STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Level 3 Communications, Inc.	:	
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Petition for Arbitration Pursuant to Section 252 (b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois.	:	**00-0332**

~~HEARING EXAMINERS'~~POST EXCEPTIONS
PROPOSED ARBITRATION DECISION

By the Commission:

I. JURISDICTIONAL STATEMENT

When the parties are unable to reach accord on an interconnection agreement through negotiations either party may ask a state commission to arbitrate any open issues. Section 252 (b) of the federal Telecommunications Act of 1996 ("the Act") sets out the procedures for the arbitration of agreements between incumbent local exchange carriers ("ILECs") and other telecommunications carriers requesting interconnection. It prescribes the duties of the petitioning party, provides an opportunity for the non-petitioning party to respond, and includes the time frames for each action. Section 252 (b) (4) limits a state commission's consideration to the issues set forth in the petition and the response, and further provides that a state commission will resolve each issue by imposing appropriate conditions upon the parties to the agreement as required to implement subsection (c), i.e., Standards for Arbitration. Section 252 (d) sets out pricing standards for interconnection and network element charges, transport and termination of traffic charges and wholesale prices.

In resolving, by arbitration, any open issues and imposing conditions upon the parties to the agreement, a state commission is required to apply the following Section 252 (c) standards:

(1) ensure that such resolution and conditions meet the requirements of Section 251, including the regulations it prescribed pursuant to Section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and
(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

II. BACKGROUND AND PROCEDURAL HISTORY:

On November 30, 1999, Level 3 Communications, LLC ("Level 3") and Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois" or "AI"), a subsidiary of SBC Communications, Inc., began negotiations for an interconnection agreement.

The instant proceeding arises out of a Petition for Arbitration ~~P~~pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, which was filed by Level 3 on May 8, 2000. This pleading identified 37 open issues which the parties were unable to resolve through their negotiations and also set out their respective positions on each of those issues. On June 5, 2000, AI filed a response to the ~~p~~Petition.

Pursuant to proper notice, a pre-hearing conference was held on May 16,2000, before duly authorized Hearing Examiners at the Illinois Commerce Commission's ("Commission") offices in Chicago, Illinois. Appearances were entered by respective counsel on behalf of Level 3, AI and the Staff of the Commission ("Staff"). On this date a schedule was set for further filings and evidentiary hearings.

At the evidentiary hearings held on July 14 and 17, 2000, ~~there were~~ admitted into evidence were the verified statements of Andrea Gavalas, Timothy Gates, and William Hunt, III, on behalf of Level 3; Robert Harris, Craig Mindell, Eric Panfil, Timothy Oyer, Debra Aron, and Michel Silver on behalf of AI; and Tortsen Clausen, Bud Green, and Sanjo Omoniyi on behalf of Staff. At the close of cross-examination of the witnesses on July 17, 2000, the record was marked "Heard and Taken."

As the parties continued to negotiate throughout the pendency of this proceeding, several additional issues were resolved. Post-hearing briefs were filed by Level 3, AI, and Staff on July 31, 2000. At the time of these filings, only 20 of the original 37 issues remained for arbitration.

On August 7, 2000, the Hearing Examiners' Proposed Arbitration Decision was served on the parties. Level 3, AI and Staff filed Exceptions to the Proposed Arbitration Decision. Those arguments are considered herein.

III. ISSUES SUBJECT TO ARBITRATION

Level 3 initially sought arbitration of 37 issues. During the pendency of this proceeding, Level 3 and AI settled issues 3, 4, 8, 9, 11-13, 15-17, 21, 26, 28-30, and 35-37. By our count, the parties' briefs reflect that there are 20 issues which remain to be resolved through arbitration. We review each of these in order and as numbered by the parties.

1. Reciprocal Compensation

(a) Definition of "Local Calls"

Level 3's Position

Internet service provider ("ISP") traffic is local for the purposes of reciprocal compensation. The concept of reciprocal ~~traffic~~ compensation was to ~~compensate~~ pay carriers for terminating the local traffic of other carriers. ISP traffic falls into that category and is indistinguishable from local traffic for that purpose. The matter has previously been considered by this Commission, and the Seventh Circuit Court upheld the Commission's decision that it was local.

The Federal Communications Commission ("FCC") issued an order declaring ISP traffic ~~as~~ to be interstate but that ruling was overturned by the D.C. Circuit Court. Of the state commissions that have ruled on this issue, 33~~,~~ of 37 have found this to be subject to reciprocal compensation. Level 3 agrees to be bound by any findings of a generic docket on reciprocal compensation.

There is no real difference between local and ISP calls. All of the LECs use the same facilities to transport and terminate calls. The methods and the suggestion that ISP calls be separated from local calls are impractical.

Ameritech's Position

AI's proposal excludes ISP-bound traffic from the definition of local calls. Local calls actually must originate and terminate with parties physically located within the same local calling area. Reciprocal compensation is applicable only for the voice portion of local calls. Internet calls are not subject to reciprocal compensation under this agreement or the Act.

