

LEVEL 3 - SBC 13State – DPL – PHYSICAL COLLOCATION

Issue No.	Petition Issue	Issue Description	Disputed Contract Language	Level 3 Position/Support	SBC Position/Support
<p>PC-1</p> <p>§§ 4.4; 7.3; 7.3.3</p> <p><i>Related to Issue VC-1</i></p>	<p>18</p>	<p>Should this Appendix be the exclusive document governing physical collocation arrangements between Level 3 and SBC, or should Level 3 be permitted to order collocation both from this Appendix and state tariff?</p>	<p>4.4 <i>This Appendix contains the sole and exclusive terms and conditions pursuant to which <u>LEVEL 3</u> will obtain physical collocation from <u>SBC-13STATE</u> pursuant to 47 U.S.C. § 251(c)(6). For the term of this Agreement, <u>SBC-13STATE</u> will process any <u>LEVEL 3</u> order for any 251(c)(6) physical collocation as being submitted under this Appendix. In addition, <u>SBC-13STATE</u> will, starting on the Effective Date of this Agreement, bill any existing section 251(c)(6) physical collocation arrangements that were provided under tariff prior to the Effective Date at the prices that apply under this Agreement. <u>SBC-13STATE</u> will not impose any charge(s) for performing such conversion(s), and the conversions will affect only pricing.</i></p> <p>7.3 <u>LEVEL 3</u> shall pay <u>SBC-13STATE</u> all associated non-recurring and recurring charges for use of the Dedicated Collocation Space. These charges may be generated on an ICB basis or may be contained in <u>the state specific tariffs or</u> the Appendix Pricing attached.</p> <p>7.3.3 ICBs</p> <p>An ICB quote is prepared by <u>SBC-13STATE</u> to estimate non-recurring and recurring charges associated with the requested Physical Collocation Space where a state specific rate element does not exist in <u>a tariff or</u> the attached Appendix Pricing. This ICB quote is prepared specifically for collocation requests and is not associated in any way with the Bona Fide Request (“BFR”) process used to request UNEs or other unique items not contained in <u>LEVEL 3’s</u> ICA.</p>	<p>Section 252(i) requires that a local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved by a state commission to any other requesting telecommunications carrier. Level 3 does not agree with SBC’s interpretation of the cases upon which it relies in support of its positions. SBC’s proposals could serve as a waiver of Level 3’s independent rights under the federal act, FCC orders and regulations, as well as any existing state orders and regulations. Level 3 cannot and will not make such a waiver.</p> <p>Further, the tariff may be amended from time to time with new rates, terms and conditions that are more favorable than what the parties have placed in their interconnection agreement. Level 3 should be entitled, as any other carrier is entitled, to purchase services at rates, terms</p>	<p>Level 3 should not be able to pick and choose rates, terms and conditions from both its interconnection agreement with SBC and a state tariff, to the extent one is available. As at least two federal courts of appeal have held, interconnection agreements are the exclusive process by which a CLEC obtains rates, terms and conditions for interconnecting with an ILEC or obtaining access to an ILEC's UNEs as provided for in Section 251 of the Telecommunications Act of 1996. <i>Wisconsin Bell, Inc. v. Bie</i>, 340 F.3d 441, 442-45 (7th Cir. 2003); <i>Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm’n</i>, 359 F.3d 493, 497-98 (7th Cir. 2004); <i>Verizon North, Inc. v. Strand</i>, 367 F.3d 577, 584 (6th Cir. 2004); <i>Verizon North, Inc. v. Strand</i>, 309 F.3d 935, 940-41 (6th Cir. 2002).</p> <p>Moreover, permitting Level 3 to pick and choose from two different sets of rates, terms and</p>

