

1 STATE OF MISSOURI  
2 PUBLIC SERVICE COMMISSION  
3  
4 TRANSCRIPT OF PROCEEDINGS  
5 Oral Argument  
6 March 16, 2005  
7 Jefferson City, Missouri  
8 Volume 2

9 Big River Telephone Company, LLC, )  
10 Birch Telecom of Missouri, Inc., )  
11 ionex communications, Inc., NuVox )  
12 Communications of Missouri, Inc., )  
13 Socket Telecom, LLC, XO )  
14 Communications Services, Inc., and )  
15 Xspedius Communications, LLC, )  
16 )  
17 Complainants, )  
18 )  
19 v. ) Case No. TC-2005-0294  
20 )  
21 Southwestern Bell Telephone, L.P. )  
22 d/b/a SBC Missouri, )  
23 )  
24 Respondent. )  
25

18 LEWIS MILLS, Presiding,  
DEPUTY CHIEF REGULATORY LAW JUDGE.

19 JEFF DAVIS, Chairman,  
20 CONNIE MURRAY,  
21 STEVE GAW,  
22 LINWARD "LIN" APPLING,  
23 COMMISSIONERS.  
24

22  
23 REPORTED BY:  
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1 P R O C E E D I N G S

2 JUDGE MILLS: Let's go on the record.

3 We're on the record this afternoon for an oral argument in  
4 TC-2005-0294, which is a complaint case by Big River  
5 Telecom Company, LLC and a number of other CLECs against  
6 SBC Missouri. We're going to hear oral argument this  
7 afternoon starting with the CLEC Coalition as the moving  
8 party.

9 Mr. Comley, do you intend to present  
10 argument this afternoon?

11 MR. COMLEY: No, I don't.

12 JUDGE MILLS: Okay. That should make it  
13 easier. We're going to hear from the CLEC Coalition  
14 first, then the Staff of the Commission, then SBC, and we  
15 will have the opportunity for a brief response from the  
16 CLEC Coalition after that. Any questions about the  
17 procedure?

18 Let's go ahead and get started, then.  
19 Mr. Magness, are you making argument?

20 MR. MAGNESS: Yes, your Honor.

21 JUDGE MILLS: Thank you. And if you would,  
22 when you-all come to the podium, please begin by making  
23 your entries of appearance.

24 MR. MAGNESS: Thank you. Judge Mills,  
25 Commission, my name is Bill Magness with Casey, Gentz &

1   Magness, Austin, Texas, and with me is Carl Lumley. And  
2   we are representing, as the Judge noted, a coalition of  
3   CLECs which I'll refer to as the CLEC Coalition throughout  
4   the argument, but for the record it is composed of Big  
5   River Telecom Company, LLC, Birch Telecom of Missouri,  
6   Inc., ionex communications, Inc., NuVox Communications of  
7   Missouri, Inc., Socket Telecom, LLC, XO Communications  
8   Services, Inc., and Xspedius Communications, LLC.

9                   Commissioners, we very much appreciate your  
10   willingness to hear these arguments so quickly after we  
11   filed the emergency motion and are very pleased to be able  
12   to answer any questions you have as much as certainly tell  
13   you our side of this argument. So I would be happy to  
14   answer any questions obviously any time you have them.

15                   Where I would like to start is a discussion  
16   of basically why we're here, why the CLEC Coalition  
17   determined there was a need to come before the Commission  
18   to attempt to seek relief. And that really comes down to  
19   what the harm is here, why it is that CLECs in Missouri  
20   are being harmed by the activities that are going on  
21   currently related to the Triennial Review Remand Order.

22                   Commissioners, it starts really with the  
23   issuance by SBC of a set of accessible letters which have  
24   been filed with the Commission. They were issued on  
25   February 11th. There were several accessible letters

1 concerning the FCC's Triennial Review Remand Order, or TRO  
2 remand. The ones that cause the problems were two that  
3 included order rejection in their title.

4                   They stated SBC's position that as of  
5 March 11th, the effective date of the Triennial Review  
6 Order, that SBC was going to be able to and was going to  
7 unilaterally reject certain orders for unbundled network  
8 elements under Section 251, ones that had been delisted in  
9 their view under the FCC's new order.

10                   And primarily to sort of shape the  
11 argument, there are a couple of different impacts here.  
12 One is on loop and transport, high capacity loops, and  
13 transport services or UNEs, I should say, that CLECs use,  
14 and I will note that those are used by, as I look at our  
15 client list in this coalition, everyone in this group.

16                   These are companies that have their own  
17 switches in Missouri, are facilities-based providers who  
18 use SBC transport, that is, the routes between SBC  
19 offices. They use UNEs to transmit their traffic between  
20 those SBC offices. In addition, they use high capacity  
21 loops to terminate services coming from their own  
22 switches.

23                   In addition, unbundled local switching, as  
24 I'm sure you're aware, is the major component in UNE-P or  
25 the unbundled network element platform, and a controversy

1 was served by those old rejection letters concerning the  
2 treatment of UNE-P. And I'll detail those as we go  
3 through.

4                   The primary harm is that when CLECs who use  
5 the SBC network, as they are entitled to do for loops, for  
6 transport or for switching in this transition period the  
7 FCC has provided, when a company is hit in its  
8 provisioning basket, that's a tough blow.

9                   When uncertainty is created about whether  
10 SBC will accept an order or not, it has a very critical  
11 impact on the CLEC's ability to send its sales people out  
12 and be able to guarantee delivery of a service at a  
13 particular time, for the CLEC's ability to be able to  
14 timely deliver services that have been promised to a  
15 business customer who needs a new high capacity line in  
16 his business.

17                   So it is completely critical to maintaining  
18 a customer base, because if you can't deliver for business  
19 customers, business customers are going to find somewhere  
20 else to go. So if there are actions being taken by the  
21 incumbent, when you rely on that incumbent for certain  
22 network elements that are harming provisioning or making  
23 it uncertain, there's a real life business impact.

24                   We can tell you that provisioners all over  
25 the SBC region have been in a state of high distraction

1 over the past couple of weeks trying to find out exactly  
2 what was going to happen on this effective date.

3                   Let me talk more specifically about loop  
4 and transport, and I want to get very specific to what's  
5 at issue here and what's not. In Missouri, according to  
6 SBC's designation of wire centers where certain UNEs are  
7 no longer available, according to that designation, which  
8 we do not necessarily concede are completely accurate --  
9 and we'll discuss that more in a bit -- there are 12  
10 Tier 1 wire centers in the state. They're located in  
11 Kansas City, in St. Louis and in Springfield.

12                   In those Tier 1 wire centers under the  
13 FCC's new order, those wire centers are -- I'm going to  
14 use the term "delisted", so that transport service cannot  
15 be ordered between any of those wire centers. So, for  
16 example, if you're providing a facilities-based service in  
17 St. Louis and your switch is in one location and you need  
18 to get traffic across town and in order to do that you  
19 need to transport it on SBC facilities between two of  
20 those wire centers in the future, those are delisted and  
21 they will not be provided as UNEs.

22                   And then there is one Tier 2 wire center,  
23 and that is located in St. Louis. And for those wire  
24 centers the CLEC cannot order what's called DS3 transport  
25 between a Tier 2 wire center and any other Tier 2 or



1 Tier 1 wire center.

2                   So the rub here is there are a number of  
3 locations in what are obviously the largest and most  
4 central to anyone's business plan wire centers in this  
5 state where CLECs cannot order DS1 transport. That is  
6 sort of the lowest level of high capacity that businesses  
7 need. DS1 transport is prohibited in those 12 wire  
8 centers, and DS3, the larger capacity, is prohibited in --  
9 as well in the Tier 2.

10                   As to loops, there is -- there are three  
11 wire centers that SBC has listed where CLECs would no  
12 longer be able to purchase DS3, that is the higher  
13 capacity, under the FCC's order. There are no DS1 loops  
14 listed by SBC that would no longer be available as UNEs in  
15 Missouri, but there is the three wire centers where  
16 DS3 loops can no longer be provisioned. One of those is  
17 in Kansas City and two are in St. Louis.

18                   So in essence, any order for transport  
19 between those Tier 1 or Tier 2 wire centers would no  
20 longer be a UNE under Section 251, and under SBC's view in  
21 its accessible letters they can reject orders for any  
22 transport UNEs into those wire centers beginning  
23 March 11th, beginning last Friday.

24                   So what happens when an order gets rejected  
25 as a practical matter? And let's focus on transport. And

1   there certainly, as I said, there's a DS3 -- there are DS3  
2   loops that cannot be provisioned. The idea is basically  
3   the same, but let's focus on the transport where there is  
4   a very large number of transport routes that SBC says they  
5   can reject.

6                   When an order for a UNE is rejected, the  
7   CLEC essentially must start over. They submit an order to  
8   SBC and say, I need a UNE at this transport route. SBC  
9   sends back an order reject, and the CLEC then has the  
10   position of having to start over again, probably on the  
11   transport side, using tariff special access service.

12                  When one orders a UNE, you use an LSR or a  
13   local service request. When one orders special access,  
14   you use an ASR or access service request. The key thing  
15   that is important about that is LSRs and ASRs run on  
16   different systems that don't necessarily talk to one  
17   another. So it is a very different process. Even though  
18   the functionality and the network is basically the same,  
19   the ordering process and the price are extremely different  
20   between those -- between tariff special access and UNE  
21   transport.

22                  So the first thing that happens is the  
23   order drops. It is not given a confirmation or a due date  
24   because SBC considers it rejected, and the CLEC either  
25   starts over or doesn't. So there is an inherent delay and

1     uncertainty caused by that rejection.

2                     Now, the business consequences of this are  
3     is there -- there is a price difference. Special access,  
4     we have estimated the difference between special access if  
5     one includes eight miles of distance-sensitive transport  
6     within a special access route as an assumption, the  
7     difference between what you pay for a UNE to transport the  
8     traffic in those St. Louis wire centers and Kansas City  
9     and et cetera and what you pay under special access is the  
10    difference of 261 percent. The cost of purchasing  
11    essentially the same functionality goes up by over  
12    250 percent if you have to order it as special access. So  
13    there's a very significant cost difference.

14                    And, in fact, if one looks at the FCC's  
15    Remand Order -- and I'll give you the cite of  
16    paragraphs 64 and 65 -- the FCC itself looked at the  
17    question of, now, if special access is available for  
18    transport for loops, isn't that enough? Shouldn't we say  
19    that CLECs are not impaired because they have access to  
20    that project?

21                    And the FCC specifically found there,  
22    particularly in paragraph 64, that it has not been  
23    demonstrated that the use of special access permits a  
24    competitor to compete economically in the long term, that  
25    CLECs have used special access as a bridge often because

1 ILECs have made it very hard to get UNEs. But the FCC did  
2 not say the fact that you can buy special access means  
3 that you compete economically. And there's a good reason  
4 for that when you look at a 200 percent price increase on  
5 each one of those transport routes.

6 In addition, once special access is ordered  
7 and put in place, there is not an opportunity to sort of  
8 true it up or in this case true it down to a UNE price.  
9 When that ASR is submitted for a tariffed service, that  
10 ASR goes in through the access ordering system and it's  
11 provided a special access under those rates.

12 There's not a provision for whatever a CLEC  
13 has to pay under special access to be pulled back down to  
14 the UNE price and have the difference refunded it if turns  
15 out SBC incorrectly designated a wire center. So once  
16 that is paid, it cannot be trued down.

17 But there are not only price differences  
18 there are operational problems as well. As I noted  
19 earlier, here in Missouri there are not DS1 loops that are  
20 delisted. So those are still available as UNEs. But in  
21 many cases, in order to complete a service, the CLEC needs  
22 the loop connected to the transport. The problem is the  
23 loop is still a UNE, and if the transport is being  
24 provisioned as special access, we run into the problem of  
25 the systems not talking to one another.

1                   Now, the FCC has said not in this most  
2 recent order but in the order before, TRO order from 2002,  
3 and the part I'm about to tell you is the part that was  
4 upheld by the D.C. Circuit. The FCC has said you have to  
5 commingle UNEs with other services, like special access.  
6 The practical problem we have right now is that there is  
7 not an SBC process for doing that. Although that  
8 commingling language was in the TRO, it's been there for a  
9 couple of years, there has not been interconnection  
10 agreement language put into the interconnection  
11 agreements, and there is not an SBC-approved method and  
12 procedure for that ordering.

13                   Now, that may not sound like a complicated  
14 thing, but typically when there is a new ordering method  
15 and procedure, because we're talking about complicated  
16 operational support systems that have to talk to one  
17 another, and when you have huge pricing distinctions  
18 between whether something is ordered one way or the other,  
19 typically that sort of process is discussed with the CLEC  
20 community. There are test runs done to be sure that  
21 orders don't get dropped or rejected when this new process  
22 is put in place. None of that has happened.

23                   There have been some indications through  
24 account representatives to certain CLECs that sort of  
25 manual work-arounds on commingling may be put in place,

1 but those are not there yet, and March 11th came and went  
2 without those being in place. So there is a very  
3 significant problem that arises if one cannot order  
4 transport as a UNE during this time period.

5                   And again, I have to emphasize, when you  
6 have these kind of operational problems, you can't true  
7 those up. If the customer needs a new DS1 arrangement and  
8 you get an order reject and all of a sudden you're several  
9 days behind where you told the customer you should be  
10 based on everything you knew at the time, or if, as many  
11 provisioners and many of my clients' companies had to do,  
12 you're paralyzed starting February 11th because you're not  
13 quite sure exactly what SBC is going to do and you keep  
14 trying to negotiate it and figure it out, but you're not  
15 going to take a risk on your customers' account and order  
16 that, you're in a situation where the company, the CLEC  
17 company becomes rather paralyzed in its ability to serve  
18 its existing customers, much less get new customers.

19                   So there very significant problems, and  
20 since you can't true up a lost customer, these kind of  
21 harms when they occur cannot easily be fixed by a later  
22 regulatory revisiting of the issue. And as I mentioned,  
23 loop and transport is used by all the carriers in our  
24 coalition from their own facilities, their own switches in  
25 the state.

1                   On March 11th, CLECs in the SWBT region,  
2   which I'm familiar with, had seen orders rejected on  
3   transport, and some of them have taken to ordering special  
4   access just to cover themselves, but there is -- there are  
5   UNEs that they are entitled to and they're entitled to pay  
6   the lower rates which they were not able to get  
7   provisioned. So that's the loop transport side.

8                   Then let me quickly visit with you about  
9   the switching side. And first let me say, and I feel  
10  compelled to do this, after reading SBC's brief, we have  
11  no disagreement that the FCC said that going forward you  
12  cannot obtain new customers using UNE-P. The distinction  
13  that the FCC made in the Remand Order was, they said UNE-P  
14  is going away under Section 251. The TELRIC price 251  
15  UNE-P that we've had in the past is going to end.

16                  What they also said is, paragraph 226, they  
17  said, we don't think it would be in the public interest to  
18  just have a flash cut and say that UNE-P goes away  
19  immediately. Point is, the FCC said, we understand that  
20  CLECs who are using UNE-P need to transition onto  
21  something else. They need to transition onto their own  
22  switch, find switching capacity from someone else, do a  
23  commercial agreement with SBC, but it's going to take some  
24  time to find their way to a new arrangement.

25                  The FCC did not say that if a CLEC uses

1     UNE-P it is subject to a death sentence on March 11th.

2     Not at all. They created a transition period to allow  
3     those CLECs to transition off.

4                     And what is a very important point in the  
5     dispute we're having right now is, the way the FCC treated  
6     the transition for switching and UNE-P is different than  
7     the way they treated the transition for loops and  
8     transport.

9                     The key difference is, consistent with the  
10    theory I just outlined, the FCC said for your existing  
11    embedded base of customers you can continue to provide  
12    UNE-P. You can service that embedded base for the  
13    transition period, the-12 month transition. You can't go  
14    get new customers, but you can serve your existing ones  
15    while you attempt to roll them over onto something else.

16                    And to give you an example, let's say a  
17    CLEC serves Bob's Restaurant. If Bob's Restaurant needs a  
18    new line, if Bob's Restaurant wants to add a feature or  
19    function to their current service, if Bob's Restaurant  
20    opens a new restaurant across town and wants to continue  
21    to get service from that CLEC, the CLEC can continue to  
22    serve Bob's Restaurant using UNE-P, but it must know that  
23    by the end of the transition period that's going to end.  
24    If it want to put Bob's new restaurant on UNE-P, it better  
25    be prepared to transition it over to something else by the



1 end of the transition period.

2                   Now, if the CLEC wants to get a new  
3 customer, Jim's Restaurant, no can do. That's the key  
4 distinction on the customer base. And the debate, I  
5 think, on the switching side really is about what that  
6 embedded base definition means. In order to serve an  
7 existing customer, and this is true of UNE-P or loops and  
8 transport or anything else, it's true for SBC, you have to  
9 be able to meet that customer's needs for moving service,  
10 moving a line from one place to another, adding new lines  
11 at the new business location, changing features, adding or  
12 dropping features.

13                   Those are standard and very common things  
14 that are ordered by CLECs because that's -- customers'  
15 needs change and evolve. And in order to serve an  
16 embedded base without telling that customer you're going  
17 to have to disappoint him and maybe they ought to go  
18 somewhere else, you've got to be able to do those things  
19 for him.

20                   The SBC accessible letter, though, took the  
21 position that these moves or adds or changes, SBC called  
22 them new or migration or move orders, would no longer be  
23 provisioned after March 11.

24                   And so as I did with loop and transport,  
25 what is the consequence for the CLEC if that is the case?

1 The CLEC should know if it's using UNE-P it's going to  
2 need to get off UNE-P by the end of the transition period.  
3 So if they're going to order anything for a current  
4 customer, they have to know that that's got to be  
5 transitioned fairly quickly.

6 But the -- and so if the move, add or  
7 change order is rejected, the CLEC has alternatives. The  
8 CLEC can order a resale line, as SBC often points out, the  
9 CLEC can enter into a commercial agreement. Now, whether  
10 the terms of the commercial agreement would allow the CLEC  
11 to just add a few lines for the current customer when  
12 everybody else is on UNE-P is a matter for negotiation,  
13 but we haven't seen a stampede of those kind of agreements  
14 going into effect.

15 In any event, let's say the CLEC got a call  
16 from Bob's Restaurant that at their existing location,  
17 say, they wanted to add a new line. They decided they  
18 need a fax machine so they could take orders over the  
19 phone and have them faxed in. Or let's say they -- it's  
20 an office, a small law firm. I'll use an example I know.  
21 And they've added someone and they need one more line on  
22 their group of lines in the office.

23 The problem with adding something off the  
24 resale system, let's say, in the law firm example is if  
25 you have what's called a hunt group within your office, so

1 if it rings on one line, if that one is busy or doesn't  
2 answer it rolls over to the next, rolls over to the next,  
3 it won't roll over to a resold line. The resold line is  
4 again systems talking to each other, is a very important  
5 thing, and if it's added as a UNE-P line, that happens.  
6 If it's not added as a UNE-P line, that doesn't happen.

7                   So there are again technical problems that  
8 arise if the provisioning -- if those move, add and change  
9 orders are not provisioned.

10                   In addition, there is indeed a price  
11 difference. There's a very large price difference between  
12 resale and the UNE-P lines. And in addition, if a line is  
13 ordered as UNE-P, the CLEC is eligible to receive access  
14 charges for long distance traffic. When one orders under  
15 resale there is no such revenues. So the revenue impact  
16 is very large.

17                   Again, you can't true up lost access  
18 revenues, and you sure can't true up if Bob's Restaurant  
19 says, you can't give me another line, I'm going to go  
20 somewhere else. That's pretty basic. And that was the  
21 idea behind the transition in the first place, is the FCC  
22 said, we're not going to make you stop serving. We're not  
23 going to make you lose customers. We're just telling you,  
24 you'd better get them on another service platform pretty  
25 fast because UNE-P's not going to be around anymore.

1                   And this view of moves, adds and changes  
2   that I've outlined for you is one that has been -- it has  
3   been before state commissions over the last hectic several  
4   weeks where these issues have been before a number of  
5   state commissions. The commissions in Texas, Michigan,  
6   and Kansas all specifically faced this question of talking  
7   about the embedded base, what can you do on moves, adds  
8   and changes for your embedded base? They specifically  
9   faced the question.

10                  Each one of those commissions found that  
11   the interpretation that we were providing for you that you  
12   can do that for your embedded base is correct.

13                  The Indiana Commission, which SBC has cited  
14   in its brief, the Indiana Commission looked at the  
15   question and said that new customers can't be added, new  
16   UNE-P customers can't be added. Didn't specifically  
17   address the question of moves, adds and changes, but the  
18   Indiana Commission did say -- I think I have -- just for  
19   the Commission's information, we provided a rather large  
20   document yesterday to the Commission that provides the  
21   decisions that we were aware of when we filed that from  
22   these states.

23                  And in any event I won't quote you chapter  
24   and verse, but I can refer to, if you'd like, the specific  
25   page -- said that for the embedded base, the idea behind

1 the FCC order was not to disrupt current customer service,  
2 not to prevent the UNE-P CLEC from doing what it could to  
3 serve those customers. So even though Indiana said, which  
4 we don't disagree with, that the Remand Order says you  
5 can't do new customers, they didn't go as far as saying  
6 that SBC's interpretation of moves, adds and changes was  
7 correct.

8                   So all that said on harm and where we are,  
9 we really think the issues before the Commission are ones  
10 of timing and exactly how this transition works. On the  
11 question of timing, what I mean is the FCC made its order  
12 effective last Friday, March 11th, 2005. But the terms of  
13 the FCC's order are not yet incorporated into the  
14 interconnection agreement of my clients here in Missouri,  
15 most of whom or all of who are in the M2A agreement. And  
16 the big question is, when do all the provisions of the  
17 Remand Order become effective, when can they be fully  
18 implemented by the parties?

19                   Now, SBC acknowledged in its reply to our  
20 petition that the Remand Order is not totally  
21 self-effectuating, and I'd refer you to paragraphs 4 and  
22 13 of their response where they acknowledge that there  
23 must be negotiations and, if necessary, arbitration, just  
24 like on every other change of law that's been before this  
25 Commission over the years. And, in fact, the rate

1 increases that SBC is allowed to charge during the  
2 transition for switching and loops and transport, those  
3 must wait until the contracts are -- the individual  
4 company-to-company contracts are amended.

5                   And, in fact, the TR-- the TRRO, the Remand  
6 Order, I believe in Footnote 524 refers to that idea. It  
7 says that these price increases -- to the extent the  
8 contract is not amended on March 11th, those price  
9 increases can be trued up back to March 11, but the  
10 true-up does not occur until the contracts are actually  
11 amended.

12                   Now, the reason why there is a major  
13 dispute on this is that the FCC tried -- I believe tried  
14 its best, I suppose, to deal with these transitional  
15 questions and timing questions in the text of the Order.

16                   In paragraph 233 of the Order, the FCC said  
17 that its findings in this Remand Order, not some of its  
18 findings, not some of its decisions, but its findings in  
19 the Remand Order are to be implemented through the 252  
20 negotiation and arbitration process; in other words,  
21 through the change of law process, like most every other  
22 change of law we've seen.

23                   They urge that CLECs and ILECs do this  
24 quickly, that the terms of this Remand Order not be  
25 delayed, that that negotiation and arbitration process

1 ought to get moving. But they said these terms are to be  
2 implemented through the change of law process.

3                   So what's happening in Missouri? SBC has  
4 alleged in its pleading that my clients are attempting to  
5 drag their feet and make this change of law process last  
6 just forever so they can hang on to whatever is left of  
7 these UNEs.