In its brief on exceptions, AI excepts that the rate is excessive based upon Level 3's cost. Level 3 would be allowed to collect up to seven times the cost of the call based upon; (1) the length of an ISP call versus a local call; (2) its advanced "soft switched" technology which results in a lower cost for delivering to network traffic; and (3) some of its customers collocate with Level 3.

Analysis and Conclusion:

Most recently this issue was visited at this commission in Docket 00-0027, In the Matter of Focal. ~~The Commission~~ We determined after considering the same issues that ISP traffic is local for the purposes of reciprocal compensation. In entering this order we are aware that this issue will be considered later as part of a generic docket. There also is a possibility that there will be changing attitudes regarding the Internet and its rapid growth. However, there is ~~not anything on~~ no evidence in this record that would change our opinion at this time.

Ameritech's objections are substantially the same as they were in Focal. The Commission considered all the factors at that time and decided the rate was appropriate. Presented with the same issue, the North Carolina Utilities Commission in Re: ICG Telecom Group, Inc., Docket P-582 concluded, "The parties should, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to ISPs at the rate the parties have agreed upon for reciprocal compensation for traffic." However, we agree with AI that this Order is subject to true-up at such time as there is a determination in our upcoming generic docket or in future FCC decisions.

(b) Eligibility for Tandem Compensation

Level 3's Position

Level 3 proposes language allowing any one of its switching entities to qualify for tandem compensation if it meets the criteria regarding geographic coverage set forth in Section 51.711 of the FCC's rules.

Ameritech's Position

Level 3 should not receive the rate for either tandem or transport elements of termination unless and until the following conditions are satisfied: (i) it proves that its switch serves a geographic area comparable to that served by AI's tandem switch and (ii) it proves that its switch performs the same functions on behalf of AI as AI's tandem performs. To satisfy the second of those two conditions, Level 3 must show that (a) it gives AI ~~meritech Illinois~~ the option to connect directly to Level 3's end office function and thus avoid payment of the tandem rate (perhaps also the transport rate) if it so chooses, and (b) it defines its switches and offers interconnection on a nondiscriminatory basis for both the termination of local traffic by other LECs and the termination of toll traffic by long distance interexchange carriers.

AI's brief on exceptions states that resolution of the tandem compensation question cannot be deferred because it involves all traffic for Level 3. It is not likely that the Commission will consider this issue in the generic docket. However, AI suggests that the issue could be deferred to such time as when Level 3 applies for compensation, by holding them to the requirements of Section 51.711(a)(3) applied consistently with paragraph 1090 of FCC's First Report and Order (FCC-96-325) in Docket 96-98.

Analysis and Conclusion:

This issue has not yet come to fruition. As stated in the Focal decision, the matter of functionality depends on whether this Commission is desirous of setting disparate reciprocal compensation rates for the transport and termination of traffic depending upon whether the traffic is terminated in an end office switch or in a tandem switch. This is a matter that is best left for the generic docket to decide. Only because we are not at the point where Level 3 is prepared to seek charges can this matter be deferred. ~~to the Commission.~~ While it is clear that Level 3 must meet the geographic area test, functionality has not been previously addressed by this Commission. Although AI's suggestion is noteworthy, it does not resolve the issue. Level 3's statement that this issue was resolved in the Focal decision is incorrect. Focal did not require such a decision because the switch met both requirements. The issue is one of policy rather than of fact. The parties are correct that at this time Level 3 is not asking for compensation but even if it were, the Commission would have to establish a policy to determine if functionality is an issue. It is apparent that a policy can be established sooner than Level 3 will apply for compensation. To that end, geographic coverage is a requirement but functionality remains to be decided.

2. Deployment of NXX Codes

a. Whether Level 3 should be required to compensate AI for interexchange transport and switching associated with its FX/virtual NXX service.

b. Whether an FX or NXX call that would not be local based on the distance it travels, is subject to reciprocal compensation.

c. Whether the parties' agreement should include Appendix FGA.

Level 3's Position

Level 3 would delete Appendices FX and FGA and related language included elsewhere in the contract that require it to pay AI for the use of unspecified facilities at unidentified tariffed rates for FX, FX-like, FGA and FGA-like services. Level 3 claims that AI has not defined "FX-like" or "FGA-like" services nor has it demonstrated that any additional compensation should be paid ~~to it~~ based on customer location. It opposes the suggestion that it pay some undefined amount for the facilities and services AI ostensibly provides in getting calls to virtual NXX customers.

Level 3 also takes issue with AI's Section 2.7 of the Appendix, Reciprocal Compensation, which specifies that Level 3 cannot receive reciprocal compensation when its customer is physically located outside the local calling area of the calling party.

Ameritech's Position

AI should not have to provide free interexchange transport and switching to subsidize Level 3's competing Foreign Exchange ("FX") services. It proposes contract language that would require each party to be compensated for the portion of the FX service it actually provides. Level 3 should not be permitted to charge reciprocal compensation on FX calls because such calls are, by definition, not local exchange calls. Level 3 also must have some revenue-sharing arrangement in place for Feature Group A ("FGA") service and it has offered no alternative to the Appendix FGA.