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				<p>and conditions that may be offered to any other carrier whether it is more favorable in the interconnection agreement or as updated in the SBC tariff. Level 3 is willing to be bound by the terms and conditions inextricably linked to the tariff services and rates it elects to purchase, but Level 3 should not lose the benefit of the terms and conditions negotiated under the Agreement in order to avail itself of the publicly available tariffs SBC makes available to all carriers.</p>	<p>conditions would be administratively confusing and burdensome for SBC. There is no compelling reason to allow Level 3 to order out of a tariff, in addition to ordering from its interconnection agreement with SBC, which is the result of arms-length negotiation and arbitration.</p> <p>To the extent that there is a change in law of which Level 3 seeks to take advantage, the Agreements provides a mechanism for doing do.</p>
<p>PC-2</p> <p>§ 6.13</p> <p><i>Related to Issue VC-2</i></p>	<p>18</p>	<p>Should Level 3 be permitted to collocate equipment that SBC has determined is not necessary for interconnection or access to UNEs or does not meet minimum safety standards?</p>	<p>6.13 <i>In the event that <u>LEVEL 3</u> submits an application requesting collocation of certain equipment and <u>SBC-13STATE</u> determines that such equipment is not necessary for interconnection or access to UNEs or determines that <u>LEVEL 3's</u> equipment does not meet the minimum safety standards or any other requirements of this Appendix, <u>LEVEL 3</u> must not collocate the equipment unless and until the dispute is resolved in its favor. <u>LEVEL 3</u> will be given ten (10) business days to comply with the requirements and/or remove the equipment from the collocation space if the equipment was already improperly collocated.</i></p>	<p>SBC should not be allowed to preemptively block the placement of equipment as it sees fit until it is determined the equipment is acceptable for placement; such action could unnecessarily delay Level 3's ability to compete and provide services to its customers.</p> <p>47 C.F.R.51.323(c) states that if an ILEC “objects to collocation of equipment by a requesting telecommunications carrier for</p>	<p>Level 3 should not be permitted to collocate equipment that SBC has determined is not necessary for interconnection or access to UNEs or does not meet minimum safety standards. Permitting such collocation threatens the integrity of SBC and others' networks and would permit Level 3 to ignore federal law. SBC's language also provides a reasonable time period for Level 3 to remove any</p>

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				<p>purposes within the scope of section 251(c)(6) of the Act, the incumbent LEC shall prove to the state commission that the equipment is not necessary for interconnection or access to unbundled network elements under the standards set forth in paragraph (b) of this section.” This rule does not allow SBC to preemptively deny collocation.</p> <p>In addition, 47 C.F.R.51.323(c) states, in part, that an ILEC “may not object to the collocation of equipment on the grounds that the equipment does not comply with safety or engineering standards that are more stringent than the safety or engineering standards that the incumbent LEC applies to its own equipment.” SBC’s language not only is preemptive, but also creates ambiguity with respect to the proper level of safety standards.</p>	<p>offending equipment.</p> <p>Contrary to Level 3's suggestion, nothing in SBC's language permits it to impose safety or engineering requirements that are more stringent than those that apply to SBC's own equipment.</p>
PC-3	18	Should this Appendix include language	<u>29.2 Billing Dispute Resolution.</u>	The parties have already agreed to language in the General Terms	The provisions proposed by SBC to deal with disputes between the