8                   In fact, CLECs and SBC are already  
9 negotiating. The M2A is expiring very soon. We expect to  
10 file -- to jointly file arbitration petitions by the end  
11 of this month. All of these TRRO issues are going to be  
12 teed up for permanent treatment in that arbitration  
13 petition. And I'll submit if you ordered us to move  
14 faster on negotiating, I'm not sure that anyone physically  
15 could. There were negotiations three days last week on a  
16 regional basis, my clients were involved in and SBC was  
17 involved in, that if they are going to try to implement  
18 the Remand Order provisions in Missouri, Oklahoma, Texas,  
19 Kansas.

20                   In Kansas, these provisions are being  
21 arbitrated next week, in Oklahoma the week after that, in  
22 Texas later in April, and they're going to be arbitrated  
23 here, unless we reach agreements -- maybe we will after  
24 three state cases on this -- but they're being implemented  
25 here in the M2A successor process, which is under way.

1                   So there isn't -- there's no sense in which  
2 we are dragging our feet or delaying. In fact, there are  
3 things that my clients were very happy about in the  
4 Triennial Review Order which we're still waiting to get  
5 implemented and hope to see implemented in those  
6 negotiations. So as a factual matter, the allegation that  
7 this is all about dragging it out just doesn't hold any  
8 water.

9                   And the FCC just made it fairly clear that  
10 they expect disputes around this Remand Order to be  
11 resolved by state commissions in Section 252 proceedings.  
12 As I mentioned, they spoke to true-ups occurring after  
13 those change of law proceedings.

14                  In another place in paragraph 100 of the  
15 Order, they talk about how they came up with the  
16 designations of wire centers where delisting occurs, and  
17 they said specifically that if the CLECs dispute what SBC  
18 said about where those wire centers are, those disputes  
19 are to be resolved in the Section 252 arbitration process.

20                  There are just several places where the FCC  
21 shows its respect for that process and its expectation  
22 that that's how this Order gets implemented. And again,  
23 state commissions who have looked at this in the last few  
24 weeks have read the TRO -- or rather the TRRO to require  
25 an interconnection agreement amendment, primarily based on



1    this paragraph 233 and related sections, in Georgia, in  
2    Kentucky, in Alabama, in Mississippi, in Michigan, in  
3    Illinois.

4                   And in the Southwestern Bell territory  
5    states that have looked at this, we have had an unusual  
6    situation because in Texas and in Oklahoma and in Kansas  
7    those were 2A agreements like the M2A. They were actually  
8    expiring or expired. So in those states interim  
9    amendments were put in place to tide the parties through  
10   to the end of the arbitration process. So in those states  
11   where interim amendments have been put in place, it's  
12   because there's no normal interconnection agreement  
13   sitting there in place where you can work change of law  
14   in.

15                   So what Texas and Oklahoma and Kansas have  
16   done is in no way inconsistent with what the other states  
17   have done, saying that there should be a change of law  
18   process. And I'll tell you, you can read the Indiana  
19   order. I think Indiana thought that certain parts of the  
20   Remand Order were self-effectuating, and that Order stands  
21   in stark contrast to that in Michigan, Illinois and a  
22   number of other states in the BellSouth territory that I  
23   listed off a moment ago.

24                   And moreover, this position, this reading  
25   of the Remand Order and of the Telecom Act itself is

1 consistent with what this Commission has done in the past  
2 concerning the need to amend bilateral interconnection  
3 agreements.

4 I would just reference you to the  
5 Commission's decision in the Report and Order issued  
6 December 18, 2004 in Case No. TO-2005-0037, in which there  
7 was an issue concerning application of new rates and  
8 interconnection agreements.

9 The Commission found that -- and I'll just  
10 quote from the Order -- while the Commission can make  
11 changes to the model T2A, when that agreement is adopted  
12 to create an interconnection between a CLEC and SBC, it  
13 becomes a private contract between the companies. The  
14 Commission does not have the authority to summarily amend  
15 those existing interconnection agreements. Those  
16 interconnection agreements contain various changes of law  
17 provisions that may allow them to be revised to include  
18 the rates that will be established in this case. If SBC  
19 decides the revision of the rates contained in those  
20 interconnection agreements is needed, it may pursue such  
21 revisions in an appropriate forum, perhaps including  
22 before this Commission.

23 So while the Commission -- and I think the  
24 Commission further clarified its Order later, saying that  
25 it was not taking any position on the substance of the

1 change of law provisions. The Commission clearly  
2 recognized that if you're going to change a bilateral  
3 agreement, it requires going through the change of law  
4 process that normally applies.

5               So as we advocated in our petition, we  
6 believe the most straightforward and legally consistent  
7 approach to this issue is to permit the M2A arbitration  
8 process, the negotiation and arbitration process which is  
9 already underway to create a successor agreement to be  
10 completed. When it is completed, the changes in law go  
11 into effect and to the extent the Remand Order allows SBC  
12 to true things up back to March 11th, so be it. We  
13 understand that's in the Order.

14              However, I would also urge you, if you  
15 don't decide that the change of law process is one that is  
16 to be respected in this context, if it is your view that  
17 there are certain provisions of the Remand Order that are  
18 self-effectuating, we still urge you that the Commission  
19 action is needed because the way that SBC is  
20 self-effectuating is inconsistent with the Remand Order.  
21 There is simply a case of overreaching going on here.

22              And let me tell you why we believe that's  
23 true. On these issues we've referenced, the limited  
24 issues of loop transport provisioning and the moves, adds  
25 and changes on UNE-P, the positions SBC is taking are not

1 consistent with the Order. As I referenced, that's been  
2 the finding in a number of states.

3                   And if you look at the interim amendment in  
4 particular that Texas came up with, that's the reading as  
5 well. In two different orders Texas has said, you can do  
6 -- move out a change for UNE-P. You can self-certify for  
7 loop and transport, and yet SBC has to provision it. So  
8 again, their view has been found unavailing in a number of  
9 states who have looked at it directly.

10                   And I have to say here, the fact that we  
11 are here, the fact that there are these threats of  
12 unilateral action -- and remember, SBC doesn't provision  
13 for a CLEC, the CLEC order drops, the CLEC is in danger of  
14 losing a customer. It's not like there's something that  
15 the CLEC can do back to SBC to try to even the odds here.  
16 It's strictly a one-way street.

17                   And I would imagine, and I'm just imaging  
18 here, but when the FCC said here is the way we want to see  
19 this Order implemented through paragraph 233, through the  
20 self-certification process in 234, it was to avoid just  
21 this kind of confusion and contentiousness and uncertainty  
22 in the process of implementing this Order.

23                   Because if there is anything certain in  
24 communications policy and law, it is that there's probably  
25 going to be some uncertainty and contentiousness as these

1 orders are implemented.

2 And, in fact, as it affects the CLECs  
3 operating in Missouri, we would have no dispute with there  
4 being no new adds on UNE-P for customers, no new customers  
5 on UNE-P. It's not something that's a big issue. I think  
6 we have agreed, in fact, in Texas and in Oklahoma interim  
7 agreements, and have said in Kansas that new customers on  
8 UNE-P are not a problem.

9 But we have been rather forced to go into a  
10 more overarching change of law position because we're not  
11 sure exactly what they're going to do. But in any event,  
12 it is not an effort to preserve UNE-P for a period of  
13 time, and that is something that we just want to make  
14 clear as you consider the issues.

15 But on the moves, adds and changes for the  
16 embedded base, that is a very important protection for the  
17 current embedded base, and if these CLECs are going to  
18 manage to move those customers to some other new platform,  
19 that transition has to be protected.

20 And I don't want to stand here and cite you  
21 paragraph after paragraph of the FCC Order. I will tell  
22 you that as far as I can tell, for the record, looking at  
23 all of the paragraphs that SBC has cited and all those  
24 that we do, there is a list of paragraphs in that order  
25 you can look at, and I believe you will find that overall

1     what SBC is saying is that the limitation is as to  
2     customers and the moves, adds and changes are permitted.

3                     I'll just for the record, if you want to  
4     look at them, paragraphs 5, 199, 204, 210, 216, 227, 228,  
5     and the FCC's rule on this, which on the embedded base  
6     question is at Section 51.319(d)(2), and then little two  
7     Is, Romanef 2. And I believe looking at all those in  
8     total and in context, you'll find that the moves, adds and  
9     changes are permitted.

10                    And I would refer you specifically to  
11    treatment of this issue in state commission orders. As I  
12    mentioned before, we filed these orders yesterday. The  
13    Commission order, if you look at page 11, you'll find a  
14    conclusion consistent with what we're advocating. The  
15    Texas order on clarification, you will find it at page 1,  
16    and the Kansas order issued last Friday, you'll find it at  
17    pages 5 and 6.

18                    Now, to finish up, let me talk about loop  
19    and transport and self-certification. The debate about  
20    loop and transport is primarily focused on if a CLEC  
21    issues an order to SBC for transport, let's say in those  
22    areas in Missouri where SBC has said UNE transport won't  
23    be available. At paragraph 234 of the Remand Order, the  
24    FCC lays out a process for how that is to be treated.

25                    The FCC seemed to understand that there may

1 be some disputes about whether the designated wire centers  
2 accurately reflect their order. And so they said, when a  
3 CLEC submits an order for loop or transport to one of  
4 these wire centers where there's been a designation by the  
5 ILEC of no impairment, they provide a self-certification  
6 based on what the FCC calls a reasonably diligent inquiry  
7 into whether that UNE order is permitted by the FCC's rule  
8 or not. A CLEC self-certifies.

9                   And in a footnote to paragraph 234, the FCC  
10 said, look, we're not going to specify a form for this.  
11 We're not going to specify exactly how you have to say it.  
12 But we'll tell you a letter is probably okay. Send a  
13 letter to the ILEC, state your case, and that's going to  
14 be enough.

15                   The next step in the process is the CLEC  
16 receives the self-certification, the ILEC provisions the  
17 UNE. The ILEC does not assess whether the CLEC is telling  
18 the truth or not. The ILEC does not assess whether it is  
19 satisfied with self-certification. Rather the ILEC  
20 provisions the order, and then it takes the  
21 self-certification after it's provisioned, if it disagrees  
22 with it, if it wants to challenge it, then there's a  
23 dispute resolution process that occurs at the state  
24 commissions through the 252 process.

25                   So it is very clear what the FCC

1 established was a provision and dispute procedure where  
2 CLECs could continue to get the UNEs. They may have to  
3 face a true-up or some other process that's going to  
4 increase their costs if it turns out they're wrong, but as  
5 to what goes on right now, it's provision and dispute.

6                   What the accessible letter says that CLECs  
7 received on February 11th is, SBC doesn't believe that a  
8 CLEC can self-certify because SBC has told us where the  
9 designated wire centers are.

10                   Now, I hope this isn't tedious, but there  
11 is a timeline that's important to consider as you look at  
12 what's really going on out here in the industry.

13                   The FCC's Order was issued on February 4th.  
14 On February 11th SBC issued its accessible letters saying  
15 it's going to reject these loop and transport orders.  
16 First question that arose was, well, we know what the FCC  
17 standards are; it's X number of business lines in a wire  
18 center and so many fiber-based collocaters based on the  
19 definition the FCC's provided, but where are they? Where  
20 are those wire centers?

21                   Well, on February 18th SBC made a filing at  
22 the FCC and they said, we believe these are the wire  
23 centers that are delisted, and all that -- all that is is  
24 a list of C-L-L-I, CLLI codes. That is the telephone  
25 company name for a wire center and what state it's in.



1 Page after page, this covers -- this filing covers every  
2 wire center in the SBC 13-state territory and are listed  
3 either as Tier 1, Tier 2, Tier 3. Designates whether SBC  
4 believes loops or transport are available there going  
5 forward as UNEs.

6 Now, in between that time -- and I want to  
7 lay this out for you both for the substance of the loop  
8 and transport issue and also to attempt to rebut the  
9 completely baseless allegations in SBC's response that  
10 CLECs have done nothing, CLECs have sat back and waited  
11 and done nothing and then filed a petition here or in  
12 other states at the very last minute.

13 On February 14th, as soon as those  
14 accessible letters were digested over the weekend, on  
15 Monday, February 14th, CLECs began discussions on a  
16 business-to-business basis with their account  
17 representatives, with whomever they escalate issues to  
18 within SBC to try to understand exactly how this was going  
19 to work on March 11th, and to express their reservations  
20 about the position SBC was taking.

21 On February 15, the Texas Public Utility  
22 Commission required SBC and the CLECs in the Texas T2A  
23 arbitration to come up with contract language that would  
24 on an interim basis implement their views of what the  
25 Remand Order says. Since, as I explained, Texas'

1 agreement had expired, they needed some sort of interim  
2 bridge to get through. That was February 15th. CLECs  
3 came forward with contract language, SBC came forward with  
4 contract language, implementing what it ought to look  
5 like.

6                   On the 18th, SBC files its list. In  
7 addition, earlier in February, the Oklahoma Commission  
8 created an interim agreement, I guess the day before SBC's  
9 accessible letters, that included references to this  
10 paragraph 234 process that needed to be followed.

11                   February 24th, the Texas PUC met and issued  
12 its Order No. 39 in which it essentially blended the  
13 contract language provided by SBC and the CLECs to create  
14 an interim amendment that went into effect immediately.  
15 That interim amendment made clear that the Section 234  
16 process was, as I said before, self-certify, provision,  
17 dispute, not self-certify, SBC decides if it's okay,  
18 provision, dispute.

19                   On February 25th -- I guess February 25th  
20 was the actual day the Texas agreement went into effect.  
21 My clients and some others who were participating in  
22 Oklahoma issued discovery to SBC in which we inquired, the  
23 CLLI code list tells us what you think the CLLI codes are,  
24 but how was it that you defined fiber-based collocator?  
25 We understand there is an FCC definition, but tell us how

1    you applied it so we can understand. Do we have a dispute  
2    about how you defined this term, or is this something we  
3    can live with?

4                   In addition, we asked for information  
5    concerning the business lines and how business lines were  
6    counted. Now, how hard can that be? Well, the FCC said  
7    what we expect the ILECs to use is information that's in  
8    their possession based on ARMIS, A-R-M-I-S, reports, ARMIS  
9    43.08 reports for business lines, plus UNE-P lines, plus  
10   UNE loop lines.

11                  Now, when you look at ARMIS reports, what  
12   you find is that when the ILECs submit this data to the  
13   FCC, it's on a statewide basis. It lists the business  
14   lines in Missouri. And then there are certain breakouts  
15   for Centrex extensions, for PBX systems, and exactly how  
16   lines are treated in situations where there may be a  
17   question of whether something is one line that flew off in  
18   five places or five lines.

19                  Now, when we received the information from  
20   SBC filed at the FCC, it was aggregated on a wire center  
21   basis. We have no access to wire center level data from  
22   ARMIS.

23                  So in Oklahoma CLECs said, give us the  
24   information on business lines and UNE-P lines, et cetera,  
25   by wire center for the whole state, so if nothing else we

1 can identify whether the total matches to what's in ARMIS  
2 to see whether there's been some interpretive liberty  
3 taken with what the FCC has said.

4                   When I say interpretive liberty, I don't  
5 mean that in a derogatory manner. As you Commissioners  
6 understand, the FCC does not always give us the clearest  
7 rules. There are often disputes about what they mean, how  
8 they are interpreted.

9                   And in the case of loop and transport  
10 delisting, those interpretive differences have enormous  
11 consequences, because once a loop or a transport route  
12 goes off the 251 list, once it is no longer a UNE, it  
13 never comes back. If it turns out it's found to be  
14 delisted, it doesn't matter if the number of business  
15 lines decreases or anything, it's gone. And that's in  
16 Footnote 466 to the Order. It's a one-way street. So  
17 this designation is incredibly important.

18                   So we asked for this what we consider  
19 fundamental information about how they interpreted the  
20 FCC's rule and order, and SBC refused to answer the  
21 questions. Some of my clients have posed the very  
22 questions to SBC on a business-to-business basis  
23 privately. SBC has refused to answer the questions. So  
24 that was February 25th that discovery was issued.

25                   On March 4th, SBC provided some additional

1 information. They sent an accessible letter out to the  
2 CLEC community and said, we have filed with the FCC the  
3 backup data for our designation of wire centers in our  
4 region, and if you want to see it, it's available at our  
5 D.C. law firm, Kellogg Huber, and you can go sign the FCC  
6 protective order and you can go look at it. You can't  
7 take any notes, but you can go look at it in Washington.  
8 And there's several of my clients who had D.C. lawyers go  
9 in and look at it.

10 Now, I have the redacted version of that.  
11 There's confidential information in the one that SBC  
12 wanted people to look at pursuant to the Protective Order.  
13 The redacted version, however, shows that -- all that data  
14 shows is, here's the name of the wire center and then  
15 here's how many business lines, how many UNE-P lines, how  
16 many UNE loop lines, total business lines and the  
17 collocaters with fiber.

18 Now, that's useful and my clients have  
19 looked at it to try to understand at least -- but all  
20 you'll see here is numbers, a list of numbers. It doesn't  
21 answer the fundamental questions we've been seeking an  
22 answer to for quite a while now of, when you said  
23 fiber-based collocater, exactly how is it you got there?  
24 What all did you include? What does it mean?

25 And there are terms within the definition

1 of fiber-based collocater that we want to be sure we agree  
2 with one another about how they're being interpreted. And  
3 again, we wanted to know when you counted business lines,  
4 what did you do with Centrex extensions, et cetera? And  
5 this data doesn't answer those questions.

6                   On March 9th one of my clients, Birch, sent  
7 a self-certification to SBC ahead of time to make sure  
8 that their orders were going to be covered, and I believe  
9 other CLECs have communicated with SBC to attempt to  
10 self-certify.

11                   On March 11th, last week, after argument in  
12 Kansas, Kansas issued its Order -- and actually I should  
13 back up a moment.

14                   On March 9th, in Texas, even though there  
15 was an interim amendment in place, SBC had communicated on  
16 a business basis that its view was that it didn't have to  
17 provide a new line to Bob's new restaurant location, for  
18 example, didn't have to do that, and it was impossible for  
19 CLECs to self-certify because SBC had given CLECs the  
20 identity of the wire centers and that's all they needed to  
21 know, thus making it very clear to CLECs that if we  
22 submitted self-certifications, our orders would be  
23 rejected.

24                   And on March 9th, the Texas Commission  
25 issued its Order and clarification where it said no. On

1 paragraph 234, you received a self-certification, you  
2 provision and then we'll have a dispute. If you want to  
3 fight about it, we'll have a dispute after you provision.

4                   So on March 11th, this is last week now,  
5 we're getting to the March 11th effective date when all  
6 this is supposed to come down. And in the meantime  
7 obviously we have filed a petition here. This is in front  
8 of all these state commissions I've identified as we've  
9 gone through this, and there has been quite a bit of  
10 activity on this issue around the SBC region.

11                   And on March 11th there was a new  
12 accessible letter issued, this one on self-certification.  
13 And SBC said this time, okay, it's not impossible for you  
14 to self-certify, but we have a form we want you to use,  
15 and you need to tell us for each wire center why it is you  
16 believe that you can self-certify that this wire center is  
17 still permissible for UNEs. And if you send this form in,  
18 then we'll do -- at least we'll accept it as a  
19 self-certification.

20                   While this is some improvement, it is not  
21 completely clear whether SBC reserves to itself some right  
22 to reject self-certifications if what the CLEC says in its  
23 justification is in SBC's mind insufficient.

24                   And SBC is still attempting, despite the  
25 Order from Texas, the Order from Kansas, other places, to

1 control the process of judging whether the  
2 self-certification is sufficient or not. And this is a  
3 significant problem, because first CLECs were told, you  
4 can't self-certify because we've given you the list of  
5 CLLIs and essentially you have to trust us. It meets the  
6 FCC's requirements.

7                   Then the next question was, well, what's  
8 the backup data supporting your self -- your designation  
9 of wire centers? CLECs were told, oh, well, here, go look  
10 at this in D.C. And by the way on March 11th --  
11 March 10th I believe SBC said it would make this  
12 information that was available in D.C. only, it would  
13 provide it in the states, so you don't have to travel all  
14 the way to D.C. to see it. But again, this data does not  
15 answer the fundamental questions of how it is the ILEC is  
16 interpreting those definitions in the FCC Order.

17                   But last week SBC was saying, you've got to  
18 look at everything we've shown you. Well, we've looked at  
19 everything they've shown us. Birch, in fact, had its  
20 self-certification rejected last week, March 11th. Birch  
21 was told on March 14th, you'll receive some more  
22 information, some more backup and then you need to look at  
23 it. And that information hasn't been provided as of March  
24 16th.

25                   And in the meantime, on a regional basis,



1 as I mentioned before, negotiations were held on TRRO  
2 implementing language on a regional basis on March 7th, on  
3 March 8th, on March 10th. Those negotiations are  
4 continuing.

5 Now, the primary reason I ask you to listen  
6 to me work through that is that what has been occurring  
7 here is just about as bad as it can be for a CLEC who  
8 wants to understand if it's going to be able to provision  
9 UNEs it's entitled to under the FCC's Order.

10 We've been told you cannot self-certify  
11 it's factually impossible for you self-certify. Then  
12 another drip, another line in the sand, well, if you go to  
13 D.C. and look at this information, then you have to do  
14 that before you can self-certify. Okay, well, it doesn't  
15 have to be in D.C. It can be in your state, but you have  
16 to look at that before you self-certify, but I'm not going  
17 to answer the questions you've asked me to assist your  
18 self-certification.

19 Now, on March 10th, last week, the Oklahoma  
20 Commission did order SBC to answer that discovery, so we  
21 hope we'll be seeing an answer to some of those  
22 fundamental questions sometime next week, I believe the  
23 discovery is due.

24 But it's put CLECs in a Catch-22 position  
25 of, well, SBC says you have not done a reasonably diligent

1 inquiry. Okay, what do we have to do? You have to look  
2 at this data. Okay. We looked at it. Well, no, you need  
3 to look at this data. Well, we looked at it.

4                   And we can't really -- I mean, to the best  
5 of our knowledge, we don't know, we can't -- I can't  
6 self-certify that I have significant doubts about whether  
7 all these designated wire centers are for real until I  
8 understand why SBC won't answer my questions and whether  
9 those calculations were done in a way that really comports  
10 with the FCC order.

11                   And it may be -- it may be that when we see  
12 how they defined it, they defined it conservatively, they  
13 worked within a view of the order that everybody has to  
14 say, okay, fair enough. But why is it they've refused to  
15 answer those questions and at the same time told us we  
16 can't self-certify?

17                   So it is the nature of this cat and mouse  
18 game that has been played that requires us, we believe, to  
19 come and ask the Commission for an Order to put a stop to  
20 this, to just permit provisioning to happen based on a  
21 self-certification. Because we are very concerned that if  
22 there is not a Commission Order that requires this, as  
23 there is now in several states, that we're going to  
24 continue to have the same problems.

25                   And I think it's -- there is evidence of

1     that in, for example, in Oklahoma. The Oklahoma  
2     Commission has heard argument similar to this. It has not  
3     issued an Order yet, and CLECs are receiving news from SBC  
4     that in Oklahoma on the UNE-P side there won't be any  
5     moves, adds and changes because Oklahoma hasn't made us do  
6     it.

7                     Texas said that's how it should be  
8     interpreted, Michigan said that's how it should be  
9     interpreted, but we've got to fight this in every single  
10    jurisdiction. And if there is not a statement from every  
11    single jurisdiction, we're not going to be able to  
12    transition under the FCC order appropriately.

13                    So we again urge the Commission to issue  
14    such an Order, and we believe the Commission's authority  
15    both under the provisions of the M2A where SBC says that  
16    it understands that it is subject to dispute resolution  
17    and interpretation of the Commission's approved  
18    interconnection agreements, as well as state law, gives  
19    the Commission the authority to interpret these  
20    interconnection agreements on change of law, to interpret  
21    the provisions of the Remand Order and prevent SBC from  
22    unilaterally violating these agreements and the FCC's  
23    Orders.