Discussion

NXX codes (the first three digits of a seven-digit number) are assigned to specific geographic areas. Carriers' billing systems will classify a call as toll or local by comparing the caller's NXX with the terminating party's NXX. FX service allows a customer physically located in one exchange to have a telephone number with an NXX code that is associated with a different exchange in a different geographic area. In giving a customer a number with an NXX code from a distant geographic area, FX service allows callers from that distant area to reach the FX customer for the price of a local call. To a billing system, such a call appears to be within a single NXX area, while in reality it travels a distance which would normally require toll charges. FX service is attractive to customers, such as ISPs, that want persons located in various geographic locations to reach them for the price of a local call.

Both AI and Level 3 provide FX services. AI asserts that the need for the Appendix FX and specific inter-carrier compensation arrangements with respect to FX services arises from the manner in which Level 3 is able to obtain an undue financial advantage through use of this service. AI explains that when it provides an FX service, its FX customer pays for the transport and switching costs incurred in carrying the call from the caller's rate center to the FX customer's physical location. In contrast, when Level 3 provides FX service, AI provides the very same interexchange transport and switching to carry the call from the caller's rate center to Level 3's point of interconnection ("POI"). Unlike AI's FX customer, however, neither Level 3 nor its customer pays anything for use of AI's network. As a result, AI maintains, Level 3 enjoys a "free ride" on AI's interexchange network which gives it an unearned cost advantage because it can offer its customers a rate with no interexchange transport or switching costs whereas AI must recover those costs from its FX customer. Even more egregiously, AI contends, Level 3 charges AI reciprocal compensation on calls to Level 3'-s FX customers, on the theory that these are "local" calls.

AI indicates, for example, that a call from an AI customer in Elgin to downtown Chicago travels a distance of some 40 miles and would normally constitute an intra-LATA ~~Lata~~ toll call. If, however, the recipient of the call in Chicago is an FX customer assigned to the same NXX code as the originating caller in Elgin, the originating Elgin caller would be billed only for a local call because AI"s billing systems recognize an intra-NXX call as a local call.

AI maintains that allowing a competitive local exchange carrier ("CLEC") this "free ride" distorts all of its incentives to invest and undermines the integrity of the competitive process. AI also contends that nothing in its proposals prevents Level 3 from providing FX service to whomever it wants. It simply would require Level 3 to pay something for its use of AI's network in providing this service. AI's witness explained that, if CLECs do not have to compensate AI for the use of its network in providing FX services, Level 3 will have little or no incentive to construct its own transport facilities. So too, AI maintains, other CLECs competing with Level 3 in the provision of FX services would face a competitive disadvantage vis-a-vis Level 3 unless they also took advantage of the free ride on AI's network instead of constructing their own facilities. Accordingly, facilities-based competition would be further reduced.

AI further points out that at least ~~three~~ two state commissions have agreed with AI's position in their recent decisions and cites to relevant language on the issue set out by the Maine Public Service Commission on June 30, 2000,~~;~~ and the California Public Utility Commission on September 8, 1999.~~; and the Public Utility Commission of Texas on July 13, 2000. Each~~ Both of these state commissions agreed, in essence, that reasonable interexchange intercarrier compensation is warranted for the routing of FX traffic.

Level 3 argues that AI's position that virtual NXX calls are actually toll calls was rejected by this Commission in the Focal arbitration. Also, according to Level 3, a Michigan Arbitration Panel concluded that virtual NXX calls are "local" and rejected provisions proposed by AI to impose additional transport costs on CLECs.

Level 3 contends that AI is responsible only for carrying a virtual NXX call to the Level 3 POI - just as it does for every other local call. Once AI delivers the call to the POI, it is Level 3's responsibility to terminate the call wherever the customer may be physically located, such that there is no additional transport based upon the customer's location. As such, Level 3 sees no difference between physical local calls and virtual or FX calls.

Level 3 contends that putting the focus on the location of the called party is meaningless to a determination of how much responsibility each carrier actually bears in transporting a given call. It claims that customer location will not cause AI's costs or function to differ in the context of a call placed by an AI customer.

Level 3 maintains that AI's costs are the same whether the call terminates to a virtual or physical NXX customer served by Level 3. When one looks at how calls are always delivered to the POI irrespective of customer location, there is no "free ride" according to Level 3.

Level 3 opposes AI's efforts to restrict or inhibit the assignment of NXX codes by referring to customers' physical locations. It claims that AI's proposal would permit AI to avoid payment of reciprocal compensation to Level 3 by reclassifying these calls as toll and preventing its own customers from placing local calls.

According to Level 3, if AI succeeds in impairing Level 3 or any other CLEC from providing virtual NXXs by actually making CLECs pay AI for such calls, not only would AI customers no longer be able to reach their ISPs by dialing a local number but, *because calls to the ISP ~~will~~ effectively* would *be reclassified as toll calls, AI no longer* would be obligated to pay the reciprocal compensation associated with local calls.

Analysis and Conclusion

(a.) The record indicates that FX service was developed in the context of a single-provider environment. In such times, the cost of an incoming call to the FX customer simply would be recovered from the FX customer. Now, however, with the opening of the local exchange market to competition, the carrier providing the FX service may differ from the carrier of the party calling the FX customer. That is the very situation in this case and AI is proposing that inter-carrier compensation, such as is commensurate with each carrier's degree of participation in the provisioning of FX or FX-like service (NXX), be required.

