a de-regulatory, competitive environment for local telecommunications.

[392] The few (23) central offices that could not meet a 90-day deadline with the batch process could do so if CLECs issued orders on a project basis.

A number of commenters dispute this position, claiming that the 1996 Act requires that *all* agreements between ILECs and CLECs are subject to state commission authority.[393] SBC has addressed these arguments in detail previously – in pleadings that the Commission has expressly incorporated into the record here[394] – and we will accordingly not belabor the point. The key consideration is that the statute plainly contemplates a distinction between, on the one hand, those agreement terms that implement the duties of section 251(b) and (c), and, on the other hand, those agreement terms that are outside the scope of those duties. SBC's position, that agreements between ILECs and CLECs are subject to state commission filing requirements only if and to the extent that they implement section 251(b) and (c) duties, is thus fully consistent with the statutory scheme.

The only new argument that commenting parties make in response is their reliance on section 252(e)(1), which provides that "*[a]ny* interconnection agreement adopted by negotiation . . . shall be submitted for approval to the State commission."[395] But this provision, like the remainder of section 252, applies only to "interconnection agreement[s]," and, as the Commission has already held, an agreement is not an interconnection agreement unless it "contain[s] an ongoing obligation relating to section 251(b) or (c)."[396] To the extent an agreement contains rates, terms, and conditions for network elements or services that are outside

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[393] *See, e.g.*, Loop & Transport Coalition at 159; MCI at 174-83; ADT at 6-10; PACE at 115-19.

[394] *See Interim Order and NPRM* ¶ 13.

[395] 47 U.S.C. § 252(e)(1) (emphasis added).

[396] Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337, ¶ 8 n.26 (2002).

the scope of section 251(b) and (c), that arrangement need not be filed with the states, notwithstanding the language of section 252(e)(1).[397]

CONCLUSION

The Commission should reject the CLECs' unsupported claims of widespread impairment and adopt unbundling rules to take account of the abundant evidence that CLECs can and do compete without unbundled access to ILEC facilities.

Respectfully submitted,

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October 19, 2004

[397] Nor does the recent decision in *Sage Telecom, LP, v. Public Util. Comm'n*, No. A-04-CA-364-SS, slip op. (W.D. Tex. Oct. 7, 2004), mandate a contrary result. That decision, which is not binding on the Commission, rests on the court's understanding that there was "no dispute" that the agreement at issue "fulfill[ed] at least two of SBC's duties under § 251." *Id.* at 6. In addition, the court's decision rested on its conclusion that the non-251 portions of the agreement were expressly tied to the 251 portions of the agreement. The court thus left open the question of whether filing requirements would attach to non-251 portions of an agreement that are not tied to 251 portions, and it clearly did not reach the question whether agreements with no section 251 provisions at all must be filed.

Attachment A
Casto Reply Declaration

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)))	CC Docket No. 01-338

REPLY DECLARATION OF PARLEY C. CASTO
ON BEHALF OF SBC COMMUNICATIONS INC.

The undersigned, being of lawful age and duly sworn, does hereby state as follows:

Qualifications

1. My name is Parley C. Casto. I am the Executive Director - Industry Markets Special Access Product Management for SBC Communications Inc. I previously provided a declaration in this proceeding, dated October 4, 2004.

Purpose of Declaration

2. The purpose of this reply declaration is to respond to the arguments of AT&T and other competitive local exchange carriers ("CLECs") that they cannot compete effectively in the market for high capacity services by relying, in whole or in part, on special access services provided by ILECs.

3. As I explained in my previous declaration, and as I will explain further below, the CLECs' allegations are wrong. In fact, competition in the special access market is strong, and it

includes competitors who rely on self-deployed and third party facilities, and others that rely exclusively on SBC's special access services or on a combination of SBC special access and competitive facilities.

The Scope of Competition in the Special Access Market

4. The CLECs claim that the ILECs have vastly overstated the amount of competition for special access services. They argue that they are almost wholly dependent upon ILECs for anything but the largest capacity high capacity facilities. AT&T, for example, states that alternatives are available only for certain entrance facilities, and that interoffice transport and channel terminations are subject to virtually no meaningful competition. In fact, empirical analyses show that competition is very strong.