24                    I'll ask if you have any questions before  
25    I --

1 JUDGE MILLS: Thank you. Questions from  
2 the Bench. Commissioner Murray?

3 COMMISSIONER MURRAY: I think I just have  
4 one. And I know that there were a lot of appeals of TRR--  
5 TRRO, but did the CLECs request clarification at all  
6 regarding the definition of -- it's escaped me now. The  
7 definition that we're arguing over here.

8 MR. MAGNESS: The embedded base or the --

9 COMMISSIONER MURRAY: Yes, the customer  
10 base.

11 MR. MAGNESS: I have not been involved in  
12 any such request for clarification, and I don't know if  
13 there was one, honestly. I could probably find out fairly  
14 quickly. There have certainly been appeals to the courts  
15 of this, and I know there were CLEC groups that appealed  
16 the switching and the loops and the transport and various  
17 parts.

18 You know, frankly, I think the -- when you  
19 look at this FCC rule itself and it refers to embedded  
20 base of customers, we don't think it's unclear, and I  
21 don't think that SBC has asked for that to be clarified  
22 either.

23 COMMISSIONER MURRAY: Thank you.

24 JUDGE MILLS: Commissioner Gaw?

25 COMMISSIONER GAW: Mr. Magness, I need you

1 to trim this down for me. We've been going on here for  
2 quite some time, and I'm having trouble with the forest  
3 and the trees thing at this point. I want you to tell me,  
4 break this down into what relief you're seeking.

5                   And I understand the part of the concept  
6 that has to do with whether or not we're dealing with new  
7 customers or embedded customers. That part you can put  
8 aside for the moment. I understand that that part of the  
9 argument is there, and I want to listen to all of  
10 everybody's points of view on it.

11                   But I'm -- beyond that, I'm having some  
12 difficulty understanding exactly what relief you're asking  
13 this Commission to grant. Could you do that for me in  
14 bullets?

15                   MR. MAGNESS: Yes.

16                   COMMISSIONER GAW: Not extended discussion.

17                   MR. MAGNESS: No. 1, on loop and transport,  
18 an Order that requires SBC to accept the CLEC  
19 certification and provision pursuant to paragraph 234.  
20 There may be elegant words to put around that. I could  
21 show you something from the Texas Order that I think is  
22 pretty comprehensive on it, but that's the idea, to make  
23 sure there isn't a holdup on loop transport provisions.

24                   COMMISSIONER GAW: Of the states that you  
25 listed that have issued orders, give me -- give me an

1 understanding about where they're falling on that issue.  
2 Who's addressed it in your favor and who has not?

3 MR. MAGNESS: Okay. The Kansas Commission  
4 specifically addressed it and said that SBC needs to  
5 accept these self-certifications and seek resolution from  
6 the KCC if it disputes the self-certification.

7 COMMISSIONER GAW: Okay.

8 MR. MAGNESS: But it is not the judge of  
9 self-certification and it has to provision. Okay.

10 COMMISSIONER GAW: All right.

11 MR. MAGNESS: Texas, the interim amendment  
12 that's now in effect in Texas has specific language that  
13 SBC accepts the self-certification and disputes it later.  
14 And the Texas interim amendment addresses it, and then the  
15 Texas order on clarification says, yes, that's what we  
16 really meant.

17 COMMISSIONER GAW: All right.

18 MR. MAGNESS: I know those states have  
19 specifically addressed it. There are other states  
20 including Ohio, California --

21 COMMISSIONER GAW: Tell me what category  
22 they're falling in.

23 MR. MAGNESS: Okay. The category I'm  
24 naming now is states who are saying you need to follow the  
25 change of law process before you try to do any of this

1 stuff. Whatever your contractual change of law process,  
2 follow that and then this stuff is implemented.

3 COMMISSIONER GAW: All right. That's  
4 Ohio --

5 MR. MAGNESS: Ohio, California,  
6 Mississippi, Michigan, Kentucky, Illinois, Georgia and  
7 Alabama.

8 And then in Michigan, Michigan also  
9 addressed the Order -- these questions about what the  
10 Remand Order means more specifically, and found that ILECs  
11 can't reject the self-certified request for loops and  
12 transport without a state commission reviewing it. So I  
13 would put Michigan in the category of change of law plus  
14 in the category of agreeing with Texas and Kansas that the  
15 ILEC is not the judge of the self-certification.

16 COMMISSIONER GAW: Okay.

17 MR. MAGNESS: And then Indiana is the state  
18 where the Commission found that SBC could stop  
19 provisioning for new customers on UNE-P as of March 11th.

20 COMMISSIONER GAW: Okay.

21 MR. MAGNESS: But they didn't speak  
22 directly to the embedded base question and they didn't  
23 speak directly to the self-certification question.

24 COMMISSIONER GAW: So that wasn't -- all  
25 right. Now, I'm trying to keep my apples and oranges

1     apart here, trying to keep this straight. On those states  
2     that you've already given me, I was assuming we were only  
3     talking about the self-provisioning issue.

4                     MR. MAGNESS: Well, the states that have  
5     said you need to go through change of law, let me kind of  
6     describe it this way. What was put in front of those  
7     states was, look, we don't need to decide  
8     self-certification right now.

9                     COMMISSIONER GAW: I'm sorry?

10                    MR. MAGNESS: We don't need to decide this  
11     stuff right now because what we've got to do is negotiate  
12     with each other and implement it.

13                    COMMISSIONER GAW: Okay.

14                    MR. MAGNESS: And then once that  
15     negotiation succeeds or fails and we arbitrate it, then it  
16     goes into effect and it's in that arbitration we can fight  
17     about all this stuff.

18                    COMMISSIONER GAW: All right.

19                    MR. MAGNESS: So that's what those states  
20     are saying. Some of these other states have addressed  
21     more directly the questions we're putting on about what  
22     the content of the Remand Order is.

23                    Now, let me say, there are state decisions  
24     cited in SBC's papers that I have tried to get ahold of  
25     since I've seen their papers and have not seen them. They



1 have claimed that in basically the New England area,  
2 Massachusetts, Rhode Island, New Jersey and I believe one  
3 other, maybe New Hampshire, that there have been  
4 commission orders that they believe are favorable to them.

5 Now, as I say, I made an effort to look at  
6 them. I have not seen them. I'd be happy to look at them  
7 and tell you whether I agree or disagree with their  
8 interpretation of them. But those orders are out there,  
9 but I've not yet seen them.

10 COMMISSIONER GAW: If -- so that's -- is  
11 that the portion that you mentioned, the first request for  
12 relief has to do with loop and transport and accepting the  
13 CLEC's self-certification?

14 MR. MAGNESS: Yes.

15 COMMISSIONER GAW: Am I saying that  
16 correctly?

17 MR. MAGNESS: Yes.

18 COMMISSIONER GAW: Okay. What other relief  
19 are you seeking?

20 MR. MAGNESS: The other would be on the  
21 switching or UNE-P side, that for existing customer base,  
22 SBC will provision moves, adds and changes as UNE-P during  
23 the transition period.

24 COMMISSIONER GAW: Okay. Now, and does  
25 that complete it?

1 MR. MAGNESS: Yes.

2 COMMISSIONER GAW: All right.

3 MR. MAGNESS: If I could back up one step.

4 COMMISSIONER GAW: Okay.

5 MR. MAGNESS: Okay. Change of -- if you

6 accept that this process needs to be dealt with in change

7 of law, there is not a need for specific findings that

8 interpret whether we're right or they're right about the

9 Remand Order, except that provision of the Remand Order

10 that says this order is to be implemented via change of

11 law.

12 Okay. We will -- actually, I mean, if you

13 granted the relief based on change of law in the

14 interpretation of M2A change of law language, we would

15 continue to do what we were doing. We would be

16 negotiating Remand Order language, we would be bringing

17 this to you for arbitration.

18 And I'll be completely honest. The

19 consequence is new orders could be placed until the

20 arbitration is over. As I said before, I mean, if -- we

21 would much rather have no new UNE-P orders for new

22 customers than end up in a situation where there are no

23 moves, adds or changes or where this self-certification

24 thing breaks down. So I'm backing up one step.

25 I basically want to tell you that a change

1 of law is kind of one form of relief. If you don't  
2 believe that it's appropriate, then if we're going to  
3 immediately implement provisions of the Remand Order  
4 without a change of law process, we're just urging that  
5 that include self-certification without SBC being the  
6 judge and jury, and a provision that when UNE-P is  
7 provisioned for existing customers, we can do the moves,  
8 adds and changes.

9 COMMISSIONER GAW: This is probably a  
10 self-evident question. When you're talking about change  
11 of law provision governing, if the Commission went that  
12 route, does that impact the second request for relief in  
13 regard to switching and moves, adds and changes?

14 MR. MAGNESS: If you took the change of law  
15 route, we would continue to operate under our current  
16 interconnection agreement, and so they would continue to  
17 provision UNE-P.

18 COMMISSIONER GAW: So in other words, that  
19 addresses both issues?

20 MR. MAGNESS: Yes.

21 COMMISSIONER GAW: That's what I was trying  
22 to get.

23 MR. MAGNESS: You said it much more  
24 elegantly than I tried to. The change of law thing  
25 handles everything because it means we continue to operate

1 under current contracts until they are amended.

2 COMMISSIONER GAW: Okay.

3 MR. MAGNESS: But if we're not going to do  
4 that, then we need to be sure that however it is we're  
5 moving forward we do it appropriately under the Remand  
6 Order.

7 COMMISSIONER GAW: All right. Let me get  
8 to the moves, adds and changes issue. Do you have the  
9 language in front of you that you believe in the TRRO that  
10 specifically requires this conclusion?

11 MR. MAGNESS: I always look primarily to  
12 the rule, which was the 51.319(d)(2), little 2, I've  
13 referenced you before. And it's there it says, for the  
14 12-month period an incumbent LEC shall provide access to  
15 local circuit switching on an unbundled basis for a  
16 requesting carrier to serve its embedded base of end user  
17 customers.

18 So there is the concept you can do this to  
19 serve your current base of customers. There isn't  
20 anything that says unless they order something in a new  
21 location or unless they order something that's a change.

22 And then if you look in -- you know, I  
23 gave you that long list of paragraphs, I think the places  
24 where -- there are references to no more UNE-P  
25 arrangements, which SBC likes to show you like

1 paragraph 227, and there are provisions of paragraph, say,  
2 199 and 216 where I believe if you read them fairly,  
3 you'll see the FCC is saying that it is serving this  
4 customer base that they're preserving in the transition.

5                   And again, it doesn't say you can only  
6 serve them if they want this or you can only serve them if  
7 they want that. It says you can serve them. You just  
8 can't get a new customer. For example, in 199 they say,  
9 this transition period shall apply only to the embedded  
10 customer base and does not permit competitive LECs to add  
11 new customers using unbundled access to local circuit  
12 switching.

13                   So again, I'm sure Mr. Lane can talk to you  
14 about no more UNE-P arrangement, but I think read as a  
15 whole, all their references keep coming back to new  
16 customers.

17                   COMMISSIONER GAW: Is the term "customer"  
18 defined any place?

19                   MR. MAGNESS: I don't believe it is.

20                   COMMISSIONER GAW: If I understand your  
21 argument, that if the FCC intended that no new lines or  
22 services be added to a particular -- I'm going to start  
23 out with location. I know that you're not going to want  
24 to limit it to that. But if you were talking about a  
25 location and you said, let's say they had a set number of

1 lines and they wanted to add an additional line. I  
2 suppose you would say that if the -- first of all, you  
3 ought to be able to do that, you ought to be able to add  
4 that additional line, provision it in a UNE-P arrangement?

5 MR. MAGNESS: Yes, sir.

6 COMMISSIONER GAW: Do you believe Bell  
7 would disagree with you --

8 MR. MAGNESS: Yes, sir.

9 COMMISSIONER GAW: -- on that?

10 MR. MAGNESS: I do.

11 COMMISSIONER GAW: Okay. And on what  
12 basis? And I'll ask Bell this in a minute.

13 MR. MAGNESS: Sure. I think they will read  
14 things into paragraph 5 and paragraph 227 and places that  
15 don't talk about customers that talk about UNE-P  
16 arrangements --

17 COMMISSIONER GAW: Yes.

18 MR. MAGNESS: -- and try to distinguish  
19 that from customers, and just as a matter of how this has  
20 played through as we've tried to negotiate, and I don't  
21 mean negotiate a settlement here, I just mean in talking  
22 about the accessible letters with SBC, initially it was,  
23 you know, no moves, no adds, no changes.

24 Then, for example, as we began to discuss  
25 it after the Texas interim order, it became clear that

1 they were going to kind of pull back, that they were not  
2 going to provision to new locations. So it's been rather  
3 fluid as everybody's tried to figure this out. But I  
4 think it's pretty clear they don't want to do new  
5 locations.

6                   One of the reasons we feel confident that  
7 these other state commissions got it right and this is the  
8 right reading is if you look at the rule itself and you  
9 contrast the transition language for loops and transport  
10 with the transition language for UNE-P or switching, the  
11 switching one talks about customers. The other ones  
12 don't.

13                   So we're not here telling you that the loop  
14 and transport side is an embedded base of customers,  
15 but -- so if they wanted to say lines or they wanted to  
16 say loops or transport or switching, they could have done  
17 so; instead they put it in terms of customers. When you  
18 read it in the context of the Order it makes a lot of  
19 sense, because they're saying you can serve your  
20 customers; just get them onto something else pretty quick.

21                   COMMISSIONER GAW: You believe it's very  
22 clear that adding another line to a specific location is  
23 something that you ought to be able to do and have --  
24 serve with the UNE-P arrangement that you currently have?  
25 Is that --

1                   MR. MAGNESS: For the transition, yes. And  
2 just to put a fine point on it, you can add a new line at  
3 your current location and if the customer -- if Bob opens  
4 his new restaurant, he can get a line there.

5                   COMMISSIONER GAW: I'm not there yet.

6                   MR. MAGNESS: Okay. All right.

7                   COMMISSIONER GAW: You're getting ahead of  
8 me.

9                   MR. MAGNESS: I don't want to do that.

10                  COMMISSIONER GAW: I'm trying to break this  
11 down into groups so I can see --

12                  MR. MAGNESS: Sure.

13                  COMMISSIONER GAW: -- where the  
14 disagreement starts, and I can't -- so that's why I'm  
15 asking you these things.

16                  Okay. Now, let's then say that Bob -- Bob  
17 decides that he wants to open his -- his -- he wants to  
18 close his current restaurant and move it across the  
19 street. Okay. I'm assuming you're still going to say  
20 that you ought to be able to serve him because that's the  
21 same customer?

22                  MR. MAGNESS: That's correct.

23                  COMMISSIONER GAW: It's a different  
24 location now, correct, in my example?

25                  MR. MAGNESS: Yes.



1 COMMISSIONER GAW: But you don't think that  
2 matters because it's still the same customer?

3 MR. MAGNESS: That's right.

4 COMMISSIONER GAW: All right. Now let's  
5 say that instead of closing that one location, he's  
6 opening up an additional location across town somewhere.  
7 Is that the same customer and is that -- is that allowable  
8 to be serviced by UNE-P in the transition period?

9 MR. MAGNESS: Yes.

10 COMMISSIONER GAW: Okay. Now, and in that  
11 case, Bob owns both restaurants?

12 MR. MAGNESS: Uh-huh.

13 COMMISSIONER GAW: All right. Does it  
14 matter whether or not he gets one or two bills?

15 MR. MAGNESS: I don't think so. If he  
16 is -- if he is an existing customer of the CLEC, he may  
17 have made a billing arrangement that has each one of his  
18 locations get a separate bill because they have a  
19 different manager.

20 COMMISSIONER GAW: Maybe so.

21 MR. MAGNESS: I don't know.

22 COMMISSIONER GAW: Could be.

23 MR. MAGNESS: I think the language of the  
24 FCC order talks in terms of customers, so if he is the --  
25 if he is the CLEC's customer, then yes, our position would

1 be that he can do those kind of arrangements in the  
2 interim or in the transition.

3 COMMISSIONER GAW: All right. Now, if we  
4 were talking about, let's say Bob's restaurant was a  
5 McDonald's franchise, and Bob had both of these -- both of  
6 these places, the examples are exactly the same as my last  
7 one, it's a franchise, it's the same thing, you're going  
8 to get the same result in your opinion, he's still their  
9 customer, correct?

10 MR. MAGNESS: Correct.

11 COMMISSIONER GAW: Let's say John also has  
12 a McDonald's franchise in the same town. Does that  
13 qualify if John was not a current customer of the CLEC?

14 MR. MAGNESS: Well, as --

15 COMMISSIONER GAW: And I'm giving you  
16 another McDonald's restaurant, but it's a different owner  
17 of the franchise.

18 MR. MAGNESS: Yeah. No, if the -- if the  
19 CLEC's customer was -- I don't remember who the first  
20 franchise owner was.

21 COMMISSIONER GAW: Bob.

22 MR. MAGNESS: The CLEC customer was Bob and  
23 he's got his McDonald's franchise, that's the CLEC's  
24 customer. The CLEC can serve him. If John also happens  
25 to be in the McDonald's hamburger business, and the CLEC

1 would have to go out and sign a new customer contract and  
2 start a new customer relationship, no, they can't do that.

3 COMMISSIONER GAW: Now, if Bob -- let me  
4 give you another example. I'm going to stop this  
5 eventually. But if Bob had two, both of -- he has two  
6 corporations, he's a shareholder, the sole shareholder in  
7 two corporations, and Corporation A owns Restaurant 1 and  
8 he starts a new Corporation B that starts a new  
9 restaurant, No. 2, he is not -- and that restaurant comes  
10 up and requests service after the magic date here that we  
11 just passed. Is that a new customer?

12 MR. MAGNESS: I think you really have to  
13 look at who the CLEC has as its customer, who does it have  
14 a billing relationship with, who does it have a customer  
15 relationship with. In that situation, if -- and again,  
16 you know, it's going to depend on the specifics, but the  
17 situation you laid out, if Corporation A is the CLEC's  
18 customer and if in order to serve Corporation B, even  
19 though they are both owned by Bob, if in order to serve  
20 Corporation B you have to open up a new customer  
21 relationship, you're serving an entity, a customer that  
22 you haven't served before --

23 COMMISSIONER GAW: Yes.

24 MR. MAGNESS: -- I would think you would  
25 be -- you would be looking at a new customer. But it -- I

1 mean, there are people who could have a number of  
2 corporations but Bob gets the bill and Bob has the  
3 relationship, and it may be --

4 COMMISSIONER GAW: Perhaps in the example I  
5 gave you --

6 MR. MAGNESS: In the example you gave me --

7 COMMISSIONER GAW: In the example, I'm  
8 assuming that the corporations are kept and held  
9 separately, and even though they have the same owner under  
10 the shareholders, the shares of stock, but the bills are  
11 paid by separate corporations.

12 MR. MAGNESS: Yeah. And I think one way --  
13 if you've got a real world situation like this, one way  
14 that you could make it maybe more straightforward is if  
15 Corporation A gets its telephone service from someone  
16 who's using UNE-P and Corporation B has phone service and  
17 gets it from somebody else, then it gets fairly easy  
18 because they'd have to switch to a new carrier to be in  
19 the same boat with A. And that's when you could say no,  
20 that's a new customer.

21 COMMISSIONER GAW: I think that's all I  
22 have. Thank you, Judge.

23 JUDGE MILLS: Commissioner Appling?

24 COMMISSIONER APPLING: Two questions. Can  
25 you in about ten minutes repeat everything you've said?

1                   MR. MAGNESS: I can talk as fast as you  
2 need me to.

3                   COMMISSIONER APPLING: Did you cover  
4 everything that my colleague asked about the bullets of  
5 what you're seeking here? Did you cover everything?

6                   MR. MAGNESS: I sure hope so. I think so,  
7 because we -- we -- you know, I'll put it kind of in the  
8 alternative in a way. We think the most straightforward  
9 way to deal with this is look at the change of law  
10 provision. We're working on amending these contracts. As  
11 soon as they're amended and done, all this goes into  
12 effect.

13                   If that is not how the Commission wants to  
14 move on this, we would urge that the Commission issue an  
15 Order, if we're going to implement some of this stuff  
16 right away, that we make sure that the self-certification  
17 process is not one that SBC runs, that they've got to  
18 provision; and two, that we can do the moves, adds and  
19 changes I was talking about.

20                   COMMISSIONER APPLING: Thank you.

21                   JUDGE MILLS: Commissioner Murray, do you  
22 have additional questions?

23                   COMMISSIONER MURRAY: Yes, I have another  
24 question.

25                   I was just looking again at Section 234,

1 the self-certification provision, and it appears -- as I  
2 think about it, it appears that what you're asking us to  
3 do here is to make a declaratory ruling ahead of time.  
4 You haven't provided, I'm assuming, the  
5 self-certifications yet; is that correct?

6 MR. MAGNESS: Some CLECs have, yes.

7 COMMISSIONER MURRAY: Your clients?

8 MR. MAGNESS: Yes. I know -- in particular  
9 I've seen the one that Birch has provided, and I'm not --  
10 I don't know naming each one of them. I haven't checked  
11 in with each one of them to see if each has filed a  
12 self-certification. Self-certifications are going in.

13 COMMISSIONER MURRAY: All right. Now, let  
14 me ask you this: The self-certifications are to certify  
15 that you are entitled, am I correct on this? Those are in  
16 areas where you think there is impairment, even though the  
17 FCC has made the ruling that they -- that you would not be  
18 impaired, and you can get around that by self-certifying  
19 that, yes, we would be impaired; is that correct?

20 MR. MAGNESS: No.

21 COMMISSIONER MURRAY: That's not?

22 MR. MAGNESS: No. The self-certification  
23 is for a situation where -- the situation we have now in  
24 the real world where, for example, SBC has said, this wire  
25 center in St. Louis is no impairment, and we've looked at

1    what we have to look at, we've looked at the data, and we  
2    are -- we have done a reasonably diligent inquiry and we  
3    still have significant doubt that that's the case.

4                   COMMISSIONER MURRAY:  I thought that's what  
5    I just said.

6                   MR. MAGNESS:  And I think that the reason I  
7    made a distinction -- and I'm sorry to interrupt.  The  
8    reason I made the distinction is the FCC has not approved  
9    SBC's list.  The FCC has not approved a list of wire  
10   centers that are subject to no impairment.  They set out  
11   the criteria and then SBC and the other BOCs made filings  
12   which said, we've looked at the criteria and we think  
13   these qualify, but the FCC has not blessed those lists.

14                  For example, in the Texas case, the Texas  
15   Order says that if the FCC blesses the SBC list, game  
16   over, you can't self-certify there anymore.  But as long  
17   as they have not blessed it, you can continue to inquire  
18   as to whether this is a legit list or not and  
19   self-certify.

20                  COMMISSIONER MURRAY:  Is it your client's  
21   intent to challenge every one on that list?

22                  MR. MAGNESS:  I don't think so.  I mean, I  
23   think some clients may, depending on where they're  
24   ordering into.  Some clients may look at them and go, I'm  
25   okay, you know, agreeing that that one's off the list.  I

1 think it's going to depend on the client and what  
2 information they have.

3 The big problem with the way this is laid  
4 out is that -- and the FCC recognized this, that most of  
5 the data that's needed to determine if the criteria is met  
6 is in the hands of the ILEC. And so you need to -- you  
7 need to be able to understand how they use the data and  
8 define it in order to really understand.

9 COMMISSIONER MURRAY: Okay. Is there a  
10 process set out by the FCC for, as you called it, blessing  
11 the list that the ILECs come up with?