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§§ 29.2 to 29.10		addressing billing dispute resolution, escrow issues, disputed amounts, informal and formal dispute resolution mechanisms, arbitrations, default in performance, etc?	<p><u>In the event that the parties have a dispute on a bill for collocation ordered under this Appendix, the Parties shall follow the procedures for Dispute Resolution set forth in Section 10 of the General Terms & Conditions Appendix of this Agreement.</u></p> <p><i>29.2 Billing Dispute Resolution</i></p> <p><i>29.2.1 In the event of a bona fide dispute between <u>LEVEL 3</u> and <u>SBC-13STATE</u> regarding any bill for anything ordered from this Appendix, <u>LEVEL 3</u> shall, prior to the Bill Due Date, give written notice to <u>SBC-13STATE</u> of the amounts it disputes (“Disputed Amounts”) and include in such written notice the following information: (a) the date of the bill in question, (b) the Billing Account Number (BAN) number of the bill in question, (c) any USOC information questioned, (d) the amount billed, (e) the amount in question and (f) the reason that <u>LEVEL 3</u> disputes the billed amount. To be deemed a “dispute” under this Section 29, <u>LEVEL 3</u> must provide proof (in the form of a copy of the executed written agreement with the financial institution) that it has established an interest bearing escrow account that complies with all of the requirements set forth in Section 29.3 of this Appendix and proof (in the form of deposit slip(s)) that <u>LEVEL 3</u> has deposited all unpaid charges into that escrow account. Failure to provide the information and proof of compliance and deposit required by this Section 29.2.1 not later than twenty-nine (29) days following the Bill Due Date shall constitute <u>LEVEL 3’s</u> irrevocable and full waiver of its right to dispute the subject</i></p>	<p>and Conditions the provides the procedures for Dispute Resolution. These same procedures should apply to billing disputes for collocation charges.</p> <p>SBC’s proposal that Level 3 notify SBC of its objection to a bill within 30 days is unreasonable. SBC’s proposed terms would have Level 3 waive its rights to the applicable statutes of limitations for either a breach of contract or for a violation of the applicable telecommunications laws. Level 3 is not willing to do that, and should not be compelled to do so by the Commission. Moreover, Level 3 may not know that there is an error in the billing within the 31 day period of time that SBC proposes.</p> <p>Under SBC’s proposal, Level 3 is responsible for late payment charges on a disputed bill, even if Level 3 is correct in disputing the</p>	<p>parties relating to amounts due under this Appendix are reasonable and typical. SBC proposes a staged process by which the parties first try to informally resolve disputes before resorting to more formal methods. SBC also proposes mandatory arbitration for smaller disputes, and elective arbitration for larger ones. SBC's proposal that Level 3 escrow any disputed amounts, rather than pay them and seek to get them back, is reasonable and appropriate.</p> <p>Level 3's claim that it is has only 30 days to dispute a bill misreads SBC's proposed language. SBC's language provides that Level 3 shall be given until 29 days <i>after the bill due date</i> to provide the information set forth in 29.2.1, as well as proof of escrow, to dispute a charge. This is an adequate amount of time given the typically recurring nature of collocation charges.</p>

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			<p><i>charges.</i></p> <p><i>29.3 Third Party Escrow Agent</i></p> <p><i>29.3.1 <u>LEVEL 3</u> shall pay all undisputed amounts to <u>SBC-13STATE</u> when due and shall pay all Disputed Amounts when due into an interest bearing escrow account with a Third Party escrow agent mutually agreed upon by the Parties. To be acceptable, the Third Party escrow agent must meet all of the following criteria:</i></p> <p><i>29.3.1.1 The financial institution proposed as the Third Party escrow agent must be located within the continental United States;</i></p> <p><i>29.3.1.2 The financial institution proposed as the Third Party escrow agent may not be an affiliate of <u>LEVEL 3</u>; and</i></p> <p><i>29.3.1.3 The financial institution proposed as the Third Party escrow agent must be authorized to handle Automatic Clearing House (ACH) (credit transactions) (electronic funds) transfers.</i></p> <p><i>29.3.1.4 In addition to the foregoing requirements for the Third Party escrow agent, <u>LEVEL 3</u> and the financial institution proposed as the Third Party escrow agent must enter into a written agreement that the escrow account meets all of the following criteria:</i></p> <p><i>29.3.1.5 The escrow account is an interest bearing account;</i></p>	<p>bill. This is unreasonable.</p>	<p>Level 3's assertion that it will be responsible for late payment charges even if Level 3 prevails during dispute resolution is not correct. SBC's language does not so provide.</p>