5. In my previous declaration, I described the wholesale special access competition that SBC faces, on a service-by-service basis. (Casto Declaration, ¶ 11 & Graph A). As the graph in my declaration shows, competitive providers supply the great majority of the highest capacity services in the states in SBC service territory (more than 70 percent of the market for OC-48 and OC-192 services), but they also supply a third or more of lower capacity services (33 percent of DS1, 38 percent of DS3 and 51 percent of OC-3 services). It is clear from this graph that there is significant competition in the special access market.

6. The same study on which that graph was based showed that competition is well developed within the largest MSAs served by SBC, and that competition has penetrated the lower capacity levels (DS1 and DS3). For example, in Tier 1 markets,[1] SBC held 46 percent of the total wholesale special access market, with 62 percent of the DS1 market, 50 percent of

[1] The Tier 1 markets are Los Angeles, San Francisco, San Diego, Chicago, St. Louis, Cleveland, Detroit, Dallas and Houston.

the DS3 market, and less than 40 percent of the market at each higher capacity level. In Tier 2 markets,[2] SBC held 63 percent of the total special access market, with 72 percent of the DS1 market, 67 percent of the DS3 market, and less than 50 percent of the market at each higher level of capacity.

7. Competitors are diverse in nature and are broadly dispersed geographically. An August 2003 study by New Paradigm Resources Group identified specific competitors present in 15 major SBC markets.[3] On average, 12 competitors are present in each of those fifteen markets, with a low of four competitors in one market and no less than seven in each of the remaining 14 markets. The competitors include CLECs (such as AT&T, MCI, McLeod, and Time Warner Telecom), wholesale transport providers (such as FiberNet, Level 3 and Looking Glass), IXCs (such as Sprint, and Qwest's out-of-region operations), and others (such as utilities, municipalities and dark fiber providers). All of these competitors reported selling special access services at wholesale. In fact, New Paradigm estimated that CLECs, the largest and most established competitor group, sell approximately 65 percent of their special access services to other carriers, most of which is to wireline carriers. Similarly, wholesale transport providers, who are also major players in the high-capacity market, sell about 60 percent of their special access services to other carriers, most of which is to wireline carriers.

8. These competitors are ready, willing and able to compete with SBC on price, as well as other key terms and conditions, at all capacity levels. An August 2002 study by New

[2] The Tier 2 markets are Little Rock, Stockton, Bakersfield, Fresno Sacramento, Hartford, Indianapolis, Wichita, Kansas City, Grand Rapids, Youngstown, Columbus, Oklahoma City, Tulsa, El Paso, San Antonio and Milwaukee.

[3] The markets surveyed, in alphabetical order, were: Chicago, Cleveland, Columbus, Dallas/Ft. Worth, Detroit, Hartford, Houston, Indianapolis, Kansas City, Los Angeles, Milwaukee, San Antonio, San Diego, San Francisco and St. Louis.

Paradigm showed that competing providers of wholesale special access services typically offer service at 15 to 30 percent below SBC's tariffed term plan rates, and sometimes at discounts greater than 35 percent. (Consistent with pricing structures in competitive markets, discounts are generally associated with term and volume commitments, with the largest discounts going to the customers with the longest term commitments and the largest volume commitments.) Competitors' prices are highly competitive at all levels of capacity, including lower capacity services (DS1 and DS3). Competitors also offer customers alternatives to SBC on other key terms and conditions, such as term length, service levels, and installation intervals. A 2003 Yankee Group study surveyed 39 competitive access providers and found that 40.87% of the respondents' metro transport needs were fulfilled by their own network. Further, 59.13% of their metro transport needs is supplied by wholesale providers. Therefore, contrary to AT&T's suggestion, interoffice transport and channel terminations are, like other special access services, highly competitive.

CLECs use of Special Access

9. In the final analysis, the CLECs' claim that they cannot compete without using ILEC special access is belied by their own actions in the marketplace. Collectively, CLECs have purchased in excess of 400,000 channel terminations from SBC as of June 2004. Further, 77% percent of the DS1s that SBC provides to CLECs are special access and 97% of DS3s are special access.