12 MR. MAGNESS: No. And this I'll admit is  
13 just what I've heard, you know, read in the trade press  
14 and talked to folks in DC, that it is unlikely the FCC is  
15 going to do that. They received the ILEC listings of  
16 designated wire centers. That was mid February. And  
17 BellSouth, in fact, said, we want you to bless this, and  
18 they haven't. And my understanding is that we shouldn't  
19 count on them doing that for us.

20 COMMISSIONER MURRAY: So this is kind of an  
21 editorial comment, but it appears that the FCC has once  
22 again given the states the opportunity to clarify  
23 something that they have said that remains very unclear.

24 In other words, if the ILECs want to list  
25 all of their exchanges or all of their wire centers, the



1 CLECs want to challenge all of their wire centers, we have  
2 no choice but to address that in state commission  
3 processes. Is that the way you interpret it?

4 MR. MAGNESS: Yeah. I wouldn't dispute the  
5 comment. I think the FCC recognized -- and this is where  
6 I referenced before in paragraph 100. They recognized  
7 that there may well be disputes on this, and those are  
8 going to be settled at the state commission level in  
9 252 processes.

10 So -- and I have to add, it may be, as I  
11 noted before, that if we get the answer to the question  
12 that we've asked in Oklahoma, for example, and asked on a  
13 business-to-business basis, just exactly what it is --  
14 what is it you counted when you applied the fiber-based  
15 collocater definition in the FCC order, we may see that  
16 answer and go, well, so be it. You know, that's a  
17 straight-up application of the definition. We may look at  
18 it and go, okay, that's not -- you know, we have a  
19 disagreement about whether you complied.

20 So unfortunately -- and I say unfortunately  
21 from the perspective of being able to tell my clients that  
22 there's some certainty. Unfortunately, I think these are  
23 taken back to the state commissions to at least resolve  
24 those disputes.

25 COMMISSIONER MURRAY: And in terms of what

1 is before us in this case, you're just asking us to  
2 provide that SBC cannot discontinue provision of either  
3 loops, high capacity loop and transport or the UNEs  
4 without resolving those disputes, any disputes before this  
5 Commission; is that what you're asking?

6 MR. MAGNESS: We're asking specifically  
7 that the process the FCC did lay out of CLEC provides  
8 self-certification, ILEC accepts self-certification and  
9 provisions loop and transport. And then if ILEC chooses  
10 to dispute that it had to provide that, that that process  
11 go forward on loop and transport. The self-certification  
12 doesn't apply to the moves, adds and changes on the UNE-P  
13 side.

14 COMMISSIONER MURRAY: And as to the moves,  
15 adds and changes, you're asking us to find that for  
16 existing customers you can do moves, adds and changes?

17 MR. MAGNESS: Yes.

18 COMMISSIONER MURRAY: All right. Thank  
19 you.

20 JUDGE MILLS: Thank you. We're ready to  
21 take a brief recess. We'll be back at quarter 'til three  
22 for Staff's argument. Off the record.

23 (A BREAK WAS TAKEN.)

24 JUDGE MILLS: Let's go back on the record.  
25 We're back on the record. We're proceeding with the Staff

1 of the Commission for their oral argument, if you can  
2 enter your appearance when you begin.

3 MR. POSTON: Good afternoon. My name is  
4 Marc Poston and I'm appearing on behalf of the Staff of  
5 the Commission.

6 After reviewing the argument of the  
7 parties, the Staff believes the CLEC Coalition presents  
8 the most reasonable interpretation of the FCC's Triennial  
9 Review Remand Order, or TRRO.

10 The network elements in question fall into  
11 two categories; there's the high capacity loop and  
12 dedicated transport, and then there's the mass market  
13 local switching or UNE-P. For loop and transport UNEs,  
14 the FCC created a transition period for the CLEC's  
15 embedded base of customers. The FCC also established a  
16 clear impairment standard, and if a CLEC's reasonable  
17 inquiry leads the CLEC to believe it meets the impairment  
18 standard, it may self-certify to the ILEC that it is  
19 entitled to unbundled access.

20 In such a case, the FCC was clear that the  
21 ILEC must immediately process the request at the price  
22 identified in the TRRO. The FCC was also clear that the  
23 ILEC can challenge that request, but only after processing  
24 it. This is the provide and dispute process discussed in  
25 paragraph 234 of the TRRO, and discussed by the CLECs'

1 attorney.

2                   Turning now to UNE-P, at paragraph 199 of  
3 the TRRO, the FCC concluded it will no longer require  
4 unbundling of mass market switching. That's not disputed.  
5 The FCC established a transition plan requiring CLECs to  
6 convert UNE-P customers to alternative arrangements within  
7 12 months or March 11th. The FCC states in paragraph 11  
8 that the transition period applies only to embedded  
9 customer base -- to the embedded customer base and doesn't  
10 permit CLECs to add new customers.

11                   The bottom line on UNE-P is that SBC is not  
12 obligated to process orders for new customers, but  
13 embedded customers can continue with access until migrated  
14 to a CLEC switch or to an alternative access arrangement  
15 negotiated by the carriers. And it's my understanding  
16 that under the M2A this must be accomplished by July 19th.

17                   And this leads to the question, what is the  
18 embedded base that has been discussed today? Does it only  
19 refer to embedded lines, which would prevent the CLEC from  
20 serving customer requests to make additions, moves and  
21 modifications, or does it refer to embedded customers,  
22 which would allow the CLEC to meet its customers' needs  
23 and it would obligate SBC to process -- process such  
24 requests during the transition period?

25                   It is the Staff's position that embedded

1 base refers to the embedded customer base, and the rules  
2 implementing the TRRO at Section 51.319, subsection (d) (2)  
3 and lower case Roman Numeral 3. This section references  
4 embedded customer base, not embedded lines. Accordingly,  
5 the Staff believes SBC is obligated to add services, add  
6 lines and process location requests for this embedded  
7 base.

8                   As explained in the -- by the Michigan PSC,  
9 the CLEC customers' needs during the transition period go  
10 beyond the level of service provided on March 11th.  
11 Otherwise the needs of the CLECs' customers could be  
12 frustrated by SBC's refusal to process orders. This  
13 interpretation of embedded base is consistent with the SBC  
14 states of -- decisions of the commissions in the SBC  
15 states of Texas, Ohio, Michigan, Indiana, Kansas and  
16 California. These are six of the seven SBC states that  
17 discussed the issue in recent orders. The seventh state,  
18 Illinois didn't decide the issue.

19                   Turning to the SBC accessible letters, the  
20 Staff agrees with the CLEC Coalition that the letters are  
21 inconsistent with the TRRO since they don't comply with  
22 the transition periods for the CLECs' embedded base of  
23 customers and they don't comply with the self-certified  
24 impairment process for loops and transport.

25                   In conclusion, the FCC's transition plan

1 obligates SBC to continue providing access to the CLECs'  
2 embedded customer base for UNE-P and for high capacity  
3 loops and for dedicated transport at the rate set forth in  
4 the TRRO.

5                   SBC is not required to provide access to  
6 loops and transport for new customers unless the CLEC  
7 self-certifies that the impairment standard is met. And  
8 SBC is also not required to provide access to UNE-P for  
9 new CLEC customers, but it is required to process requests  
10 for the CLEC's embedded base of customers during the  
11 transition period.

12                   For these reasons, Staff supports a  
13 Commission Order further requiring the continued  
14 provisioning of service to the embedded base during the  
15 transition period or until replaced by another  
16 interconnection agreement, whichever occurs first.

17                   That's all I've prepared, and I am  
18 available for questions.

19                   JUDGE MILLS: Commissioner Gaw, do you have  
20 questions?

21                   COMMISSIONER GAW: I might. It might take  
22 me a minute. Do you want to go on to somebody else? I  
23 can come back to him.

24                   JUDGE MILLS: Thank you, Mr. Poston. We'll  
25 move on to SBC.

1                   MR. LANE: Thank you, your Honor. My name  
2 is Paul Lane and I'm here on behalf of Southwestern Bell  
3 Telephone, LP, doing business as SBC Missouri.

4                   SBC Missouri would respectfully request the  
5 Commission not extend the Order that it previously issued.  
6 In our view, the relief that has been sought by the CLEC  
7 Coalition is, one, beyond the Commission's authority, and  
8 two, lacking in substantive merit.

9                   At its core the Order is a request for an  
10 exercise of equitable authority that the Commission simply  
11 does not have. The recent Report and Order in Case  
12 No. CO-2005-0066, which was issued on December 14th of  
13 2004, is instructive on the lack of the Commission's  
14 authority. And in that case, Socket, one of the CLEC  
15 Coalition members here, sought to opt into an  
16 interconnection agreement with CenturyTel and then operate  
17 under that agreement in another carrier's territory, i.e.  
18 Spectra.

19                  The Commission noted, quote, Socket  
20 carefully avoids directly asking for equitable relief  
21 because it is aware that as an administrative agency this  
22 Commission cannot do equity, unquote. The Commission also  
23 noted in that same Order, quote, regardless of whether  
24 Socket chooses to call the relief it seeks equity, the  
25 relief that it seeks is, in fact, equitable, unquote.

1                   Both of those statements apply with equal  
2 force here. The CLEC Coalition carefully avoids asking  
3 for equitable relief because they know this Commission  
4 does not have that authority. Regardless of whether they  
5 call it equitable relief, that's exactly what they seek.  
6 They want a declaratory judgment with regard to the  
7 contract and an injunction to require SBC Missouri to  
8 process orders.

9                   The case law is crystal clear that the  
10 Commission does not possess the power to construe  
11 contracts or to grant any type of equitable relief.  
12 There are a number of cases which provide this. I'll cite  
13 to one; that is, State, ex rel GS Technologies vs. Public  
14 Service Commission. That's at 116 SW 3d 380. That's a  
15 Missouri appellate court decision issued in 2003.

16                  On page 9 of that decision, the Court said,  
17 quote -- I'm going to eliminate the internal quotes and  
18 the internal cites, but the Court said, quote, while the  
19 Commission does have exclusive jurisdiction of all utility  
20 rates when a controversy arises over the construction of a  
21 contract or of a rate schedule upon which a contract is  
22 based and a claim of overcharge is made, only the courts  
23 can require an accounting or render a judgment for the  
24 overcharge. This is so because the Commission cannot  
25 enforce, construe nor annul contracts, nor can it enter a



1 money judgment. Likewise, the Commission does not have  
2 the authority to do equity or grant equitable relief.

3               There are several other cases to the same  
4 effect, Hornbook Law from Missouri about this Commission's  
5 authority. Katz Drug Company vs. Kansas City Power &  
6 Light at 303 SW 2d 672, Missouri Appellate decision in  
7 1957 is one case. American Petroleum Exchange v Public  
8 Service Commission is 127 SW 2d 952, Missouri Supreme  
9 Court 1943 case, and Straub v Bowling Green Gas 227 SW 2d  
10 666, another Missouri Supreme Court case from 1950, all  
11 provide the same directives in terms of this Commission's  
12 lack of authority to enter orders in equity or to construe  
13 contracts.

14               This should end the inquiry. The  
15 Commission cannot, even if it were 100 percent convinced  
16 that the CLECs' position was correct and that SBC  
17 Missouri's position was wrong, grant the relief requested.  
18 It has no power to issue a declaratory ruling interpreting  
19 the contract or to issue an order requiring SBC to follow  
20 the contract and to process the orders.

21               The CLECs' claim of authority is based on  
22 Section 386.310 of the Revised Missouri Statutes, but a  
23 reading of that section shows it's not applicable.  
24 386.310 gives the Commission the right to issue orders to  
25 preserve the health and safety of the public. There's no

1 allegation that the health and safety of the public are at  
2 issue here, nor can there be. This is a case about money.  
3 The CLECs can continue to provide service, but they don't  
4 want to pay the price that in our view the FCC has  
5 ordered. Even if the Commission had equitable powers,  
6 this would not be an appropriate case to use that power.

7               Injunctive relief is a four-part test under  
8 both Missouri and federal law. Plaintiffs must show, one,  
9 probability of success on the merits; two, irreparable  
10 harm; three, that the harm to plaintiffs outweighs the  
11 harm to defendant; and four, that the public interest  
12 favors equitable relief.

13               On the state side, State, ex rel Director  
14 of Revenue v Gabbert at 925 SW 2d 838, Missouri Supreme  
15 Court decision of 1996 provides to that effect. On the  
16 federal side Watkins Inc. v Lewis 346 F 2d 841, an 8th  
17 Circuit case from 2003, provides for similar evaluation of  
18 injunctive relief.

19               The claimants here must show all four  
20 factors. In fact, none of the four factors are met.  
21 First is probability of success on the merits. The FCC  
22 has made it abundantly clear that the transitional plan is  
23 to be implemented immediately and is self-effectuating.  
24 I'll return to this point later in evaluating the  
25 substance of the complaint.

1                   Second is that there's no showing of  
2     irreparable harm. If the Commission is at all inclined to  
3     continue the Order in this case, it must hold a hearing,  
4     and each CLEC must adduce proof of irreparable harm. We  
5     would intend to cross-examine any witnesses on this  
6     because we do not agree with their claims of irreparable  
7     harm that they've made, and the statements of their  
8     attorneys here today and the statements that they made in  
9     pleadings are not evidence and are not proof upon which  
10    the Commission can rely.

11                   Here are some of the issues that we would  
12    want to explore on the irreparable harm issue if the CLECs  
13    choose to come forward and produce some evidence and if  
14    this Commission determines that it does have power to  
15    issue equitable orders.

16                   One, are they using the UNE-P today? Not  
17    all of them are. It's hard to imagine irreparable harm  
18    from discontinuance of UNE-P arrangements when some of  
19    them don't use it, and those that do don't use it in all  
20    exchanges and to serve all customers. We have some  
21    20-plus CLECs that are using UNE-P today in Missouri, but  
22    less than half of them are here and are part of this case.  
23    That should say something to you about the claim of  
24    irreparable harm.

25                   The CLECs can provide service themselves.

1 They can resell service from us. They can enter into a  
2 commercial agreement with us. They can enter into an  
3 agreement with a third party to provide these services.  
4 Remember, all of these services are ones that the FCC have  
5 said that the CLECs are not impaired without access to.

6 Second, we'd like them to show and we'd  
7 want to explore where they're providing using their own  
8 switch in Missouri today. Mr. Magness I believe said that  
9 all of his clients that are at issue here have their own  
10 switch and are currently using it in Missouri.

11 It's difficult to show irreparable harm for  
12 the lack of ability to order additional UNE-P arrangements  
13 when they have their own switch and are using it in  
14 Missouri to provide service today.

15 Third, there is a claim with regard to DS3  
16 loops. There's three wire centers that we have that meet  
17 the FCC's criteria for non-impairment for purposes of  
18 purchasing DS3 loops. That's out of 160 exchanges and  
19 some 220 switches that we have, there's three. Throughout  
20 the state of Missouri, with regard to all CLECs, we  
21 provide zero DS3 loops. It's difficult to understand how  
22 CLECs that do not purchase DS3 loops can claim irreparable  
23 harm by SBC Missouri's refusal to process orders for  
24 something that they have yet to order in Missouri ever.

25 Fourth, with regard to DS1 loops, which is

1 part of their petition, they've admitted here today that  
2 under the FCC's directives, under their Order in the TRRO,  
3 SBC Missouri has not claimed that any of its central  
4 office switches meet the criteria for non-impairment.  
5 We're not going to refuse the order for DS1 loops under  
6 the Order as it exists today. They cannot be irreparably  
7 harmed, and we haven't threatened to do anything with  
8 regard to those central offices.

9 Fifth, with regard to DS3 transport and DS1  
10 transport, the Commission would need to explore exactly  
11 where they're allegedly harmed as they claim. Again,  
12 there's 12 central offices that meet the criteria of  
13 Tier 1, I believe, and one that meets the criteria of  
14 Tier 2. That's 13 switches out of 160 exchanges and some  
15 220 switches that we have. The CLECs have produced no  
16 evidence to the Commission about where they're ordering  
17 DS1 and DS3 transport between those central offices, nor  
18 have they produced any evidence of their inability to  
19 acquire transport from another source or from SBC  
20 Missouri.

21 In fact, Mr. Magness said one of the things  
22 they can do was buy special access. And while he  
23 attempted to say that wasn't a very adequate remedy from  
24 their perspective because it costs more, an increase in  
25 cost is not the basis for issuing any kind of injunctive

1 relief under the law.

2 Nor does their claim of operational  
3 insufficiencies meet any kind of reasonable test, as  
4 Mr. Magness himself -- again, there is no evidence, but if  
5 you listened to what he said, he said that some of his  
6 CLEC clients today in light of the order and in light of  
7 SBC Missouri's position do buy special access in lieu of  
8 getting DS1 or DS3 transport. Again, these CLECs can't be  
9 harmed if other CLECs are actually providing service to  
10 their customers utilizing special access or other  
11 arrangements to provide them.

12 With regard to all of the services that are  
13 at issue here, UNE switching, DS1 and DS3 loops, DS1 and  
14 DS3 transport, all these are areas where the FCC's TRRO  
15 found that non-impairment exists precisely because the  
16 CLECs have alternatives. Again, these alternatives  
17 include self-provisioning, resale of service, commercial  
18 agreements with SBC and agreements with third parties.  
19 You cannot find reasonably irreparable harm when all of  
20 these alternatives are available to them.

21 The third item in -- or third prong of an  
22 irreparable harm test is the balancing of the harm. You  
23 have to look at what harm there is to SBC Missouri from  
24 issuing your Order or continuing the Order in effect  
25 versus what the harm is to the plaintiffs.

1                   The UNE-P is not lawful and it never has  
2     been. We've been operating under it for nine years. The  
3     FCC's unbundling standards have been overturned three  
4     times by the courts. Only now with regard to UNE-P has  
5     the FCC taken action. When you're balancing the harms,  
6     SBC Missouri has lost tens of thousands of customers and  
7     tens of millions of dollars under this unlawful regime.

8                   The CLEC plaintiffs or claimant here assert  
9     that their loss of customers causes incalculable harm that  
10    money damages can't remedy. If that's true, the loss of  
11    customers by SBC Missouri as a result of continuation of  
12    the obligation to provide UNE-P and the other services at  
13    issue here is also a matter of incalculable harm to SBC  
14    Missouri.

15                  If we're looking at the right to compete  
16    for a customer, it's the same harm that's suffered by them  
17    that they claim that would be suffered by us by continuing  
18    the Order. You can't balance the equities and say it's  
19    better and more appropriate for the CLECs to get customers  
20    than SBC Missouri.

21                  Again, all of them have an equal  
22    opportunity to compete, and again, they have alternatives  
23    that they can use to serve the customer. If it costs more  
24    to serve them, that doesn't change what they charge the  
25    customers. They can ultimately charge what they think is

1 appropriate to the customers. It's not irreparable harm  
2 for them to be denied access to these items that the FCC  
3 has said they are not impaired without.

4                   The last prong is the public interest.  
5 Again, SBC Missouri has been forced to provide UNE-P and  
6 these other services that are at issue, network elements  
7 that are at issue for nine years under an unlawful regime.  
8 Public interest weighs heavily against continuing to  
9 require SBC Missouri to follow this unlawful regime.

10                   The FCC has found non-impairment for UNE-P  
11 and for certain loops and transport. That means they  
12 don't need those to compete. The public interest is not  
13 advanced by continuing unlawful requirements.

14                   The FCC has noted that the UNE-P wrongfully  
15 reduces incentive to invest and has harmed the development  
16 of facilities-based competition. Again, the public  
17 interest strongly favors SBC Missouri's position, not that  
18 of the CLECs. We go to the substance of the complaint,  
19 both because it helps you analyze whether there is a  
20 substantial likelihood of success on the merits and  
21 because we would like you to feel comfortable that the  
22 position that we're advancing is correct on the merits.

23                   With regard to the UNE-P, the CLECs are  
24 seeking to force SBC Missouri to provision UNE-P to all  
25 customers everywhere in SBC Missouri's territory. They



1 say that in paragraph 38 of their petition.

2 I heard Mr. Magness tell you two different  
3 things up here today. He told you what they really want  
4 is moves, adds and changes for existing customers. At the  
5 same time he said, but he said, if you do it on the basis  
6 that we would really like, finding that this has to go  
7 through a change of law process, we will get to add new  
8 customers under UNE-P.

9 And I'm glad he was frank enough to say  
10 that, because that's true, and that's what they're  
11 seeking. If you believe that their position is correct  
12 and you feel that change of law is required, that would  
13 allow them to add new UNE-P customers, new ones that don't  
14 exist today. Not just new locations for existing  
15 customers, new UNE-P customers. That would be wholly  
16 inappropriate and directly contrary to the FCC's Order.

17 Turning to the TRRO itself now, the FCC  
18 notes that the courts have rejected its unbundling  
19 requirements three separate times, and the FCC also  
20 conceded the adverse impacts on investments unbundling  
21 decisions have had. Attempting to comply with the court  
22 orders, the FCC ended unbundled switching as an unbundled  
23 network element and it found that the CLECs were not  
24 impaired for access to DS1 and DS3 loops at certain wire  
25 centers.

1                   Again, as I noted, there's not a wire  
2     center in Missouri that we're claiming that we no longer  
3     have to provide DS1 loops. With regard to DS3 loops,  
4     there's only three central offices that would meet the  
5     non-impairment test of the FCC, but they're not ordering  
6     DS3 loops anywhere in Missouri and never have.

7                   With regard to DS3 and DS1 transport,  
8     again, there's only a minority of our central offices that  
9     are at issue from this. The FCC's transition plan allows  
10    the CLECs to continue the in-place arrangements that they  
11    have for a period of a year at a slightly higher price.

12                  Just so there's no mistake, we are not  
13    claiming and we are not going to discontinue providing  
14    DS1, DS3 transport or UNE-P to existing customers at  
15    existing locations. They continue to have it under the  
16    transition plan. It will ultimately be billed at the  
17    higher rate that the FCC has set out.

18                  The CLECs' position comes down to this,  
19    that there's no changes to be made as a result of the  
20    FCC's Order until the parties negotiate an amendment. By  
21    that they do seek to continue unlawful UNEs in effect both  
22    for new and existing customers. But the FCC has made it  
23    abundantly clear that its Order as to the transition  
24    period was self-effectuating and takes effect immediately.

25                  With regard to UNE-P, the FCC placed a

1 nationwide ban on UNE-P that, quote, does not permit  
2 competitive LECs to add new UNE-P arrangements, unquote.  
3 It's the TRRO, paragraph 227. CLECs try to get around  
4 this by saying, except as otherwise provided in this  
5 Order, which they seek to mean you must comply with the  
6 change of law provisions. That position makes no sense  
7 since it effectively eliminates the transition  
8 requirements and the ban on new arrangements.

9 Paragraph 5 of the FCC's TRRO is very clear  
10 on this. It provides, quote, this transition plan applies  
11 only to the embedded customer base and does not permit  
12 CLECs to add new switching UNEs. It doesn't say embedded  
13 base. It says no new switching UNEs.

14 Again, in paragraph 199, the FCC says,  
15 quote, this transition plan shall apply only to the  
16 embedded customer base and does not permit competitive  
17 LECs to add new customers using unbundled access to local  
18 circuit switching. If there's doubt in your mind, you  
19 need to look at the FCC's rule.

20 In the Order that is 51.319(d), and  
21 subsection 2, Roman Numeral 3 on page 148 of the FCC's  
22 order spells that out for you.

23 COMMISSIONER GAW: I'm sorry. I didn't  
24 catch that.

25 MR. LANE: It's page 148 of the FCC's

1 Order. It's Rule 51.319(d) (2), small Roman Numeral 3,  
2 triple I. Let me read the first and the last sentences of  
3 that. The first sentence of that provides that  
4 notwithstanding paragraph 2D1 of this section, for a  
5 12-month period from the effective date of the Triennial  
6 Review Remand Order, an incumbent LEC shall provide access  
7 to local circuit switching on an unbundled basis for a  
8 requesting carrier to serve its embedded base of end user  
9 customers.