We note that AI's proposal in this case is different from that presented in the Focal arbitration. -In that case, ~~O~~our finding was based on the question of whether Focal should be required to establish a POI within 15 miles of the rate center for any NXX code that it uses to provide FX service and our consideration of the Focal evidence as to the number of POIs being established. Here, AI is asserting that the lack of POIs requires it to carry a call long distances with no compensation for the haul.

From the evidence presented, we note a number of economic and policy perspectives that drive AI's proposal. While Level 3 does not address these concepts directly it has set out its own policy-based arguments. *In particular, it maintains that* through the use of virtual NXX assignments, Level 3 and other CLECs provide a valuable service which allows ISPs to provide low-cost advanced services to their customers who can gain *Internet access by dialing a local number*. Neither party tells us enough about the technological and economic underpinnings in the NXX or FX situation, such as were afforded the California Public Utilities Commission, Decision No. 99-09-029 (September 2, 1999).

Level 3 opposes paying AI any additional compensation for calls based on customer location. It maintains that when an AI customer originates a call, AI's responsibility for the call ends when it delivers the call to the POI it has established with the CLEC. Once the call is handed off at the POI, the CLEC is responsible for the costs of delivering the call to the terminating number.

In other words, Level 3 tells us that AI is providing transport in the NXX situation no different from that which it is otherwise legally obligated to provide. On balance, AI offers policy considerations of some merit. *Some of those concerns, Level 3 observes,* will fall away given our findings in Issue 27 below. We agree. Moreover, Level 3 maintains, the FCC's "rules of the road" as set out in TSR Wireless, LLC v. U.S. West Communications, Inc., Memorandum Opinion and Order, FCC 00-194 (June 21, 2000) make clear that the originating carrier is responsible for the cost of delivering the call to the network of the co-carrier who will terminate the call. On the basis of this legal authority, and the limited record before us, we find in favor of Level 3 on the first of the three questions before us.

~~Both the record and the time constraints that drive these proceedings mitigate against any meaningful review and analysis of the intercarrier compensation portion of the dispute. While we see some merit to AI's position, the language it proposes is not detailed or developed enough or supported by the type of evidence necessary to gain our confidence. To the extent that AI did not get all the evidence in discovery that it required to make its showing, it could have and should have brought the matter to our attention. Moreover, while the premise AI offers may be meritorious to some degree, the particular methodology advanced does not show itself as the most reasonable for the task. Hence, we agree with Level 3 to the extent that AI's proposal is ill-defined and cannot be included in this agreement.~~

(b.) The reciprocal compensation portion of the issue is straightforward. ~~a different matter. As we are told,~~ The FCC's regulations require reciprocal compensation only for the transport and termination of "local telecommunications traffic," which is defined as traffic "that originates and terminates within a local service area established by the state commission." 47 C.F.R. 51.701 (a)-(b)(1). ~~According to AI,~~ FX traffic does not originate and terminate in the same local rate center and therefore, as a matter of law, cannot be subject to reciprocal compensation. Whether designated as "virtual NXX," which Level 3 *uses, or as "FX," which AI prefers, this service works a fiction. It allows a caller to* believe that he is making a local call and to be billed accordingly when, in reality, such call is travelling to a ~~distance~~ distant point that, absent this device, would make the call ~~constitute~~ a toll call. The virtual NXX or FX call is local only from the caller's perspective and not from any other standpoint. There is no reasonable basis to suggest that calls under this fiction can or should be considered local for purposes of imposing reciprocal compensation. Moreover, we are not alone in this view. The Public Utility Commission of Texas recently determined that, to the extent that FX-type calls do not terminate within a mandatory local calling area, they are not eligible for reciprocal compensation. See, Docket No. 21982, July 13, 2000. ~~All in all,~~ On the basis of the record, the agreement should make clear that if an NXX or FX call would not be local but for this designation, no reciprocal compensation attaches.

To the extent that the Commission opens a generic proceeding on reciprocal compensation, the scope of which addresses FX/NXX traffic, we observe that the parties' interconnection agreement contains a change of law provision to address any future rulings.

(c.) Finally, with respect to Appendix FGA, the only proposal on the table is that of AI, and Level 3 has not apprised us fully as to the specifics of its objections. Hence, on the understanding that the FCC requires such action, which Level 3 does not dispute, the AI language should be adopted. The parties will work together to arrive at a definition of "FGA-like."

3. (Resolved)

4. (Resolved)

5. Charges for CLEC Name Changes

Who should bear the costs for ~~CLEC name~~ changes to the records, systems and data bases if the CLEC changes its name during the course of the agreement?

Level 3's Position:

AI should not be able to charge Level 3 on an individual case basis for processing name changes. To the extent that AI absorbs the cost of processing customer name changes as a cost of business in the retail context, Level 3 maintains that there is no principled reason for it to ~~foist~~ impose the costs of processing name changes on its wholesale customers. Level 3's brief on exceptions asks this commission to adopt a ruling by the Texas Commission and a proposed ruling by the California Commission that name change costs should be borne by AI as a cost of doing business. Level 3 is like any other large corporate client and should be treated the same.