	DS1	DS3
UNEs	123,016	290
Special Access	401,966	8,159*
Total	524,982	8,449

*Special access DS3s excluding wireless and entrance facilities total 5,951.

SBC Special Access Rates and Discounts

10. In response to the competition it confronts in the special access market, SBC offers a wide variety of discount options, the most important of which I discussed in my previous declaration (¶¶ 17-23 & Table A). These include the Managed Value Plan (MVP) and federal pricing flexibility ("price flex") contract offers.

Basic Term Plans

11. Significant discounts are available from ordinary term plans. For DS1 services, even a one-year commitment produces a discount of 11 percent from monthly rates, and three- and five-year commitments produce discounts of 41 and 45 percent, respectively. These discounts are often available with no volume commitment at all, so even the smallest customers can take advantage of them. SBC has developed for its customers over 90 price flex plans for DS1 through OC-192 services. These plans, while generally available, are developed in consultation with particular carrier(s). SBC has 60 price flex plans pending final discussions with carriers which demonstrate its continued willingness to work with carriers in developing a plan to best meet the carrier's needs.

Managed Value Plan

12. SBC offers additional discounts through the MVP offering. (The MVP discounts shown in Table A of my previous declaration are added to the otherwise applicable term discounts.)

MVP discounts begin at 9 percent in the first year, increase to 11% in the second year and then increase by one percent per year for three years, to 14 percent in the fifth year. Combining the ordinary term discounts with the additional MVP discounts results in total discounts on all special access services ranging from 20 percent (for a one-year term) to 59 percent (for a five-year term). In addition, SBC waives all non-recurring charges for MVP customers who purchase services pursuant to a 36 month or greater term payment plan.

13. In the MVP, each customer has a minimum annual revenue commitment (MARC) and an associated monthly average MARC. The MARC is based on the customer's average monthly billings for the three months prior to the effective date of the MVP arrangement. Customers are under no obligation to increase their average monthly billings from those baseline levels in order to obtain the MVP discounts. They are free to continue using alternative facilities or providers to the extent they already did, and they are free to take all of their growth elsewhere. Of course, MVP customers may choose to increase their MARCs during the term of the plan, but, as noted, they are not required to do so.

14. MVP customers also commit at least 95 percent of their SBC access product billings to special access services, as opposed to UNEs (the "access service ratio"). The access service ratio applies only to SBC offerings, and it does not in any way limit a customer's ability to deploy its own facilities, or to use those of third party providers. The access service ratio was not imposed unilaterally by SBC, but instead was negotiated by SBC with one of the first, and largest, MVP customers, prior to the filing of the MVP tariff. That customer is one of the nation's largest CLECs and is one of the parties complaining about the access service ratio in this proceeding.

15. The advantage to increasing the MARC for the MVP customer is to receive a discount on a greater percentage of its spend with SBC. It is the MVP customer's choice, not SBC's, when and if it increases the MARC.

16. MVP discounts are applied monthly, in every month in which the customer meets both its monthly average MARC and the access service ratio. If during any month the customer fails to meet its MARC, or does not meet the access service ratio, the customer will not receive an MVP discount for that month.

17. The customer can regain lost monthly discounts through an annual true-up process, in either of two ways. First, if a customer misses its monthly average MARC for one or more months, but then meets or exceeds its MARC for that year, the customer will be credited for the missed monthly discounts. Second, if the customer misses one or more monthly MARCs and also falls short of its annual MARC, the customer can make a true-up payment equal to the annual shortfall, and the customer will then receive credits equal to the missed monthly discounts. Similarly, if a customer loses a monthly discount by failing to meet the access service ratio, the customer will be credited for that month's discount if the customer meets the access service ratio at the year's end.

18. SBC currently has 11 MVP customers, which include several of the nation's largest CLECs (and some of the same CLECs that are claiming, in this proceeding, that MVP is not a viable competitive option), as well as wireless and interexchange carriers.

19. Almost all MVP customers have met their MARCs (and the access service ratio), and therefore have achieved their full discounts. In fact, of the 11 current MVP customers, only two have ever failed to meet their MARCs. One, discussed below, exercised its option to make a true-up payment, and thus obtained more than 80 percent of the available discounts.