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			<p><i>29.3.2 All charges associated with opening and maintaining the escrow account will be borne by <u>LEVEL 3</u>; That none of the funds deposited into the escrow account or the interest earned thereon may be subjected to the financial institution’s charges for serving as the Third Party escrow agent; All interest earned on deposits to the escrow account shall be disbursed to <u>LEVEL 3</u> and <u>SBC-13STATE</u> in the same proportion as the principal; and Disbursements from the escrow account shall be limited to those: authorized in writing by both <u>LEVEL 3</u> and <u>SBC-13STATE</u> (that is, signature(s) from representative(s) of <u>LEVEL 3</u> only are not sufficient to properly authorize any disbursement); or made in accordance with the final, non-appealable order of the arbitrator appointed pursuant to the provisions of Section 6.6.7 of this Appendix; or made in accordance with the final, non-appealable order of the court that had jurisdiction to enter the arbitrator’s award pursuant to Section 6.6.7 of this Appendix.</i></p> <p><i>29.4 Disputed Amounts</i></p> <p><i>29.4.1 Disputed Amounts in escrow shall be subject to Late Payment Charges as set forth in Section 30.7 of this Appendix.</i></p> <p><i>29.5 Investigation Report</i></p> <p><i>29.5.1 Upon receipt of the notice and both forms of proof required by Section 30.6.1 of this Appendix, <u>SBC-13STATE</u> shall make an investigation as shall be required to report the results to <u>LEVEL 3</u>. Provided that <u>LEVEL 3</u> has furnished all of the information and proof required by Section 29.2.1 on or before the</i></p>		

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			<p><i>Bill Due Date, <u>SBC-13STATE</u> will report the results of its investigation within sixty (60) calendar days following the Bill Due Date. If <u>LEVEL 3</u> is not satisfied by the resolution of the billing dispute under this Section 29.5 of this Appendix, <u>LEVEL 3</u> must notify <u>SBC-13STATE</u> in writing within thirty (30) days following receipt of the results of <u>SBC-13STATE</u>'s investigation that it wishes to invoke the informal resolution of billing disputes afforded under Section 29.6 of this Appendix.</i></p> <p><i>29.6 Informal Resolution of Billing Disputes</i></p> <p><i>29.6.1 Upon receipt by <u>SBC-13STATE</u> of written notice of a billing dispute from <u>LEVEL 3</u> made in accordance with the requirements of Section 29.2.1 of this Appendix, each Party will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any billing dispute arising under this Appendix. The location, form, frequency, duration and conclusion of these discussions will be left to the discretion of the representatives. Upon agreement, the representatives may utilize other alternative dispute resolution procedures such as mediation to assist in the negotiations. Discussions and the correspondence among the representatives for purposes of resolution are exempt from discovery and production and will not be admissible in the arbitration described below or in any lawsuit without the concurrence of both Parties. Documents identified in or provided with such communications that were not prepared for purposes of the negotiations are not so exempted, and, if otherwise admissible, may be admitted in evidence in the arbitration or any lawsuit.</i></p>		

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			<p><i>29.7 Formal Resolution of Billing Disputes</i></p> <p><i>29.7.1 If the Parties are unable to resolve the billing dispute through the informal procedure described in Section 29.6 of this Appendix, then either Party may invoke the formal dispute resolution procedures described in this Section 29.7 of this Appendix. Unless agreed by both Parties, formal dispute resolution procedures, including arbitration or other procedures as appropriate, may be invoked not earlier than sixty (60) calendar days after receipt of the notice initiating dispute resolution required by Section 29.5 of this Appendix and not later than one hundred eighty (180) calendar days after receipt of the notice initiating dispute resolution required by Section 29.5 of this Appendix.</i></p> <p><i>29.7.2 Billing Disputes Subject to Mandatory Arbitration – If not settled through informal dispute resolution, each unresolved billing dispute involving one percent (1%) or less of the amounts charged to <u>LEVEL 3</u> under this Appendix during the twelve (12) months immediately preceding receipt of the notice initiating Dispute Resolution required by Section 29.5 of this Appendix will be subject to mandatory arbitration in accordance with Section 29.8 of this Appendix, below. If <u>LEVEL 3</u> has not been billed for a minimum of twelve (12) months immediately preceding receipt of the notice initiating Dispute Resolution required by Section 29.5 of this Appendix, the Parties will annualize the actual number of months billed.</i></p>		