Ameritech's Position:

AI incurs actual costs to implement a CLEC's change and it should have the right to charge appropriate non-recurring, cost-based rates, as is already covered by tariffs. More than just changing the master database may be involved. A CLEC can require the changing of the individual customers to reflect the correct CLEC information. Why should AI be financially ~~AI be~~ responsible for changes occasioned by the actions of the CLEC~~.~~? There are real costs involved in making all these changes and the burden should be on the party requesting the changes. AI responds to Level 3 in its reply brief that free individual name changes are more than it provides for its corporate customers.

Analysis and Conclusion

When a CLEC seeks to change its name there are associated costs. AI contends that some of the costs are borne by the ILEC to change the records in its Operation Support Systems ("OSS") and the costs are not part of OSS administration. (AI brief at 6.) Level 3 asserts that AI changes names ~~changes~~ every day without ~~changing~~ charging its customers and to ~~hold~~ charge a wholesale customer, which happens to be its competitor, is discriminatory.

The question is, ~~A~~are name changes merely a cost of doing business as Level 3 asserts or are they a burden unfairly imposed on AI?~~"~~ Level 3 asserts that hundreds of customers a day required changes which AI processes without charge. The CLEC's customers, therefore, should not be treated any differently. AI's charge is based solely on ~~upon~~ the fact that Level 3 is a wholesale customer. This argument is persuasive to the extent that Level 3's customers are entitled to the same service as AI's customers. The sheer number of accounts AI changes should not matter. The argument that Level 3 causes the name change is no different than saying that the individual customers also cause the change. To that extent AI should bear any costs of making changes to its master billing accounts of the CLEC~~'~~s.

AI points out that, at the CLEC's direction, it must update the accounts of each of the CLEC's customers in the database to reflect the correct information. That service is not normally provided to other customers. Therefore, any additional services requested other than changing the master billing database should be paid for by the requesting party.

The Texas Commission case cited by Level 3, Southwestern Bell Arbitration PUC docket No. 21791, determined that each party to the agreement shall be responsible for the cost of name changes as a result of corporate restructuring. Further, MCIW is SWBT' s customer under that agreement and should be treated as such. AI has agreed to make the necessary changes to its master data base. As AI points out, Level 3 could require them to make additional changes, which indicates that this is a non-essential additional service. Level 3 does not challenge this assertion. AI also points out that this is not something it does for its business customers. AI is required to give only the same service on the same level as it gives to its own customers. Anything more appears to be a premium service and should be paid for, no matter how nominal the cost.

6. Term of Agreement (GT&C 5.2)

When should the instant agreement expire?

Level 3's Position:

Level 3 would have the agreement expire after three years.

A three-year term would provide certainty and cost savings. According to Level 3, requiring it to renegotiate all relevant interconnection terms at intervals of less than three years would make it difficult for the entity to effectuate a stable long-term plan for entry and development of operations in Illinois. It maintains that there is no need to throw out the entire contract after one year simply because changes in law or technology might occur within the next year or so.

Ameritech's Position:

AI would have the agreement expire after one year.

A one-year term is appropriate given the frequent changes in technology and regulatory schemes. AI maintains that it is reasonable to allow for shorter term interconnection agreements so that parties can keep pace with and renegotiate in light of changed market conditions. It points out that negotiation increases costs and uncertainty for both parties such that the incentive to renegotiate is minimal absent any changed market conditions. In the final analysis, AI indicates that it is amenable to a two-year term.

Analysis and Conclusion

We believe that a company cannot implement its business plan efficiently if the contracts on which it relies expire within a short time interval. We further recognize that there are significant costs to negotiating and/or arbitrating a new agreement in terms of time, money and human resources. On the other hand, the telecommunications field is changing so rapidly that contract provisions which are reasonable under the law and circumstances at one point in time may be rendered obsolete, ineffective or burdensome under the law and circumstances which develop at a later point in time.

Level 3 ~~tells us~~ states that the undisputed intervening law clause of the contract, i.e., Section 21, provides that if a change in the law affects a contract provision, the parties "shall" renegotiate the affected provision. Likewise, Level 3 maintains, changes in technology can be addressed through renegotiations and amendment. AI, however, raises the point that while the parties are entirely free to negotiate amendments to the agreement if there are changes in the market or technology, this is no guarantee that "both parties will be willing" to renegotiate. Only a shorter term will ensure that terms that have become onerous or outdated due to market changes are renegotiated.

In balancing all of these interests, we reject both the one-year and the three-year proposals. To be sure, Level 3 notes that in the Focal arbitration, the parties agreed to a three-year term with no need to arbitrate the issue. We observe, however, that the Focal Order decided only five issues whereas in this case there are 19 or 20 issues in dispute between the parties. Not only the vast number of open issues but also the type of issues we review here persuade us that a reasonable term for the instant agreement is two years.

7. Deposits, Billing and Payments

Should the CLEC be required to post a deposit at the onset of the agreement, absent a satisfactory credit history, and, if so, under what conditions, terms and in what amounts? Secondly, what method should be employed to handle legitimate disputed amounts?