10 I read that pretty clearly as applying to  
11 existing lines for existing customers. The CLECs prefer  
12 to read otherwise, but if there's doubt in your mind, look  
13 at the last sentence of that section. It says, quote,  
14 requesting carriers may not obtain new local switching as  
15 an unbundled network element, unquote. There is no  
16 provision to continue to add lines for existing customers  
17 at either existing or new locations. The rule itself is  
18 very clear, as is the Order.

19 With regard to transport UNEs,  
20 paragraph 142 of the TRRO states, quote, these transition  
21 plans apply only to the embedded customer base and do not  
22 permit competitive LECs to add new dedicated transport  
23 UNEs pursuant to Section 251(c) (3) where the Commission  
24 determines that no Section 251(c) unbundling requirement  
25 exists. The rule again is to the same effect, and if

1   there's any doubt in your mind, look at the rule. That  
2   rule with regard to transport is 51.319(e)(2), small  
3   double IC and small triple IC.

4                   With regard to DS1, in the rule the FCC  
5   states for a 12-month period beginning on the effective  
6   date of the TRRO, any DS1 dedicated transport UNE that a  
7   competitive LEC leases from the incumbent LEC as of that  
8   date but which the incumbent LEC is not obligated to  
9   unbundle pursuant to law shall be available at the rate  
10  provided. Again, in the last sentence of that, where  
11  incumbent LECs are not required to provide unbundled DS1  
12  transport pursuant to paragraphs E2 Roman Numeral 2A or  
13  E2 Roman Numeral 2B of this section, requesting carriers  
14  may not obtain new DS1 transport as unbundled network  
15  element.

16                  It really can't be clearer when they say it  
17  has to be provided as of the effective date of the Order.  
18  If it wasn't leased on that date, they can't order new,  
19  where the central office meets the requirements that the  
20  FCC lays out for non-impairment.

21                  The same is true with regard to high  
22  capacity loops. Paragraph 195 of the TRRO states, quote,  
23  these transition plans shall apply only to embedded  
24  customer base and do not permit competitive LECs to add  
25  new high capacity loop UNEs pursuant to Section 251(c)(3)

1 where the Commission has determined that no Section 251(c)  
2 unbundling requirement exists.

3 Again, the rule is to the same effect. The  
4 rule is Section 51.319(a)(4), small triple I and  
5 51.319(a)(5), small triple I. If you look at those, they  
6 again make it clear that it has to be a line that's in  
7 effect as of the date of the Order.

8 There's discussion about on the transport  
9 side and on the loop side, does it meet the criteria, and  
10 what does paragraph 234 of the FCC's Order means -- mean?  
11 The implication, I think, that the CLECs would like to  
12 leave you with is that it's very unclear exactly how to  
13 apply and what the FCC Order means, and they have the  
14 right to certify whatever they want. But if you look at  
15 the Order, I think any confusion is quickly cleared up.

16 The FCC does not consider its Order to be  
17 one that requires a lot of analysis. It says in the first  
18 sentence in paragraph 234, quote, we recognize that our  
19 rules governing access to dedicated transport and high  
20 capacity loops evaluate impairment based upon objective  
21 and readily obtainable facts such as the number of  
22 business lines or the number of facilities-based  
23 competitors in a particular market. These are facts that  
24 are obviously peculiarly within the knowledge of the  
25 incumbent LEC, and that is why -- and they're not in the

1 knowledge of the CLECs.

2                   They have no idea how many lines we have in  
3 a particular central office until we tell them. And so we  
4 have. We've provided the information in a filing with the  
5 FCC. We made it known to them in an accessible letter, in  
6 a series of accessible letters that Mr. Magness outlined  
7 for you. We've let them know that the information is  
8 there, ready, waiting for them to review if they so  
9 choose.

10                   And what they were provided with on March  
11 11th, I was named as the designated contact for people to  
12 see the information. No one has contacted me and asked to  
13 see the information.

14                   Instead, some of the carriers like Birch  
15 have issued letters to us without the benefit of having  
16 reviewed the information. For all of the states they say,  
17 we hereby certify that we're entitled to continue ordering  
18 regardless of what you say, because you really haven't  
19 proved it as far as we're concerned. Well, they haven't  
20 looked at the data. How can they certify what's in our  
21 central office, how many lines we have out there until  
22 they've at least looked at the data?

23                   And that's all we're asking them to do,  
24 look at the data, and if you've got legitimate issue that  
25 you raise, or as the FCC says in paragraph 234, provide an

1     indication that the UNE meets the relevant factual  
2     criteria, then we have to proceed to honor the request and  
3     dispute it later.

4                     But they have to look at the data, unless  
5     they have some knowledge that I don't know they have to be  
6     able to determine how many lines there are at a particular  
7     central office and how many fiber-based collocaters there  
8     are at a particular central office before they can make  
9     the kind of indication that  
10    paragraph 234 requires of them.

11                    CLECs don't dispute the authority of the  
12    FCC to supersede interconnection agreements, and they have  
13    no basis to do so. The courts have found the provision of  
14    these UNEs to be unlawful, and these agreements exist only  
15    to implement those unlawful orders. We cite cases in our  
16    response to the CLECs that indicate pretty clearly that  
17    the FCC maintains the authority to enforce the law and to  
18    correct the wrongs that it has done as it has done in this  
19    case.

20                    The issue is not whether they have the  
21    authority. I think the issue in the CLECs' minds is  
22    whether they've done so. We believe pretty clearly that  
23    they have. Even the Georgia Commission which CLECs cite  
24    in their supplemental motion makes it clear that the FCC  
25    does have the authority to do that.



1                   We address Section 271 in our filing that  
2 we made in response to the Commission's Order. The CLECs  
3 don't rely on that here today in their oral argument, so I  
4 won't address it other than to say it's very clear that  
5 Section 271 does not provide any authority for an order  
6 from this Commission like the joint CLECs seek.

7                   Let me turn to the other states because  
8 that issue has been raised here. I'll say that the vast  
9 majority of the states where this issue has been -- well,  
10 actually, the issue exists everywhere under the Order, but  
11 the vast majority of the states have not granted the  
12 extraordinary relief sought by the CLECs here. Those  
13 states that have granted on the whole have granted only a  
14 portion of the relief sought and typically only as to a  
15 limited number of CLECs.

16                  The states listed in the Complainants'  
17 supplemental motion reflect the limited relief granted and  
18 the significant differences in governing state law. I  
19 think there's some misstatements made about what some of  
20 the other states have done, so I'm going to try to take a  
21 few minutes to try to correct some of those.

22                  In Illinois, which Staff I think  
23 incorrectly indicates hadn't addressed the issue, they  
24 actually did. They did it contrary to what our position  
25 is. But there's a reason they had the authority to act

1     when this Commission does not.

2                     The Illinois Order, which you can read  
3     attached to the CLECs' supplemental motion, makes it clear  
4     that that commission's actions were taken -- undertaken  
5     pursuant to 220 ILCS, Section 5/13-515E, and under that  
6     section of the Illinois statute, the Illinois Commerce  
7     Commission is authorized to issue, quote, an Order for  
8     emergency relief may be granted without an evidentiary  
9     hearing upon a verified factual showing that the party  
10    seeking relief will likely succeed on the merits, that the  
11    party will suffer irreparable harm in its ability to serve  
12    customers if emergency relief is not granted, and that the  
13    order is in the public interest, unquote.

14                    There is no provision in Missouri law which  
15    gives this Commission comparable authority to issue an  
16    injunctive relief. And as I indicated earlier, the case  
17    law which I cited is absolutely and abundantly clear that  
18    the Commission has no equitable authority whatsoever.

19                    So Illinois can't stand as precedent  
20    because there's a lack of authority for this Commission to  
21    act, unlike the specific authority that was delegated to  
22    the Illinois Commission. We're disputing in Illinois so  
23    you know the validity of its Order -- of that Commission's  
24    Order. But it's clear that it's different from Missouri.

25                    In Indiana, in Cause No. 42749, the

1 Commission issued an Order on March 9th this year, and in  
2 that the Commission rejected the claim that new UNE-Ps  
3 must be allowed until the interconnection agreements are  
4 amended. On page 6 of that Order, the Indiana Commission  
5 stated, quote, we do not find joint CLECs' position to be  
6 the more reasonable interpretation of the TRRO. First, as  
7 stated earlier, the FCC is clear in its intent to  
8 eliminate UNE-Ps. It is also clear that the FCC intends  
9 to eliminate UNE-P from its existing requirement to be  
10 unbundled pursuant to Section 251 of the Act.

11 For some purposes pursuant to  
12 Section 251/252 of the Act the interconnection agreements  
13 exist so parties can implement the unbundling requirements  
14 of the Act. If mass market circuit switching is no longer  
15 an element required to be unbundled pursuant to  
16 Section 251/252 of the Act, it can therefore no longer be  
17 required to be unbundled within the context of an  
18 interconnection agreement for the stated purposes of  
19 Sections 251 and 252.

20 They repeated this on page 7 and 8 in that  
21 same order where they said, does not require  
22 interconnection agreements to be amended to implement the  
23 FCC's Order with regard to new UNE-P. It then refused to  
24 grant the CLECs' request to order SBC Indiana to comply  
25 with the change of law provisions of the interconnection

1 agreement. That's on page 9 of the Order. And again,  
2 this is an Order that the joint CLECs have attached to  
3 their supplemental motion that they filed.

4                   In California, Mr. Magness indicates that  
5 that is an area where -- or a state where the Commission  
6 has found that the change of law provisions must be  
7 complied with. I respectfully disagree with that. The  
8 order that he attaches with the joint CLECs to their  
9 supplemental motion makes clear that that's not true.

10                   In California there was a joint motion to  
11 continue the UNE-P, and in a March 11th Order in  
12 Investigation No. 95.04-044, the Commissioner to whom that  
13 case was assigned held at page 8, quote, therefore, since  
14 there's no obligation and a national bar on the provision  
15 of UNE-P, we conclude that new arrangements refers to any  
16 new UNE-P arrangements, whether to provide service for new  
17 customers or to provide a new arrangement to existing  
18 services. The TRRO clearly bars both, unquote.

19                   Despite that finding, the California  
20 Commission required SBC California to continue to process  
21 orders for the existing customer base, but only until  
22 May 1st of this year. That was a time it gave to amend  
23 any interconnection agreements as necessary. But as you  
24 can see, no new orders, and only until May 1.

25                   In Kansas, which is also attached to their

1 joint supplemental -- or motion to supplement, the  
2 Commission stated on page 4, paragraph 9, quote, the  
3 Commission agrees with SWBT's position regarding the  
4 self-effectuating nature of the TRRO as to serving new  
5 customers, unquote.

6                   With regard to a claim of irreparable harm  
7 in that case, the Kansas Corporation Commission also  
8 stated that any claim of irreparable harm for the CLECs  
9 was, quote, no different from the harm that they must  
10 inevitably face in the relatively short term as a result  
11 of implementing the FCC's new rules. On the other hand,  
12 the sooner the FCC's new rules can be implemented, the  
13 sooner rules held to be illegal can be abrogated.

14                   The Kansas Commission allowed the CLECs to  
15 issue orders only with regard to existing customers and  
16 only until they had completed some proceeding that's  
17 underway there that's scheduled to be completed on  
18 April 29.

19                   With regard to Ohio, Mr. Magness also  
20 indicated that that was one where the state commission had  
21 determined that the change of law provisions must be  
22 complied with. As you'll see from reading the Order, on  
23 page 3, the Ohio Commission stated that the FCC clearly  
24 determined that no orders for new customers for subloops,  
25 switching -- I'm sorry -- for switching loops and

1 transport need be worked. That Commission ordered that  
2 work orders for new customers would only have to be worked  
3 in Ohio until May 1.

4               So in summary, let me say this, that first  
5 this Commission does not have the authority to issue the  
6 injunctive relief that the joint CLECs ask for. The law  
7 doesn't provide it. Unlike Illinois and some other states  
8 where the commissions are specifically given authority to  
9 issue injunctions, they are not issued that authority here  
10 and don't have it.

11              Second, even if the Commission had the  
12 authority to issue some sort of injunctive relief as  
13 requested here, they should not because none of the four  
14 factors have been met where the law would require each of  
15 the four factors to be met. There's no substantial  
16 likelihood of prevailing on the merits, there's no showing  
17 of irreparable harm, and there's certainly been no  
18 evidence before the Commission in the hearing to establish  
19 that. The harm to the Defendant SBC Missouri is clearly  
20 equal to or greater than the harm claimed by the joint  
21 CLECs and for the public interest.

22              Third, finally, from a substantive merit  
23 perspective, the joint CLECs are simply wrong. The FCC's  
24 Order is self-effectuating and they made it clear that it  
25 was to be implemented immediately, and they're not

1 entitled to continue UNE-P and they're not entitled to  
2 continue to order switching -- I'm sorry -- to order  
3 unbundled loops and transport except in compliance with  
4 the FCC's TRRO.

5 Thank you.

6 JUDGE MILLS: Thank you. Questions from  
7 the Bench, Chairman Davis?

8 CHAIRMAN DAVIS: Okay. I'm a little late  
9 here, but I think I understood all the legal arguments  
10 that you laid out there. Is there anything -- in your  
11 opinion, is there anything in the contract that might  
12 require you to keep providing these services until a new  
13 arrangement is worked out?

14 MR. LANE: No, Chairman, there is not. The  
15 position that we advocate and that we believe is correct  
16 as a matter of law, that the FCC's Order is itself  
17 self-effectuating and it overrides any existing  
18 interconnection agreements. The law is clear on that.

19 CHAIRMAN DAVIS: Okay. I'm sorry. So the  
20 FCC Order is self-effectuating and overrides any existing  
21 order; is that correct?

22 MR. LANE: That is correct. And that's a  
23 position that the Georgia Commission, which nevertheless  
24 unfortunately ordered the change of law provisions be  
25 complied with, agreed with in the order that the joint

1 CLECs have attached to theirs, and the difference was in  
2 that case they ordered -- determined that that's not what  
3 the FCC had done. But there's no question that that's  
4 within the FCC's authority to do so, and they've done so  
5 on several occasions in the past, including the interim  
6 order that preceded this one.

7                   We cite in our response that we filed to  
8 the joint CLECs' complaint the law that makes it clear  
9 that the administrative agency that issued an unlawful  
10 order has the power to undo its acts, which is what it has  
11 done here. We had an unlawful UNE-P regime that was in  
12 existence for nine years, that has been declared unlawful  
13 three different times by the court, and now the FCC has  
14 attempted to comply in some respects with those prior  
15 court orders, and it has done so by saying that its  
16 provisions that it's ordering are to be implemented  
17 immediately, period. And the rules that it has issued  
18 make that abundantly clear.

19                   CHAIRMAN DAVIS: Isn't there one state that  
20 don't they just refer all their telecom stuff to the FCC  
21 now? Don't they just --

22                   MR. LANE: You know, I think there is.

23                   CHAIRMAN DAVIS: Didn't one state just get  
24 fed up with the FCC and say, you know what, we're just  
25 going to send it all to you?



1                   MR. LANE: I think it might have been  
2 Virginia, but I'm not 100 percent positive on that.

3                   CHAIRMAN DAVIS: Maybe we should just  
4 invite the FCC to come out here and just settle all this.  
5 Thank you.

6                   JUDGE MILLS: Commissioner Murray?

7                   COMMISSIONER MURRAY: Thank you.

8                   Mr. Lane, assuming that we agree that the  
9 FCC order is self- effectuating, what would be the remedy  
10 for a party claiming that embedded customer base in that  
11 FCC order means something different? In other words, if  
12 there is a dispute over the language of a  
13 self-effectuating order, where does that dispute take  
14 place?

15                  MR. LANE: It probably depends upon what  
16 relief is being sought. And when I say self-effectuating,  
17 just so it's clear, I'm talking about the provisions of  
18 the rule itself as you read them and what they say. And  
19 paragraph of the TRRO itself uses the phrase  
20 self-effectuate, so there's some support for that.

21                  If there's -- if there's a dispute as to  
22 the application of it, and if we do something that the  
23 joint CLECs believe is incorrect, then they have a remedy  
24 to sue us in court if they want to exercise that. And  
25 they can seek, I suppose, injunctive relief there in

1 federal court if they think they have that kind of  
2 authority, but I don't think they'd meet the criteria for  
3 that.

4 COMMISSIONER MURRAY: Can they seek any  
5 relief at the FCC?

6 MR. LANE: Sure. I mean, I'm sure they can  
7 ask for clarification of the order if they believe that  
8 our interpretation is improper.

9 And I'd point out, too, Commissioner, that  
10 the fact that we're at this late date isn't at our  
11 choosing. We told the joint CLECs, as well as all the  
12 other CLECs with whom we deal, back on February 11 of our  
13 interpretation of the Order, and they waited more than  
14 three weeks before they came to this Commission.

15 COMMISSIONER MURRAY: Is there anything,  
16 any language in the TRRO that you can point to that  
17 clarifies the ILEC's remedy if a CLEC just blindly --  
18 blindly is not a good adjective there, but just very  
19 superficially self-certifies, in other words, fills out a  
20 piece of paper and says --

21 MR. LANE: For the loops and transport  
22 issues?

23 COMMISSIONER MURRAY: Yes. Yes.

24 MR. LANE: I don't know what I could point  
25 to in the FCC's order that provides the specific remedy

1 for claims like that that have no basis and no  
2 justification. I think when we look at paragraph 234, it  
3 requires that the CLEC when they submit a request, they  
4 have to indicate that the UNE meets the relevant factual  
5 criteria.

6                   And if we've provided them with the  
7 information that shows that they are not impaired under  
8 the FCC's Order without it, then they have some obligation  
9 to present something that shows that that's -- that they  
10 have some independent knowledge, that the number of lines  
11 that we have in a particular wire center or that the  
12 number of collocaters in that wire center if that's what's  
13 at issue don't meet the criteria.

14                   And if they do provide some indication,  
15 some support for that, then under the Order we'd have to  
16 process it and dispute it later. But when we dispute it,  
17 this Order doesn't provide what the remedies are, if we're  
18 shown to be right and they're shown to be wrong.

19                   COMMISSIONER MURRAY: Okay. Section 234  
20 provides that we therefore hold that to submit an order to  
21 obtain a high capacity loop or transfer UNE, a requesting  
22 carrier must undertake a reasonably diligent inquiry and  
23 based on that inquiry self-certify that to the best of its  
24 knowledge its request is consistent with the requirements  
25 discussed in Parts 4, 5 and 6 above. And then looking

1 back at Parts, 4, 5 and 6, the unbundling framework, the  
2 dedicated interoffice transport and the high capacity  
3 loops sections of this Order, and that it is therefore  
4 entitled to unbundled access to the particular network  
5 elements sought pursuant to Section 251(c)(3).

6                   Although this Order sets out what the CLEC  
7 has to do, I'm not sure it's clear who determines whether  
8 the CLEC has met that requirement. The FCC decided not to  
9 use forms, not to provide forms for that purpose, correct?

10                   MR. LANE: Under Footnote 658, yes.

11                   COMMISSIONER MURRAY: We do not believe it  
12 is necessary to address the precise form that such a  
13 certification must take, but we note that a letter sent to  
14 the incumbent LEC by a requesting carrier is a practical  
15 matter of certification. And then it refers back to the  
16 Triennial Review -- earlier Triennial Review Order, which  
17 I'm -- I haven't referred back to to see what that  
18 explanation is.

19                   But they do go on to say in that same  
20 footnote, although we again decline to adopt specific  
21 recordkeeping requirements, we expect that requesting  
22 carriers will maintain appropriate records that they can  
23 rely on to support their local usage certification. What  
24 kinds -- what record -- kinds of records are being  
25 referenced there, do you think?

1                   MR. LANE: I don't know. It's difficult to  
2 answer because the criteria that the FCC set out in the  
3 Order is based upon the number of business lines that are  
4 served in a particular wire center and/or the number of  
5 fiber-based collocaters in a particular wire center.  
6 That's not information that the CLECs have ready access to  
7 other than from through the ILEC itself.

8                   So I don't know what records they can  
9 maintain that justifies self-certification in light of  
10 our provision of the information that shows that a small  
11 minority of our wire centers meet the criteria for DS  
12 loops and a small minority of our wire centers meet the  
13 criteria for non-impairment of DS1/DS3 transport.

14                  COMMISSIONER MURRAY: Well, when they refer  
15 to maintaining appropriate records that they can rely upon  
16 to support their local usage certification, are they  
17 needing to supply some information that they are using a  
18 certain number of network elements in a particular wire  
19 center or --

20                  MR. LANE: You know, that's -- certainly  
21 that's not the test. The test is to the total number of  
22 business lines that are served by the ILEC, a particular  
23 wire center. And the CLECs could certainly have records  
24 of how many lines it has in that wire center, but it  
25 wouldn't have the records to show what other lines were in

1 the wire center.

2 COMMISSIONER MURRAY: Well, being left very  
3 much in the dark, I think we all have been left very much  
4 in the dark about what some of these things mean.

5 Going on then to the ILEC's responsibility  
6 under 234, upon receiving a request for access to a  
7 dedicated transport or high capacity loop UNE that  
8 indicates that the UNE meets the relevant factual criteria  
9 discussed in Sections 5 and 6 above, the incumbent LEC  
10 must immediately process the request.

11 First of all, I guess the request must  
12 indicate that the UNE meets the relevant factual criteria  
13 discussed in Sections 5 and 6?

14 MR. LANE: Yes, which means that the wire  
15 center at issue where they're ordering either the DS3  
16 loops or the wire center between which they seek DS1 or  
17 DS3 transport must not have the number of business lines  
18 that the FCC set out and/or not have the relevant number  
19 of fiber-based collocaters.

20 COMMISSIONER MURRAY: So the incumbent does  
21 not have the obligation to process the request immediately  
22 if that request does not meet -- does not indicate that  
23 the UNE meets the relevant factual criteria?

24 MR. LANE: I think there has to be some  
25 information presented by the CLEC that demonstrates why

1 they think that there are not a relevant number of  
2 business lines and/or the relevant number of fiber-based  
3 collocaters in a particular central office. If they do  
4 that, then we have to process the request. But can they  
5 simply say, as far as I know without doing any inquiry, I  
6 don't think so. I think they have to do a reasonably  
7 diligent inquiry. And certainly when we say here's the  
8 information, come and look at it, I would think that  
9 should be part of a reasonably diligent inquiry, and then  
10 if there's some reason to dispute what we have provided to  
11 them, then they can certify that and we'll take it from  
12 there.

13 COMMISSIONER MURRAY: And once they provide  
14 a request that indicates that the UNE meets the relevant  
15 factual criteria, even if you disagree with it, you have  
16 to process the request and then come to the state  
17 commission through the dispute resolution procedures?

18 MR. LANE: Yes. I think you're reading  
19 what the Order says, and the issue, if there's one that  
20 comes in the future, would be, have they provided some  
21 indication that that central office doesn't meet the  
22 criteria when they say that it does.

23 It's hard to know exactly how to handle  
24 that now and what the different variations might be, but  
25 what we have today, for example from Birch, is a letter

1     that purports to certify for all central offices in all of  
2     SBC -- SBC's territory that none of the offices meet the  
3     criteria because they don't have enough information to say  
4     that it does. I don't think that's probably sufficient.

5                   COMMISSIONER MURRAY: Okay. I wanted to go  
6     into that specifically. What specific requests for access  
7     to dedicated transport or high capacity loop UNE do we  
8     have from these complainants, do you have?

9                   MR. LANE: Let me make sure I'm following  
10    the question. You know, as I mentioned today with regard  
11    to high capacity loops, none of them order DS3s today, and  
12    we don't meet the criteria right now for DS1 in any of the  
13    central offices. So there has been no request that I know  
14    of for DS3s either before or after the accessible letters  
15    were sent out.