The other terminated its MVP in connection with its filing for bankruptcy. That customer has since emerged from bankruptcy and is now an MVP customer again.

20. To illustrate the workings of the MVP and the annual true-up process, consider the following real-world examples, involving the same SBC customer, one of the nation's largest CLECs and a party to this proceeding, in two different SBC regions.

- For the SBC Midwest (Ameritech) Region, the CLEC had a MARC of approximately *****[BEGIN REDACTED]***** *****[END REDACTED]***** million. During the CLEC's fourth year on the MVP, its billings fell to approximately *****[BEGIN REDACTED]***** *****[END REDACTED]***** million, missing the monthly average MARC by a small margin in all twelve months. By paying SBC slightly less than *****[BEGIN REDACTED]***** *****[END REDACTED]***** million, the CLEC qualified for its full 13 percent discount for the year, netting out to a credit of approximately *****[BEGIN REDACTED]***** *****[END REDACTED]***** million. This reduced the CLEC's effective MVP discount from 13 percent to 11 percent for that year.
- In the Southwest (SWBT) Region, the same CLEC had a MARC of approximately *****[BEGIN REDACTED]***** *****[END REDACTED]***** million. During its fourth year on the MVP, the CLEC met its monthly average MARC in seven months, and missed its monthly average MARC in five months, receiving approximately *****[BEGIN REDACTED]***** *****[END REDACTED]***** million in monthly credits. The CLEC's total revenues for the year were approximately *****[BEGIN REDACTED]***** *****[END REDACTED]***** million, so the CLEC exceeded its annual MARC by *****[BEGIN REDACTED]***** *****[END REDACTED]*****

million. As a result, SBC issued additional credits of approximately *****[BEGIN REDACTED]***** *****[END REDACTED]***** million, and the CLEC received the full 13 percent annual discount.

21. I would note that this CLEC had voluntarily increased its initial MARC, then fell short in the Midwest Region when its business did not meet its plan. Had the CLEC either stayed with its original MARC or executed its business plan, it would not have missed the MARC. Thus, the CLEC's failure to meet the MARC cannot be attributed to any alleged harsh or unfair terms of the MVP.

Pricing Flexibility Contract Offers

22. Price flex contract offers provide discounts and a wide variety of other negotiated terms and conditions that respond to the business needs of individual customers. Price flex contract offers provide discounts ranging from 8 to 50 percent, at terms ranging from 2 to 10 years, based on the needs of the individual customer. Currently, eleven different wholesale customers are taking service under 26 different price flex offers. Like the MVP tariff, price flex contract offers are typically "overlay" arrangements that provide discounts in addition to generally available term discounts. Some price flex contract offers are also available in combination with the MVP.

23. SBC's price flex contract offers are the result of true, bilateral negotiation, and our customers typically make it clear to SBC that they have alternative suppliers available to them. In many cases, our customers confront us with specific rates, terms and conditions that have been offered by the competition, and demand that SBC match or beat those offers to win the business. Indeed, the variety of the price flex contract offers alone is strong evidence that these contracts represent truly bilateral arrangements.

24. For intrastate services, individual case basis (ICB) contracts are also available. Competition, pricing, and general terms and conditions of intrastate ICB contracts are generally similar to those of federal price flex contract offers.

25. SBC's recent experience with special access negotiations involving federal price flex contract offers and intrastate ICB contracts confirms the conclusions of the empirical research: competition for wholesale special access services is vibrant, and that competition includes services at all capacity levels, including DS1 and DS3 services. As SBC has gained additional flexibility and worked with customers to meet their needs in the competitive special access market, the revenue generated via price flex contracts has increased significantly over the past three years since price flex contract offerings began in 2002. SBC's special access revenue associated with price flex and individual case basis contracts is detailed below.

*****[BEGIN REDACTED]*****

	2002	2003	2004
Annual Revenue			

*****[END REDACTED]*****

26. These figures clearly demonstrate that price flexibility is at work in the marketplace today. Additionally, while the total revenue has increased, the average revenue per circuit has decreased.

27. The following are all relatively typical negotiations that either have been completed within the past 2 years or are still pending.