Level 3's Position

Level 3 should not be required to provide to each AI-affiliated ILEC an initial cash deposit ranging from two to four months of projected average monthly billings as a precondition for AI to furnish resale services or Unbundled Network Elements ("UNEs"). It proposes to delete the entire deposit section because AI has not shown Level 3 to be a credit risk such that protection against nonpayment is needed.

Level 3 implies that if the section were modified to include firm objective criteria, to identify when a deposit would be required, it might agree to a deposit clause in the agreement.

Level 3 objects to a deposit being tied solely to notices of late payment. It should be tied to objective financial criteria. The burden of proving the amount of dispute should not be on Level 3. The payment portion should be reciprocal, i.e., AI should pay interest on late payments as well. Finally, the Order does not address the reasonableness of increasing the deposit or suspending service if Level 3 fails to pay within five days of the due date.

Ameritech's Position

CLECs without a satisfactory credit history should be required to provide an initial deposit before obtaining resale services and UNEs. AI also maintains that CLECs should provide notice of billing disputes before the bill due date.

AI objects to the provision that Level 3 need not put disputed amounts in escrow unless there are more than two disputes within a 12-month period.

According to AI, the Commission first must decide whether CLECs without a satisfactory credit history should be required to make a deposit (which earns interest and will be returned if the CLEC pays its bills) before obtaining resale services or UNEs. If the Commission agrees that a deposit is appropriate, it must decide whether AI's amount is proper. Finally, it also must resolve disagreements concerning details of the contract language that will excuse Level 3 (and other CLECs) from the deposit requirement.

AI contends that it is common business practice to obtain a form of security when extending credit. AI claims that it is extending credit to a CLEC because its services or UNEs are provided before a bill is rendered and the CLEC is not obligated to pay the bill until 30 days after ~~the bill~~ it is rendered.

Staff's Position

Staff views an initial deposit as commercially acceptable, but recommends that the size of the deposit be based on objective criteria, fairly applied, and related to the CLEC's credit history. According to Staff, requiring a substantial deposit based upon AI's delivery of a delinquency notice in a twelve-month period is subject to error and abuse. Staff recommends a 30-day notice period to commence after the bill due date for notice of disputed amounts and payment of deposits. In instances of payment disputes (where no deposit is made), Staff would recommend that, at the least, a 15-day notice be given (after failure to pay deposit when due) prior to disconnection.

Staff asserts that a CLEC should not have to post a deposit unless it is actually late.

Analysis and Conclusion:

It is common business practice for a party to protect its interest by requesting some type of security deposit. The criteria for determining who is required to post a deposit include not just the ability to pay but whether a party pays promptly. Other jurisdictions have determined that a deposit by a CLEC is appropriate where there is no, an inadequate, or a poor credit history. AI suggests that a determination of whether a deposit is required should be examined in relation to late payment notices. AI asserts that a four-months' deposit based upon projected billings is necessary to protect its interests. Level 3 asserts that because of its good financial standing it should not be required to post any deposit and that the agreement is too vague because it fails to define good credit history. Furthermore, late notice may be sent out in error.

AI wants written notice of a billing dispute and of the basis for the dispute so that it may be resolved within a reasonable time. Level 3 claims that when a dispute arises it often takes more time to determine what the actual disputed amount is.

It is a common business practice to require a deposit for new clientele. However, that is usually based upon something other than a mere lack of credit-history, especially in the utility industry. When a deposit is required of a new customer it is generally because he has shown him/herself to be unreliable in the past or a poor credit risk based upon accepted business practices. AI has failed to show that CLECs pose any greater risk than any other business customers. The amounts claimed as losses are meaningless unless they relate to overall charges or similar risks with other customers. ~~They are merely dollar amounts and w~~ While they may constitute significant numbers, do they represent 1% or 25% or 50% of billings of CLECs? What percentage of business losses did AI suffer during that period? It is hard to ascertain from the testimony whether there is an acute problem or just a regular business occurrence. There is nothing in the record to indicate that CLECs should be treated differently from any other business customers. Level 3 correctly points out in its argument (Level 3 brief at 52) that the terms of this agreement are different from how AI treats its own business customers.

The marriage of CLECs and ILECs is a governmental arrangement. It was contemplated that it also was a business arrangement. Care must be taken to ensure that CLECs are afforded an opportunity to enter and compete in the market. That ILECs may be placed at a disadvantage was contemplated by the Act. The method by which AI determines the need for a deposit is adequate for this agreement, as established by retail local services tariff with a slight modification. It also must be recognized that CLEC charges generally will pose a larger exposure for AI than a regular business customer will. To add a measure of protection, we tie the number of months of deposit to the number of months the CLEC is late in paying. If the CLEC is late in paying three times in a 12-month period a deposit of two months' estimated billing is justified, four late payments would justify three months' deposit and five or more late payments would justify four months' deposit. This will protect AI against CLECs as it would against any of its other business customers. This Commission is not persuaded or dissuaded by the amount of finances a CLEC has on hand. It is its willingness to part with it in a timely fashion, which establishes its credit history. Further, this will not act as a bar to other CLECs since the amount of potential deposit will be related to their size.