16                  With regard to transport, DS1 and DS3  
17    between the 12 or 13 central offices that are at issue  
18    here, I'm not aware of orders having been submitted, but  
19    that's not to say they haven't been. If they have been at  
20    least at this point obviously we've complied with the  
21    Commission's -- well, with the TRRO that says they've got  
22    to self-certify.

23                  So I'm not aware, but again, Commissioner,  
24    I have not inquired as to each of the CLECs, what orders  
25    they've issued and the like. I don't know the answer to



1     that.

2                   COMMISSIONER MURRAY:   Okay.  I'm just  
3     trying to understand what -- what standing these CLECs  
4     have to be bringing this action today if they have made  
5     a -- if they have self-certified for -- and I believe you  
6     said Birch purports to self-certify in every wire center.

7                   MR. LANE:   That's my understanding.

8                   COMMISSIONER MURRAY:   But they have not  
9     made any requests for particular --

10                  MR. LANE:   If they have, I'm not aware of  
11     it, Commissioner.  That's not to say they haven't, because  
12     I have not made that specific inquiry.  What they say is  
13     this:  They say in their letter, and this was from  
14     March 9th, quote, at this juncture our reasonably diligent  
15     inquiry leads us to believe that Birch is justified in  
16     placing orders for high capacity loop and transport UNEs  
17     consistent with the self-certification process outlined in  
18     the FCC's TRRO.  Unless and until SBC prevails on a  
19     dispute regarding any UNE order, TRRO 234 says the ILEC  
20     has to provision high capacity loops and the ILEC must  
21     identify any provisioned UNE-Ps to dispute.

22                  COMMISSIONER MURRAY:   But they've not  
23     requested for you any provisions that you denied; is that  
24     correct?

25                  MR. LANE:   I'm not aware of any.

1                   COMMISSIONER MURRAY: So even if we were  
2   able to grant injunctive relief, there's nothing to  
3   enjoin, is there?

4                   MR. LANE: I think what they're asking for  
5   is a continuing injunction for some period of time that  
6   would say if they do submit an order, that any kind of  
7   certification that they give must be accepted and we must  
8   work the order. I think that's what they're asking for.

9                   COMMISSIONER MURRAY: They want a  
10   declaratory ruling that says that?

11                  MR. LANE: Declaratory ruling that that's  
12   what the TRRO means and an injunction that requires us to  
13   process orders in conjunction with their interpretation of  
14   the TRRO

15                  COMMISSIONER MURRAY: Well, wouldn't it be  
16   appropriate if at the time that a CLEC requested certain  
17   access and self-certified, that they were entitled to it,  
18   and if at that time SBC said no, we disagree and just  
19   refused to provision it, wouldn't it be appropriate for  
20   the CLEC at that time, if they believed you were acting  
21   against the provisions in the TRRO, to come to us at that  
22   time for resolution?

23                  MR. LANE: They certainly could. I mean,  
24   the issue really is going to come down to what are they  
25   going to provide that shows that they did the reasonably

1 diligent inquiry and that they have some indication that  
2 the number of lines that we say are at a central office  
3 aren't there or that the number of fiber collocaters that  
4 we say aren't there. If they have some rationale for that  
5 then, you know, I think we will have to say, okay, we'll  
6 have to provision and dispute. If they have no rationale  
7 whatsoever, then I don't think that's what paragraph 234  
8 requires us to look at. Then in that case they could  
9 dispute.

10 It's hard to envision because I don't know  
11 exactly what they'll say to meet the self-certification  
12 requirements. Until we see that, we won't know how to  
13 respond to it.

14 COMMISSIONER MURRAY: But you agree that if  
15 they do provide -- if they do their reasonably diligent  
16 inquiry and based upon that self-certify and request  
17 access, that you must provision it?

18 MR. LANE: Under those circumstances, yes,  
19 if they have -- as the paragraph 234 states, they provide  
20 some indication that the central office does not meet the  
21 test, then we would have to do that.

22 COMMISSIONER MURRAY: And then if you  
23 dispute their -- your requirement to provide it, you have  
24 to come to us?

25 MR. LANE: Yes.

1 COMMISSIONER MURRAY: You have to do it  
2 through the dispute resolution process?

3 MR. LANE: Yes.

4 COMMISSIONER MURRAY: And as to the other,  
5 the dispute about what you're really required under the  
6 TRRO to provide as to embedded customer base, you're  
7 saying that their relief would be either through  
8 injunctive relief at the circuit court or clarification at  
9 the FCC?

10 MR. LANE: Those avenues are available to  
11 them. I would say at the Federal District Court. I think  
12 this is a federal law issue.

13 COMMISSIONER MURRAY: You're right. Is  
14 Birch the only one that has self-certified?

15 MR. LANE: I don't know the answer to that.  
16 It's the only one that I'm aware of, but I have not  
17 inquired as to each of the CLECs whether they have  
18 self-certified with regard to any particular central  
19 office. I don't know.

20 COMMISSIONER MURRAY: Thank you.

21 JUDGE MILLS: Commissioner Gaw?

22 COMMISSIONER GAW: Thank you, Judge.

23 Mr. Lane, you mentioned Illinois relying on  
24 some particular state provision in regard to the relief it  
25 granted.

1 MR. LANE: Yes.

2 COMMISSIONER GAW: Do you have similar  
3 statutory quotes for every other state that's issued an  
4 order in this case?

5 MR. LANE: No.

6 COMMISSIONER GAW: Do you believe that they  
7 have similar state statutory authority to stay the  
8 proceeding or they would not have the authority to enter  
9 the order?

10 MR. LANE: I do not know the answer to  
11 either of the two questions. Whether there's specific  
12 statutory authority, I don't know, and whether there's  
13 case law in that particular state that makes it clear that  
14 the commission does not have such authority, I don't know  
15 the answer to either one of those with regard to the other  
16 states that I responded to the joint CLEC supplemental  
17 submission with regard to.

18 COMMISSIONER GAW: How does this state  
19 commission derive its authority to hear cases dealing with  
20 matters that have to do with the Telecommunications Act of  
21 1996, the Federal Act?

22 MR. LANE: I would say that depending on  
23 what the issue is, it's going to be federal law. You've  
24 been given some rights specifically under the statute to  
25 hear arbitration matters that are brought to you.

1                   COMMISSIONER GAW: And you don't have  
2 anything in those other orders other than in Illinois to  
3 suggest that there's some requisite state authority that  
4 has to be coupled in with the authority that the state  
5 commission has derived through federal law. Is that  
6 something that --

7                   MR. LANE: Let me say it -- two things, I  
8 guess.

9                   COMMISSIONER GAW: All right.

10                  MR. LANE: I'm not aware of any provision  
11 of the Federal Telecommunications Act that purports to  
12 give this Commission the right to issue injunctive relief.

13                  COMMISSIONER GAW: And I'm jumping to the  
14 conclusion that you must believe that those other states  
15 either had some state provision that said that they could  
16 enter their orders or that they somehow crafted their  
17 orders so that they were in compliance with the federal  
18 law or that those orders themselves were beyond the  
19 jurisdiction of those states. I guess I'm asking you what  
20 it was in your opinion.

21                  MR. LANE: This supplemental filing was  
22 made last night at some time.

23                  COMMISSIONER GAW: Yes.

24                  MR. LANE: And I read those this morning  
25 between the prehearing and now, and so I can't answer all

1 of the questions about those other states.

2 COMMISSIONER GAW: I'm having difficulty  
3 even asking the questions because I got back so late last  
4 night from another hearing we had, and other Commissioners  
5 are in the same boat as I am.

6 MR. LANE: I don't think -- you know,  
7 personally, I don't think you need to look to the other  
8 states. I think you look to this state and you can say  
9 pretty clearly you don't have the authority to issue any  
10 kind of equitable order like is being requested here. You  
11 just don't. I don't know with regard to the other states  
12 whether they have similar bars on them and/or whether they  
13 have --

14 COMMISSIONER GAW: Maybe we can find out.  
15 Someone can find out for us, you or opposing counsel or  
16 someone, because I'll ask them the same question in a  
17 minute so I can find out if they have cites for me.

18 MR. LANE: I'll say this: There's often a  
19 dispute in issues that arise as to what the scope of a  
20 state commission's authority is and what is the interplay  
21 between state law and federal law, and there are  
22 frequently times when state commissions assert that they  
23 have the right to do something under state law even if  
24 it's not specifically authorized under federal law. And  
25 generally -- generally we're not in agreement with that

1 concept.

2 COMMISSIONER GAW: Do you have the filing

3 that you made in Illinois on your arguments with you?

4 MR. LANE: No, I do not.

5 COMMISSIONER GAW: Would you provide those,

6 please?

7 MR. LANE: Yes.

8 COMMISSIONER GAW: I'd like to see your

9 arguments on the Illinois, that case. Did you handle

10 that?

11 MR. LANE: No.

12 COMMISSIONER GAW: But you have access to

13 it?

14 MR. LANE: I mean, yes, I'll get it.

15 COMMISSIONER GAW: That would be great.

16 Tell me where in 234 of the FCC Order that it says that

17 the certification document must state that the carrier,

18 what the carrier's findings were after it did its

19 reasonably diligent inquiry.

20 MR. LANE: I think it's the provision that

21 they say they have to provide something that indicates

22 that the UNE meets the relevant factorial criteria.

23 COMMISSIONER GAW: Just point to me where

24 that is.

25 MR. LANE: Sure. It's 9th and 10th --



1 beginning I think of the 9th line upon receiving request.

2 COMMISSIONER GAW: Okay.

3 MR. LANE: Upon receiving a request for  
4 access dedicated transport or high capacity loop UNE that  
5 indicates that the UNE meets the relevant factorial  
6 criteria discussed in Sections 5 and 6 above, incumbent  
7 LEC must immediately process the request.

8 COMMISSIONER GAW: Okay. So your  
9 interpretation of that is that it requires specific  
10 statements in the certification that gives the grounds for  
11 its certification, not just that it can self-certify that  
12 it has reviewed it and finds it -- finds that it meets the  
13 requirements?

14 MR. LANE: So it's -- so it's clear, I  
15 mean, that the requirements that we're talking about, the  
16 issue is how many business lines does the ILEC serve in  
17 the wire center and/or how many fiber-based collocaters  
18 are in that wire center.

19 COMMISSIONER GAW: You're representing that  
20 your interpretation of that is that the letter that's  
21 being sent to in this case Bell would have to list all of  
22 the reasons that they -- that they found in their inquiry  
23 that allowed them to certify that they thought that they  
24 met the requirements?

25 MR. LANE: I do think they need to provide

1 the basis of their assertion that it meets the  
2 requirements.

3 COMMISSIONER GAW: When you say that, what  
4 does that mean?

5 MR. LANE: Well, to be honest, I don't  
6 know --

7 COMMISSIONER GAW: Can you be more  
8 specific?

9 MR. LANE: To me it's fairly cut and dried  
10 how many lines there are in a central office. It's  
11 relatively cut and dried. Now, I know that Mr. Magness  
12 has tried to make it sound like it's a bigger issue than  
13 it is, but the FCC in its first sentence in paragraph 234  
14 I think makes it clear that they see it as a fairly  
15 objective, readily obtainable fact, and so --

16 COMMISSIONER GAW: And I'm just trying to  
17 understand how you read into this in your argument, how  
18 you read into this that it requires setting forth of some  
19 criteria in these -- in these certification letters.

20 MR. LANE: Well, they're required to do a  
21 reasonably diligent inquiry.

22 COMMISSIONER GAW: And I'm -- go ahead. I  
23 have a thought in my head. I'm not sure -- I'm just  
24 trying to see if there's a -- if you're saying there is  
25 ambiguity in the way the sentence is reading or not, and

1 it says --

2 MR. LANE: I think that --

3 COMMISSIONER GAW: When it says --

4 MR. LANE: -- each of us would like to

5 rewrite it.

6 COMMISSIONER GAW: Yeah, I'm sure. And all

7 of you are trying. I understand it's now in the Third

8 Circuit; is that true? It went to the Third Circuit now.

9 MR. LANE: Yes. I'm sorry. You mean the

10 TRRO itself?

11 COMMISSIONER GAW: Yes.

12 MR. LANE: It was assigned to the Third

13 Circuit, that is correct. All of the appeals, yes.

14 COMMISSIONER GAW: All of them.

15 MR. LANE: Well, they do a lottery and

16 that's where it was assigned in the lottery. That's not

17 to say it will necessarily stay there.

18 COMMISSIONER GAW: Okay. Will that be

19 argued as well?

20 MR. LANE: Sure.

21 COMMISSIONER GAW: Upon receiving a request

22 for access to a dedicated transport or a high capacity

23 loop UNE that indicates that the UNE meets the relevant

24 factual criteria, et cetera. When it says that indicates,

25 I'm having -- I'm having some difficulty understanding how

1     you read into that that that requires there to be  
2     something, some specific facts or alleged facts that have  
3     to be set forth.

4                     MR. LANE: Well, the --

5                     COMMISSIONER GAW: Other than to --

6                     MR. LANE: The FCC has said that the number  
7     of lines and the number of locators, those are objective  
8     and readily obtainable facts. They say that in the first  
9     sentence of that.

10                    COMMISSIONER GAW: Yes.

11                    MR. LANE: Then they say they have to do  
12     reasonably diligent inquiry.

13                    COMMISSIONER GAW: All right.

14                    MR. LANE: And then they have to certify  
15     that -- provide something that indicates that it meets the  
16     criteria or in this case obviously that it doesn't meet  
17     the criteria for non-impairment.

18                    COMMISSIONER GAW: Then I go down to the  
19     Footnote 658, and it says, as in the past we do not  
20     believe it is necessary to address the precise form that  
21     such a certification must take, but we note that a letter  
22     sent to the incumbent LEC by a requesting carrier is a  
23     practical method of certification.

24                    And I don't see anything there that says it  
25     shall set forth in detail or shall set forth in any

1 particular form the information. It just seems to say you  
2 send a letter and you certify that the requirements are  
3 met.

4 Then it goes on -- and I want you to  
5 respond, Mr. Lane. Then it goes on and it says, although  
6 we decline to adopt specific recordkeeping requirements,  
7 we expect that requesting carriers will maintain  
8 appropriate records that they can rely upon to support  
9 their local usage certification.

10 That -- doesn't that indicate that they're  
11 expecting the CLECs to be able to document their support  
12 of their certification, but doesn't it also not infer that  
13 it's not expected that that be in the letter?

14 MR. LANE: Well, I don't read it that way,  
15 but I understand the question. This is not a model of  
16 clarity, and it's obviously a little bit unusual when you  
17 have facts that are peculiarly within the knowledge of the  
18 incumbent LEC as to the number of lines and the number of  
19 collocaters, how they can certify anything other than --

20 COMMISSIONER GAW: I'm not unsympathetic  
21 with what you're suggesting, and I do want to inquire of  
22 the CLECs in a moment about this issue. But it seems to  
23 go on, if I go on down through there in the -- back up at  
24 the top in 234 into that next sentence, to the extent that  
25 an incumbent LEC seeks to challenge any such UNEs, it

1 subsequently can raise that issue through the dispute  
2 resolution procedure provided in its interconnection  
3 agreements.

4                   In other words, the incumbent LEC must  
5 provide the UNE and subsequently bring -- must provision  
6 the UNE and subsequently bring any dispute regarding  
7 access to the UNE before a state commission or other  
8 appropriate authority.

9                   This -- isn't it fairly clear that what's  
10 to happen here is that the CLECs are supposed to send  
11 their letter certifying that they meet the criteria? If  
12 the incumbent believes that that's not true, that they  
13 have to go ahead and provision, but then bring the action  
14 in front of the state commission or perhaps somewhere  
15 else. I'm not sure what other appropriate authority is.  
16 I haven't read that footnote.

17                   But it seems to me fairly clear what's to  
18 happen here. And I understand your argument, and I have  
19 sympathy for the issue of whether or not these  
20 certifications are really based on something real. And  
21 I'm really wanting to ask about that from someone else,  
22 but I want you to go ahead and respond before I get too  
23 carried away.

24                   MR. LANE: I'm glad you have some sympathy.

25                   COMMISSIONER GAW: If they're sending -- my

1 question -- after you answer that, my next question to you  
2 is going to be, if they did provide such a certificate,  
3 and if they had no basis for it, what are the  
4 ramifications for that? And that's -- I'm trying to see  
5 whether there are any or not.

6 MR. LANE: And I think that the fact that  
7 there's some unknowns here is a reason that you really  
8 shouldn't be taking any action at this point. I think we  
9 need to see what it is they do, and if it meets -- you  
10 know, from my perspective, if they provide something that  
11 says, well, they really aren't getting any lines here or  
12 you didn't count this or you counted this and you  
13 shouldn't have, even if we disagree and probably say,  
14 well, okay, they've given something so we better dispute.  
15 But if they do absolutely nothing and they simply say, I'm  
16 certifying, that doesn't appear to me to meet what the FCC  
17 is trying to lay out.

18 COMMISSIONER GAW: So let's say --

19 MR. LANE: So maybe this thing is to be  
20 determined later, not now, because we don't know how it is  
21 that they would purport to implement this  
22 self-certification.

23 COMMISSIONER GAW: Now, here's where I'm  
24 going. One side wins and one side loses, depending upon  
25 whether -- who's providing -- whether you're providing

1 service or not providing service -- I'm using that term  
2 loosely -- during this interim period, if we don't act now  
3 to clear this up, and let's say in this the first scenario  
4 Bell refuses to provision and it -- then what do the CLECs  
5 do? What's their remedy?

6 MR. LANE: They have the ability to  
7 self-provision or to obtain from another carrier or to  
8 take special access from us. So those are three avenues  
9 that are available to them, and they don't have to change  
10 their price to their customer and they can process  
11 whatever claim they have against us either before the  
12 Commission or if they're seeking money damages before a  
13 court.

14 Contrast that with if it's the other way  
15 around, they submit a certification that has absolutely no  
16 basis whatsoever, we have to provision it. Maybe it means  
17 we lose the customer if we're talking about a DS3 loop,  
18 for example. Transport probably is less an issue on a  
19 customer-by-customer basis, but certainly loops are. Then  
20 we're left with a dispute resolution process that has -- I  
21 don't know exactly what ramifications ultimately, what  
22 we're entitled to.

23 COMMISSIONER GAW: Are you saying you don't  
24 know because you haven't looked or you don't know because  
25 its unexplored territory?



1                   MR. LANE: I think it's unexplored  
2     territory. If we've provided them with a UNE to which  
3     they're not entitled for our damages?

4                   COMMISSIONER GAW: As a result of a  
5     certification that was done in bad faith.

6                   MR. LANE: Right. What are our damages?

7                   COMMISSIONER GAW: Yes.

8                   MR. LANE: I don't know right now.

9                   COMMISSIONER GAW: Is that something you  
10    can similarly take to a court to recover damages on the  
11    same way that you just gave the flipside a while ago that  
12    they could sue Bell for damages in the event that you fail  
13    to follow the provisions of the Act -- of the Order?

14                  MR. LANE: Yes. I would say ultimately,  
15    yes, but unlike the first example, we would have lost the  
16    customer with the DS3 loop, and that's a little hard to  
17    calculate what the loss of a customer was.

18                  COMMISSIONER GAW: You might argue they  
19    might have gained a customer. I mean, it can work both  
20    ways.

21                  MR. LANE: Sure. Well, but my point is,  
22    and maybe I didn't make it artfully, is that they have  
23    other options that they can explore, and they can continue  
24    to charge the customer whatever price they believe is  
25    appropriate based upon ultimately getting the transport or

1 the loop at the price that they claim they're entitled to  
2 under the agreement.

3 COMMISSIONER GAW: Isn't that shifting the  
4 burden that's intended in 234? Isn't that shifting the  
5 burden over to them to suggest that really it is their  
6 obligation to force Bell to provision, even if they have  
7 given you a letter of certification?

8 MR. LANE: And again, if they provide  
9 something in the letter that indicates why it meets the  
10 criteria, or actually it should be why it doesn't meet the  
11 criteria, but then we'll have to follow paragraph 234 and  
12 do that, yes. On the other hand, if they just say certify  
13 everywhere, then I think that that's not consistent with  
14 234 and we probably wouldn't have to do it.

15 And again, that may be a dispute that's  
16 brought back to you at some point, maybe But I don't  
17 think it's one that's appropriate for this Commission now  
18 because we haven't seen what the problem is or what the  
19 issue is, because we're talking in such hypothetical  
20 terms. That's an indication that we're premature, I  
21 think.

22 COMMISSIONER GAW: Earlier you said that  
23 the vast majority of states -- and I'm paraphrasing -- the  
24 vast majority of states have not intervened or taken  
25 action, something like that. You can use your own words

1 to correct me.

2 MR. LANE: Yeah, and, you know --

3 COMMISSIONER GAW: And I'm going -- I'm  
4 going to add -- and first I want to see if I've got it  
5 right. Is that close?

6 MR. LANE: What I'm trying to say to  
7 clarify is that out of the full gamut of relief that  
8 they're seeking here, meaning continuation of UNE-P for  
9 new customers and for embedded base and the switching --  
10 I'm sorry -- and the transport and the loop piece, that  
11 I'm not aware of many commissions that have bought into  
12 that. Certainly there haven't been 26 of them that have  
13 bought into that.

14 COMMISSIONER GAW: To the full argument?

15 MR. LANE: Right. I have not done a  
16 state-by-state analysis of where everybody stands.

17 COMMISSIONER GAW: And whether or not some  
18 states may have actions pending and whether or not some  
19 actions -- some states may -- the number of states that  
20 have actually looked at this and said, we're not dealing  
21 with it at all.

22 MR. LANE: Right.

23 COMMISSIONER GAW: Do you know of any state  
24 that has said that, has looked at it and said, we are not  
25 dealing with this, the way that you're currently

1     advocating that this Commission do?

2                     MR. LANE:   And I have not undertaken that  
3     inquiry because I generally looked at what they provided  
4     in their supplemental motion just yesterday.   So I have  
5     not -- our position really --

6                     COMMISSIONER GAW:   You can't cite me a case  
7     right now, though?   I mean, there might be one, but you  
8     don't have one that you can give me right now?

9                     MR. LANE:   That's correct.   That's correct.

10                    COMMISSIONER GAW:   Okay.   Do you want to go  
11    into the switching issue?

12                    MR. LANE:   I'm satisfied.   No, I'm sorry.  
13    You want a general discussion of it?

14                    COMMISSIONER GAW:   I'm just curious about  
15    where you -- I had that little exchange earlier about  
16    where they draw the line on what's a new customer, and I  
17    just -- if you want to clarify for me, I think I know what  
18    your position is on what constitutes a new customer, but I  
19    thought maybe you could explain it in just a little -- a  
20    little bit more for me.

21                    MR. LANE:   Let me say this:   When you look  
22    at the order again, it would be the rule, 51.319(d)(2),  
23    which is on page 148, the first sentence gives rise at  
24    least in the joint CLECs' view to some ambiguity because  
25    it says that will provide access to local circuit

1 switching on an unbundled basis for requesting carrier to  
2 serve its embedded base of end user customer? So that's  
3 the provision of the rule that they rely on to say, well,  
4 this is really a customer-by-customer analysis.

5                   And while I don't read it that way, I think  
6 that the last sentence of that same paragraph of the rule  
7 makes it abundantly clear that they may not add any new  
8 lines, because it says requesting carriers may not obtain  
9 new local switching as an unbundled local network element.  
10 And I think that is encompassing and includes existing  
11 customers.

12                   COMMISSIONER GAW: So in my Bob's  
13 Restaurant hypotheticals, if Bob has his restaurant and he  
14 wants to add one line at that location, you would say the  
15 answer to that is no, you can't do it, if that's -- that  
16 store is being served through UNE-P.