- Customer A solicited bids for more than 700 DS1s. One of our competitors, a large CLEC, responded with an aggressive flat-rate pricing on DS1s including mileage. To win the deal, SBC offered a competitive price, and also agreed to complete a related implementation project in an accelerated time frame and also to provide optical handoffs for OC12, at no additional cost.

- Customer B signed a deal with a major cable company, for fiber based DS1 service to cell sites and back to the customer's MTSO. SBC believes that price and service levels were probably a major factor in the customer's decision, as well as the cable company's willingness to absorb special construction costs.
- Customer C has issued an RFI for fiber based services (mainly DS1 level services) to cell sites, with traffic going back to the customer's MTSO. The customer is specifically requesting a service level of "five nines" (99.999 percent availability). Several cable companies are competing aggressively for this business.
- Customer D, one of the nation's largest long-distance carriers, has recently negotiated regarding three separate price flex agreements, entering into two and rejecting the third. The first of these (FCC Tariff 73, Contract Offer 23) is a five-year agreement for an OC-3 and related service at a 14 percent discount. The second (FCC Tariff No. 73, Contract Offer 27) is also a five-year agreement for an OC-3 and related services, at a 35 percent discount. In August 2003, Customer D rejected SBC's offer of a 40 percent discount on an OC-12 ring, an OC-3 ring and associated services, with the customer indicating that it would build the facilities itself.
- Customer E, also a very large long-distance carrier, entered into an agreement to purchase service over an OC-48 point-to-point circuit with subtending OC-12, OC-3 and DS3 services, with a discount of 12 percent on the point-to-point circuit and discounts of 5 percent on the subtending services.

Managed Integrated Bandwidth Service

28. As a further response to growing competition, SBC has developed a new and innovative service, after many meetings with potential customers—Managed Integrated Bandwidth Service (MIBS) – in which SBC assumes responsibility for ensuring that the customer's network is as efficient as possible. Currently, that is a responsibility that customers generally undertake. Under MIBS, SBC will handle the management and routing of facilities, thereby allowing the customer to achieve significant cost savings from a more efficient network architecture. The service will also provide a simplified ordering and pricing structure that will be consistent throughout the SBC enterprise region. SBC developed MIBS after conducting extensive outreach with potential customers – precisely the kind of activity and response one would expect in a competitive market. SBC is currently proposing to make MIBS available to special access customers (including wholesale providers) that generate at least approximately $12 million in annual special access revenues.

29. MIBS combines special access services (approximately 95 percent of the offering) with other related transport services to offer the customer an efficient special access transport network solution. MIBS will offer customers the ability to constantly route traffic optimally within a LATA. Through MIBS, special access customers will no longer have to determine which facilities to purchase to get the most efficient routing. Instead, SBC will handle the management and routing of the facilities throughout the MIBS network. MIBS will maximize network efficiencies, resulting in reduced costs, which will be passed along to the customer in terms of reduced rates.

Response to CLEC Claims Regarding MVP and Price Flex Pricing

30. The CLECs claim that special access rates have increased– or that they have not decreased as they would have under price caps -- in pricing flexibility areas, particularly for lower capacity (DS1) facilities. These claims are both false and specious. As an initial matter, it is not the case that rates move in one direction only in competitive markets, particularly when those markets are deregulated for the first time. The direction rates take depends upon a host of factors, including, but not limited to, whether they were too high or low when they were first deregulated; changes in demand for particular types of services; variations in demand elasticity among different customer segments; variations in costs over time and among specific service offerings; and the availability of facilities to accommodate such demand. CLECs' claims that rates inexorably move in one direction only are thus at odds with the realities of competitive markets. Indeed, one need look no further than the highly competitive long-distance market for evidence. While AT&T and others have introduced a variety of new discount plans in recent years, their rack rates have not uniformly declined. To the contrary, they have increased.

31. In this respect, the CLECs' claims regarding rate increases are misleading. Although SBC has not decreased its "rack" rates to the extent that would have been required under price caps, those are not the rates most customers pay. As I discussed in my previous declaration (¶¶ 14-15 & Graph B), an analysis of the rates customers actually pay shows that SBC's average DS1 prices have fallen by 11 percent between 2001 and 2004, without MVP credits, or by 14 percent during that period, including MVP credits. These declines actually understate the rate at which rates have declined because they do not reflect the significant additional discounts given to customers pursuant to SBC's price flex contracts.