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			<p><i>29.7.3 Billing Disputes Subject to Elective Arbitration – If not settled through informal dispute resolution, each unresolved billing dispute involving more than one percent (1%) of the amounts charged to <u>LEVEL 3</u> under this Appendix during the twelve (12) months immediately preceding receipt of the notice initiating Dispute Resolution required by Section 29.5 of this Appendix will be subject to elective arbitration pursuant to Section 29.8 if, and only if, both Parties agree to arbitration. If <u>LEVEL 3</u> has not been billed for a minimum of twelve (12) months immediately preceding receipt of the notice initiating Dispute Resolution required by Section 29.5 of this Appendix, the Parties will annualize the actual number of months billed. If both Parties do not agree to arbitration, then either Party may proceed with any remedy available to it pursuant to law, equity or agency mechanism.</i></p> <p><i>29.8 Arbitration</i></p> <p><i>29.8.1 Disputes subject to mandatory or elective arbitration under the provisions of this Appendix will be submitted to a single arbitrator pursuant to the Commercial Arbitration Rules of the American Arbitration Association or pursuant to such other provider of arbitration services or rules as the Parties may agree. The arbitrator shall be knowledgeable of telecommunications issues. Each arbitration will be held in a mutually agreed upon location. The arbitration hearing will be requested to commence within sixty (60) calendar days of the demand for arbitration.</i></p> <p><i>29.8.2 The arbitrator will control the scheduling so as to process</i></p>		

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			<p><i>the matter expeditiously. The Parties may submit written briefs upon a schedule determined by the arbitrator. The Parties will request that the arbitrator rule on the dispute by issuing a written opinion within thirty (30) calendar days after the close of hearings. The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all disputes. The arbitrator will have no authority to award punitive damages, exemplary damages, consequential damages, multiple damages, or any other damages not measured by the prevailing Party’s actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of this Appendix.</i></p> <p><i>29.8.3 The times specified in this Section 29.8 may be extended or shortened upon mutual agreement of the Parties or by the arbitrator upon a showing of good cause. Each Party will bear its own costs of these procedures, including attorneys’ fees. The Parties will equally split the fees of the arbitration and the arbitrator. The arbitrator’s award shall be final and binding and may be entered in any court having jurisdiction thereof. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.</i></p> <p><i>29.9 Cooperation Between Parties</i></p> <p><i>29.9.1 Immediately upon resolution of any billing dispute, <u>SBC-13STATE</u> and <u>LEVEL 3</u> shall cooperate to ensure that all of the following actions are taken within the time(s) specified:</i></p> <p><i>29.9.1.1 <u>SBC-13STATE</u> shall credit <u>LEVEL 3</u>’s bill for any portion</i></p>		

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			<p><i>of the Disputed Amount(s) resolved in favor of <u>LEVEL 3</u>, together with any portion of any Late Payment Charges assessed with respect thereto no later than the second Bill Due Date after the resolution of the dispute; within fifteen (15) calendar days after resolution of the dispute, any portion of the escrowed Disputed Amounts resolved in favor of <u>LEVEL 3</u> shall be disbursed to <u>LEVEL 3</u> by the Third Party escrow agent, together with any interest accrued thereon; within fifteen (15) calendar days after resolution of the dispute, any portion of the Disputed Amounts resolved in favor of <u>SBC-13STATE</u> shall be disbursed to <u>SBC-13STATE</u> by the Third Party escrow agent, together with any interest accrued thereon; and no later than the third Bill Due Date after the resolution of the dispute regarding the Disputed Amount(s), <u>LEVEL 3</u> shall pay <u>SBC-13STATE</u> any difference between the amount of accrued interest <u>SBC-13STATE</u> received from the escrow disbursement and the amount of Late Payment Charges <u>SBC-13STATE</u> billed and is entitled to receive pursuant to Section 6.7 of this Appendix</i></p> <p><i>29.10 Failure by <u>LEVEL 3</u> to pay any undisputed charges determined to be owed to <u>SBC-13STATE</u> within the time specified by the Arbitrator pursuant to Section 29.8 shall be grounds for immediate re-entry and termination of services provided under this Appendix.</i></p>		