Level 3 claims that it will not have enough time to examine its bills properly and resolve disputes within the time set for payment of bills. It opines that 30 days is adequate for payment of undisputed bills but a longer period is required for determining disputed amounts. AI asserts that Level 3 will be able to delay payment for up to 90 days by claiming that it has a disputed ~~a~~ bill.

Although Level 3 claims to be unable to determine the extent of a dispute within 30 days, it is not unduly burdensome to give notice within the 30-day period that it is disputing the bill. Further, within another 30 days after the bill is due, Level 3 shall pay all undisputed amounts to AI and fully identify what the nature of the dispute is and the amount disputed. An escrow deposit of the disputed amount shall not be required unless the number of disputes exceeds two per 12-month period. Further, to protect AI from frivolous disputes, if Level 3 fails to substantiate 75% of the disputed amount it shall constitute a late payment.

The parties have misconstrued the Order. Level 3 is incorrect in its assumption that because of its financial standing it need not post any deposit. In other jurisdictions, namely California and Minnesota, other CLECs, such as AT&T and MCI, have been required to post deposits. The Order provides that AI follow the same practices and criteria as it does with other business customers in determining a deposit requirement. Level 3 also is incorrect in its assessment that the deposit is tied to late notices. Even with good credit, if it fails to pay on time it may be required to post a deposit. It is the actual late payment that triggers the deposit. As part of usual business practice, five days after payment is due it is considered late. A mere notice of late payment does not enter into the equation; actual lateness is what matters. This should allay Level 3's fears of errant notices, for if the payment is not late the notice is meaningless. Likewise, Level 3's arguments regarding partial or incomplete payments are also not founded. Level 3 representatives have conceded that 30 days is an adequate time to determine whether a bill is undisputed. It is certainly enough time to pay the bill.

Level 3 objects to being required to prove 75% of the disputed amount or it would be considered a late payment. The argument is that AI has the records and Level 3 should not have the burden of proving a negative. This argument is likewise invalid. AI does not gain any position advantage by issuing an erroneous billing. However, the measure is designed as a safeguard to prevent CLECs from arbitrarily disputing amounts. The same can be said for the requirement that a deposit in escrow not be required unless there are more than two disputes within a 12-month period. This would cover the occasional erroneous billing so that a CLEC would not have to tie up funds. AI has already stated in its reply to exceptions that it would not require a deposit based upon delinquency notices or legitimate disputes about bills.

There is no reason that payment of interest should not be reciprocal for both parties. Further, five days appears to be an adequate interval to determine whether a payment is late. However, we agree with Staff's proposal that, after the lapse of the five-day grace period, a ten-day notice shall go to the CLEC before suspending service in order that it may seek to correct the deficiency. This is not unreasonable in light of the deposit requirement.

AI has a legal duty to bargain in good faith throughout these negotiations. Many of the concerns of the parties are unfounded and predicated upon the mistaken assumption that the parties may not uphold their end of the agreement.

8. (Resolved)

9. (Resolved)

10. Third- Party Intellectual Property Rights

Level 3's Position:

At issue, according to Level 3, is the extent to which AI is required to obtain any consents, authorizations, or licenses to or for any third-party intellectual property rights that may be necessary for Level 3's use of interconnection, network elements, functions, facilities, products and services furnished under the agreement. AI must use its "best efforts" to obtain intellectual property rights for Level 3, as required by the FCC and as defined in Level 3's proposal. Level 3 further claims that the terms and conditions proposed by AI discriminate against it in violation of the Act and the FCC's direction, because they would require Level 3 to indemnify AI if its interconnection with AI or its use of AI's UNEs or services infringe upon any third-party intellectual property right.

Ameritech's Position

AI must use its "best efforts" to obtain intellectual property rights for Level 3 as required by the FCC and as defined in AI's proposal. AI, however, cannot be required to indemnify Level 3 against claims or losses arising from Level 3's use of such intellectual property.

Analysis and Conclusion

We believe it to be settled that AI will use its "best efforts" to obtain third-party intellectual property rights for CLECs to use AI's UNEs, OSS and interconnection. Indeed, under the FCC's Intellectual Property Order, as AI recognizes, an ILEC must use its "best efforts" to obtain such intellectual property licenses.

The question might remain, however, whether AI should be required to indemnify Level 3 against any "claims or losses for actual or alleged infringement of any intellectual property right or interference with or violation of any contract right." (GT7C 14.5.3). On this point, which Level 3 does not address, AI refers us to the FCC's recent pronouncement that its Intellectual Property Order did not require ILECs to indemnify CLECs for any intellectual property liability associated with their use of UNEs. (See, Texas 271 Order)

Level 3 also maintains that the FCC requires the ILEC to use its best efforts to obtain co-extensive rights for CLEC use of UNEs. To this end, Level 3 suggests a flaw in AI's latest proposal to the extent it states that AI has no obligation to seek rights for CLECs "to use any unbundled network element in a different manner than used by [Ameritech]". According to Level 3, the CLEC is entitled to the panoply of rights obtained by AI - not merely those that AI uses in its network.