32. The CLECs claim, nonetheless, that in order to avail themselves of special access discounts, they must agree to terms that lock up virtually all of their special access traffic and forego self-deployment and third party supply. They base this claim largely on a mischaracterization of SBC's MVP plan. I respond below to those representations, but as noted above, MVP is by no means the only vehicle by which carriers may obtain substantial special access discounts.

33. First, I would note that SBC developed MVP in consultation with our largest special access customers some five years ago. These customers voluntarily chose to enter into the MVP agreement, which netted them additional savings. For example, one carrier saved more than *****[BEGIN REDACTED]***** *****[END REDACTED]***** percent over the past four years, or nearly *****[BEGIN REDACTED]***** *****[END REDACTED]*****in savings per year.

34. Second, as I explained above, steep discounts are available to SBC's competitors under SBC's generally available tariff term plans, generally without any volume commitment at all. Those discounts are, in fact, larger than the additional discounts available for MVP customers. For example, three and five-year DS1 plans provide discounts of more than 40 percent for even the smallest customers. MVP provides an additional discount of 9-14 percent, in excess of the basic term discounts. The MVP and price flex contract offers do not limit, or otherwise affect, any customer's ability to obtain the basic term plan discounts.

35. Third, SBC stands ready, willing, and able to negotiate price flex contracts with its customers where it has the ability to do so. SBC has already entered into numerous such arrangements and, as described further below, is aggressively reaching out to its customers, large and small, in an effort to meet their business needs. I believe that SBC would have

executed more price flex contracts had many of these customers not made a conscious decision to defer serious negotiations until after this proceeding.

36. As for the CLECs' specific claims about MVP, they present a distorted picture of the SBC offering. Contrary to the CLECs' assertions, the MVP does not require CLECs to give SBC 95 percent of their total high-capacity business, whether purchased as special access or otherwise. Instead, it requires only that 95 percent of the services provided by SBC be committed to special access, rather than unbundled facilities. This allows CLECs to continue to provide their own facilities and/or to obtain special access services from third-party suppliers (which, as discussed above, are readily available), to whatever extent they deem appropriate. It is entirely possible for a carrier to qualify for maximum MVP discounts while buying from SBC only a fraction of the customer's total transport requirements within the SBC region.

37. Furthermore, a customer that misses its monthly MARC under the MVP (or fails to meet the required access service ratio) loses its MVP discount only for the months during which the MARC was not achieved. In addition, a customer may regain lost discounts through the annual true-up process, in two ways. First, a customer that exceeds its annual MARC can, in effect, earn back its missed monthly discounts. Second, even if the customer does not exceed its annual MARC, the customer can make a true-up payment equal to the MARC shortfall, in which case the full discount will be provided. As I explained above, in practice, almost all MVP customers meet their MARCs and achieve all of the potential MVP discounts. Of the two customers that have failed to meet their MARCs, one still achieved most of the available discounts by making a true-up payment, and the other terminated its MVP as a result of its bankruptcy. Both of the two customers that have failed

to meet their MARCs did so because they failed to execute their business plans, not because the terms and conditions of the MVP were in any way harsh or unfair, as alleged.

38. Some CLECs fault SBC for conditioning discounts on term and/or volume commitments. Contrary to their assertions, that is neither anticompetitive nor a reflection of market power. Term and volume discounts are a standard commercial practice in a multiplicity of highly competitive markets. In the interexchange market, for example, customers who are willing to commit to higher volumes of calling can obtain the steepest discounts. That is true, as well, in the wireless market and, of course, in a broad range of markets that have nothing to do with telecommunications services. Indeed, SBC's competitors in special access offer the very same types of volume and term discounts they now criticize. In this regard, the August 2002 New Paradigm study showed that virtually all wholesale special access providers follow that model, with generally similar discount structures prevailing throughout SBC's service territory, across the spectrum of providers and at all capacity levels.