17                   MR. LANE: Yes.

18                   COMMISSIONER GAW: So I don't even have to  
19 go to whether or not he closes his store and moves to  
20 another location or any of that?

21                   MR. LANE: As far as I'm concerned, you  
22 don't. Now, if you issue an Order in the case that  
23 purports to require us to do something with regard to the  
24 existing customer base, then it would be pretty important  
25 for you to spell out what your Order means so we can

1 follow it.

2 COMMISSIONER GAW: I know you don't want to  
3 change what your position is in your argument, but if I  
4 said to you that if you had -- if you didn't have that as  
5 a choice -- and I'm not saying that's the case, but if you  
6 didn't have that as a choice --

7 MR. LANE: I would say --

8 COMMISSIONER GAW: -- is there another  
9 place that the line could be drawn if the first choice  
10 were not on the table, so to speak?

11 MR. LANE: And again I understand you're  
12 not asking me to say I disagree.

13 COMMISSIONER GAW: I am not.

14 MR. LANE: If you were to issue an Order  
15 like that, it would be easy to understand and implement if  
16 we talked about existing customers at existing locations.  
17 It gets incredibly complicated if you try to talk about  
18 other locations for the same customer.

19 It's extremely difficult to know for  
20 purposes -- and again, and I say this because that's -- I  
21 think part of the reason that any kind of injunctive  
22 relief is being sought is inappropriate because it would  
23 be difficult to even draft an Order that was capable of  
24 being implemented without controversy.

25 COMMISSIONER GAW: That's all I have,

1 Mr. Lane. I've got some follow-ups with other counsel.

2 JUDGE MILLS: Commissioner Appling?

3 COMMISSIONER APPLING: I have no questions.

4 JUDGE MILLS: Before you go, let me just

5 ask you a question. When you get orders, will they

6 specify that this line is for X customer at X location?

7 MR. LANE: Yes.

8 JUDGE MILLS: Okay.

9 MR. LANE: That's my understanding, yes.

10 JUDGE MILLS: So you'll be able to tell

11 from the Order itself whether it's for an existing

12 customer at an existing location as opposed to an existing

13 location at a location next door, for example?

14 MR. LANE: Yes. I believe so. I have to

15 say that I am not undertaking that particular inquiry, but

16 that's my understanding of how the process would work.

17 JUDGE MILLS: That's all I had. Thank you.

18 We're going to go back to -- well, actually, before we do

19 that, we're going to Mr. Comley. You've been waiting

20 patiently and listening attentively. I will give you at

21 this point the opportunity to enter your appearance or

22 contribute to the argument, if you wish.

23 MR. COMLEY: Let the record reflect the

24 appearance of Mark W. Comley, Newman, Comley & Ruth, PC,

25 601 Monroe Street, Suite 301, Jefferson City, Missouri, on

1   behalf of AT&T Communications of the Southwest, Inc, TCG  
2   Kansas City, Inc., and TCG St. Louis, Inc., collectively  
3   referred to as AT&T. And no, thank you, Judge. I have no  
4   comments to lend.

5                   JUDGE MILLS: Thank you.

6                   Okay. Mr. Magness, we'll go back to you as  
7   a brief rebuttal. As the moving party, we've offered you  
8   the opportunity to open and close.

9                   MR. MAGNESS: Thank you, your Honor. I'd  
10  like to address --

11                  JUDGE MILLS: I'm not going to set a  
12  specific time limit, but I will warn you that our  
13  attention is likely to wander around five o'clock.

14                  MR. MAGNESS: I want to try to just address  
15  questions that came from the Bench.

16                  On the question of other states acting, I  
17  have to note that Qwest has 14 states in the United States  
18  in their territory. Qwest did not push CLECs to the edge  
19  on this as SBC did. Qwest did not issue accessible  
20  letters that said, we're going to start rejecting your  
21  orders on March 11. They said, we're going to step back  
22  and not push you here.

23                  BellSouth, even though there have been a  
24  number of states that have ruled favorably for the CLEC  
25  change of law argument, last week after a few of those



1    came down, BellSouth issued their equivalent of an  
2    accessible letter that said, okay, we don't think you're  
3    right, we think this is all terrible, but we're going to  
4    back off, and until April 17 we're going leave time for  
5    negotiation and then try to move this forward. And they  
6    got generic proceedings on change of law teed up in every  
7    one of those states.

8                    So that's why you're seeing a lot of states  
9    not acting because the ILEC hasn't forced the issue. And  
10   as to the states that have acted, I think when you read  
11   these cases, it's clear, just as it should be clear at  
12   this Commission, the authority comes from Section 252 of  
13   the Federal Act, which tells this Commission -- gives this  
14   Commission an implementing role. And from the  
15   interconnection agreements like the M2A where the RBOC  
16   including SBC here steps up and says, Commission, we  
17   understand you have dispute resolution authority to figure  
18   out what this agreement really means and to enforce the  
19   terms of this agreement.

20                   The courts have looked at this question  
21   since 1996 and have uniformly said state commissions  
22   because they have this authority granted by Congress under  
23   Section 252 have that authority to make sure these  
24   agreements are not ignored, as SBC claims it can do here.

25                   Now, as to the paragraph 234 issues that

1 you raised, Commissioner Gaw, and you as well,  
2 Commissioner Murray, first as you put it, Commissioner  
3 Gaw, is this a one side wins, one side loses situation?  
4 No, it's not. If a CLEC puts in a self-certification and  
5 says, I should get a UNE here, SBC provisions it, SBC  
6 challenges it, takes it to a 252 proceeding before a state  
7 commission and SBC wins, SBC gets to true up back to the  
8 rate it should have gotten back to March 12th.

9 And I'll take you to paragraph 198,  
10 Footnote 524 as support for that. Okay. So if they  
11 provision and it turns out, okay, you were right, that was  
12 a good wire center for delisting, they get the money. If  
13 they did not provision, the CLEC has to pay special access  
14 or the CLEC because there's no commingling, as I mentioned  
15 before, can't serve the customer effectively, potentially  
16 loses the customer or at least loses the circuit, the CLEC  
17 can't go to the state commission and say, I paid special  
18 access, I should have gotten a UNE. It doesn't -- there's  
19 nothing in the TRRO that provides for that.

20 And I would ask you to look -- later on if  
21 you look at the Texas interim agreement, the Texas interim  
22 agreement attempts to follow those parts of the Remand  
23 Order, and it provides for just that in paragraphs 1.5  
24 through 1. -- several 1.5s and then 1.6, that, for  
25 example, consistent with Footnote 524 of the TRO Remand

1 Order high capacity loops no longer subject to unbundling  
2 under Section 521 shall be subject to true-up to the  
3 applicable transition rate.

4                   If it is subsequently determined that the  
5 CLEC's request for a high capacity loop and/or transport  
6 is inconsistent with the requirements of the TRO Remand  
7 Order, the rates paid by CLECs for high capacity loops and  
8 transport shall be subject to true-up.

9                   So the SBC's got a remedy. If they don't  
10 provision, however, the CLEC doesn't. And as to this  
11 question of self-certification and bad faith or good faith  
12 or that sort of thing, this may be a place where Mr. Lane  
13 and I can stand together and agree, this order could have  
14 been written better. But the clear intention of the  
15 Remand Order is that in these controversial situations the  
16 CLEC self-certifies and then there's provision and then  
17 you fight about it. You don't fight before it gets  
18 provisioned.

19                   And if there's one thing that's clear about  
20 paragraph 234 is the ILEC is not the judge and jury of the  
21 CLEC's good faith. But let's look at it as a practical  
22 matter. How is this actually working out? Birch, you've  
23 heard a lot about Birch's letter. Birch told SBC, look,  
24 we've done everything you've asked us to do. You filed a  
25 list of CLLI codes and wire centers at the FCC; we looked

1 at it. You provided further information.

2 Mr. Lane says that Birch hasn't called him  
3 to look at it. Birch looked at the information at the  
4 Washington, D.C. law firm and in Kansas at the state  
5 commission, and that information is the information I  
6 showed you before. That information is for every state.  
7 So when you look at it once, you see every state. You  
8 don't need to go to each state to see the very same  
9 information. So that's just -- there's just nothing to  
10 that.

11 So they've looked at everything SBC has  
12 offered to give them. They have read SBC's brief to the  
13 D.C. Circuit that says we think the transport unbundling  
14 is going to be tiny; the FCC must have messed this up.  
15 And then we look at their list, it's a lot larger.  
16 Interesting.

17 In addition, Birch said to SBC, to complete  
18 the -- a complete inquiry which we want to do, we'd like  
19 to ask you these questions. These are the same questions  
20 that they refused to answer in Oklahoma discovery, and as  
21 Mr. Lane says, it's very true, most of the information  
22 that shows whether or not you meet the FCC's criteria is  
23 in the possession and control of the ILEC.

24 But the FCC didn't say you have to trust  
25 the ILEC. The FCC said you can validate it. But how do

1 you validate it if they won't answer the questions?  
2 Mr. Lane says, well, you know, it can't be that hard.  
3 What could we have done, counting business lines? Well,  
4 then, why won't they answer the question: In determining  
5 the number of switched business lines in a particular wire  
6 center, what methodology did SBC employ to count PBX  
7 trunks and Centrex lines?

8 Fiber-based collocater, can't be that hard.  
9 Maybe it's not. Why won't they answer the question? How  
10 does SBC determine a collocater independently, quote,  
11 operates a fiberoptic cable or comparable transmission  
12 facility, unquote, for purpose of identifying a  
13 fiber-based collocater as defined in 347 CFR Section 51.5.  
14 They tell the CLECs that, we know whether we've got a  
15 dispute to bring to you or not. They won't answer the  
16 question.

17 So how can they stand here and say the CLEC  
18 can't self-certify if all the inf-- they have all the  
19 information and they've been parcelling it out and we've  
20 been looking at every bit of it as it comes out, we've  
21 asked for the information that will really answer the  
22 fundamental questions and they won't give it to us, and  
23 yet we can't self-certify so they don't have to provision.  
24 That just doesn't work. That doesn't make any sense.

25 And that's why we need an Order here,

1 because while tomorrow they may answer these questions,  
2 tomorrow they may also say, well, Missouri didn't issue an  
3 Order, so you know, I'm the judge and jury on  
4 self-certification. So on self-certification, I think it  
5 just doesn't make any sense to say we can't do it,  
6 especially based on what we've done in the real world.

7                   As to the other state cases that Mr. Lane  
8 cited, I really want to answer Chair Davis' question about  
9 are there things in the contracts or in the Missouri  
10 contract that are important? I think the answer is yes.  
11 In the Georgia case that Mr. Lane talked about, it's just  
12 interesting, you know. Nobody disagrees that the FCC's  
13 got the power if they want to to say that they can  
14 abrogate a contract when they pass new rules, not a  
15 problem.

16                   But in Georgia what's real interesting is  
17 BellSouth tried that and the Commission said as follows:  
18 The TRRO could not be read to abrogate the rights of  
19 parties related to the change of law provisions in their  
20 agreements. BellSouth's response did not include a single  
21 reference to a statement in the TRRO that modification of  
22 the agreements was in the public interest, much less a  
23 citation to analysis of why such reformation would be in  
24 the public interest.

25                   In fact, BellSouth does not cite to any

1 express language in the TRRO that says the FCC intends to  
2 reform contracts. They could have done it, but they  
3 didn't, and since they didn't, we have to follow change of  
4 law.

5                   And as we look at some of these other  
6 states, I just have to point out in California, Mr. Lane  
7 read you some bits and pieces of that, but here's the  
8 Commission's determination after it looks at paragraph 233  
9 where it says you're supposed to do this through the  
10 change of law process. They say, paragraph 233 clearly  
11 indicates that the FCC did not contemplate that ILECs  
12 would unilaterally dictate to CLECs the changes to their  
13 interconnection agreements necessary to implement the  
14 FCC's finding in the TRRO.

15                   Just as clearly, the California Commission  
16 was afforded an important role in the process by which  
17 ILECs and CLECs resolved their differences through good  
18 faith negotiations. The warning against unreasonable  
19 delay in paragraph 233 is meaningful only where a process  
20 for contract negotiation was contemplated to implement  
21 change of law provisions that could extend beyond  
22 March 11, 2005. The remedy against unreasonable delay is  
23 not to circumvent the negotiation process by unilateral  
24 implementation of the ILEC accessible letters on March 11,  
25 2005. Thus the centerpiece of the FCC's TRRO is a

1 negotiation process envisioned to take place during the  
2 transition period. The California Commission said, go  
3 negotiate. Don't implement those accessible letters, go  
4 negotiate.

5                   And as to the -- I just feel obliged for a  
6 moment to respond to the question -- the issues about the  
7 Commission's authority here. As I referenced before,  
8 Section 252 and the interconnection agreement itself which  
9 was approved by this Commission very strongly support the  
10 exercise of authority here. In addition, I would  
11 reference the Commission to cases in which the Commission  
12 has ordered service restoration or has a telephone utility  
13 stop a particular action because of public interest harms.

14                   I would cite to TC-2002-1100, the  
15 CompuTechnology case, Case TC-2005-02-- I'm sorry --  
16 that's this one. Sorry. Case 2004-0064, where the  
17 Commission has exercised such authority and the exercise  
18 of that authority comes from both this Commission's  
19 authority under state law, as well as delegated authority  
20 in Section 252.

21                   And just as to a couple of other points  
22 raised in questions, there have been transport orders  
23 submitted. Birch for one has submitted them. We have  
24 seen loop transport orders rejected in Texas despite the  
25 Texas order, the Texas language. Rejections have



1 occurred. We have seen rejections in other states on  
2 moves, adds and changes.

3                   So this is a real thing that is actually  
4 happening, and we believe that in order to have to wait  
5 for more harm, more lost customers, more problems before  
6 we can even challenge it flies in the face of the  
7 interconnection agreements and this Commission's authority  
8 over them.

9                   And in addition, I have to add, I think if  
10 we came here after such action had occurred, SBC would  
11 still contend that you don't have the authority to do  
12 anything about it. We strongly disagree with that and  
13 urge you to do something about it.

14                   JUDGE MILLS: Thank you. Questions from  
15 the Bench, Chairman Davis?

16                   CHAIRMAN DAVIS: Can we go back to Mr. Lane  
17 and ask Mr. Lane a real quick question about the --

18                   JUDGE MILLS: Certainly.

19                   CHAIRMAN DAVIS: -- about the first point  
20 that this gentleman brought up, which was with regard  
21 to -- I'm sorry. Refresh for my recollection.

22                   JUDGE MILLS: The questions that were  
23 submitted to SBC in Oklahoma that SBC has so far refused  
24 to answer. Mr. Lane, if you could step forward, just a  
25 quick question.

1 CHAIRMAN DAVIS: Do you understand the  
2 question, Mr. Lane?

3 MR. LANE: I'm sorry. I don't, no. I  
4 apologize. What's my reaction, is that --

5 CHAIRMAN DAVIS: Yeah.

6 JUDGE MILLS: Yeah.

7 MR. LANE: Okay. It's really hard to  
8 respond for Oklahoma because I'm not a lawyer there and I  
9 didn't represent the company there and I don't know what  
10 the details are there.

11 CHAIRMAN DAVIS: Mr. Lane, let me just  
12 switch gears on you here for a second.

13 MR. LANE: They didn't ask us this question  
14 in Missouri until Monday. So we have the discovery  
15 requests and we'll have to process it.

16 CHAIRMAN DAVIS: Okay. All right. Well,  
17 let me ask you this: Have you attempted to negotiate this  
18 situation or has SBC? I mean, has there been any attempt  
19 to resolve or to come up with an interconnection  
20 agreement?

21 MR. LANE: Well, obviously we do have an  
22 interconnection agreement that's in effect. I don't know  
23 with regard to each of the CLECs. Today in a prehearing  
24 conference, actually afterwards there was a suggestion  
25 made and, you know, we're going to explore it, but I can't

1 say that there's a likelihood of the parties resolving the  
2 issue.

3 CHAIRMAN DAVIS: Okay. And I know it's  
4 hard for you to put yourself in the CLEC position, but  
5 exactly, I mean -- I mean, I guess explain to me, do you  
6 think they have any bargaining power at all in this  
7 relationship?

8 MR. LANE: Sure. This particular issue  
9 is -- involves the interpretation of the FCC's Order, and  
10 so it's not really a matter of, I don't think, bargaining  
11 position. It's a matter of interpreting and applying the  
12 FCC's Order.

13 CHAIRMAN DAVIS: Okay. And -- well, let me  
14 just stop you. Is it in the public interest to stop  
15 processing these, you know, orders when they come in and  
16 say, well, we've got an existing customer that would like  
17 to add a line or we have a new customer that we'd like to  
18 add? Is it -- do you think it's in the public interest to  
19 say, no, we're not going to do that?

20 MR. LANE: It would be clearly contrary to  
21 the public interest in my opinion to order us to process  
22 orders like that, when the FCC --

23 CHAIRMAN DAVIS: Okay. So it's contrary to  
24 the public interest for us to order you to process those?

25 MR. LANE: Yes.

1                   CHAIRMAN DAVIS: And why would it be  
2 contrary to the public interest?

3                   MR. LANE: Because the FCC certainly has  
4 made a determination that these unbundling rules are to be  
5 implemented immediately, and part of their rationale for  
6 that was that they are -- have been declared unlawful on  
7 three separate occasions by the court and we've operated  
8 under the unlawful regime for about nine years now. And  
9 the unlawful regime has in the FCC's view, and I agree  
10 with this, is contrary to the public interest because it  
11 diminishes facilities-based investment as a result of the  
12 continuation of the UNE-P arrangements.

13                  CHAIRMAN DAVIS: I'm processing. So  
14 ultimately if I was going to distill that answer down into  
15 five words or less, it would be because the FCC says so,  
16 correct?

17                  MR. LANE: I might pick a different five  
18 words, I suppose, but that's certainly --

19                  CHAIRMAN DAVIS: I'll let you choose five  
20 words.

21                  MR. LANE: Because the law requires it.

22                  CHAIRMAN DAVIS: The law according to the  
23 FCC?

24                  MR. LANE: I think it's broader than the  
25 FCC is why I changed the phraseology. I don't think

1   there's any authority for the Commission, nor should it  
2   effectively issue an injunctive order in this case when  
3   there hasn't been a showing of the factors that I  
4   described earlier that are required to obtain any kind of  
5   injunctive relief, nor does this Commission have the  
6   authority to grant it.

7                   CHAIRMAN DAVIS: All right. That's all the  
8   questions that I have for you, Mr. Lane. Thank you.

9                   JUDGE MILLS: Thank you, Mr. Lane. Are  
10   there further questions from the Bench for Mr. Magness?

11                   CHAIRMAN DAVIS: I want to ask Mr. Magness  
12   some questions.

13                   Okay. Mr. Magness, do you think we have  
14   the legal authority to grant you equitable relief?

15                   MR. MAGNESS: I don't -- the Commission  
16   does not have traditional state law injunction authority.  
17   The Commission can interpret the interconnection  
18   agreements and enforce the interconnection agreements --  
19   interpret the interconnection agreement to say, SBC, you  
20   cannot do this.

21                   CHAIRMAN DAVIS: Okay. This is the  
22   existing interconnection agreement?

23                   MR. MAGNESS: Yeah, because here we have an  
24   existing interconnection agreement, and the question is  
25   what --

1                   CHAIRMAN DAVIS: Can they unilaterally  
2 terminate it?

3                   MR. MAGNESS: Can they unilaterally  
4 terminate it? Can they unilaterally stop doing things  
5 under it that it says they have to do? So we're  
6 requesting an Order that you read that interconnection  
7 agreement and the FCC rules that have an impact on it and  
8 issue an Order as the other states have that says that  
9 would violate these agreements, that's not permissible,  
10 that's contrary to what the FCC has said, can't do it.

11                  CHAIRMAN DAVIS: Okay. Weren't the --  
12 okay. Weren't the agreements predicated on rules and  
13 aren't those rules somewhat -- have those rules passed  
14 constitutional muster that the contracts are based on?

15                  MR. MAGNESS: Yeah. The rules that --  
16 well, for example, in the M2A, SBC agreed to provide  
17 UNE-P. Part of the reason is that it helped them get into  
18 long distance.

19                  CHAIRMAN DAVIS: Okay.

20                  MR. MAGNESS: They made an agreement, this  
21 is how it's going to be for the term of this agreement.

22                  COMMISSIONER GAW: Okay.

23                  MR. MAGNESS: Rules or no rules. Now, the  
24 FCC has promulgated new rules and said, take UNE-P again.  
25 There's not going to be UNE-P in the future, but we have a

1 transition plan for the next year so that the carriers  
2 that use it will pay a little bit more money, but you're  
3 going to amend your agreements to say you're going to roll  
4 off it by the end of a year and you're not going to get it  
5 anymore under Section 251.

6                   So that when we talk about what the FCC's  
7 rules are, the FCC said, we don't think UNE-P under  
8 Section 251 is good in the future. What the FCC said for  
9 the next year is that disrupting customer relationships  
10 under existing agreements is not in the public interest.  
11 That would be bad. That's why we have to transition.

12                   CHAIRMAN GAW: Right.

13                   MR. MAGNESS: So that's -- so when you say  
14 have the rules passed muster, I think the FCC tried to  
15 provide a bridge between what's in current interconnection  
16 agreements and what they're planning for the future, which  
17 is that under 251 you get a lot less in the way of  
18 unbundled network elements. The bridge is just as much a  
19 part of their findings and their rules as is everything  
20 else.

21                   And what we're complaining about here today  
22 is the way that SBC has tried to blow up the bridge, not  
23 comply with those provisions of the transition plan. So  
24 the interconnection agreement -- and I have to add, the  
25 interconnection agreements are good until they expire.

1 They have provisions in them.

2 CHAIRMAN DAVIS: And when does the existing  
3 interconnection agreement expire?

4 MR. MAGNESS: The M2A will expire probably  
5 around the end of this month. Like I said, we're going to  
6 be filing -- we're negotiating right now to try to come up  
7 with ways to implement the TRO Remand Order, and we're  
8 going to be arbitrating our disagreements almost  
9 immediately to get to --

10 CHAIRMAN DAVIS: Oh, I can't wait for that.

11 MR. MAGNESS: Oh, and it's going to be a  
12 joy to behold.

13 CHAIRMAN DAVIS: I believe you have a note  
14 here.

15 MR. MAGNESS: Yes. And the actual,  
16 Mr. Lumley reminds me is March 6, 2005, the way this thing  
17 is written there's an expiration date of March 6, 2005,  
18 then the agreement is extended for an additional 135 days  
19 to get us through the arbitration. Okay. So we are now  
20 in that period where the contract is still in effect but  
21 we're clicking off the 135 days toward its ultimate end.

22 CHAIRMAN DAVIS: And didn't SBC -- back  
23 when this issue originally came up, didn't they send a  
24 letter and say, you know, our commitment's not to do  
25 anything until March 6, 2005 or something like that?



1                   I don't have the letter in front of me, but  
2   I remember receiving it as part of a case that I guess was  
3   a predecessor of this one.

4                   MR. MAGNESS: Well, I'm not -- I can't tell  
5   you I'm sure which letter you're talking about, but I know  
6   last spring, almost a year ago, after the D.C. Circuit  
7   decision came out, there was a lot of concern in the  
8   industry about -- you know, there was a lot of saber  
9   rattling by SBC and the other BOCs about, you know, we're  
10  going to implement this immediately and there's no more  
11  UNEs and they're all illegal.

12                  And we kind of went through this exercise  
13  of, wait a minute, that's not what the contracts say,  
14  that's not what the court said. And then SBC and the  
15  other BOCs made a commitment to voluntarily keep the UNEs  
16  in place for a period of time, and then the FCC issued  
17  some interim rules and it created another period of time,  
18  and then the FCC finally got their final rules done.