In its Third Party IP Ruling, the FCC clarified an ILEC's obligations to provide non-discriminatory access to network elements, and its Order includes these directives:

- Section 251(c)(3) requires only that the intellectual property rights provided to a requesting carrier will entitle that carrier to use the element for the same uses as the ILEC (para. 16)
- To the extent that the requesting carrier intends to use the element in a different manner (e.g. in combination with some other element not contemplated by the ILEC's particular license) the requesting carrier is solely responsible for obtaining this right from the vendor. (para. 16).
- in order to limit its use to that contemplated by the contract, a competing carrier needs to know the extent to which the ILEC is entitled to use a particular element, such that parties need to negotiate a reasonable means of conveying this information while honoring the terms of confidentiality. (para. 17).

We see that each of these directives is reflected in the latest version of AI's Section 14.5 and that the FCC's Order is itself referenced therein. To the extent that Level 3 perceives itself subject to infringement claims simply because it is not using UNEs in exactly the same manner as AI, we direct its focus to the language in paragraph 16 of the Third Party IP Ruling. This provision provides guidance relevant to its concerns.

In response to Level 3's complaint, AI tells us that use of the phrase "commercially reasonable terms" (Section 14.5.1.1) does nothing to diminish its obligation to use its best efforts to obtain co-extensive rights for Level 3. It merely makes clear that AI is not obligated to obtain co-extensive rights from third parties under wholly unlawful terms and conditions. While Level 3 would have AI's language be replaced with some other wording to reflect more accurately the FCC's order it offers no language of its own.

In the final analysis, we find no legal infirmity in AI's language and would further note that Level 3 provides no substitute language for our consideration and review.

~~Given that the FCC language Level 3 cites in footnote 163 appears to support AI's proposal, we require Level 3 to state its objection, if still viable, with more specificity in its next brief.~~

~~Level 3 also claims that AI commits only to obtaining "commercially reasonable terms" for the CLEC and that this may not be equal to the FCC's requirement that co-extensive rights be obtained on terms and conditions "equal in quality" and at "the lowest reasonable cost." We require AI to respond to these assertions in its next brief.~~

~~On the whole, we must be certain that the parties are on the same page and that the actual open issues are set out with clarity.~~

11. (Resolved)

12. (Resolved)

13. (Resolved)

14. *Assignment*

Should both parties be required to seek prior written approval of assignments and transfers of the agreement? What notice should be required?

Level 3's Position

Level 3 proposes that both parties ~~should~~ be required to seek prior written approval of assignments and transfers of the agreement, including sales and exchanges. *In its view, the parties should not unreasonably withhold consent of* assignments. It also proposes that 30-days' advance notice of assignments, rather than AI's proposed 90 days, is sufficient.

Ameritech's Position

A CLEC may not assign or transfer its agreement to third persons without the prior written consent of AI; except that a CLEC may assign or transfer its agreement to an affiliate by providing ninety ~~(90)~~ days' prior written notice of such assignment or *transfer*.

AI believes that this Order does not address the following issues; (1) a right to approve the assignment of interconnect agreements to affiliates, who have existing agreements with AI, (2) an agreement on charges prior to any actual valve charges; and (3) the required days' notice of assignment.

Analysis and Conclusion

Level 3 and AI both want the other parties to seek prior approval of the transfer or assignment of this agreement to another party. However, AI objects, stating that this is not a symmetrical situation and it should not be required to get the approval of CLECs to transfer or assign agreements.

The purpose of seeking this type of approval is to assure the parties that in the event of transfer or assignment they will not receive anything less than what they bargained for. We agree with AI's position. As the ILEC, its bears most of the burdens in these transactions. It is almost certain that, should it transfer or assign any rights, it will be to an equal or superior status. The same cannot be true of all CLECs. As the IIEC, AI is here to stay; ~~and the~~ any transfer or assignment to another company would involve close scrutiny by many regulatory bodies before it took effect. However, a CLEC transfer could occur in a short time and compel the ILEC to do business on terms which it normally would not accept. For that reason we believe that it is necessary for Level 3 to seek approval from AI prior to transfer or assignment of its rights under the agreement. We do not hold that the same is necessary for AI.

We find that AI has a legitimate concern when a CLEC seeks to transfer to an affiliate. First, AI is entitled to determine that the affiliate has the same ability to pay for the services provided. Secondly, an affiliate that has a prior agreement may now have two agreements. We expect AI not to delay a transfer for any reason other than to make the determination of the affiliate's means. The second sub-issue is a little less clear; AI does not propose any language to solve that problem, nor does Level 3. The affiliate therefore, would have the option after approval of the transfer by AI, either to opt into or merge the Level 3 agreement into its own. The reason for allowing this election is to ensure that AI's decision is based solely upon the criteria in its first sub-issue.

We agree with AI that the example posed by Level 3 is different from this situation. As posed by AI there are certain physical things that may be required to be done prior to transfer. However, we conclude that 60 days would an adequate time to effectuate these acts. It would be unfair to impose an unduly long interval constraint on Level 3 to accomplish a transfer.

15. (Resolved)

16. (Resolved)