<u>Response to AT&T's Price Squeeze Claim</u>

39. AT&T has claimed that it faces a price squeeze in the retail frame relay market, as a result of the prices that SBC charges for the wholesale inputs to that service that AT&T is forced to buy from SBC (that is, the access links). Before responding to AT&T's specific claims, I must note that I did not have access to the data provided by AT&T to support its claim because it submitted that data under seal. As a consequence, I cannot directly respond to the data. However, utilizing the scant description of the inputs and the retail service provided publicly by AT&T, I have reviewed SBC's retail pricing for the frame relay product described by AT&T, as well as SBC's pricing for the wholesale inputs used to

provide that service. The table below sets forth in detail the retail prices SBC's advanced services affiliate (ASI) charges for the retail frame relay product, as well as the wholesale rates for the access links used to provide the AT&T retail product. It bears emphasis that these wholesale rates are available to all carriers, including AT&T. In brief, my analysis revealed that the wholesale rates charged by SBC provide an ample opportunity for providers of frame relay service to earn a profit. I have not attempted to address all of the legal and economic flaws in AT&T's purported price squeeze analysis, but must stress several key points of disagreement with AT&T's claim.

40. First, AT&T's claims just do not ring true, in light of actual market conditions. As noted above, SBC's local exchange companies do not sell frame relay service. Instead, frame relay is provided only through SBC's separate affiliates, Advanced Solutions Inc. (ASI) and SBC Long Distance (SBCLD). ASI and SBC LD buy special access services, at tariffed rates that are available to all providers, including AT&T. Additionally, it should be noted that AT&T often purchases lower speed special access services (DS1 and DS3 level) than SBC's separate affiliates which purchase primarily larger optical level services. These optical level services purchased by SBC's affiliate almost always produce a lower price per unit of bandwidth than the DS1 or DS3 level services purchased by AT&T.

41. Second, AT&T did not consider frame relay service as a whole, but instead only compared the retail pricing of the frame relay rate elements that include the access link with the costs of access links purchased as special access. However, SBC does not offer the access link portion of frame relay service on a "stand alone" basis, nor as far as I am aware does AT&T. As a result, AT&T's purported analysis is facially incomplete, and is essentially useless for purposes of evaluating AT&T's claim.

42. In any event, SBC's analysis of AT&T's price squeeze claim shows that SBC's prices for access links do not support their claim of a price squeeze. SBC compared the prices of the inputs purchased by AT&T from SBC to the retail prices of SBC's frame relay offerings, using essentially the same scenarios presented by AT&T. I would note that AT&T's scenarios are not fairly representative of a typical customer offering, but instead appear to have been chosen for the specific purpose of setting up AT&T's price squeeze argument. Nevertheless, even using AT&T's allegedly "representative" scenarios, the price of SBC's access links leaves AT&T with ample margin to provide the additional inputs to the finished frame relay service and to make a reasonable profit. As Table A shows, under AT&T Scenario 1, SBC's frame relay rate, including discounts, would be $21,278, while SBC's access link rates would likely range from *****[BEGIN REDACTED]***** *****[END REDACTED]***** to *****[BEGIN REDACTED]***** *****[END REDACTED]*****. Access links would normally account for well over half of the costs of providing frame relay service, so the difference between the access link rates and the frame relay rates (between *****[BEGIN REDACTED]***** *****[END REDACTED]***** and *****[BEGIN REDACTED]***** *****[END REDACTED]***** is more than adequate to allow AT&T to compete. Similarly, for AT&T's Scenario 2, SBC's frame relay rate would be $33,453, while AT&T's access link costs from SBC would range from *****[BEGIN REDACTED]***** *****[END REDACTED***** to *****[BEGIN REDACTED]***** *****[END REDACTED]*****, leaving AT&T with a very adequate difference of *****[BEGIN REDACTED]***** *****[END REDACTED]*****

to ***[BEGIN REDACTED]*** ***[END REDACTED]*** from which to provide the remaining inputs and make a profit.

43. Moreover, more than 90 percent of SBC's DS1 revenues, and 93 percent of its DS3 revenues, come from wholesale customers. These services are merely inputs into the types of enterprise services that AT&T (and others provide), and SBC has only a tiny share of the enterprise services market. To suggest that SBC could drive its rivals from the enterprise services market by raising special access prices is a stretch, to say the very least.