19                  So I think that was part of that commitment  
20  back, you know, last spring or summer to not disrupt  
21  things during the course of the contract.

22                  CHAIRMAN DAVIS: Okay. So your 135-day  
23  clock is ticking right now?

24                  MR. MAGNESS: Yes, we're ticking, and in  
25  fact we are providing decision point list input to SBC

1 this week. I was in a negotiation call with them  
2 yesterday on recip comp issues. We've had -- you know,  
3 we're doing a lot of negotiations. We're moving towards  
4 filing arbitration petitions the end of this month, and  
5 then we'll need to have a prehearing and set a schedule  
6 for getting through the arbitration proceeding and into a  
7 new agreement.

8 So yes, we're in that time period where the  
9 agreement is still in effect and pending arbitration.

10 CHAIRMAN DAVIS: And so let me ask you  
11 this: So the Order that you would have us write would  
12 say, you know, we need a TRO or a stay for approximately  
13 how long?

14 MR. MAGNESS: Well, I think -- I mean, if  
15 you went with the change of law provisions we've talked  
16 about, if you said, we read the interconnection agreement  
17 to say that SBC cannot make these changes unilaterally  
18 without going through the change of law amendment process,  
19 that change of law amendment process is going to be  
20 complete when the M2A successor arbitration ends, because  
21 we're going to have a new interconnection agreement that  
22 implements all this stuff. So I think ideally you need  
23 something that takes it through the end of that  
24 negotiation and arbitration process.

25 Now, if you-all decide, look, we're not

1 going to go with the change of law argument, but we think  
2 they're overreaching on their interpretation of what can  
3 happen right now, then I would still suggest that whatever  
4 order you issue carry everyone through to the period when  
5 the new interconnection agreements go into effect, so that  
6 in the middle of getting those new interconnection  
7 agreements arbitrated and finalized, we don't have another  
8 blowup where we're threatened with disconnection, and it  
9 just -- it seems to be the most sensible route to say  
10 whatever remedy there is is through the end of this  
11 arbitration that's about to start.

12 CHAIRMAN DAVIS: Now, what about Mr. Lane's  
13 assertion that the CLEC Coalition had the opportunity to,  
14 I guess, raise this issue two or three weeks ago and chose  
15 not to, chose to wait to the very last minute to put the  
16 CLECs in a greater bargaining position in terms of  
17 demonstrating eminent harm?

18 MR. MAGNESS: Well, my primary response to  
19 that is that in this transaction that's been going on  
20 since early February, no deed goes unpunished. If we had  
21 come into the Commission on February 11th, I imagine that  
22 we would have gotten the response that you need to talk to  
23 your account representatives, you need to try to negotiate  
24 this, you need to try to deal with this on a  
25 business-to-business basis, you know, perhaps we can work

1 something out.

2                   So perhaps we should have filed in every  
3 single state commission the moment we laid eyes on these  
4 accessible letters. But instead we worked on in the  
5 states where it was teed up immediately, and CLECs have  
6 had countless conversations with their account  
7 representatives and the vice presidents and everyone else  
8 to try to see, you know, is this just a position you're  
9 taking that maybe we can reach a compromise, or is this a  
10 line in the sand? And it became clear that it was a line  
11 in the sand, and we came to the state commissions.

12                   And I have to add, once Texas had an  
13 interim amendment, we were hopeful that, at least in the  
14 SWBT region, that was something that they were going to  
15 have to operate under in Texas, so perhaps we could just  
16 extend it to the other states and see if that would work.  
17 That was rejected.

18                   So, you know, we really did find ourselves  
19 in a place where it looked like if we didn't do something,  
20 they were going to implement just like they said they were  
21 on March 11th.

22                   CHAIRMAN DAVIS: No further questions.

23                   MR. MAGNESS: Just one thing for the record  
24 I wanted to correct on the Birch issue. The discovery  
25 request, we submitted discovery requests here yesterday,

1 but in substance, the very same questions were submitted  
2 to SBC to Mr. Larry Cooper, who's their regional vice  
3 president for account management for this region, on  
4 March 9th. And again, just as in Oklahoma, there was no  
5 voluntary answers and still no answers to these questions.  
6 So they have been posed on behalf of the CLECs for all  
7 states before yesterday.

8 JUDGE MILLS: Commissioner Murray, do you  
9 have questions?

10 COMMISSIONER MURRAY: Yes, a couple. Thank  
11 you. That was going to be my first question, what was the  
12 date of your Data Request, so it appears that you -- they  
13 first had your Data Request only eight days ago.

14 MR. MAGNESS: February 25th actually.  
15 February 25th was when the Data Request was submitted in  
16 Oklahoma, and then this was formally submitted by Birch on  
17 a business-to-business basis on February -- or rather on  
18 March 9th, but by March 9th we had heard from SBC in  
19 Oklahoma, we're not going to answer these questions. And  
20 we had to go to a discovery hearing and get the Commission  
21 to order them to answer the questions.

22 COMMISSIONER MURRAY: Aren't the answers  
23 different in the different states?

24 MR. MAGNESS: They -- well, I'll put it  
25 this way. They -- mainly I don't think they should be,

1 because, for example, when we ask SBC, how do you  
2 determine what a fiber-based collocater is, there -- if  
3 they have done that differently in Missouri than they did  
4 in Oklahoma than they did in Texas, that's a problem, and  
5 I don't think -- I would doubt that they did.

6 COMMISSIONER MURRAY: So your question just  
7 asked for how determinations were made, not specific  
8 determinations?

9 MR. MAGNESS: Well, we actually asked both.  
10 One is how were determinations made, and two, we asked a  
11 specific set of questions where we asked them, for each  
12 one of these wire centers, tell us not, only these wire  
13 centers, but the wire centers around the state, what's the  
14 number of business lines, what's the number of XYZ? So we  
15 get a statewide picture for each state and then a generic  
16 answer, we hope, on each one of these procedural or  
17 methodology questions.

18 COMMISSIONER MURRAY: So certainly those  
19 would be different for different states, you would agree  
20 with that, right?

21 MR. MAGNESS: The questions about specific  
22 numbers of lines, oh, yes, absolutely.

23 COMMISSIONER MURRAY: You talked about the  
24 change of law argument, if we went with the change of law  
25 argument. Would there -- would that still allow a true-up

1 if SBC turns out to be correct?

2 MR. MAGNESS: The Remand Order  
3 contemplates -- actually, if I could just get it, it's  
4 Footnote 524 that I was referencing earlier. When it --  
5 when it -- and this is on the loop issue. Okay. I think  
6 the concept is similar for transport.

7 They outline the new prices that are part  
8 of the transition plan for loops and they say, high  
9 capacity loops no longer subject to unbundling shall be  
10 subject to true-up to the applicable transition rate upon  
11 the amendment of the relevant interconnection agreements,  
12 including any applicable change of law processes.

13 So I think what the FCC's contemplating is,  
14 you know, you'll pay the same up until change of law is  
15 done. Once the contract's amended, the ILEC is entitled  
16 to a true-up back to March 11th.

17 COMMISSIONER MURRAY: All right. And then  
18 you said that under either scenario you would hope that  
19 the result would carry everyone through to the end of  
20 the arbitration that is about to start. Is that time  
21 period -- I wasn't paying close attention when you were  
22 talking about the timeline there. And is that time period  
23 within the FCC transition period?

24 MR. MAGNESS: Yes. Yes. Because the M2A  
25 will -- the 135 days has begun running, and the transition

1 period is 12 months for switching loops and transport,  
2 18 months for dark fiber. So we would certainly expect to  
3 have a new interconnection agreement in Missouri before  
4 March 11th of 2006.

5 COMMISSIONER MURRAY: I'd like to ask Mr.  
6 Lane a question. Mr. Lane, if, in fact, any of these  
7 rates are subject to true-up, first of all, I guess I  
8 would ask you if you agree with that, if we went with the  
9 change of law argument, for example?

10 MR. LANE: No, I wouldn't agree with that  
11 in its entirety. The change of law arguments would  
12 entitle the CLEC to continue to buy UNE-P to serve  
13 brand-new customers that they don't serve today, and so  
14 there is not a true-up that can be made that would make  
15 SBC whole for having lost a customer to a UNE-P  
16 arrangement that is clearly and absolutely unlawful under  
17 the FCC's order and which most states which have looked at  
18 it have agreed cannot stand.

19 COMMISSIONER MURRAY: Thank you for  
20 reminding me. The change of law argument takes it well  
21 beyond even the dispute over the meaning of existing  
22 customer base?

23 MR. LANE: Absolutely.

24 COMMISSIONER MURRAY: Takes it back to the  
25 contract language?



1 MR. LANE: Right.

2 COMMISSIONER MURRAY: Then the other basis  
3 for determining in favor of the CLECs, would everything  
4 there be subject to true-up so that in the end SBC would  
5 not be harmed?

6 MR. LANE: And I'm going to try to clarify  
7 to make sure I'm tracking, that if the Commission said  
8 that with regard to transport and loops, that we would  
9 have to continue to provide that pursuant to the paragraph  
10 234, whatever that means, and says probably more  
11 importantly with regard to the existing embedded base of  
12 UNE-P customers that they could add new lines in some  
13 fashion?

14 COMMISSIONER MURRAY: Yes.

15 MR. LANE: Well, to the extent that it's  
16 existing lines at existing locations for some designated  
17 period of time while the Commission decides the merits of  
18 the case, which is what's happened, or requires  
19 amendments, but in other states has been April 29th or May  
20 1st or short periods like that, then presumably we'd be  
21 entitled to a true-up for that, I suppose.

22 But I don't know -- I don't know precisely  
23 what the true-up would be because, again, would we use  
24 resale as the rate that they should have been paying for  
25 those services and do they get back the access charges

1     that they took on those lines while they had them under  
2     the UNE-P arrangement?

3                     There's a lot of issues that would be  
4     pretty difficult to solve that I can't say would be an  
5     easy calculation to true up what we were entitled to, and  
6     that's setting aside the issue of whether they would have  
7     kept the customer or what have you. I don't agree with  
8     the proposition that you've got a true-up, that takes care  
9     of everything.

10                    COMMISSIONER MURRAY: Thank you.

11                    JUDGE MILLS: Commissioner Gaw?

12                    COMMISSIONER GAW: I want to try to be real  
13     quick. Let me go back to Mr. Magness first anyway.  
14     Mr. Magness, if the Commission were to make a ruling based  
15     upon the change of law provision, how does -- I'm going to  
16     single this out because we've been focusing on it, but how  
17     does 234 then play into the mix?

18                    MR. MAGNESS: If you went strictly on  
19     change of law, we would be living in a situation where  
20     we're still operating under the M2A, all right, so the  
21     provisions of the Remand Order would not go into effect  
22     until the contract was amended, okay, so we would continue  
23     to operate, and loop and transport orders could be  
24     provisioned.

25                    And then when the contract is amended, then

1 234 and everything else in the Remand Order go into  
2 effect. And some of that would involve, as I mentioned  
3 true-ups back for certain things, but we would not have to  
4 go through the 234 process because we would be operating  
5 under current contract for a period of time.

6 COMMISSIONER GAW: The reason I'm asking  
7 that question is, what is the purpose of 234 if it's  
8 contemplated by the Order that change of law provision  
9 would apply, if you can follow my question?

10 MR. MAGNESS: Sure. Yeah. There are  
11 several provisions that -- well, start this way. Once the  
12 contract is amended, be that tomorrow or be that in June  
13 or whenever it is, there may be disputes between the ILEC  
14 and the CLEC about whether a particular office wire center  
15 is off the list or not. So this provides that if you have  
16 such a dispute, CLEC self-certifies, the ILEC provisions,  
17 then you go into dispute resolution.

18 So even after we get an amended new  
19 interconnection agreement, there could be situations  
20 where -- where those disputes would occur. And I think --  
21 I'll tell you more than you're asking, but I think there's  
22 a question that we'll just have to figure out over these  
23 next few months here whether the new interconnection  
24 agreement has a list of designated wire centers that have  
25 all been disputed and fought over and the Commission

1 reaches a conclusion or whether -- and I -- this is again  
2 to refer to what Texas is contemplating, there may be a  
3 separate proceeding where everybody identifies all the  
4 ones where there's a dispute about and you have one  
5 proceeding and get it done that way. But in that event  
6 you'd still need the 234 process for provisioning to go  
7 on.

8 COMMISSIONER GAW: I think that's all I  
9 had, Mr. Magness, of you. I was thinking I had another  
10 question for Mr. Lane, and it's escaping me. He may be  
11 thankful or he may be sorry, depending upon what the  
12 question was. Does Staff have anything to add?

13 MR. POSTON: The only thing I would want to  
14 add is on the question of the Commission's authority, I  
15 know in a recent case it's -- I believe it's TO-2005-0117.  
16 I hope I got that number right. That's the case where SBC  
17 filed to amend interconnection agreements with a handful  
18 of CLECs under change of law provisions.

19 And in that case SBC has argued that the  
20 Commission -- state commissions do have authority to  
21 enforce and interpret interconnection agreements, and they  
22 cite a whole list of federal cases that I'd just like to  
23 bring to the Commission's attention that would support the  
24 Commission's authority in this case.

25 COMMISSIONER GAW: Thank you. I do have

1 one more question of Mr. Lane.

2 JUDGE MILLS: I've got a couple questions  
3 for Mr. Magness, so we'll do Mr. Lane first.

4 COMMISSIONER GAW: Mr. Lane, I'm back to  
5 these hypothetical roads the Commission could travel down.  
6 If the Commission were in a quandary here in regard to  
7 whether or not we conclude that there's a change of law  
8 provision that applies or we're going to interpret these  
9 particular provisions and say this is what -- this is what  
10 parties should be doing, something to that effect, if  
11 those were the only options, which does Bell prefer of the  
12 two evils?

13 MR. LANE: And I'm not sure if I -- can I  
14 repeat it?

15 COMMISSIONER GAW: Yes. Go ahead.

16 MR. LANE: Your question is if you agree  
17 with the CLECs and you're going to go with them, should I  
18 go with them on the basis of change of law or should I go  
19 on the basis of interpreting and applying the TRRO?

20 COMMISSIONER GAW: Yes.

21 MR. LANE: I think the latter would be the  
22 preference.

23 COMMISSIONER GAW: That's what I assume.  
24 Now, if your argument in regard to the Commission's  
25 authority seems to be more focused on the latter than the

1     former -- I'm not sure that it is, but if it's more  
2     effective on the latter than the former --

3                     MR. LANE: I think it applies as to both,  
4     and let me say --

5                     COMMISSIONER GAW: In an equal way?

6                     MR. LANE: I think so.

7                     COMMISSIONER GAW: All right. Go ahead if  
8     you want to explain.

9                     MR. LANE: Well, actually -- and it's  
10    trying to draw a distinction between what the Commission  
11    can do under an existing interconnection agreement when  
12    the parties have gone through a dispute resolution process  
13    and they specifically agreed that the Commission can take  
14    a particular action to resolve a controversy versus the  
15    Commission issuing an Order without an evidentiary  
16    hearing, not only interpreting the contract but directing  
17    a party to act in a particular way under the contract,  
18    there's a significant difference between those two.

19                    COMMISSIONER GAW: I'm not sure I followed  
20    you in regard to how that -- if that's a similarity, both  
21    of those scenarios about whether the Commission concludes  
22    as a matter of law that you need a change of law action or  
23    if we're interpreting the TRO, or are you suggesting both  
24    of those require an evidentiary proceeding?

25                    MR. LANE: I think an Order directing us to

1 act in a certain way requires an evidentiary hearing, yes.  
2 Yes, because you're being asked to take action based upon  
3 alleged irreparable harm, and the facts to establish the  
4 irreparable harm aren't in the record.

5 COMMISSIONER GAW: I'm just -- I would  
6 like -- go ahead.

7 MR. LANE: Well, and then with regard to  
8 interpreting, if you do the change of law context applying  
9 interpreting, if that's the issue, the Commission pretty  
10 clearly doesn't have any authority under the  
11 interconnection agreement to issue any kind of injunctive  
12 relief ordering the party to act in a particular way.

13 COMMISSIONER GAW: Without having -- okay.  
14 I think I'm following.

15 MR. LANE: Period.

16 COMMISSIONER GAW: Period. That's your  
17 position or you think that's just not debatable by the  
18 other side, would not be debated by the other side?

19 MR. LANE: I can't -- there is no provision  
20 in the agreement that gives the Commission any kind of  
21 authority to issue injunctive relief. I don't think  
22 that's in dispute.

23 COMMISSIONER GAW: I think I'm following.  
24 Thank you.

25 Mr. Magness, do you want to respond to that

1 real quickly, if you were -- if you had an opportunity to  
2 hear?

3 MR. MAGNESS: There are provisions in the  
4 agreement that contemplate the Commission resolve disputes  
5 arising out of the agreement. This is a dispute arising  
6 out of the agreement. In order to resolve the dispute you  
7 have to address the question, what does change of law  
8 mean, what does Remand Order mean, so the commission order  
9 the other states have that says, this is what this  
10 interconnection agreement is. If they want to violate it,  
11 contrary to your order, then --

12 COMMISSIONER GAW: In the interim period,  
13 if you were going down that road, between now and then, do  
14 you believe it would be -- we are required to take  
15 evidence on the record in order to issue the Order that  
16 you're requesting?

17 MR. MAGNESS: I think the Commission can  
18 look at this almost -- I mean, it's not precisely summary  
19 judgment, but that kind of basis because I don't know that  
20 there's facts in dispute. I know SBC disputes the harm,  
21 but I think when you look at the dispute, the dispute is  
22 how do you read the TRO Remand Order, how do you read the  
23 contract?

24 If you read the contract the way we read  
25 the contract and Remand Order, then SBC is not entitled to



1 take these unilateral actions pursuant to the contracts,  
2 and that's the resolution of the dispute.

3 If you read it the other way, then you have  
4 a different outcome, which is there is no action the  
5 Commission should take because they've done nothing  
6 contrary to the interconnection agreement. So you don't  
7 need to take any interconnection agreement enforcement  
8 type of action.

9 COMMISSIONER GAW: Thank you, Judge.

10 JUDGE MILLS: I just had a couple of quick  
11 questions for you. One, if -- take a worst-case scenario.  
12 If the petition for arbitration under the M2A is filed at  
13 the last possible day and the Commission takes the maximum  
14 amount of time to reach a decision, what's the time frame  
15 we're looking at?

16 MR. MAGNESS: If I could -- if someone  
17 could count the days for me, I think I could tell you. I  
18 think the objective of the parties -- is there a date?

19 MR. LANE: July 19th.

20 MR. MAGNESS: July 19th.

21 JUDGE MILLS: July 19th is the last  
22 possible day for the Commission to issue a decision?

23 MR. MAGNESS: That's when it expires,  
24 unless there is some sort of extension of time for the  
25 Commission to make a decision, but that's under the terms

1 of the contract when it would expire. And we're moving  
2 forward to file arbitration petitions the end of this  
3 month so that we can try and get that done.

4 JUDGE MILLS: My last question was, if  
5 under the provisions paragraph 234, if one of your clients  
6 was to self-certify, would you advise them that they don't  
7 have to allege any basis for disagreement with SBC's  
8 classification, they could simply say, we've done our due  
9 diligence, you're wrong, we're right?

10 MR. MAGNESS: No. I'm not violating any  
11 confidence to tell you, what I would advise them, and I  
12 think what 234 contemplates, what I have advised people is  
13 look at anything they'll give you, ask them the questions  
14 that you need answered in order to complete your inquiry,  
15 and try to get them to answer. Because, you know, I think  
16 there is significant basis for doubt based on sort of the  
17 contrast between what they told the D.C. Circuit and what  
18 we're seeing on this list between -- and then just the  
19 whole question of why they won't answer these basic  
20 fundamental questions itself raises some doubt about  
21 whether this list can be disputed or not.

22 So no, I have advised people when they said  
23 the information's available in D.C. I advise them go get  
24 somebody in D.C. to look at it.

25 JUDGE MILLS: My question was, you would

1     advise them to allege all these things in  
2     self-certification letter, not simply say we think you're  
3     we're right and so we self-certify? You would advise them  
4     to give the basis for why they think they're right and  
5     Bell's wrong?

6                     MR. MAGNESS: Well, put it this way, I  
7     think paragraph 234 and the associated footnote do not  
8     necessarily require all that. I think you tell SBC here's  
9     what we've done in our inquiry, I think that's the best  
10    anyone can do.

11                    In addition, really it comes down to each  
12    company. If there's a company that says I'm not going to  
13    allege -- you know, I'm not going to try and self-certify  
14    as to this wire center but I am as to that one, that's  
15    based on the information they have, their ability to, you  
16    know, sort the tea leaves based on what SBC has given  
17    them, and that's going to be up to each company based on  
18    their own knowledge.

19                    JUDGE MILLS: But you'd expect them to say  
20    things like that in their request to self-certify?

21                    MR. MAGNESS: I would expect, yeah. I  
22    don't know that -- again, none of us know exactly what is  
23    required, but I think it's wise to say, as Birch did,  
24    we've looked at this, we've looked at that, and we need to  
25    know more information, here's the problem. Because then

1 SBC knows, you know, what you tried to do.

2 JUDGE MILLS: Okay. Great. Is there  
3 anything further?

4 COMMISSIONER MURRAY: Mr. Magness, if the  
5 Commission decides to resolve this dispute and finds that  
6 the definition of embedded customer base would require new  
7 orders to existing customers at existing locations but  
8 would not require new orders to existing customers at new  
9 locations, is that a reasonable interpretation?

10 MR. MAGNESS: I don't agree that it is,  
11 because I don't think there's any basis for making that  
12 distinction in the way that the FCC sets forth its  
13 existing customer base definitions. So I think the new  
14 location versus current location is a construction of that  
15 that SBC has created recently, so I could not agree with  
16 you that it's reasonable because I don't -- I really don't  
17 think it is under the FCC rules. I mean, obviously it's  
18 your call, but I don't think it's --

19 COMMISSIONER MURRAY: Mr. Lane, is it  
20 reasonable in your interpretation?

21 MR. LANE: It would -- our view is that  
22 that's not -- it's not an appropriate interpretation of  
23 the TRRO. And we cite to the rule for that because it  
24 says no new arrangements, period. But if your  
25 interpretation is different and your interpretation is

1     that it's existing customer base, then we would say in  
2     that case that it really needs to be only at existing  
3     locations.

4                   COMMISSIONER MURRAY:   And, Staff, do you  
5     have any opinion on that?

6                   MR. POSTON:   No.   No, Commissioner.

7                   COMMISSIONER MURRAY:   One last question.   I  
8     wasn't here when the Staff spoke, can you tell -- can you  
9     tell me, have you taken a position, just real briefly?

10                  MR. POSTON:   I will be real brief.  
11     Basically we support the position of the CLEC Coalition.

12                  COMMISSIONER MURRAY:   So you support their  
13     interpretations of the TRRO?

14                  MR. POSTON:   Yes.

15                  COMMISSIONER MURRAY:   Thank you.

16                  JUDGE MILLS:   Anything further from the  
17     Bench?

18                  (No response.)

19                  JUDGE MILLS:   Anything further from the  
20     parties?

21                  MR. COMLEY:   Judge Mills, I wanted to  
22     mention to the Commission that AT&T sought appearance in  
23     this case because it has an M2A-based agreement very  
24     similar to those the CLEC Coalition have entered with  
25     Southwestern Bell.   For the record, to the extent that the

1 Commission decides to grant the relief the CLEC Coalition  
2 is requesting, AT&T would like to have the same relief  
3 granted to it.

4 JUDGE MILLS: Thank you. If there's  
5 nothing further, we're off the record.

6 WHEREUPON, the oral argument in this case  
7 was concluded.

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